National Cooperative Highway Research Program

Final Rept

RESEARCH RESULTS DIGEST

DIGEST 11 - OCTOBER 1969

Valuation Changes Resulting from Influence of Public Improvements

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Highway Research Board is the agency conducting the research. The report was prepared by John C. Vance, HRB Counsel for Legal Research, principal investigator, and Hayes T. O'Brien, Research Attorney, serving under the Special Projects Area of the Board.

THE PROBLEM AND ITS SOLUTION

A major and continuing need of state highway departments involves the assembly, analysis, and evaluation of operating practices and legal elements of special problems involving right-of-way acquisition and control and highway law in general. The question of whether to allow or disallow valuation effects of public improvements in right-of-way acquisition has been a vexatious problem for many years. There appears to be no uniform means of treating this problem, nor is there a uniform approach taken by the various state courts and highway departments. The problem of enhancement or decline in value, due to the public improvement itself, is of concern to the condemnor as well as to the condemnee. It is somewhat surprising that this problem, which is one of fundamental justice between the sovereign or condemning authority and the individual citizen, has not been treated more extensively by legislative bodies or handled in a more definitive way by the courts. The following paper collates the apposite cases and discusses and analyzes them, then recommends a legislative solution to the problem which would bring about uniformity of results and would be practical and workable. An explanation also is given of each provision contained in the proposed bill.

A careful review of the research reported herein will help state highway officials understand the highly legalistic problem of valuation changes resulting from the impact of public improvements. The proposed legislation will help highway officials in formulating their own legislative needs to cope with this national problem.

RESEARCH FINDINGS

Research findings are not to be confused with findings of law. The monograph that follows constitutes the research findings from this study. *Because it is also the full text of the agency report, the above statement concerning loans of uncorrected draft copies of agency reports does not apply.*

The subject of this research is the long-standing problem of whether to include or exclude, in the valuation of lands condemned for a public improvement, enhancement or diminution in value attributable to the improvement. Although this paper is oriented to highway construction, cases involving condemnation for other public purposes are apposite, and are reviewed and considered herein.

A statement of the problem is in order. In highway construction it is inevitable that there will be a lapse of time between the selection of the route alignment, design of the road by the State,

HIGHWAY RESEARCH BOARD
NATIONAL RESEARCH COUNCIL
NATIONAL ACADEMY OF SCIENCES—NATIONAL ACADEMY OF ENGINEERING

approval of alignment and design by the Bureau of Public Roads, and the actual condemnation of lands for the right-of-way. In some instances this lapse may cover a period of several years. It further frequently happens that there is widespread public knowledge of the fact that the road will be constructed, and of the probable alignment thereof, before the above-indicated finalization takes place, or any official public announcement with respect to the new construction is made. In the interval after public awareness of the project, or official commitment by the State and the Bureau thereto, lands lying along and adjacent to the designated right-of-way may appreciate or depreciate in value, which appreciation or depreciation is directly due to the highway project itself. If neighboring lands deteriorate in value due to the planned project, then, at the time of the taking of lands lying within the right-of-way, comparables will be lower than they would have been before the public gained knowledge of the project. On the other hand, if there is appreciation in value due to the project, comparables will be higher at the time of taking than they otherwise would have been. In addition, market value may be affected by speculation as to what the government will pay for the properties to be taken. Tested by the rule of what a willing buyer would pay to a willing seller in a voluntary sale, the market value of lands lying within the right-of-way may, at the time of taking, be up or down as the proximate result of the highway project itself.

Such enhancement or decline in value due to the public improvement itself is not peculiar to highway construction. It may obtain in any other area where the power of eminent domain is exercised. A pointed example in recent years has been experienced in the field of urban renewal projects, where "planning blight" sets in and properties in the affected area deteriorate seriously in value from the initial stages of the project to the finalization thereof. If market value is determined as of the time of taking, without regard for depreciation caused by the project itself, those persons whose properties are last to be taken may suffer serious economic loss. Conversely, appreciation often occurs as a result of a public improvement; witness, for example, that the value of rural lands which are adjacent to interchanges on the Interstate System generally increases.

Whether to allow or disallow in condemnation of lands for a public improvement enhancement in value due to the improvement, or to include or exclude depreciation caused by the improvement, is a problem which has had a checkered history in the courts. It is somewhat surprising that this problem, which is one of fundamental justice as between the sovereign or condemning authority and the individual citizen, has not been handled more definitively by the courts. The decisions reflect not only a lack of uniformity of result, but also, in many instances, a lack of clarity of approach. Certain rules may be elucidated from the cases, but these must, in all accuracy, be couched in broad and general terms. Unfortunately in many instances the precise holding of the court and the reasoning on which it is based approaches speculation. Facts are insufficiently stated and the underlying rationale is vague.

The purpose of this paper, therefore, is to enunciate those general rules which appear to emerge from the cases, while at the same time pointing out the areas of uncertainty occasioned by the existing status of the case law and indicating the loose ends which are evident in the practical application of such rules as may be announced.

The allowance or disallowance of appreciation, and the allowance or disallowance of depreciation, are, of course, both part of the same problem, which is the achievement of equity and justice between condemnor and condemnee in the taking of lands for public use. However, they rather clearly submit to individual treatment. The cases relating to appreciation in value of property due to a public improvement are discussed first.

I. ENHANCEMENT IN VALUE RESULTING FROM PUBLIC IMPROVEMENT

The arguments for and against the allowance of enhancement in value may be stated briefly as follows:

1. Where lands in the vicinity of a public improvement are enhanced in value by reason thereof, it is inequitable that the owners of lands taken for the improvement be denied the increment in value which inures to the benefit of the owners of vicinal lands not taken.
2. The public should not be required to pay the owners of lands taken for an improvement an advanced value created by the improvement paid for by the public. The owners of lands adjacent to the improvement enjoy benefits therefrom, but the owners of lands taken for the improvement cannot enjoy such benefits, and hence are not entitled to the increment in value represented by such benefits. An increase in value of the lands taken would not be due to an increase in benefits inuring to the lands, but to speculation as to what the government might pay therefor.

These opposing views have led to a division of authority. The cases may be roughly grouped into five categories, as follows:

1. One line of cases, uniformly denying enhancement, proceeds on the theory that the landowner is not entitled to any increment in value attributable to the improvement if it is known or reasonably probable from the outset thereof that the lands will be taken for the improvement.

2. Another line of cases treats of the situation where the original project is subsequently enlarged and the question is presented whether the enlargement was a foreseeable extension of the original project, in which case enhancement will be denied, or whether the enlargement constituted an independent project not conceived as part of the original improvement, in which case enhancement will be allowed.

3. A third line of cases supports the proposition that enhancement in value due to the improvement will be disallowed under any circumstances and without regard to whether it was known or reasonably probable from the outset of the project that the lands would be taken.

4. A fourth line of cases holds that enhancement in value will be permitted under any circumstances and without regard to whether it was known or reasonably probable from the outset of the project that the lands would be taken.

5. A fifth line of cases deals with the construction of statutory and constitutional provisions as affecting or determining the allowance or disallowance of enhancement.

It should be stated at this point that except where otherwise compelled by statute the cases uniformly follow the rule that valuation is as of the date of taking. The question then is whether, in determining valuation *as of the date of taking*, enhancement in value will be included or excluded.

In the following, the cases are considered in the order of categorization previously designated.

A. ALLOWANCE OF ENHANCEMENT GOVERNED BY CERTAINTY OR PROBABILITY OF LANDS BEING TAKEN FOR PUBLIC IMPROVEMENT

It has been held that appreciation in value due to a public improvement will not be allowed if it was known or reasonably probable, or certain or practically certain, that the lands would be included in the public project from the outset thereof.

United States v. Miller (1943) 317 U.S. 369, 87 L.Ed. 336, 63 S.Ct. 276.
Kerr v. South Park Comm'rs (1886) 117 U.S. 379, 29 L.Ed. 924, 6 S.Ct. 801.
Shoemaker v. United States (1893) 147 U.S. 282, 37 L.Ed. 170, 13 S.Ct. 361.
Olson v. United States (1934) 292 U.S. 246, 78 L.Ed. 1236, 54 S.Ct. 704.
United States v. Certain Lands (1910, C.C.R.I.) 180 F. 260.
Williams v. City and County of Denver (1961) 147 Colo. 195, 363 P.2d 171.
City and County of Denver v. Smith (1963) 152 Colo. 227, 381 P.2d 269.
Smith v. Commonwealth (1911) 210 Mass. 259, 96 N.E. 666.
Cole v. Boston Edison Co. (1959) 338 Mass. 661, 157 N.E.2d 209.
Re Munson (1883) 29 Hun. (N.Y.) 325.
Fitzgerald v. State (1959) 9 A.D.2d 486, 194 N.Y.S.2d 569.
In re Addition to Lincoln Square Urban Renewal Project (1960, Sup.Ct.) 199 N.Y.S.2d 225.
Rhode Island Hosp. Trust Co. v. Providence County Court House Comm'n (1932)52 R.I. 186, 159 A. 642.

Shoemaker v. United States (1893) 147 U.S. 282, 37 L.Ed. 170, 13 S.Ct. 361, involved the acquisition of land for the establishment of Rock Creek Park in the District of Columbia. Some of the land within the general area designated for the park was taken, and some was not, but all that was taken was valued without any enhancement due to the park project itself. The Supreme Court of the United States approved the following instruction given by the trial court:

> * * * The commissioners are instructed that they shall receive no evidence tending to prove the prices actually paid on sales of property similar to that included in said park, and so situated as to adjoin it or to be within its immediate vicinity, when such sales have taken place since the passage of the act of Congress of the 27th of September, 1890, authorizing said park, but any recent bona fide sales made before the passage of said act, of lots similarly situated and adapted to similar uses, or recent bona fide contracts made before the passage of said act, with land owners, for other lands in the vicinity similarly situated, may be considered by the commissioners, looking at all the circumstances of these sales or contracts in the determination of the ultimate question of value. (Underscoring supplied.)

In *Kerr v. South Park Comm'rs* (1886) 117 U.S. 379, 29 L.Ed. 924, 6 S.Ct. 801, also involving the taking of land for park purposes, the landowner sought to introduce evidence of prices paid for properties adjacent to or within the immediate vicinity of the park which were sold after the boundaries of

the park had definitely been established. The Supreme Court of the United States sustained the action of the trial court in refusing to admit evidence of such sales, and upheld an instruction of the lower court which read, in part:

> In the nature of things the lands within the proposed park, and which were to constitute it, could not have been -- specially benefited, and the owner of the lands in question should be allowed nothing on the ground that his property was -- specially benefited.

The question before the Court in *United States v. Certain Lands* (1910, C.C.R.I.) 180 F. 260, was whether, in the condemnation of a tract of land by the Federal Government, there could be taken into consideration claimed enhancement in value resulting from the partial construction by the government of a breakwater adjacent thereto. In denying enhancement the Court stated:

> It is true that according to the general rule damages are to be assessed as of the date of condemnation. This rule has been so applied as to compel the state --- to pay for values created by the public improvement itself. This was illustrated in the building of the Rhode Island Statehouse. After purchasing a portion of the land, the state proceeded to condemn the adjacent lands, and was compelled to pay a price for these adjacent lands enhanced by the fact that it had, by embarking upon the building of a State Capitol and purchasing lands therefor, increased the value of all lands in the vicinity. In *re State House Commission*, 19 R.I. 390, 35 Atl. 212; *Stafford v. City of Providence*, 10 R.I. 567, 14 Am.Rep. 710.
>
> While such a rule is probably sound where the condemnation of adjacent lands is for the purpose of enlarging an old and fixed location, the rule seems of more doubtful justice in cases where, from the nature of the work, it is evident, from the moment of the passage of the legislation authorizing it, that the land in question will necessarily be required for the public improvement. Where, from the inception of the public improvement, it is known with practical certainty that the land will be required for the public project, this in itself negatives any supposed advantages which might accrue to the land held in private ownership by reason of its adjacency to the grounds of a public Capitol, park, or like improvement. If from the outset it is known that the lands must be taken for the public purpose, it is unsound to base their valuation upon any supposed advantages arising from their continuance in private hands as lands adjacent to public grounds. ---
>
> The enhancement of price due to the public improvement, if based upon the reasonable expectation that the lands may be held by the private owner with the added advantages of adjacency to the lands improved by the public, is legitimate; but when this expectation is destroyed by the practical certainty, as distinguished from legal certainty, that the lands are not to continue in private ownership adjacent to improved public lands, then the reason fails. It is unsound to look merely at the date of filing a petition for condemnation in considering how far the value has been enhanced by the public project.
>
> In view of the fact that by the application of this rule the public has been compelled to pay private owners of lands an advanced value due to the very improvement which the public had undertaken, it would be wise, upon the institution of public works requiring the exercise of eminent domain, that officers of government, national, state, or municipal, should have some of the prevision shown by Jeremy Bentham, when, among other interesting occupations, he framed a project for a canal across the Isthmus of Panama, and in pursuance of his habit of foresight made provision that, in awarding compensation for lands taken, no compensation should be awarded for values created by the improvement itself.

