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# Consequence of Anticipated Eminent Domain Proceedings - Is Loss of Value a Factor?

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# CONSEQUENCE OF ANTICIPATED EMINENT DOMAIN PROCEEDINGS—IS LOSS OF VALUE A FACTOR?†

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As a practical matter, months and years usually elapse between the time when preliminary plans for a particular project are announced by a public agency and the time when the summons initiating an action for condemnation of land required for the project issues. During the intervening period, the inhabitants of the affected area are usually aware of the nature and extent of the project and if it is of a kind that would be injurious to the area, the fact of its imminence hangs, as one writer has said, ". . . like the sword of Damocles over the heads of the landowners. . . ."[1] This circumstance cannot fail to diminish the value of their land. When the public agency subsequently attempts to condemn the land required for the project, should it receive the advantage of such a depreciation in value, or should the extent of such depreciation be determined in order that it may be restored to the landowner? During 1963, the District Court of Appeals considered this question on two occasions within the space of six months and reached disparate conclusions.

In *City of Oakland v. Partridge*[2] (decided by Division 2 of the Second District on March 20, 1963), the court, referring to two earlier cases,[3] held inadmissible evidence that the prospect of a freeway had "blighted" the property in question and reduced its income potential.[4] To admit such evidence, the court said, would be to indulge in "unfathomable speculation."[5] In *People v. Lillard*[6] (decided by the Third District on August 15, 1963) counsel for the condemnee had asked a State right-of-way agent on cross-examination if the State had not been threatening to close various access

† The views expressed herein are those of the author and do not necessarily reflect those of the City of Mountain View, California.

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1 4 NICHOLS, *Law of Eminent Domain*, § 12.3151 (Rev. 3d ed. 1962).

2 214 Cal. App. 2d 196, 29 Cal. Rptr. 388 (1963).

3 People v. Lucas, 155 Cal. App. 2d 1, 317 P.2d 104 (1957); Atchison, T. & S.F.R.R. v. Southern Pac. Co., 13 Cal. App. 2d 505, 57 P.2d 575 (1936).

4 214 Cal. App. 2d at 202-03, 29 Cal. Rptr. at 392.

5 214 Cal. App. 2d at 203, 29 Cal. Rptr. at 392.

6 219 Cal. App. 2d 368, 33 Cal. Rptr. 189 (1964).

openings and take portions of the property in question during the previous 10 years. The lower court sustained an objection to the question[7] and the court affirmed the ruling, but indicated, referring to a recent case,[8] that if there had been some evidence of threatened condemnation or of a depression in the market value ". . . (p)roperly framed and with a foundation-laid inquiry, cross-examination of an adverse witness on this subject would have been proper."[9]

Section 1249 of the *California Code of Civil Procedure* provides that the measure of compensation for property taken in eminent domain proceedings is to be the "actual value" of the property at the time of the issuance of the summons, except that if the case is not tried within one year of the commencement of the action and the delay was not caused by the condemnee, the measure of damages shall be the "actual value" of the property at the time of the trial.[10] It is well settled in California and elsewhere that "actual value" is ordinarily measured by "market value,"[11] and that "market value," in turn, is estimated with reference to the uses to which the property is adapted.[12] The burden of proof of market value in California and most other jurisdictions is on the condemnee.[13] Thus the issue raised by the *Partridge* and *Lillard* cases, cast in terms of applicable law, is: If an announcement of projected eminent domain proceedings abridges the uses to which the subsequently condemned land is adapted, may the condemnee introduce evidence of this abridgment, so that it may be excluded as a factor in the determina-

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[7] 219 Cal. App. 2d at 377, 33 Cal. Rptr. at 194.

[8] Buena Park School Dist. v. Metrim Corp., 176 Cal. App. 2d 255, 1 Cal. Rptr. 250 (1959).

[9] 219 Cal. App. 2d at 377, 33 Cal. Rptr. at 194.

[10] CAL. CODE CIV. PROC. § 1249 provides in part:

> For the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken and the basis of damages to property not actually taken but injuriously affected, in all cases where damages are allowed as provided in section one thousand two hundred forty-eight; provided, that in any case in which the issue is not tried within one year after the date of commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have occurred at the date of the trial.