There was assigned as error in *Rhode Island Hosp. Trust Co. v. Providence County Court House Comm'n* (1932) 52 R.I. 186, 159 A. 642, rulings of the trial court excluding testimony to the effect that the value of the land sought to be condemned increased in value as soon as the Legislature authorized the taking thereof for a public project. In sustaining the action of the lower court the Supreme Court of Rhode Island stated:

> The rule is that the owner of land taken by right of eminent domain is not entitled to recover any increase in value of this land, due to the fact that the land was known to be within the area designated for condemnation and was certain to be taken.

B. ENLARGEMENT OR EXTENSION OF ORIGINAL PROJECT

The rule enunciated in the cases cited and set forth above has been applied where the original public project was later extended, and adjacent lands were subsequently taken for the extension of the original project. Thus, it has been held that if from the outset of the public improvement it was known or reasonably probable, or certain or practically certain, that the initial project would be enlarged, and that lands adjacent thereto would later be taken for the enlarged project, no increment in value attributable to the improvement may be allowed owners of lands that were subsequently taken to effect such enlargement.

United States v. Miller (1943) 317 U.S. 369, 87 L.Ed. 336, 63 S.Ct. 276.
St. Louis Elec. Terminal Ry. v. MacAdaras (1914) 257 Mo. 448, 166 S.W. 307.
Cincinnati v. Ziegler (1914) 16 Ohio N.P.N.S. 169, 26 Ohio Dec. N.P. 79.
Nichols v. City of Cleveland (1922) 104 Ohio St. 19, 135 N.E. 291.

Conversely, it has been held that if the subsequent augmentation is to be viewed as an independent project not conceived as part of the original improvement, the owners of lands later taken are entitled to the enhancement in value resulting from the original improvement.

United States v. Goodloe (1920) 204 Ala. 484, 86 So. 546.
Williams v. City and County of Denver (1961) 147 Colo. 195, 363 P.2d 171 (recognizing rule).
City and County of Denver v. Smith (1963) 152 Colo. 227, 381 P.2d 269 (recognizing rule).
Virginia & T.R.R. v. Lovejoy (1872) 8 Nev. 100.
Andrews v. State (1961) 9 N.Y.2d 606, 176 N.E.2d 42.
Brubaker v. State (1963) 17 A.D.2d 519, 236 N.Y.S.2d 395.
Stafford v. City of Providence (1873) 10 R.I. 567, 14 Am.Rep. 710.
In re Condemnation of Certain Land for New Statehouse (1896) 19 R.I. 382, 33 A. 523.
Gulf, C. & S.F. Ry. v. Brugger (1900) 24 Tex.Civ.App. 367, 59 S.W. 556
City of El Paso v. Coffin (1905) 40 Tex.Civ.App. 54, 88 S.W. 502.
McChristy v. Hall County (1940, Tex.Civ.App.) 140 S.W.2d 576.
State v. Willey (1961, Tex.Civ.App.) 351 S.W.2d 900.
City of Dallas v. Rash (1964, Tex.Civ.App.) 375 S.W.2d 502.

1. Application of Rule Resulting in Disallowance of Increment in Value

The leading case is *United States v. Miller* (1943) 317 U.S. 369, 87 L.Ed. 336, 63 S.Ct. 276. This case involved the condemnation of certain lands for the relocation of a railroad, required by the construction of the Shasta Dam in California and the prospective flooding of the existing railroad right-of-way. A complaint in eminent domain was filed by the United States, and the action was tried to a jury. The lands sought to be condemned lay within an area where property values had risen sharply as a result of the construction of the dam. The owners offered evidence as to the fair market value on December 14, 1938, the date of filing of the complaint. Objection was interposed on the ground that the condemnees were not entitled to any increment in value after August 26, 1937, the date on which the government became committed to the project pursuant to authorization by Act of Congress. The trial court sustained the objection, and the Circuit Court of Appeals reversed, holding that the witnesses should have been allowed to testify as to fair market value on the date of taking without limitation as to enhancement of value.

In affirming the action of the District Court and reversing the judgment of the Circuit Court of Appeals, thus disallowing increment in value to the owners, the Supreme Court of the United States stated:

> Respondents correctly say that value is to be ascertained as of the date of taking. But they insist that no element which goes to make up value as at that moment is to be discarded or eliminated. We think the proposition is too broadly stated.
>
> If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

> The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.
>
> In which category do the lands in question fall? The project, from the date of its final and definite authorization in August 1937, included the relocation of the railroad right-of-way, and one probable route was marked out over the respondents' lands. This being so, it was proper to tell the jury that the respondents were entitled to no increase in value arising after August 1937 because of the likelihood of the taking of their property. If their lands were probably to be taken for public use, in order to complete the project in its entirety, any increase in value due to that fact could only arise from speculation by them, or by possible purchasers from them, as to what the Government would be compelled to pay as compensation.
>
> * * * If, in the instant case, the respondents' lands were, at the date of the authorizing Act, clearly within the confines of the project, the respondents were entitled to no enhancement in value due to the fact that their lands would be taken. If they were within the area where they were likely to be taken for the project, but might not be, the owners were not entitled, if they were ultimately taken, to an increment of value calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the land taken. In so charging the jury the trial court was correct. (Underscoring supplied.)

In *Nichols v. City of Cleveland* (1922) 104 Ohio St. 19, 135 N.E. 291, decided before *Miller*, suit was instituted to condemn certain land in the City of Cleveland for park purposes. The trial court's ruling denying enhancement was assigned as error. The Supreme Court of Ohio conceded the proposition that "if a public improvement is made and completed and the public authorities subsequently decide to make an addition to it, or extension of it --- the owner is entitled to the increased value which the original improvement gave to his land." The Court went on to hold, however, that since in the instant case the land in question was a necessary part of the park scheme, the trial Court's ruling that enhancement in value due to the park project could not be considered in ascertaining value was correct. It said:

> But as already shown, these entire 4.22 acres were a necessary part of the original park scheme. The deeds of Mr. Rockefeller and other grantors were made on the express condition that this and the other tracts specified should be included in the park scheme. If it had not been, the condition of the Rockefeller and other deeds would have been violated and the land forfeited. In other words, the entire park scheme, as prepared, would have had to be abandoned. That has been the situation with reference to these particular 4.22 acres from the inception of the scheme. There never has been a time when this land could have received any value apart from the park plan, or from the establishment of the park, for it was an essential element in the park itself, and by the great weight of authority the rule stated by the trial court in this case for the determination of the value of the land taken was correct.

2. Application of Rule Resulting in Allowance of Increment in Value

The rule enunciated in *Miller*, supra, was applied in *Andrews v. State* (1961) 9 N.Y.2d 606, 176 N.E.2d 42, to allow enhancement, on the ground that the subsequent taking was not part of the project as originally contemplated. The Court of Appeals of New York stated:

> The trial court has found as a fact and the Appellate Division affirmed that the appropriation of the subject property for the construction of a power line was not contemplated by the original project, which was enlarged to include that purpose only after the project was well under way. The valuation of the property for that purpose included an element of value enhanced by the existence of the original project, but under the ruling in *United States v. Miller* -- this is to be compensated where, as here, the project is subsequently enlarged by the construction of transmission lines, in which event the *Miller* case requires payment of the market price as enhanced by the factor of proximity to the public improvement.

McChristy v. Hall County (1940, Tex.Civ.App.) 140 S.W.2d 576, decided before *Miller*, allows enhancement on the ground that the subsequent taking was not contemplated as part of the original project.

In this case it appeared that appellee, the condemning authority, had previously taken a right-of-way for highway purposes across a tract of 7 acres belonging to appellant. After a substantial portion of the road had been constructed, appellee instituted suit to condemn another portion of the 7-acre tract, for the removal therefrom of earth, stone and gravel for use in completing construction of the highway, and maintaining and repairing it. Testimony that the value of the land was increased by the building of the highway, and that the subject property would be a good location for a filling station, was on motion ordered stricken by the trial court, and appeal from such ruling taken. In reversing and remanding, the Texas Court of Civil Appeals said:

> --- the condemnation proceeding was not in connection with, nor a part of, the procedure by which the original right-of-way for the road was procured. That had already been accomplished and the location of the road definitely established. Not only so, but the contract to build the road had been entered into and a large portion of the grading completed. This proceeding was not incidental to the establishment of the highway but one instituted after the highway had been established and it became desirable to use the earth, rock and gravel from this tract for use in constructing the highway. It was, therefore, an independent proceeding and, under the law, appellant was entitled to the fair market value of her land under the circumstances and conditions existing at the time it was taken only four days prior to the trial of the case. --- It is not contended by appellee that it was absolutely necessary to condemn this particular tract in order to procure the materials necessary to construct the road, nor is the suggestion made that this condemnation proceeding is a part of, or has any connection with, any procedure which had been instituted or conducted for the purpose of obtaining the right-of-way when the road was located some months before. --- The benefits and enhancements in value that had already accrued on account of the previous improvements or the enterprise that had already been initiated to establish and build the road are not matters to be considered as offsets when subsequent condemnations such as this are instituted. The owner is entitled to such compensation as is warranted by the facts shown to exist at the time the land is taken.

3. Practical Application of the Miller Rule

The rule enunciated in *Miller*, which, of course, must be followed in the lower Federal courts, has to date been adopted and followed in a few State court cases. It seems reasonable to suppose that this leading case will be followed by the State courts more closely in the future. The question arises as to the precise impact and practical effect of the rule in *Miller*.

It is to be noted that the allowance or disallowance of appreciation is made to turn on the date the government becomes *"committed"* to the project. Increment in value accruing before the date of commitment *will* be allowed, and increment in value accruing subsequent thereto *may* or *may not* be allowed, dependent on whether or not on the date of commitment it was "certain or practically certain" that the lands would later be taken for enlargement of the original project.

There appears no reason why the *Miller* rule should not be applied with full force and effect to the factual situation treated in Section A hereof; that is, where a single project is involved and there is no question of enlargement. In applying the rule in *Miller* to a single project, such as the construction of a given and determined number of miles of highway along a designated alignment, what results ensue?

The application of the *Miller* rule seems quite workable where an appropriation or authorizing act is involved, as was the factual situation therein. To pinpoint the date of the government's commitment to the date of passage of such act (or, perhaps in lieu thereof, some administrative action required to be taken to implement the same) makes for certainty. However, where no appropriation or authorizing act is involved which pertains to a specific public improvement (as would be usual in the case of highway construction) the application of the rule in *Miller* would seem to lead to a considerable measure of uncertainty. This is considered more fully later herein, after the rulings in other cases are set forth and discussed.

C. DENIAL OF ENHANCEMENT IRRESPECTIVE OF TEST OF CERTAINTY OR PROBABILITY OF INCLUSION OF LANDS IN PROJECT

In a number of cases, enhancement in value due to the improvement for which the lands were condemned has been disallowed, without discussion or mention of whether it was known or reasonably probable, or certain or practically certain, from the outset of the public project that the lands would be taken therefor.

United States v. Chandler - Dunbar Water Power Co. (1913) 229 U.S. 53, 57 L.Ed. 1063, 33 S.Ct. 667.
United States v. First National Bank (1918 , D.C. Ala.) 250 F. 299.
Murray v. United States (1942, C.A.D.C.) 130 F.2d 442.
Housing Auth. v. Title Guarantee Loan & Trust Co. (1942) 243 Ala. 157, 8 So.2d 835.
Arkansas State Highway Comm'n v. Griffin (1967) 241 Ark. 1033, 411 S.W.2d 495.
People v. Pera (1961, Dist.Ct.App.) 12 Cal. Rptr. 129.
Cook v. South Park Comm'rs (1871) 61 Ill. 115.
Louisville & N.R. Co. v. Ingram (1890) 12 Ky.L.Rep. 456, 14 S.W. 534.
Commonwealth v. Hendricks (1966, Ky.) 400 S.W.2d 676.
Louisiana Ry. & Nav. Co. v. Xavier Realty (1905) 115 La. 328, 39 So. 1.
Opelousas, G. & N.E. Ry. v. St. Landry Cotton Oil Co. (1907) 118 La. 290, 42 So. 940.
Opelousas, G. & N.E.R. Co. v. Bradford (1907) 118 La. 506, 43 So. 79.
State v. Johnson (1962, La.Ct.App.) 141 So.2d 54.
Moale v. Baltimore (1854) 5 Md. 314, 61 Am.Dec. 276.
Bonaparte v. Baltimore (1917) 131 Md. 80, 101 A. 594.
Carli v. Stillwater & St. P.R.R. (1871) 16 Minn. 260, Gil 234.
Re Water Comm'rs (1842, N.Y.) 3 Edw.Ch. 552.
Re Simmons (1909) 130 A.D. 350, 114 N.Y.S. 571.
Brainerd v. State (1911) 74 Misc.Rep. 100, 131 N.Y.S. 221.
New York Cent. & H.R.R. v. Mills (1913) 160 A.D. 6, 144 N.Y.S. 646.
Gibson v. Norwalk (1896) 13 Ohio C.C. 428, 7 Ohio CD6.
Woodfolk v. Nashville & C.R.R. (1852) 2 Swan (Tenn.) 422.
State Dep't of Highways v. Jennings (1968, Tenn.Ct.App.) 435 S.W.2d 481.
State v. Vaughan (1958, Tex.Civ.App.) 319 S.W.2d 349.
State v. Cartwright (1961, Tex.Civ.App.) 351 S.W.2d 905.

These cases were decided without explicit reference to the test of whether the lands were known or likely to be taken for the project from the inception thereof; however, the caveat is in order that it seems reasonably clear from the recital of facts in some of these cases that the lands sought to be condemned were in actuality, from the outset of the project, certain or practically certain to be taken.

By way of example, consider the holding in *State v. Vaughan* (1958, Tex.Civ.App.) 319 S.W.2d 349, involving condemnation of lands adjacent to the Texas State Capitol, and lying within the boundaries of a tract which had been officially designated by the State Building Commission as the "Capitol Area." In holding that the trial court improperly admitted evidence of increase in value of lands in such area subsequent to said designation by the State Building Commission, the Court did not explicitly premise its ruling on the ground that the lands were known or likely to be taken for the development of the Capitol complex. However, the Court's broad statement, that when "property is taken for a public purpose by condemnation the condemnor should not be required to pay for an increased value due to the public improvement," perhaps should be read in the context that all lands in the designated "Capitol Area" were presumably earmarked for public use.

However, in other cases it seems by no means assured that the axis of decision was whether or not the lands sought to be condemned were certain or likely to be taken for the project.

In *Arkansas State Highway Comm'n v. Griffin* (1967) 241 Ark. 1033, 411 S.W.2d 495, involving condemnation of lands for right-of-way for an interstate highway, evidence was introduced at the trial of sales of neighboring properties to oil companies for use as sites for filling stations. The Supreme Court of Arkansas stated that "the evidence during the trial clearly establishes that the price of property in this area 'sky-rocketed' when the proposed location of Interstate 40 became known ---." In ruling that the evidence of such sales was improperly admitted, the Court did not base its holding on the certainty or probability that the lands sought to be condemned would be taken for the project. The decision may well be read to proceed on the theory that no evidence of increment in value accruing after the project became known, and attributable to the project itself, could be considered in determining market value at the time of taking, without regard to whether it was definite or probable that the subject lands would be included within the right-of-way. The Court stated, quoting with approval from Nichols, *The Law of Eminent Domain*, 3d ed., Vol. 4, Sec. 12.3151:

> 'The general rule is that any enhancement in value which is brought about in anticipation of and by reason of a proposed improvement is to be excluded in determining the market value of such land, (emphasis supplied) although there is some authority which, contrariwise, unqualifiedly allows recovery for such enhanced value.'
> 'While, as pointed out, there is some authority to the contrary, we like the logic of the general rule, and align ourselves with those who have adopted that view.'

The opinion is silent as to whether the lands *sub judice* were included in the planning from the outset of the project, but the decision in any event is not made to turn on this point.

While, as before stated, doubtless some of the cases denying enhancement without qualification should be read in the light of the fact that it appeared certain or likely from the initiation of the project that the lands would ultimately be condemned, the fact remains that the courts did not choose to rest decision on this point, but instead disallowed increment in value attributable to the improvement without limiting language. And, in other cases, it is not clear from the recital of facts that the lands were definitely or likely to be taken, but enhancement in value was nonetheless denied. Since the cases do not expressly announce the rule that allowance or disallowance of appreciation is dependent on whether or not from the outset of the project it appeared certain or practically certain that the lands would be taken, it follows that to interpolate such rule into the decisions would be clearly without warrant. The language employed by the courts, taken at face value, would seem to require the conclusion that these cases stand for the proposition that increment in value proximately flowing from the improvement itself will be disallowed without regard to the test of foreseeability of inclusion of the lands in the project.

D. ALLOWANCE OF ENHANCEMENT IRRESPECTIVE OF TEST OF CERTAINTY OR PROBABILITY OF INCLUSION OF LANDS IN PROJECT

In a few cases, enhancement in value due to the improvement has been allowed without qualification. The statements of facts in these cases do not disclose or indicate that it appeared from the inception of the project uncertain or unlikely that the lands would be taken for the improvement, nor did the courts in any manner discuss or advert to such test as a governing factor. These cases (constituting a numerical minority) thus adopt and follow the rule that enhancement due to the improvement is a proper element of market value as of the time of taking, without regard to whether or not it appeared certain or probable from the outset of the project that the lands would be taken.

Sunday v. Louisville & N.R.R. (1912) 62 Fla. 395, 57 So. 351 (Involving construction of constitutional and statutory provisions).
Gate City Terminal Co. v. Thrower (1911) 136 Ga. 456, 71 S.E. 903.
Hard v. Housing Authority (1963) 219 Ga. 74, 132 S.E.2d 25.
Sanitary District v. Loughran (1896) 160 Ill. 362, 43 N.E. 359.
Interstate Water Co. v. Adkins (1927) 327 Ill. 356, 158 N.E. 685.
Snouffer v. Chicago & N.W. Ry. (1898) 105 Iowa 681, 75 N.W. 501
Ranck v. City of Cedar Rapids (1907) 134 Iowa 563, 111 N.W. 1027.
Prudential Ins. Co. v. Central Neb. Pub. Power & Irrigation Dist. (1941) 139 Neb. 114, 296 N.W. 752.
Allen v. Missouri K. & T. Ry. (1894, Tex.Civ.App.) 25 S.W. 826.
Panhandle & G. Ry. v. Kirby (1906) 42 Tex.Civ.App. 340, 94 S.W. 173.
Weber Basin Water Conservancy Dist. v. Ward (1959) 10 Utah 2d 29, 347 P.2d 862.
State Road Comm'n v. General Oil Co. (1968) 22 Utah 2d 60, 448 P.2d 718.
Guyandotte Valley Ry. v. Buskirk (1905) 57 W.Va. 417, 50 S.E. 521.

Although several of the cases cited above are of early date, the view adopted therein has been forcefully expressed in more recent years in the case of *Hard v. Housing Authority* (1963) 219 Ga. 74, 132 S.E.2d 25. In this case the Supreme Court of Georgia stated that the only issue before it was "whether or not, upon the trial of a condemnation on appeal, evidence, showing that the value of the subject property has been enhanced, by the general knowledge for a number of years that a large area, including it, would be taken for urban renewal, and much of the other property has been taken and slums cleared therefrom, is admissible in fixing its value." In holding that evidence of enhancement was admissible in determining market value as of the time of taking, the Court stated:

> While it might be difficult to see how knowledge of this impending taking of this particular property for urban renewal would enhance its value, yet that is conceivable, and testimony to that effect cannot be rejected. Anything that actually enhances the value must be considered in order to meet the demands of the Constitution that the owner be paid before the taking, adequate and just compensation. Since the date for fixing value was after the inclusion of this land in the announced intention to take it, it had no market value except in contemplation of the condemnation award, thus confronting the court with the necessity of either changing the date of valuation as the Court of Appeals did - which is flatly forbidden by the Constitution --, or rejecting the standard of market value in favor of a hypothetical value based on the utterly fallacious assumption that it will remain in private ownership adjacent to the improvement; or do as the trial court did, allow proof of any element, including knowledge of the impending urban development, that entered into fixing its value right up to the time it was taken. ---

> A brief filed on behalf of the State quotes extensively from Orgel On Valuation Under Eminent Domain (1953). But it fails to quote as did an opposition brief from Volume I, page 433, Footnote 16 of the same authority, the following: 'In some cases all enhancement in value resulting from the improvement is expressly and unqualifiedly allowed. *Gate City Terminal Company versus Thrower*, 136 Ga. 456, 71 S.E. 903 (1911), was apparently a case of this kind.' Able counsel for the Housing Authority cites numerous cases from other jurisdictions, apparently holding contrary to the Thrower case ---. We have not examined the constitutional provisions of those jurisdictions to determine if they differ from ours, but for the reasons hereinbefore stated, we follow what we conceive to be the rule in Georgia.

The Court went on to quote with approval from a prior Georgia case as follows:

> 'Every direct authority known to us is against us. Nevertheless, we are right, and these authorities are all wrong, as time and further judicial study of the subject will manifest.'

The latter statement, as applied to the issue before the Court in *Hard v. Housing Authority*, may be taken as hyperbole, since, as above indicated, cases from other jurisdictions also follow the rule that evidence of enhancement in value due to the improvement is properly admissible in determining market value as of the time of taking, without regard to the certainty or likelihood of condemnation from inception of the project.

It should be pointed out that the Georgia Constitution, adverted to by the Court as compelling its decision, has no singular provisions with respect to the exercise of the power of eminent domain, but contains only the usual prescription against private property being taken for a public use without just and adequate compensation first being paid.

As has been seen, the above cases pursue a rationale at variance and incompatible with that employed by the courts in the cases cited and discussed in Sections A, B, and C hereof. An examination of a further line of cases dealing with the construction of constitutional and statutory provisions follows.

E. EFFECT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

In a few jurisdictions, provisions are embodied in the State constitutions, or contained in statute law, to the effect that valuation in eminent domain shall be determined "irrespective" of benefits from or enhancement due to the public improvement for which the lands are taken. The meaning of the word "irrespective" in the context used is ambiguous. It may be argued that proper construction requires that value shall be determined by inclusion of benefits, or, conversely, that value shall be determined by way of exclusion of benefits. It is hence perhaps not surprising that the courts have reached diametrically opposed results -- in some cases the construction given to the word leading to the allowance of enhancement, and in others to the denial thereof.