[11] See, *e.g.*, People v. LaMacchia, 41 Cal. 2d 738, 751, 264 P.2d 15, 24 (1953); San Diego Land & Town Co. v. Neale, 78 Cal. 63, 68, 20 Pac. 372, 375 (1888); United States v. Petty Motor Co., 327 U.S. 372, 379 (1945). See cases cited 4 NICHOLS, *op. cit. supra* note 1, § 12.1 n.12.

[12] See, *e.g.*, People v. LaMacchia, 40 Cal. 2d 738, 751, 264 P.2d 15, 24 (1956); People v. Ocean Shore R.R., 32 Cal. 2d 406, 425, 196 P.2d 570 (1948); Olsen v. United States, 292 U.S. 246, 255 (1934). See cases cited 4 NICHOLS, *op. cit. supra* note 1, § 12.314 n.1.

[13] See, *e.g.*, San Francisco v. Tilman Estate Co., 205 Cal. 651, 653-54, 272 Pac. 585, 586 (1928); People v. Thomas, 108 Cal. App. 2d 832, 840, 239 P.2d 914, 920 (1952). See cases cited 4 NICHOLS, *op. cit. supra* note 1, § 18.5 n.1.

tion of market value?[14] *Partridge* has held that he may not, while *Lillard* has indicated, arguably, that he may.

## PRECEDENT

### *The Partridge Case*

Because *Partridge* relied, without comment, on two earlier California cases, any discussion of its holding becomes, for all practical purposes, a discussion of the cases which preceded it. A review of precedent may, therefore, serve as a convenient point of departure for the present discussion.

The cases referred to by the court in *Partridge, Atchison, T. & S.F.R.R. v. Southern Pac.*[15] and *People v. Lucas*,[16] appear to have been the only California cases, apart from *Partridge* and *Lillard*, to have considered the present problem. In *Atchison*, which was the earlier of the two, the District Court of Appeals, held that testimony relevant to a depreciation in value resulting from anticipation of eminent domain proceedings was inadmissible. The court did not refer to any authority in support of the precise proposition but

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[14] This problem is to be distinguished at the outset from the entirely different problem arising where decline in value results from a protracted delay in instituting condemnation proceedings subsequent to the formulation of the original plans. A loss resulting from such a delay will give rise to a personal cause of action sounding in Tort, but is not an element to be considered in the determination of market value. For an extensive discussion of this distinction see Gettelman Brewing Co. v. City of Milwaukee, 245 Wis. 9, 13 N.W.2d 541, 542-46 (1944) and cases cited therein. *But see* United States v. Certain Lands in Town of Highlands, 47 F. Supp. 934 (S.D.N.Y. 1942), discussed *infra*, in text accompanying note 24, where the court apparently fails to recognize the distinction. Another distinguishable, but deceptively similar problem, is that which arises where it is contended that a depreciation in value of the land resulted from the fact that a pending eminent domain action rendered the property unsaleable. It is abundantly clear that depreciation of this character will be disallowed, since the notion of saleability is implicit in the definition of market value. See discussion *infra* in text accompanying note 41, Buena Park School Dist. v. Metrim Corp., 176 Cal. App. 2d 255, 1 Cal. Rptr. 250 (1959). See generally 4 NICHOLS, *op. cit. supra* note 1, § 12.2 n.1.

[15] 13 Cal. App. 2d 505, 57 P.2d 575 (1936), quoted in 1 ORGEL, *Valuation Under Eminent Domain Proceedings* § 105 (2d ed. 1953). The court affirmed the trial court's refusal to permit examination of witnesses on the question of the depreciation in value of land as a result of the commissioner's order authorizing the condemnation on the ground that, to do so, would permit indulgence in "unfathomable speculation."