Enoch v. Spokane Falls & N. Ry. (1893) 6 Wash. 393, 33 P. 966, involved the taking of lands for a railroad right-of-way. The Court had before it the construction of a provision of the Constitution of the State of Washington reading that when private property is taken for a right-of-way by any corporation other than a municipal corporation, compensation shall be determined "irrespective of any benefit from any improvement proposed by such corporation." The Court posed the question of construction presented by such language, as follows:

> Does this phrase mean that the corporation making the appropriation may show that the value of the property, a part of which it takes for a right of way, has been enhanced by the construction or proposed construction of its road, and then deduct such enhancement from the present value of the land, and only pay the remainder as damages? Or does it mean that a person whose land is taken for the use of a railroad is entitled to its fair market value, without regard to the causes that may have contributed to make up such value?

In opting for the latter construction the Court stated that the jury should not be permitted to consider or make any use of the fact that market value as of the time of taking was enhanced by the proposed construction by the railway company of a new line of track.

Giesey v. Cincinnati W. & Z.R.R. (1854) 4 Ohio St. 308 is on all fours with *Enoch v. Spokane Falls & N. Ry.*, supra. The language of the Ohio Constitution under review was virtually identical with that

of the State of Washington, providing that in condemnation by a private corporation the property owner shall be awarded compensation "irrespective of any benefit from any improvements proposed by such corporation." The case likewise involved the taking of property by a railway company. In holding that this phrase of the Ohio Constitution compelled the allowance of enhancement, the Court said:

> The word 'irrespective' relates to --- full compensation, and binds the jury to assess the amount, without looking at or regarding, any benefits contemplated by the construction of the improvement. When this is done, and this consideration wholly excluded, the jury have nothing to do but ascertain the fair market value of the property taken, which is but saying that nothing shall be deducted from that value on account of such benefits. The opposite construction, so far from requiring the assessment to be made irrespective of these benefits, in effect compels the jury to ascertain their value to the property, and to deduct so much as they have increased it; thus using a word introduced for the sole benefit of the property holder, in such manner as to deprive him of a portion of the acknowledged present value of his property, or to allow him to be paid for a part of its value in benefits; and, at the same time, fastens upon the constitution the gross inconsistency of allowing a corporation to procure the right of way upon easier terms than could be done by the public.
> --- whether property is appropriated directly by the public, or through the intervention of a corporation, the owner is entitled to receive its fair market value at the time it is taken -- as much as he might fairly expect to be able to sell it to others for, if it was not taken -- and that this amount is not to be increased from the necessity of the public or the corporation to have it, on the one hand; nor diminished from any necessity of the owner to dispose of it, on the other. It is to be valued precisely as it would be appraised for sale upon execution, or by an executor or guardian; and without any regard to the external causes that may have contributed to make up its present value.

See to the same effect:

Sunday v. Louisville & N.R.R. (1912) 62 Fla. 395, 57 So. 351.
Seattle & M.R.R. v. Roeder (1902) 30 Wash. 244, 70 P. 498.

A contrary result was reached in *Portland-Oregon City Ry. v. Penney* (1916) 81 Ore. 81, 158 P. 404. In this case, suit was instituted by a railroad company to condemn for right-of-way purposes land devoted to agricultural use. The owner of the land contended that the new line of railroad would operate to bring products grown on the land closer to market, thus enhancing the value of the land for agricultural purposes, and that he was entitled to such increment in value. An Oregon statute provided that: "No appropriation of private property shall be made until compensation be made therefor to the owner thereof, irrespective of any increased value thereof, by reason of the proposed improvement." Holding that this language required the exclusion of enhancement in determining market value, the Court said:

> --- the statute in this state and statutes and judicial decisions in other states have said that increase in the value of the property by reason of the construction of the road shall not be considered in estimating damages, and, in effect, require the jury to estimate all the inconveniences caused by the construction of the road and to eliminate the incidental benefits which are shared in common by the other members of the community. This seems to be the law in Oregon, and, while the writer follows it with unwilling feet, the courts are bound to recognize it until it is amended.

See also *Pierce County v. Duffy* (1918) 104 Wash. 426, 176 P. 670, decided subsequent to the holding in *Enoch v. Spokane Falls & N. Ry.*, supra, and reaching a seemingly opposite result. In this case, involving condemnation of lands for the Camp Lewis Army Post in the State of Washington, the trial court charged the jury that under "the provisions of our Constitution --- the measure of damage is the true, fair cash market value of the land taken, without regard to any benefits that may result from --- the proposed construction or establishment of an army post." The Supreme Court of Washington, in upholding the validity of the instruction, stated that "there is no foundation for the fanciful theory that the taking of all of one's lands for a public use shall or can redound to the advantage of the owner by means of any supposed or contemplated increase in value flowing from the establishment and maintenance of such public improvement."

These two Washington cases can in fact be satisfactorily distinguished on the ground that the constitutional provision compelling the result in *Enoch* (relating to the taking of lands by a private corporation) had no reference to the facts presented in *Duffy* (taking by a governmental subdivision), but the Court in the latter case did not advert to its prior ruling or attempt to draw any such distinction.

It thus appears, as hereinbefore stated, that the courts have reached contrary results in construing the meaning of the word "irrespective," as contained within the scope of virtually identical constitution and statutory provisions.1/

II. DEPRECIATION IN VALUE RESULTING FROM IMPACT OF PUBLIC IMPROVEMENT

The cases are relatively few in number which deal with the question whether in the condemnation of property for public use market value at the time of taking shall be ascertained with or without regard to depreciation in value occasioned by the public improvement. The majority of the cases adopt the rule (favoring the condemnee) that depreciation shall not be taken into consideration in determining fair market value, but other cases (favoring the condemnor) announce a contrary result.

The arguments for and against the exclusion of depreciation in determining market value may be stated briefly as follows:

1. Depreciation due to a public improvement cannot inure to the benefit of the condemnor, since it is manifestly unjust to permit a condemning authority which brings about a diminution in property values by the prospect, imminence or threat of the exercise of its power of eminent domain to take advantage of depreciated values which proximately result from its own action.
2. Fair market value at the time of taking must include and reflect depreciation due to a public improvement for the reasons that:
   (a) The property owner cannot avail himself of increment in value due to a public improvement, and it follows as a necessary corollary that he cannot avail himself of depreciation ensuant on a public improvement.
   (b) Determination as to whether depreciation was or was not caused by a public improvement would necessarily be based on speculation, and hence must be excluded from consideration.

It is submitted that while the rationale of decision set forth in (1) above seems quite satisfactory, the reasoning expressed in 2(a) and (b) above, if given general application, would appear something less than wholly convincing. With respect to 2(a), it is suggested that the adoption of a rule does not by logical necessity constitute adoption of the converse thereof. In respect to 2(b), conceding that in some cases determination whether the public improvement was the cause of depreciation might rest on a speculative basis, in other cases it might well appear clear beyond doubt that the improvement itself was the causative agent. Hence 2(b) would seem necessarily to constitute more a frame of reference to a particular factual situation than a rule of firm general application. As might be expected, the numerical weight of authority follows and adopts the rationale expressed in (1) above.

It should be pointed out that the same result can be reached both by the exclusion and by the inclusion of evidence relating to depreciation. Thus, in cases reaching a result favoring the condemnee, evidence bearing on depreciation may be rejected as inadmissible, or the same may be received in evidence and the jury instructed to exclude depreciation from consideration in arriving at fair market value. The end result is, of course, the same.

F. EXCLUSION OF DEPRECIATION DUE TO PUBLIC IMPROVEMENT IN ASCERTAINMENT OF FAIR MARKET VALUE

In the following cases it has been held, or stated *obiter dicta*, that in determining fair market value at the time of taking depreciation which ensues on and results from a public improvement shall not be taken into consideration. These cases thus announce a rule which restores to the property owner that measure of diminution in the market value of his property which was occasioned by the impact of the public improvement.

1/ A few early Massachusetts cases denied enhancement under the terms of statutes providing, in the case of condemnation for public road right-of-way, that damages should be "fixed at the value --- before --- laying out, alteration, or widening," and providing in the case of lands taken for other public use that "damages --- shall be fixed at the value thereof before the taking." See by way of example *Dorgan v. Boston* (1866, Mass.) 12 Allen 223; *Benton v. Brookline* (1890) 151 Mass. 250, 23 N.E. 846; *May v. Boston* (1893) 158 Mass. 21, 32 N.E. 902; *Mowry v. City of Boston* (1899) 173 Mass. 425, 53 N.E. 885. These cases are not discussed because, in the more recent decision of *Cole v. Boston Edison Co.* (1959) 338 Mass. 661, 157 N.E.2d 209 (cited in Section A hereof), the Supreme Judicial Court of Massachusetts, in adopting the *Miller* rule as the preferable statement of law in the premises, qualifiedly criticized or modified the earlier Massachusetts decisions.

United States v. Virginia Elec. & Power Co. (1961) 365 U.S. 624, 5 L.Ed.2d 838, 81 S.Ct. 784.
Murray v. United States (1942, C.A.D.C.) 130 F.2d 442.
Edlin v. Security Ins. Co. (1957, D.C. Ill.) 160 F. Supp. 487 (dictum).
State Road Dep't v. Chicone (1963, Fla.) 158 So.2d 753.
Tharp v. Urban Renewal and Community Dev. Agency (1965, Ky.) 389 S.W.2d 453 (dictum).
Lipinski v. Lynn Redevelopment Auth. (1969, Mass.) 246 N.E.2d 429.
Housing and Redevelopment Auth. v. Minneapolis Metropolitan Co. (1966) 273 Minn. 256, 141 N.W.2d 130 (dictum).
St. Louis Elec. Terminal Ry. v. MacAdaras (1914) 257 Mo. 448, 166 S.W. 307 (dictum).
City of Cleveland v. Carcione (1963) 118 Ohio App. 525, 190 N.E.2d 52.
Becos v. Masheter (1968) 15 Ohio St.2d 15, 238 N.E.2d 548.
Wadsworth v. Manufacturers' Water Co. (1917) 256 Pa. 106, 100 A. 577 (recognizing rule).
State v. Carswell (1964, Tex.Civ.App.) 384 S.W.2d 407.

Suit was brought by the Federal Government, in *United States v. Virginia Elec. & Power Co.* (1961) 365 U.S. 624, 5 L.Ed.2d 838, 81 S.Ct. 784, to condemn a flowage easement, in connection with the acquisition of certain lands for dam and reservoir purposes. The only question presented on appeal was as to the measure of compensation awarded below to the owner of the easement. In speaking thereto, the Supreme Court of the United States, citing *United States v. Miller*, supra, ruled as follows:

> The court must exclude any depreciation in value caused by the prospective taking once the Government 'was committed' to the project. --- Accordingly, the impact of that event upon the likelihood of actual exercise of the easement cannot be considered. As one writer has pointed out, '[i]t would be manifestly unjust to permit a public authority to depreciate property values by a threat --- [of the construction of a government project] and then to take advantage of this depression in the price which it must pay for the property' when eventually condemned.

Thus, the *Vepco* case adopts the *Miller* rule (which relates to enhancement) to arrive at the result that depreciation must be excluded in determining market value. It is to be noted that the Court reaffirms the *Miller* thesis that the cut-off point is the date of the government's *commitment* to the project. Nothing is said with respect to the test prescribed in *Miller* as to the certainty or foreseeability of inclusion of the property sought to be condemned in the public project from the date of the government's commitment thereto. As will be seen later, omission of the application of such test of prevision is common to the cases dealing with depreciation.

City of Cleveland v. Carcione (1963) 118 Ohio App. 525, 190 N.E.2d 52, involved the condemnation of property within an urban renewal area. An ordinance of the City Council of Cleveland authorizing the urban renewal project was passed some three years prior to the institution of suit to condemn the subject property, which was held by its owner for rental purposes. During this period the City had employed a policy of piecemeal acquisition and demolition of buildings within the project area. As inhabitants moved out the entire neighborhood suffered serious deterioration. At the time of the instant suit, rentals derived from the property had fallen off drastically. That the decline in rentals was directly attributable to the renewal project seems not to have been disputed. The question was presented on appeal as to the validity of instructions of the lower court requiring the jury to ascertain value as of the time of trial without exclusion of depreciation caused by the project. In ruling the instructions erroneous, the Court of Appeals said:

> The jury under the instructions --- determined the fair market value of appellant's property as it stood at the time of trial, virtually abandoned, vandalized and badly deteriorated, in the midst of a wasteland. Moreover, it was permitted to view the premises in such a dilapidated state for the purpose of being able to better understand and follow the evidence presented in court describing such condition and surroundings. But the fact remains that the property described by the testimony and viewed by the jury was totally different in condition and surroundings than the property that existed before the City of Cleveland had taken any affirmative steps to effectuate the St. Vincent Renewal Project. Mrs. Carcione's property at that time consisted of buildings in reasonably good condition, fully rented, and located in a built-up urban area with business activities and living conditions in keeping with the economic status of those residing in the area. The mere recitation of these bare facts, it seems to us, demonstrates that the evaluation of her property as it was at the time of the trial was unjust to her. Her property had undergone radical changes for the worse caused by activities carried on to further the very project which prompted the City of Cleveland to appropriate it. Yet, under the procedures pursued in the trial court, the appellant was compelled to suffer a substantial financial loss while the City was permitted to obtain her property at a much depreciated value. ---

> Under the facts in this case and the law applicable thereto, we conclude that Mrs. Carcione was entitled to an evaluation of her property irrespective of any effect produced upon it by the action of the City in carrying out the St. Vincent Urban Renewal Project. Hence, the standard for measuring the compensation to be awarded her should have been the fair market value of it as it was immediately before the City of Cleveland took active steps to carry out the work of the project which to any extent depreciated the value of the property.

The holding in *Carcione*, supra, was expressly approved by the Supreme Court of Ohio in *Becos v. Masheter* (1968) 15 Ohio St.2d 15, 238 N.E.2d 548. However, the result reached in *Becos* (exclusion of depreciation in determining fair market value) was achieved by *backdating the date of taking*. The Supreme Court was evidently of the opinion that this was the approach taken by the Court of Appeals in *Carcione*. (Although such construction must be accepted as controlling it may be noted that there is no express language in the opinion in *Carcione* which relates to varying the date of taking.) The facts in the *Becos* case were as follows:

Suit was instituted by Lucas County of the State of Ohio to condemn land for right-of-way for an expressway. The first take for the expressway project was several years prior to the instant suit. During this period the County acquired numerous parcels. Buildings situated on the properties so acquired were in many instances demolished, or left standing vacant and unoccupied. Serious neighborhood deterioration set in. The sole question on appeal was whether a ruling of the trial judge establishing the date of take several years prior to the commencement of the trial was proper. The Supreme Court of Ohio posed the question as follows:

> May a court establish a date of take for the purpose of evaluating private property appropriated for a public purpose which is earlier than the date of trial or the actual taking of possession by the appropriating authority?

It is to be noted that the question as presented by the Court does *not* go the question whether actions of the condemning authority prior to the institution of the condemnation proceeding constituted an actual or constructive taking.2/ Rather, the question is whether a court may arbitrarily "establish a date of take --- which is earlier than the date of trial or the actual taking of possession." In answering this question in the affirmative the Court said:

> Under these circumstances, it was proper to establish a date of take which was reasonably related to events in the vicinity of the property taken whereby the appropriating authority's activity contributed to or caused substantial depreciation of the property taken.
>
> This rule facilitates the valuation of property taken by adjusting the date of valuation in order to exclude depreciation or appreciation due to delays in public projects and promotes the constitutional requirement that just compensation be paid.

The Ohio rule, which varies the date of take for valuation purposes, appears not to be followed elsewhere, either in cases relating to depreciation, or in cases relating to appreciation. *The same result can, of course, be achieved by leaving the date of take undisturbed and excluding from valuation as of that date appreciation or depreciation caused by the improvement.* The latter approach would seem to comport more satisfactorily with accepted principles establishing the date of take as of the time of trial than the former approach which adopts a fictionalized date of taking to achieve the desired result. [Quaere, whether the Ohio rule, by backdating the date of taking prior to the onset of depreciation, would contemplate withdrawing from the jury the question whether depreciation subsequent to the date of take was in fact caused by the improvement? It may be noted that the dissenting opinion in *Becos* imputes this result to the majority opinion.]

Representative of cases excluding depreciation without backdating the date of taking is *State Road Dep't v. Chicone* (1963, Fla.) 158 So.2d 753. In this case it appeared that the State Road Department of Florida made public announcement in 1957 of the proposed alignment of I-64 through the City of Orlando. The first right-of-way acquisitions for the construction of this segment of I-64 were made the following year. Suit to acquire the parcels involved in the instant suit was not commenced until 1960. Over objection, expert testimony was introduced at the trial to the effect that subsequent to the public announcement the subject lands had depreciated approximately 20 percent in value, which diminution in value was due solely to the prospect of condemnation. The Supreme Court of Florida stated:

2/ Cases dealing with the question of what constitutes a taking are beyond the scope of this paper.

> The single question for decision by this Court is whether compensation for lands taken in eminent domain proceedings shall be measured by their value as affected by the imminence of condemnation or by their value as it would be if there had been no threat of taking.

In holding that error was committed at the trial in permitting the introduction in evidence of depreciation due to the project, the Court said:

> The rule advocated by the Department and followed in the trial in the instant case, would permit a condemnor to depreciate property values by a threat of condemnation then take advantage of the depressed value which results by paying the landowner the depreciated value.
>
> This would amount to a confiscation of the owner's property to the extent of the depreciation in value. All of our laws, organic and statutory, are intended to prevent this happening.
>
> ---we conclude that the value of property at the time of taking as depreciated or depressed by the prospect of condemnation is not a proper basis for measure of compensation for the property taken.
>
> Effect can easily be given to this conclusion --- by holding simply, as we do here, that compensation shall be based on value of the property as it would be at the time of the taking if it had not been subjected to the debilitating threat of condemnation and was not being taken.

The foregoing cases thus establish the rule that in the ascertainment of market value at the time of taking there shall be excluded from consideration depreciation proximately caused by the public improvement.

G. INCLUSION OF DEPRECIATION DUE TO PUBLIC IMPROVEMENT IN ASCERTAINMENT OF FAIR MARKET VALUE

A few cases announce the rule that market value at the time of taking shall include and reflect depreciation due to the impact of the public project.

United States v. Certain Lands (1942, D.C.N.Y.) 47 F. Supp. 934.
Atchison T. & S.F.Ry. v. Southern Pac. Co. (1936) 13 Cal.App.2d 505, 57 P.2d 575.
City of Oakland v. Partridge (1963) 214 Cal.App.2d 196, 29 Cal.Rptr. 388.
St. Louis Housing Auth. v. Barnes (1964, Mo.) 375 S.W.2d 144.
Chicago Housing Auth. v. Lamar (1961) 21 Ill. 2d 362, 172 N.E.2d 790.

In *United States v. Certain Lands* (1942, D.C.N.Y.) 47 F. Supp. 934, plaintiff, the United States of America, moved for an order confirming the report of commissioners of appraisal appointed in the proceeding, brought to condemn lands for expansion of the United States Military Academy at West Point. Objection to the report was interposed on the ground that the amount of the award was grossly inadequate. In affirming the determination of the commissioners the Court said:

> It is possible that the long lapse between the time when Congress first publicly evinced an interest in this tract for the uses of the U. S. Military Academy and the commencement of these proceedings thwarted the efforts of the claimant fully to subdivide the tract and dispose of home sites and recreational facilities. I know, however, of no method of compensating an owner for such consequences of Congressional action. Legislative debates or even unfounded rumors may affect market values favorably or adversely. The owner is entitled to no more than the market value of the property taken regardless of the myriad influences which combine to annex that value to the property.

There was assigned as error in *Atchinson, T. & S.F.Ry. v. Southern Pac. Co.* (1936) 13 Cal.App.2d 505, 57 P.2d 575 (involving condemnation of lands for the construction of a railroad passenger depot) the action of the trial court in refusing to permit the introduction in evidence of an order of the State Railroad Commission issued some six years prior to the instant proceeding, authorizing and directing the construction of the depot. It was contended by the landowner that such order "stigmatized" the property and caused an area retardation which was a material factor to be considered in determining market value as of the date of filing the complaint in the instant action. In sustaining the action of the trial court, the California District Court of Appeal said:

> The law does not --- lend a willing ear to speculation. While appellants may have evidenced change for the worse in the demand for real estate -- yet the trial court would have permitted an indulgence in unfathomable speculation had it opened the road to the examination of witnesses, using the order --- as a basis --- to determine

> whether there was a slump in the market in this area, and, if so, what it was due to, during that period.

The Court went on to advert to the rule denying increment in value resultant on a public improvement, and reasoned:

> If the benefits may not be considered, why consider the detriment? A value so derived is too remote and speculative.

The same result was reached in *St. Louis Housing Auth. v. Barnes* (1964, Mo.) 375 S.W.2d 144, a proceeding to condemn lands for a low-rent housing project, without, however, explicit statement of the precise theory or ground holding. In ruling that the lower court committed no error in refusing to permit to be shown in evidence the depreciative effect of the pendency of condemnation, and in refusing to instruct the jury to consider depreciation in arriving at the amount of just compensation, the Supreme Court of Missouri elaborated little beyond the statement that:

> If [condemnees] suffered damages for which [condemnor] is liable by reason of the condemnation action, such damages are not part of the damages for the taking and, --- are not an item of just compensation within the meaning of Section 26 of Article I of the Constitution of Missouri.

Chicago Housing Auth. v. Lamar (1961) 21 Ill. 2d 362, 172 N.E.2d 790, likewise involved condemnation for a low-rent housing project. At issue was whether condemnee was entitled to have market value determined as of a point in time prior to depreciation in value of the subject property that was alleged to have set in by reason of the housing project. In holding that valuation must be determined as of the date of filing of the petition in condemnation without regard to depreciation caused by the project, the Supreme Court of Illinois said that one of the conditions of ownership of property is that it may some day be taken for public use, and that land held in private ownership cannot in legal contemplation be said to be damaged by preliminary procedures looking to future appropriation for a public purpose.

Comment

The cases requiring the individual landowner to suffer the consequences of depressed values brought about by an improvement instituted for the common good, or to benefit the public at large, seem either scant on underlying rationale to support the result reached, or to proceed on theories which on close scrutiny appear somewhat questionable. The proposition that the denial of enhancement requires the denial of depreciation may be met by the short answer that the one does not of logical necessity follow from the other. The reasoning further adduced that determination whether depreciation was caused by the improvement must necessarily be based on speculation is in some factual situations patently incorrect, and in others there seems no reason why a fair jury question would not be presented. It would seem evident that far more difficult questions are within the ordinary province of the jury. In sum and on balance there appears little reason to quarrel with the judgment of an eminent scholar that: "It would be grossly unfair to permit a condemnor to take advantage of a depreciation in values caused by anticipated injuries from the proposed improvement ---." (Orgel, *Valuation Under the Law of Eminent Domain*, Sec. 146.) In accord with such observation, it is submitted that the rule adopted by the majority of the cases appears better to hold claim to achieving justice between the condemning authority and the private landowner whose property is appropriated for a public use than does the minority rule, which enables the public to benefit at the injury and expense of the individual.