[16] 155 Cal. App. 2d 1, 317 P.2d 104 (1957). On cross-examination, the condemnees asked an expert witness of the condemnor if he knew that the State Highway Commission, prior to the initiation of the action, had designated alternate routes for the freeway in question, one of which would require the taking of the condemnees' land. The witness answered that he had read about it. The condemnees then asked the witness whether the possibility that the route selected might be one requiring the condemnees' property would affect the development of the land on both sides of the street upon which the condemnees' property was located. The court upheld a ruling of the trial court sustaining an objection to this question.

relied, instead, on the California Supreme Court case of *San Diego Land & Town Co. v. Neale.*[17]

*Neale* is one of a series of California decisions dealing with the approximate converse of the present problem; i.e., the anticipated eminent domain proceedings had resulted or would result[18] in an appreciation in the value of the land. The California courts have uniformly held that this appreciation *may not be considered* as a factor in the calculation of market value.[19]

In referring to *Neale*, the court in *Atchison* said:

> . . . [T]he case of San Diego Land & Town Co. v. Neale . . . expressly holds, ". . . it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land." *If the benefits may not be considered, why consider the detriment?* A value so derived is too remote and speculative.[20]

From this statement it seems patent that the court concluded that logical consistency required that evidence of depreciation resulting from anticipation of eminent domain proceedings should be excluded in the determination of market value since evidence of appreciation is excluded in the converse situation.[21] This is justified on the ground that the detriment should not be "considered" if the benefit is not. But, by refusing to admit evidence of depreciation in value resulting from anticipation of eminent domain proceedings, the *Atchison* case, in effect, permitted it to be "considered" as an element in the determination of market value. At the time of issuance of the summons or commencement of the trial, the value of the land would of course, have been diminished to the extent of such depreciation. Unless the condemnee can introduce evidence of this depreciation its amount cannot be determined and added to the value of the property. If the amount of such depreciation is not added to the value of the property, in light of the fact that the burden of proof of the value of the land is on the condemnee, it

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[17] 78 Cal. 63, 20 Pac. 372 (1888).

[18] See the text *infra* for a discussion of the difference in the rationales of the courts where it is contended that appreciation has taken place and where it is contended that appreciation will take place in the future and the significance of this difference as it reflects on the reasoning of the *Partridge* case.

[19] San Diego Land & Town Co. v. Neale, 78 Cal. 63, 20 Pac. 372 (1888); City of Pasadena v. Union Trust Co., 138 Cal. App. 21, 31 P.2d 463 (1934); City of Stockton v. Vote, 76 Cal. App. 369, 244 Pac. 609 (1926); *cf.* Los Angeles County v. Hoe, 138 Cal. App. 2d 74, 291 P.2d 98 (1955).

[20] Atchison, T. & S.F.R.R. v. Southern Pac. Co., 13 Cal. App. 2d 505, 518, 57 P.2d 575, 581 (1936). (Emphasis added.)

[21] At 17 Cal. Jur. 2d 652 (1954) the same conclusion is implicit in the writer's statement that ". . . the condemnation project or improvement as such is not a factor to be considered in determining the market value of the land. . . ."

cannot be effectively disallowed as an element in the determination of market value. By contrast, the court need only exclude testimony with respect to appreciation in the value of land as a consequence of anticipated eminent domain proceedings in order to disallow such appreciation as an element in the determination of market value.

If *Atchison* is consistent with *Neale* at all, it is so only in the limited sense that both cases deny the admission of evidence of a change in property values as a result of anticipation of eminent domain. This apparent consistency results in a more fundamental inconsistency in that *Atchison* permits the change in property values to operate as a factor in valuation, whereas *Neale* does not. The courts in other jurisdictions which have dealt with the problem have concluded that disallowance of depreciation in value is the logical converse of disallowance of appreciation.[22]

It is submitted that the *Atchison* case is based on an incorrect interpretation of the holding of the Supreme Court in *Neale* and that it is, in reality, contrary to that holding. The *Lucas* case,[23] unhappily, relied on *Atchison* as well as the Federal case of *United States v. Certain Lands in Town of Highlands*.[24] *Town of Highlands* involved damages arising from a delay in prosecution of eminent domain proceedings rather than from depreciation resulting from their anticipation.[25] This is a fundamentally different issue and the

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22 In St. Louis v. MacAdras, 257 Mo. 448, 166 S.W. 307, 310 (1914) the court said, "If, when property is taken *in toto*, as here, it be the rule that the owner can have considered, as an element of his damages, the enhanced value of the property occasioned by a partial construction of the railroad, . . . then the converse of the proposition should likewise be true; . . . if a partial construction of the contemplated road and its incidents, above named, had depreciated the property sought to be taken, then the railroad should have the benefit of such depreciation, when it actually came to the taking of the property. No court would stand for this latter rule, and yet it is the very converse of the one sought to be enforced here. The proper rule, when the whole property is being taken, is not to allow the jury to consider either enhancements or depreciations brought about by the construction of the improvement for which the property is being taken." And in Brainerd v. State, 74 Misc. 100, 131 N.Y. Supp. 221 (1911) it was said that, "Because the state contemplates constructing an improvement it should not be made to pay for the enhancement in the value of property that follows the anouncement or construction of the improvement where it benefits property specially, nor should claimants be made to suffer the damages resulting therefrom where it produces depreciation in the value of property." In Conner v. Metropolitan Dist. Water Supply Comm., 314 Mass. 33, 49 N.E. 593, 596 (1943), the court cites cases disallowing appreciation resulting from anticipated eminent domain in support of its conclusion that depreciation would be similarly disallowed, see 4 NICHOLS, *op. cit. supra* note 1, § 12.3151(1) n.20, where "appreciation" cases and "depreciation" cases are cited for the proposition that ". . . in valuing the land the effect of the proposed improvement upon the neighborhood is to be ignored."

23 People v. Lucas, 155 Cal. App. 2d 1, 6-7, 317 P.2d 104, 107 (1957).

24 47 F. Supp. 934 (S.D.N.Y. 1942).

25 The court in the *Highlands* case said, ". . . the long lapse between time when Congress first publicly evinced an interest in this tract . . . and the com-

cases seem clearly distinguishable on their facts.[26] While *Lucas* indicated, in random fashion, a variety of reasons for upholding the lower court's ruling[27] it adds little to the *Atchison* case.

It thus appears that the *Partridge* case finds no real support in California precedent and it becomes necessary to refer to other jurisdictions in an effort to find support for it. It has previously been suggested that cases wherein the condemnee is claiming that damages resulted from the condemnor's protracted delay in instituting eminent domain proceedings are distinguishable.[28] One other factual situation which has arisen in other jurisdictions is that wherein the condemnee claims that the time of the preliminary announcement should be regarded as the time of taking for the purpose of awarding interest on the damages. This claim has been consistently denied,[29] but here, again, the facts are clearly distinguishable. The condemnee in *Partridge* and *Lillard* did not seek to have the day of the preliminary announcement designated the day of the taking,[30] but rather that, at the time of the subsequent taking, the depreciation resulting from the preliminary announcement should be disallowed.

When these two factually dissimilar type of cases have been distinguished, the remainder of authority in other jurisdictions is

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mencement of these proceedings, may have thwarted the efforts of the claimant fully to subdivide the tract. . . ." 47 F. Supp. at 937. However see 1 ORGEL, *op. cit. supra* note 15 § 105 where the *Highlands* case is apparently regarded as authority for the inclusion of depreciation resulting from anticipation of eminent domain proceedings as a factor in market value.

[26] See discussion in note 14, *supra*. The court in the *Highlands* case seemed unaware of the remedy discussed in the case of Gettelman Brewing Co. v. City of Milwaukee, 245 Wis. 9, 13 N.W.2d 541, 542-46 (1944).

[27] Four conceivable bases for the affirmance of the lower court ruling were stated during the course of the *Lucas* opinion:

1. That the trial court has wide discretion regarding the scope of cross-examination so that the test on appellate review is not whether a specific question should have been allowed but whether the scope, generally, has been sufficiently broad, and in this instance, it was;
2. That the question was irrelevant in that it had no bearing on market value but only on "development";
3. That the question was inadmissible in that it assumed facts not in evidence;
4. That the question was inadmissible in that to allow evidence of the depreciation of market value would result in an indulgence in speculation.