III. CASES WHICH INVOLVE APPRECIATION OR DEPRECIATION DUE TO A HIGHWAY CONSTRUCTION PROJECT

The cases are limited in number which deal with appreciation or depreciation due to a highway construction project. Subject to the exceptions hereinafter noted, they in general reflect the application of the rules hereinbefore stated and discussed. Thus, in *State v. Cartwright* (1961, Tex. Civ.App.) 351 S.W.2d 905 [Section C, supra], where expert testimony was adduced to the effect that the land sought to be condemned for right-of-way purposes was augmented in value by reason of the highway project itself, it was held reversible error for the lower court to have refused to instruct the jury that they should not, in determining fair market value, consider any increment in value due to the project. In another decision rendered the same day by the same Court, *State v. Willey* (1961, Tex.Civ. App.) 351 S.W.2d 900 [Section B, supra], evidence of increment in value due to the construction of a highway was held properly admissible, on the ground that the lands proceeded against were within a construction program conceived independently of the original project. In *Becos v. Masheter* (1968) 15 Ohio St.2d 15, 238 N.E.2d 548 [Section F, supra], and *State Road Dep't v. Chicone* (1963, Fla.) 158

So.2d 753 [Section F, supra], it was held that depreciation caused by a highway project must be excluded in determining just compensation for the lands taken for the project.3/

No cases have been found that deal with highway construction which invoke the test of certainty or foreseeability of inclusion of the lands in the project, nor any cases which adopt and apply the rule announced in *Miller* and *Vepco* making the date of the government's commitment to the project the cut-off point for determination of allowance or disallowance of enhancement, or inclusion or exclusion of depreciation.

IV. SUMMARY AND CONCLUSION

1. By way of recapitulation, the cases relating to enhancement are discussed first. As has been seen, they disclose three basic lines of approach:4/

1. Enhancement is allowed without qualification or limiting language.
2. Enhancement is denied without qualification or limiting language.
3. Allowance or disallowance of enhancement is made to depend on whether it was certain or practically certain from the outset of the public project or the government's commitment thereto that the lands would be condemned for the project.

By way of preliminary overview, the following may be noted. The cases allowing enhancement without qualification or limiting language constitute, as has been seen in Section D, supra, a distinct minority and most of them are older cases. They proceed on the theory that the impact of a public improvement is an element of market value which cannot be excluded consistent with the payment of just compensation. They reason further that it is a matter of fundamental inequity that the owners of lands taken for an improvement be denied the increment in value which inures to the benefit of the owners of vicinal lands not taken. The cases treated in Sections A, B, and C, supra, which deny enhancement, pursue a logic irreconcilable with that employed in the decisions allowing enhancement. The rationale of these cases is based on the proposition that the public should not be required to pay the owners of lands taken for an improvement an advanced value created by a project paid for by the public. In support, it is reasoned that the owners of lands adjacent to an improvement enjoy benefits therefrom, but the owners of lands taken for an improvement cannot enjoy such benefits, and hence are not entitled to the increment in value represented by such benefits. It is said to follow that an increase in value of the lands taken would not be due to an increase in benefits inuring to the lands, but to speculation as to what the government might pay therefor, which cannot, of course, be viewed as a proper element of market value.

In respect to the cases treated in Sections A and B, supra, which enunciate the rule that allowance or disallowance of enhancement is dependent on whether or not it is certain or likely that the lands will be condemned for the improvement, attention is invited to the fact that one line of such cases leaves the date of determination of the certainty or likelihood of condemnation more fluid than in another line of such cases. Both lines of decision pursue the same underlying rationale, the only substantial difference being that the one treats the cut-off point in general terms only, referring to it as the "commencement," "inception," "outset," etc., of the project, whereas the other treats the cut-off point in more specific terms, making it the date of the government's "commitment" to the project. The latter approach is no more than a definition of what constitutes the beginning of the project. Enhancement is disallowed if inclusion of the lands could be foreseen at the beginning of the project, and enhancement is allowed if inclusion of lands could not be so foreseen. In the case of enlargement (Section B, supra) allowance or disallowance of increment in value turns on whether the enlargement was a foreseeable extension of the original project, or an unforeseeable independent project conceived at a point in time subsequent to the original project.

3/ Other cases involving highway construction projects include: *Arkansas State Highway Comm'n v. Griffin* (1967) 241 Ark. 1033, 411 S.W.2d 495; *People v. Pera* (1961, Dist.Ct.App.) 12 Cal.Rptr. 129; *Williams v. City and County of Denver* (1961) 147 Colo. 195, 363 P.2d 171; *Commonwealth v. Blackburn* (1963, Ky.) 364 S.W.2d 332; *Cincinnati N.O. & T.P. Ry. v. Commonwealth* (1964, Ky.) 376 S.W.2d 307; *Commonwealth v. Hendricks* (1966, Ky.) 400 S.W.2d 676; *State v. Johnson* (1962, La.Ct.App.) 141 So.2d 54; *Moale v. Baltimore* (1854) 5 Md. 314, 61 Am.Dec. 276; *Benton v. Brookline* (1890) 151 Mass. 250, 23 N.E. 846; *State, Dep't of Highways v. Jennings* (1968, Tenn.Ct.App.) 435 S.W.2d 481; *McChristy v. Hall County* (1940, Tex.Civ.App.) 140 S.W.2d 576; *Uehlinger v. State* (1965, Tex.Civ.App.) 387 S.W.2d 427; *Weber Basin Water Conservancy Dist. v. Ward* (1959) 10 Utah 2d 29, 347 P.2d 862; *State Road Comm'n v. General Oil Co.* (1968) 22 Utah 2d 60, 448 P.2d 718.

4/ For purposes of this review, cases in which the results are governed by constitutional or statutory provisions are omitted.

In the following, the rules enunciated in (1), (2), and (3), above, are considered in inverse order of statement.

2. The cases discussed both in Section A, supra, and in Section B, supra, adopt and follow the rule that allowance or disallowance of enhancement turns on whether it was certain or practically certain, or known or reasonably probable, that the lands would be included in the project either from the outset thereof or from the date of the government's commitment thereto. The only factual difference between the cases treated in Section A, supra, and those treated in Section B, supra, is that in the former there was no question as to enlargement of the original project, and in the latter the matter of enlargement was before the court in all cases. The question presents itself whether the test of foreseeability (as it shall be called herein) is applied for the same purpose and to achieve the same result in both the cases relating to an unenlarged project and the cases dealing with an enlarged project. Although an affirmative answer would seem self-evident, clarification of the enlargement cases and the applicability of the rule thereto may be useful.

The application of the rule of foreseeability presents no problem in the case of an unenlarged project (other than that pointed out in Subsection (e), infra). However, in the case of an increase in size and scope, the question arises whether the test of foreseeability is employed to *determine* whether there is in fact but an extension of the original project (resulting in denial of enhancement), or whether there is in fact a separate project conceived subsequent to and independent of the original project (resulting in allowance of enhancement due to the original project).

The answer is that language may be found in the cases which reasons from the premise of unforeseeability to the conclusion of a separate project, and from the premise of a separate project to the conclusion of unforeseeability. It hence seems necessary to conclude that foreseeability and the existence of an independent project are treated by the courts as being from a logical standpoint dichotomous, or put another way that the objective fact of a separate project and the subjective condition of foreseeability are of necessity mutually exclusive. Although this result may or may not be logically satisfactory, the end result, of course, is that the test of foreseeability becomes a necessary hinge of decision. Thus, it may be said that if it is foreseeable that the lands will be included in the project, an extension of the original project is involved, and enhancement will be denied, and if it is not foreseeable that the lands will be included in the project, a separate project is involved, and enhancement will be allowed.

It follows that the test of foreseeability is determinative of the result, both in the cases dealing with an enlarged project and in the cases dealing with an unenlarged project. Although it is patent, it is perhaps worth underscoring at this point that the test of foreseeability does not determine whether enhancement was due to the project, but is employed solely to determine whether enhancement due to the project will be allowed or disallowed.

3. Turning to the cases considered in Section C, supra, which deny enhancement without regard to the test of foreseeability, the following can be asked: Since these cases do not employ as the linchpin of decision the test of foreseeability, on what theory do they proceed in arriving at the result of denying enhancement? It seems that the answer is sufficiently clear, although not always clearly expressed in the cases. These cases, it is submitted, proceed on the reasoning (if by necessary implication only) that *all* enhancement which *proximately results* from a public improvement must be disallowed. (Consideration of the possibility that these cases, or some of them, adopt *sub silentio* and without any overt language the test of foreseeability is omitted as speculative.) These cases treat the test of foreseeability as being an unnecessary dialectical exercise in arriving at the correct result. They stand for the proposition that if enhancement was in fact proximately caused by the improvement, it is immaterial whether it could or could not be foreseen that the lands would be included in the project.

It must be admitted and should be pointed out that these cases in general eschew the language of proximate cause, but that they proceed on such doctrine seems so evident that it hardly needs statement. Consider, for example, the inverse factual situation. If it had clearly appeared from the facts in these cases that enhancement was *not* caused by the improvement, would the same results have been reached? The question is, of course, rhetorical, since the denial of an increment in value brought about by a cause other than the improvement would obviously be confiscatory and an act of expropriation.

It is hence submitted that the cases considered in Section C, supra, must be read and *can only be understood* in the light of the fact that they announce the rule that *all* increment in value proximately resulting from the public improvement will be denied without reference to the extraneous and unnecessary factor or consideration of foreseeability of inclusion of the lands in the project.

4. The cases treated in Section D, supra, enunciate the rule that enhancement resulting from the improvement will be allowed under all circumstances and without qualification. It is submitted that these cases, constituting a numerical minority, pursue the less satisfactory logic.

Once it becomes apparent that lands are earmarked for condemnation it is clear that the owner not enjoy *in futuro* any benefits from the improvement. Benefits which cannot be enjoyed are, of necessity, without value, and it is patent that the public should not be required to pay value for a valueless commodity. Further, in ascertaining the proper elements of market value, it is repugnant to logic to ascribe value to a commodity which has no value. It follows that benefits which are of no value are of logical necessity outside the concept of fair market value.

Since benefits due to the improvement are not a proper element of market value, any advancement in price would be due to speculation as to what the government would pay for the property, and value derived from or accruing through speculation likewise must be excluded from the concept of fair market value.

It is thus submitted that the cases allowing enhancement without qualification adopt a view which is not supported by the more persuasive logic.

5. The merits of the test of foreseeability deserve some discussion. Such rule is, of course, supported by the highest authority. Nonetheless, a second look may yield instruction.

The test of foreseeability ties in nicely with the logic of denying enhancement for the reason that benefits due to the improvement cannot inure to lands earmarked for condemnation, and the view that any advancement in value of lands to be condemned for a public improvement derives from a base in speculation. However, it falls down in the following instance. It is perfectly conceivable that it could appear from the outset of the project, or the government's commitment thereto, that it was unlikely the lands would be condemned for the project, and due to a change of plans or for other reasons the lands would in fact be condemned. The test of foreseeability would, of course, require the result that enhancement be allowed. This would fly in the face of the undeniably sound proposition that the public should not pay for advanced value due to a public improvement. *It is significant that in preparing this paper the researchers have found no case reaching such result.* (The cases which deal with a separate and independent project are inapposite.) To apply the test of foreseeability in such situation would bring about a head-on clash of balancing equities. The researchers cannot but feel that the test of foreseeability would yield if such factual situation were squarely presented.

(It might be added here, for what it is worth, that although the test of foreseeability is doubtless, as a practical matter, workable, its whole premise seems somewhat alien to fundamental jurisprudential concepts. Can it be denied that foreseeability may be equated with prevision? And can it be denied that prevision is perilously close to the necromantic art? Are projections as to future events, which may or may not take place, as sound a basis for legal decision as reasoning from cause to observed effect? Employment of the test of foreseeability may be unavoidable in certain negligence cases, but it does not seem required in condemnation cases.)

It is submitted without further belaboring the point that application of the doctrine of proximate cause alone, without regard to the test of foreseeability, is a proper and sound basis of decision. This is the view which has been taken by the Legislatures of the States of Maryland and Pennsylvania in enacting legislation which makes the allowance or disallowance of enhancement rest squarely on the application of the rule of proximate cause, without regard to or reliance on the test of foreseeability.

This is dealt with further in the terms of proposed legislation at the end of this paper.

6. The applicability to highway construction of the rules previously set forth and discussed is considered here.

The test of foreseeability, in particular the *Miller* rule, which specifies the outset of the project as being the date of the government's commitment thereto, runs into trouble when applied to the usual and ordinary highway construction project.

Putting aside for the moment the *Miller* rule, consider what point in time might be said to constitute the outset, inception, or commencement of a highway project. It is obvious that any highway construction project must pass through several stages. Beginning with preliminary planning it must run through financing, route alignment, design, securing approval of the Bureau of Public Roads (in the case of Federal-aid highways), announcement, letting of contracts, etc. What point in such sequential chain be said to constitute the beginning of the project? This is a perplexing question, and the decided cases relating to highway construction are singularly uniformative. In point of fact, as previously pointed out, the highway cases avoid adoption of the test of foreseeability, and the reasons for such avoidance are doubtless founded in practical considerations.

The *Miller* rule, which makes the time of the government's commitment to a public project the po' of departure for determining the allowance or disallowance of enhancement, would seem to work well w. e an authorizing act is involved. In the *Miller* case, the specific legislation involved was an act of Congress authorizing the construction of the Shasta Dam in California. In the ordinary highway construction project no such authorizing act is involved. In the absence of such an act what serves to specify date of the government's commitment to the project?

Consider the double hearing procedure. If it is not to be rendered a meaningless formality, can the government be said to be committed to a highway construction project before opportunity for hearing is given, or hearing is had on alignment and possibly also on design? By the time such notice is given or such hearings held, it is obvious that appreciation might have developed or serious depreciation begun its course.

As stated, the highway cases uniformly avoid the adoption of the test of foreseeability. The reason for this, doubtless, and in plain language, is that in most instances it will not work satisfactorily because of the inherent difficulty of determining what point in time can be generally accepted as the inception of the project. The thread that binds the highway cases together is that they proceed on the doctrine of proximate cause *alone*. Both appreciation and depreciation found to be due to the highway construction project itself is denied in these cases, without regard to the test of foreseeability.

That the test of foreseeability seems ill suited to the ordinary highway construction would appear sufficiently clear that the researchers believe the matter requires nothing in the way of further consideration.

7. In respect to the cases relating to depreciation, the researchers believe that little need be added to what has already been said in Section II, supra. The cases requiring the landowner to suffer economic loss caused by an improvement for the benefit of the public at large rest, it is submitted, on shallow reasoning. To disallow depreciation because appreciation is denied cannot, it is submitted, even rise to the stature of a logical nicety, because the one result does not logically compel the other. The proposition that the individual should not be enriched at the expense of the public hardly compels the conclusion that the public should be enriched at the expense of the individual. And it plainly incongruous to hold that depreciation cannot be determined without resort to speculation in a case where it can be clearly shown that depreciation was due solely to the improvement. The majority rule, which does not shift the burden of depreciation to the landowner, seems obviously fair and proper. It is submitted that it is manifestly unjust to permit the condemning authority to bring about a diminution in property values by the prospect, imminence, or threat of the exercise of its sovereign power of eminent domain, and then to take advantage of the depression in values directly stemming from its own action.

No case dealing with the subject of depreciation, whatever the result reached, invokes the test of foreseeability.

V. PROPOSED LEGISLATION

It is submitted that the better-reasoned cases support the rule that depreciation due to the improvement shall be excluded from fair market value, determined as of the date of taking, and that appreciation shall likewise be excluded from fair market value, determined as of the date of taking. It is additionally submitted that the test of foreseeability is unsuited to the ordinary highway construction project, and that it is unnecessary to the achievement of equity and justice between condemnor and condemnee in other takings for a public use. It is conceded that the test of foreseeability may be useful in the cases dealing with the question whether there was an extension of the original project, or a separate and independent project; but it is submitted that the test is not indispensable to the determination of such question, which is one of fact.

There is included for consideration proposed legislation which proceeds squarely on the doctrine of proximate cause and without regard to the test of foreseeability. The proposed bill follows in broad scope and general outline statutes of the States of Maryland and Pennsylvania which embody the doctrine of proximate cause and wholly omit the test of foreseeability. These statutes provide, in part, material for the purposes of this research, as follows:

Section 6, Article 33A, Annotated Code of Maryland, provides that there shall be excluded in th ascertainment of fair market value:

> --- any increment in value proximately caused by the public project for which the property condemned is needed, plus the amount, if any, by which such price reflects a diminution in value occurring between the effective date of legislative authority for the acqui-

> sition of such property and the date of actual taking if the trier of facts shall find that such diminution in value was proximately caused by the public project for which the property condemned is needed, or by announcements or acts of the plaintiff or its officials concerning such public project, and was beyond the reasonable control of the property owner.

Title 26, §1-604, Purdon's Pennsylvania Statutes Annotated, reads as follows:

> Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining fair market value.

Attention is also invited to a bill prepared for the Committee on Public Works of the United States House of Representatives (but not enacted into law), appearing on page 149 of Committee Print No. 31, entitled "Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs," dated December 22, 1964, which provides, in part, as follows:

> As used in this title --
> (1) the term 'fair value' means --
> (A) the highest cash price which a property could reasonably be expected to bring if exposed for sale in the open market for a reasonable time, taking into consideration all lawful uses to which such property is adapted and could reasonably be put: *Provided*, That any change in such price prior to the date of valuation caused by the public improvement for which the property is acquired, and any decrease in such price caused by the likelihood that the property would be acquired for the proposed public improvement, other than that caused by physical deterioration within the reasonable control of the owner, shall be disregarded in determining such price.

Attention is further invited to the Muskie Bill, S.1, now pending in Congress,[5/] entitled "Uniform Relocation Assistance and Land Acquisition Policies Act of 1969." S.1 provides, in part, as follows [§321 (b)]:

> Notwithstanding any other provision of law, no grant to, or contract or agreement with a State agency, under which Federal financial assistance will be available to pay in whole or in part the cost of acquisition of real property --- may be approved by the head of the Federal agency responsible --- unless such State agency has --- agreed --
> (3) that any decrease in the value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for the proposed public improvements, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property.

The Muskie Bill, as introduced, is silent with respect to treatment of increment in value due to the improvement.

The following is a proposed bill, drafted with a view to the foregoing State statutes and proposed Federal legislation, and premised on conclusions drawn from the study reported herein of the apposite case law.

[5/] As of July, 1969.

PROPOSED BILL

The fair market value of property in a proceeding in eminent domain shall be the price for the highest and best use of the property which would be accepted by a seller willing but unobligated to sell and would be paid by a buyer willing but unobligated to buy in a voluntary sale, which such price shall be determined and ascertained as of the date of taking. Provided, that in the condemnation of property for a public improvement there shall be excluded from such price any appreciation in value proximately caused by such improvement, and any depreciation in value proximately caused by such improvement. Provided further, that such appreciation or depreciation shall not be excluded where property is condemned for a separate improvement conceived independently of and subsequent to the original improvement.

COMMENTS ON PROPOSED BILL

The first sentence of the proposed bill contains a definition of fair market value couched in terms of general usage. For purposes of clarity it is spelled out *in extenso* that market value shall be determined as of the time of taking. The definition, although generic in terminology, does not contemplate applicability to special-purpose property or use other than as a pronouncement of widely accepted valuation principles appropriate to the ordinary valuation situation. If for any reason it is incompatible with local law, it should be emended to conform therewith, or the bill may be rephrased so as to omit altogether any attempt to enunciate by legislative enactment a rule of valuation intended to be a concise statement of established concepts.

The second sentence follows in broad scope and general outline the provisions of the Maryland and Pennsylvania statutes relating to exclusion of both appreciation and depreciation due to the improvement, but differs from the terms of these statutes, and also the Federal bill (S.1), in omitting all reference to physical deterioration within the reasonable control of the owner. It is felt that the inclusion of such provision opens the door to imposition of the very hardship sought to be prevented. It is common knowledge that when "planning blight" sets in, properties are frequently vacated, vandalism may strike, and at the least a sharp drop in rental values may occur. It is felt that where a taking is imminent and it is public knowledge that the subject buildings will be demolished to make way for the improvement, it is unreasonable to expect the property owner to maintain the same in such condition as might reasonably be expected if taking and destruction were not at the threshold. It is recognized that it may be arguable whether the language of the State statutes and the Federal bill contemplate holding the owner to the same standard of maintenance and degree of care in avoidance of waste as would be required under normal conditions, but the researchers of this paper are compelled to the view that the language in question tends to uncertainty in this regard, and in the event of strict construction and application would impose an undue burden and hardship on the property owner. Where buildings are not to be destroyed, or have significant salvage value, the condition thereof would be a factor in determining market value in the absence of statutory direction as to duty of care on the part of the owner.

The proposed bill departs from the Maryland act and follows the approach taken by the Pennsylvania statute and the Federal bill in omitting reference to an authorizing act or other specification of the date of the inception of the project. For reasons hereinbefore elucidated it is felt that it is preferable to leave this matter flexible, and not to seek to specify a seminal point of departure from which all appreciation or depreciation must be deemed to develop. The chief significance of establishing a cut-off point is in connection with application of the test of foreseeability; by eliminating such test the troublesome problem can be largely avoided.

The suggested legislation differs from the Maryland and Pennsylvania acts and the Federal bill in providing that appreciation or depreciation shall *not* be excluded where property is condemned for a separate improvement conceived independently of and subsequent to the original improvement. It is submitted that this change is supported in logic, and, as has been seen, follows the holdings in a

substantial body of case law. A point beyond which increment in value stemming from the improvement will be allowed seems required, both as a practical matter and in order to achieve justice between the condemning authority and the condemnee. Consider, for example, the supposititious case as follows: A highway construction project is completed and, as a result thereof, a general increment in value of adjacent lands takes place. It is decided some years following the completion of the project to acquire through condemnation a borrow pit for use in maintenance of the completed highway. Should the owner of the land so taken be denied the increment in value common to other lands similarly situated? If so, what future date may properly be established from which increment in value will be allowed? Obviously, increment in value deriving from the original improvement cannot be disallowed in perpetuity. It is submitted that the rule that enhancement caused by the original improvement shall be allowed in the case of a taking for a separate and independent project is fair, equitable, and provides a workable solution in the necessary balancing of equities between the sovereign or condemning authority and the private citizen. The same obtains with respect to depreciation. It must be remembered that all private property is held in ownership subject to the condition of being taken for a public purpose when the need arises, and protection from the consequences of the exercise of the sovereign power of eminent domain cannot logically and as a practical matter be expected to extend in unbroken continuity into the indefinite future.

By way of conclusion, it is pointed out that the vital matter of proof (whether enhancement or diminution in value was in fact caused by the improvement) has been omitted from discussion in this paper for the reason that it was felt discursion into the broad area of proof would yield little in the way of useful result. For much the same reason, the matter of proof is not adverted to in the proposed bill. It may be noted that the Maryland and Pennsylvania statutes and the Muskie Bill are each silent with respect to proof. It is felt that any attempt by way of legislative enactment to cover the matter of proof would probably create more problems than it would solve, and the same is, therefore, excluded from the terms of the proposed bill.