In support of the fourth basis the court merely refers to the *Atchison* and *Highlands* cases without the formality of an independently reasoned conclusion. The third basis was merely referred to without comment as one of the objections "to the question in the trial court." 155 Cal. App. 2d at 6-7, 317 P.2d at 107. However, it assumes new significance in light of the holdings in the *Lillard* case discussed *infra*, in text accompanying note 60.

[28] See note 14 *supra*.

[29] See, *e.g.*, Danforth v. United States, 308 U.S. 271, 283-85 (1939).

[30] Such a contention would be precluded, in any event, by the clear wording of section 1249 of the Code of Civil Procedure, see note 5 *supra*.

apparently uniform in disallowing depreciation resulting from anticipated eminent domain proceedings in determining the value of the property condemned.[31] This is the rule whether the preliminary designation specifically included the property ultimately taken, included it in the alternative, or merely referred to the neighborhood in general terms.[32] Thus, it would seem that the holding in *Partridge* finds no real support in precedent.

*The Lillard Case*

The court in the *Lillard* case, in its discussion of the present problem, begins by conceding, curiously, that:

> . . . there appears to be a conflict of authority on whether "market value" is still the yardstick of just compensation when it is established that a depressed market for the property is created by a proposed condemnation.[33]

As authority for this proposition, the court cites Orgel's treatise on valuation in eminent domain.[34]

In the first place, it is at least arguable that the reasoning of the courts, in those cases where depreciation in value has occurred as a consequence of a proposed condemnation, may be more appropriately understood as a refinement of the market value concept than a departure from it.[35] Further, a perusal of Orgel's text[36] reveals that the very cases on which the author relies to establish this

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31 See, *e.g.*, Lower Nueces River Dist. v. Collins, 357 S.W.2d 449, (Tex. Ct. App., 1962); State Dept. Highway v. Clarke, 135 So. 2d 329, (La. App. 1961); Hermann v. North Pa. R.R., 270 Pa. 551, 113 Atl. 828 (1921); Brainerd v. State, 74 Misc. Rep. 100, 131 N.Y. Supp. 221 (1911); *cf.* State Road Dept. v. Chicone, 148 So. 2d 532 (Fla. 1962). The case of *Lower Nueces River Dist. v. Collins, supra,* is particularly interesting if only because it illustrates the *reductio ad absurdum* of the *Partridge* rule. The land in that case, consisted of three islands which were to be immersed by virtue of the proposed project. In light of the imminence of the project they were worthless and under the rule of the *Partridge* case the condemnee would not have been entitled to any compensation.

32 In the converse situation, where appreciation in value has occurred, some courts apparently distinguish between specific and general designation; disallowing appreciation in the former and allowing it in the latter. See, United States v. Miller, 317 U.S. 369, 376-79 (1942). See generally, 4 NICHOLS, *op. cit. supra* note 15, §§ 100-103. The courts have refused to make this distinction where depreciation has resulted, however, apparently because of the danger manifest in a rule which would permit the condemnor to lower market values by announcing his intention to erect an offensive structure in the general neighborhood of the land subsequently to be condemned. See State v. Burnett, 24 N.J. 280, 131 A.2d 765 (1957), Brainerd v. State, 74 Misc. Rep. 100, 131 N.Y. Supp. 221 (1911).

33 219 Cal. App. 2d 368, 377, 33 Cal. Rptr. 189, 194 (1963).

34 1 ORGEL, *op. cit. supra* note 15, § 105.

35 The courts seem to say, in effect, that the value of the land shall be its market value with respect to those uses to which it would be adapted but for the proposed project. See cases cited in note 31, *supra.*

36 1 ORGEL, *op. cit. supra* note 15, §§ 105-06.

"conflict of authority" are none other than *Atchison* and *United States v. Certain Lands in Town of Highlands*.[37] It has been previously suggested that the latter is distinguishable[38] and the former incorrectly decided.[39]

Having conceded this "split of authority" however, the court, in the *Lillard* case goes on to observe that:

> . . . at least one California case has said that the trial court could have, within the limitations of sound legal and equitable principles, advised the jury that they should treat the property as having the value that it would have had, had no preliminary action been taken by the board toward the acquisition of the property.[40]

This case is *Buena Park School Dist. v. Metrim Corp.*[41] It should be noted at the outset that *Buena Park* is distinguishable from both *Partridge* and *Lillard*. The condemnee, in *Buena Park*, did not contend that depreciation had resulted from the anticipation of eminent domain proceedings. Rather, the condemnor contended that evidence concerning the value of the land in question for subdivision purposes should not have been received because, in light of the pending condemnation action, the land had become unsaleable for those purposes.[42] The court held such evidence admissible stating, in effect, that the notion of saleability is implicit in the definition of market value.[43] Although thus distinguishable, the broad dictum of *Buena Park* served as a useful predicate for the *Lillard* case and, when it is considered in conjunction with the cases decided in other jurisdictions,[44] it seems clear that the *Lillard* case finds significant support in precedent.

## RATIONALE

### *Just Compensation*

Any attempt to rationalize the *Partridge* and *Lillard* cases must begin with a consideration of the constitutionality of the holding of the *Partridge* case. A rule which would permit the condemnor to depress the value of property by the announcement of a plan to erect an offensive structure and then acquire the property at a reduced value would seem to violate the "Just Compensation" provision of

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[37] 47 F. Supp. 934 (S.D.N.Y. 1942).

[38] See note 14 *supra*.

[39] See text accompanying note 15 *supra*.

[40] 219 Cal. App. 2d 368, 377, 33 Cal. Rptr. 189, 194 (1963).

[41] 176 Cal. App. 2d 255, 1 Cal. Rptr. 250 (1959).

[42] *Id.* at 258, 1 Cal. Rptr. at 253. Because the condemnation action had been filed, the county recorder would not accept the final subdivision map.

[43] *Id.* at 258-59, 1 Cal. Rptr. at 255.

[44] See cases cited in note 31 *supra*.

the eminent domain section of the California Constitution.[45] The court, in *Partridge*, as well as in *Atchison* and *Lucas*, however, seemed unaware of this possibility.

Significantly, when it was contended before the Massachusetts Supreme Court[46] that a statute requiring damages to be fixed at the value of the property "before the taking" violated the Massachusetts "Just Compensation" provision[47] because it permitted the inclusion of depreciation resulting from anticipation of the proposed improvement in the determination of market value, the court interpreted "before the taking" to mean "damages shall be based upon the value of the land unaffected by the improvements" to obviate the constitutional objection. Implicit in the court's ruling is its recognition of the fact that if the statute were interpreted to permit such depreciation to operate as an element in the determination of market value, it would have been unconstitutional.[48]

Why did the court in *Partridge* fail to anticipate this problem? Perhaps because it relied on the *Atchison* case and the court in *Atchison*, felt that depreciation, in this context, could be disallowed by the process of excluding such evidence when, in fact, the exclusion of such evidence resulted in the inclusion of such depreciation as an element of market value. In all events this constitutional problem poses a serious objection to the *Partridge* holding.

*"Unfathomable Speculation"*

The court, in *Partridge*, quoting from *Atchison* indicated that, to admit evidence of depreciation in value of land as a consequence of anticipated eminent domain would be to indulge in "unfathomable speculation."[49] The apparent theory is that a decline in market value subsequent to the preliminary announcement can result from the interaction of many factors and that it is impossible to isolate the anticipation of eminent domain as one of these and assign a portion of the decline to it.[50]

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[45] CALIF. CONST. art. 1 § 14 provides, in part, "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner. . . ."

[46] Conner v. Metropolitan Dist. Water Supply Comm., 314 Mass. 33, 49 N.E.2d 593, 596 (1943).

[47] MASS. CONST. Pt. 1, art. 10, § 11.

[48] See also Herman v. North Pa. R.R. Co., 270 Pa. 551, 113 Atl. 828, 829 (1921), where the concern of the court over "illegal compensation . . . feebly disguised" suggests that it is anticipating a constitutional problem.