VI. BIBLIOGRAPHY

TABLE OF CASES

Federal Cases

Edlin v. Security Ins. Co. (1957, D.C. Ill.) 160 F. Supp. 487
Kerr v. South Park Comm'rs (1886) 117 U.S. 379, 29 L.Ed. 924, 6 S.Ct. 801
Murray v. United States (1942, C.A.D.C.) 130 F.2d 442
Olson v. United States (1934) 292 U.S. 246, 78 L.Ed. 1236, 54 S.Ct. 704
Shoemaker v. United States (1893) 147 U.S. 282, 37 L.Ed. 170, 13 S.Ct. 361
United States v. Certain Lands (1910, C.C.R.I.) 180 F. 260
United States v. Certain Lands (1942, D.C.N.Y.) 47 F. Supp. 934
United States v. Chandler-Dunbar Water Power Co. (1913) 229 U.S. 53, 57 L.Ed. 1063, 33 S.Ct. 667
United States v. First National Bank (1918, D.C. Ala.) 250 F. 299
United States v. Miller (1943) 317 U.S. 369, 87 L.Ed. 336, 63 S.Ct. 276
United States v. Virginia Elec. and Power Co. (1961) 365 U.S. 624, 5 L.Ed.2d 838, 81 S.Ct. 784

State Cases

Allen v. Missouri K. & T. Ry. (1894, Tex.Civ.App.) 25 S.W. 826
Andrews v. State (1961) 9 N.Y.2d 606, 176 N.E.2d 42
Arkansas State Highway Comm'n v. Griffin (1967) 241 Ark. 1033, 411 S.W.2d 495
Atchinson, T. & S.F.Ry. v. Southern Pac. Co. (1936) 13 Cal.App.2d 505, 57 P.2d 575
Becos v. Masheter (1968) 15 Ohio St.2d 15, 238 N.E.2d 548
Benton v. Brookline (1890) 151 Mass. 250, 23 N.E. 846
Bonaparte v. Baltimore (1917) 131 Md. 80, 101 A. 594
Brainerd v. State (1911) 74 Misc.Rep. 100, 131 N.Y.S. 221
Brubaker v. State (1963) 17 A.D.2d 519, 236 N.Y.S.2d 395
Carli v. Stillwater & St. P.R.R. (1871) 16 Minn. 260, Gil 234
Chicago Housing Auth. v. Lamar (1961) 21 Ill.2d 362, 172 N.E.2d 790
Cincinnati N. O. & T. P. Ry. v. Commonwealth (1964, Ky.) 376 S.W.2d 307
Cincinnati v. Ziegler (1914) 16 Ohio N.P.N.S. 169, 26 Ohio Dec. N.P. 79
City of Cleveland v. Carcione (1963) 118 Ohio App. 525, 190 N.E.2d 52
City and County of Denver v. Smith (1963) 152 Colo. 227, 381 P.2d 269
City of Dallas v. Rash (1964, Tex.Civ.App.) 375 S.W.2d 502
City of El Paso v. Coffin (1905) 40 Tex.Civ.App. 54, 88 S.W. 502

City of Oakland v. Partridge (1963) 214 Cal.App.2d 196, 29 Cal.Rptr. 388
Cole v. Boston Edison Co. (1959) 338 Mass. 661, 157 N.E.2d 209
Commonwealth v. Blackburn (1963, Ky.) 364 S.W.2d 332
Commonwealth v. Hendricks (1966, Ky.) 400 S.W.2d 676
Cook v. South Park Comm'rs (1871) 61 Ill. 115
Dorgan v. Boston (1886, Mass.) 12 Allen 223
Enoch v. Spokane Falls & N. Ry. (1893) 6 Wash. 393, 33 P.966
Fitzgerald v. State (1959) 9 A.D.2d 486, 194 N.Y.S.2d 569
Gate City Terminal Co. v. Thrower (1911) 136 Ga. 456, 71 S.E. 903
Gibson v. Norwalk (1896) 13 Ohio C.C. 428, 7 Ohio CD6
Giesey v. Cincinnati W. & Z. R.R. (1854) 4 Ohio St. 308
Gulf, C. & S.F. Ry. v. Brugger (1900) 24 Tex.Civ.App. 367, 59 S.W. 556
Guyandotte Valley Ry. v. Buskirk (1905) 57 W. Va. 417, 50 S.E. 521
Hard v. Housing Auth. (1963) 219 Ga. 74, 132 S.E.2d 25
Housing Auth. v. Title Guarantee Loan & Trust Co. (1942) 243 Ala. 157, 8 So.2d 835
Housing and Redevelopment Auth. v. Minneapolis Metropolitan Co. (1966) 273 Minn. 256, 141 N.W.2d 130
In re Addition to Lincoln Square Urban Renewal Project (1960, Sup.Ct.) 199 N.Y.S.2d 225
In re Condemnation of Certain Land for New Statehouse (1896) 19 R.I. 382, 33 A. 523
Interstate Water Co. v. Adkins (1927) 327 Ill. 356, 158 N.E. 685
Lipinski v. Lynn Redevelopment Auth. (1969, Mass.) 246 N.E.2d 429
Louisiana Ry. & Nav. Co. v. Xavier Realty (1905) 115 La. 328, 39 So. 1
Louisville & N.R.Co. v. Ingram (1890) 12 Ky. L.Rep. 456, 14 S.W. 534
May v. Boston (1893) 158 Mass. 21, 32 N.E. 902
McChristy v. Hall County (1940, Tex.Civ.App.) 140 S.W.2d 576
Moale v. Baltimore (1854) 5 Md. 314, 61 Am.Dec. 276
Mowry v. City of Boston (1899) 173 Mass. 425, 53 N.E. 885
New York Cent. & H.R.R. v. Mills (1913) 160 A.D. 6, 144 N.Y.S. 646
Nichols v. City of Cleveland (1922) 104 Ohio St.19, 135 N.E. 291
Opelousas, G. & N.E.R. Co. v. Bradford (1907) 118 La. 506, 43 So. 79
Opelousas, G. & N.E. Ry. v. St. Landry Cotton Oil Co. (1907) 118 La. 290, 42 So. 940
Panhandle & G. Ry. v. Kirby (1906) 42 Tex.Civ.App. 340, 94 S.W. 173
People v. Pera (1961, Dist.Ct.App.) 12 Cal.Rptr. 129
Pierce County v. Duffy (1918) 104 Wash. 426, 176 P. 670
Portland-Oregon City Ry. v. Penney (1916) 81 Ore. 81, 158 P.404
Prudential Ins. Co. v. Central Neb. Pub. Power & Irrigation Dist. (1941) 139 Neb. 114, 296 N.W. 752
Ranck v. City of Cedar Rapids (1907) 134 Iowa 563, 111 N.W. 1027
Re Munson (1883, N.Y.) 29 Hun. 325
Re Simmons (1909) 130 A.D. 350, 114 N.Y.S. 571
Re Water Comm'rs (1842, N.Y.) 3 Edw.Ch. 552
Rhode Island Hosp. Trust Co. v. Providence County Court House Comm'n (1932) 52 R.I. 186, 159 A. 642
Sanitary District v. Loughran (1896) 160 Ill. 362, 43 N.E. 359
Seattle & M.R.R. v. Roeder (1902) 30 Wash. 244, 70 P. 498
Smith v. Commonwealth (1911) 210 Mass. 259, 96 N.E. 666
Snouffer v. Chicago & N.W. Ry. (1898) 105 Iowa 681, 75 N.W. 501
Stafford v. City of Providence (1873) 10 R.I. 567, 14 Am.Rep. 710
State, Dep't of Highways v. Jennings (1968, Tenn.Ct.App.) 435 S.W.2d 481
State Road Comm'n v. General Oil Co. (1968) 22 Utah 2d 60, 448 P.2d 718
State Road Dep't v. Chicone (1963, Fla.) 158 So.2d 753
State v. Carswell (1964, Tex.Civ.App.) 384 S.W.2d 407
State v. Cartwright (1961, Tex.Civ.App.) 351 S.W.2d 905
State v. Johnson (1962, La.Ct.App.) 141 So.2d 54
State v. Vaughan (1958, Tex.Civ.App.) 319 S.W.2d 349
State v. Willey (1961, Tex.Civ.App.) 351 S.W.2d 900
St. Louis Elec. Terminal Ry. v. MacAdaras (1914) 257 Mo. 448, 166 S.W. 307
St. Louis Housing Auth. v. Barnes (1964, Mo.) 375 S.W.2d 144
Sunday v. Louisville & N.R.R. (1912) 62 Fla. 395, 57 So. 351
Tharp v. Urban Renewal and Community Dev. Agency (1965, Ky.) 389 S.W.2d 453
Uehlinger v. State (1965, Tex.Civ.App.) 387 S.W.2d 427
United States v. Goodloe (1920) 204 Ala. 484, 86 So. 546
Virginia & T.R.R. v. Lovejoy (1872) 8 Nev. 100
Wadsworth v. Manufacturers' Water Co. (1917) 256 Pa. 106, 100 A. 577
Weber Basin Water Conservancy Dist. v. Ward (1959) 10 Utah 2d 29, 347 P.2d 862
Williams v. City and County of Denver (1961) 147 Colo. 195, 363 P.2d 171
Woodfolk v. Nashville & C.R.R. (1852, Tenn.) 2 Swan 422

LAW REVIEW ARTICLES

Anderson, W., *Consequence of Anticipated Eminent Domain Proceedings -- Is Loss of Values a Factor?*, 5 Santa Clara Lawyer 35 (1964-65)
Dettelbach, T. L., *Just Compensation for Real Estate Condemnation*, 15 Clev. - Mar. L. R. 171 (1966)
Glaves, D. W., *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 U. Chi. L. Rev. 319 (1963)
McAuliffe, J. W. and Sengstock, F. S., *What is the Price of Eminent Domain? An Introduction to the Problems of Valuation in Eminent Domain Proceedings*, 44 J. Urban L. 185 (1966)
Slavitt, A. D., *Inequities and Injustices of Condemnation Acquisitions*, 40 Connecticut Bar J.11 (1966)
Wasserman, N., *Procedure in Eminent Domain*, 11 Mercer L. Rev. 245, 282 (1960)
Comment, *Condemnation Procedure -- An Argument for Reform*, 29 Fordham L. Rev. 757 (1961)
Comment, *Enhanced Value Resulting From Proposed Improvement - Condemnation*, 15 Mercer L. Rev. 488 (1964)
Comment, *Time for Fixing Damages -- Superhighway Construction*, 1 Vill. L. Rev. 105 (1956)
Comment, *Updating the Time of "Taking" in Condemnation Proceedings in Oklahoma*, 4 Tulsa L. J. 95 (1967)

MISCELLANEOUS

Kupferle, G. M., *Effect of Pre-Condemnation Value Changes on the Time of Taking Rule*, Hwy. Res. Circ. 4, pp. 1-7 (1965)
Highway Research Board, *Condemnation of Property for Highway Purposes; Part I*, Special Report 32 (1958); *Part II*, Special Report 33 (1958); *Part III*, Special Report 59 (1960)
3 Nichols, *The Law of Eminent Domain*, §8.5(2) (rev. 3d ed., 1965)
4 Nichols, *The Law of Eminent Domain*, §12.3151 (rev. 3d ed., 1962)
1 Orgel, *Valuation Under the Law of Eminent Domain*, §98 - §106 (2d ed., 1953)
James, L. R., Annotation, *Depreciation in Value, From Project for Which Land is Condemned, as a Factor in Fixing Compensation*, 5 ALR 3d 901
Vartanian, P. H., Annotation, *Increment to Value, from Project for which Land is Condemned, as a Factor in Fixing Compensation*, 147 ALR 66
House Committee on Public Works, *Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs*, 88th Cong., 2d Sess. 11, 14, (Committee Print No. 31, Dec. 22, 1964)
Md. Stat., art. 33A, §6 (Supp. 1965)
Pa. Stat. Ann., Tit. 26, §1-604 (Supp. 1965)

APPLICATIONS

The foregoing research and resultant proposed legislation should prove helpful to highway officials, their legal counsel, right-of-way engineers, and appraisers. Highway officials are urged to review their own land-acquisition procedures to determine how the proposed legislation could benefit them if it were enacted by their legislatures. The proposed legislation is presented only as a guide and should be modified to meet local conditions where required.

The researchers found the problem of enhancement and decline in value due to public improvements to be of sufficient national magnitude that they recommend in this paper a legislative solution to the problem.