[49] 214 Cal. App. 2d 196, 203, 29 Cal. Rptr. 388, 392 (1963). This same language from the *Atchison* case was quoted by the court in People v. Lucas, 155 Cal. 2d 1, 6, 317 P.2d 104, 107.

[50] It is interesting, in this context, to note that in the *Atchison* case, the announcement of the project occurred prior to and the initiation of the action sub-

In the converse situation, where appreciation has resulted from the anticipation of eminent domain, the California courts have had little difficulty in determining what portion of the appreciation is attributable to the anticipation of eminent domain for the purpose of excluding such evidence. They circumvent the objection of "unfathomable speculation" by the expedient of stating the portion of appreciation attributable to the anticipation in terms of the increased uses to which the land becomes adapted as a consequence of the condemnation plans.[51]

To illustrate the above, the *City of Pasadena v. Union Trust Co.*,[52] the highest use to which land was adapted in the hands of the condemnee was as a cabin site. The condemnor proposed to use the land, in conjunction with other land previously acquired, for a reservoir, and the condemnee sought to have the market value estimated with reference to the higher use of the land as a reservoir site, even though it would not have been practicable for him to acquire the additional land necessary to put the land to this use. It was held that the damages were to be measured in terms of the current market value of land in that vicinity adapted for use as a cabin site. By first excluding evidence of the increase in available uses resulting from anticipation of eminent domain and then determining the value of the land for the uses to which it was adapted in the hands of the condemnee in terms of current market value, the court effectively isolated appreciation resulting from anticipation of eminent domain as a factor. Additionally the court precluded the disallowance of appreciation resulting from other elements reflected in general economic conditions since these elements are, of necessity, reflected in the current market value of land for whatever use.

It would seem logical that this valuation process should apply inversely to the facts of the *Partridge* case and that the damages should be assessed in terms of the current market value of land for uses to which it was adapted in the hands of the condemnee without reference to the abridgment of those uses resulting from the anticipation of eminent domain proceedings. The courts in other jurisdictions have applied this formula in effect, if not in terms.[53]

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sequent to the great depression of 1929, a circumstance which may instinctively have prompted the court's conclusion in this regard.

[51] City of Pasadena v. Union Trust Co., 138 Cal. App. 21, 31 P.2d 463 (1934); City of Stockton v. Vote, 76 Cal. App. 369, 244 Pac. 609 (1926); *Cf.* Los Angeles County v. Hoe, 138 Cal. App. 2d 74, 291 P.2d 98 (1955).

[52] 138 Cal. App. 21, 31 P.2d 463 (1934).

[53] See, *e.g.*, Brainerd v. State, 74 Misc. 100, 131 N.Y. Supp. 221, 226 (1911), where the court says, ". . . the claimants are entitled to have their premises valued before the appropriation by reference to the condition in which they were at that time with the use of the dock and the old canal. . . ." In Hermann v. North Pa. R.R.

On the facts of *Partridge*, it is obvious that the condemnees could not have their land valued with reference to its use as a highway site since it was not adapted to that use prior to the announcement of the condemnation plans. Conversely, it would seem that they should have been permitted to offer evidence tending to show that, prior to the announcement of the condemnation plans, their land was adapted to certain long term uses which the character of the proposed project rendered unfeasible.[54]

The question remains: Why did the court in the *Partridge* case and the *Atchison* case fail to apply inversely the proof formula used in the "appreciation" cases? Obviously, *Partridge* did not apply this formula because *Atchison*, upon which it relied, did not. *Atchison* did not apply the formula because, it is submitted, the court erroneously interpreted the *Neale* case on which it relied.

The *Neale* case dealt with two fundamentally different questions. The first of these was whether the anticipated eminent domain proceedings had resulted in an appreciation in value.[55] The court answered in the negative saying that there had been no increase in uses to which the land was adopted as a consequence of the anticipated proceedings but clearly indicated that, if there had been an increase in prospective uses, evidence thereof would be inadmissible. The court considered such evidence inadmissible not because it would be speculative,[56] but because the consequence of the admission would be to require the condemnor to pay for the appreciation in value attributable to his announcement of the projected improvement.[57]

The second problem dealt with in *Neale* was whether the erection of the proposed improvement would result in a future appreciation in the value of the land.[58] The court refused to admit

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Co., 270 Pa. 551, 113 Atl. 828, 829 (1921) the court states, "When the appropriation takes place this 'impairment of value' from these preliminary steps becomes merged, as it were, in the damages then payable; the matter being worked out practically in assessing the damages by simply ignoring the detrimental effect of the plotting and treating the property as though there had been no harmful results."

[54] In the *Partridge* case there was some indication that, in light of the anticipated proceedings, the property had become unsuitable for use with respect to business rentals. 214 Cal. App. 2d 196, 202-03, 29 Cal. Rptr. 388, 392 (1963).

[55] 78 Cal. 63, 20 Pac. 372 (1888).

[56] The court says, generally, that permitting proof of the prospective use in question was not ". . . sanctioning a remote or speculative value. It was merely taking the present value for the prospective purposes." *Id.* at 71, 20 Pac. 372, 376.

[57] The case of City of Pasadena v. Union Trust Co., 138 Cal. App. 21, 31 P.2d 463 (1934) previously referred to (see note 15, *supra*) as an illustration of the disallowance of appreciation by exclusion of evidence of increased uses, relies on the case of Stockton v. Vote, 76 Cal. App. 369, 244 Pac. 609 (1926) which in turn relies extensively on this portion of the *Neale* opinion.

[58] 78 Cal. 63, 73-76, 20 Pac. 372, 377-78 (1888).

evidence tending to show that a general increase in land values would result from the completion and operation of the improvement on the grounds that it was "remote and speculative."

The problem which arose in *Atchison* is clearly the converse of the first problem considered in *Neale;* i.e., whether the anticipated eminent domain proceedings had resulted in a depreciation in value. If the court had analogized from the first portion of *Neale*, it would have concluded that evidence of a decrease in prospective uses should be admitted, since it is neither remote nor speculative. This would prevent the condemnor from taking advantage of the depreciation in value attributable to his announcement of the projected improvement. The court, however, analogized instead, from the second portion of the *Neale* opinion dealing with evidence of appreciation which would occur in the future as a result of the erection of the improvement to conclude that evidence of depreciation which had occurred in the past as a result of the anticipation of eminent domain proceedings was inadmissible because it was "speculative."[59]

It thus appears that the reasoning of *Atchison* was incorrect in this regard and that to admit evidence of depreciation in value as a consequence of anticipated eminent domain proceedings would not require indulgence in "unfathomable speculation," but merely the application of a fairly simple rule of thumb.

*A Proper Foundation*

It has been suggested that the holding of *Partridge* is constitutionally suspect and that the argument that to admit evidence of depreciation in value attributable to anticipated eminent domain proceedings would be to indulge in "unfathomable speculation" is of dubious merit. It follows, therefore, that the rule of *Lillard* rather than that of *Partridge* is the more reasonable.

The *Lillard* case did not involve an attempt by the condemnee to introduce evidence of a depreciation in value in his own behalf. Rather, counsel for the condemnee had attempted to elicit such information from a witness on cross-examination.[60] The conclusion of

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[59] This fact is apparent from the face of both the *Neale* and the *Atchison* cases, for the court in the latter quotes a portion of the former and states, ". . . It seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element in the value of the land." San Diego Land & Town Co. v. Neale, 78 Cal. 63, 75, 20 Pac. 372, 377 (1888) quoted in Atchison T. & S.F.R.R. v. Southern Pac. Co., 13 Cal. App. 2d 505, 518, 57 P.2d 575, 581 (1936). The court in *Atchison* is apparently overlooking the fact that it is dealing not with "benefit arising from the proposed improvement" but rather with appreciation resulting from anticipation of condemnation for the erection of the proposed improvement.

[60] 219 Cal. App. 2d 368, 376-77, 33 Cal. Rptr. 189, 194-95 (1963).

the court that such evidence would be admissible on direct examination seems implicit in the court's ruling that the question would not have been objectionable had a proper foundation been laid since the business of laying the foundation would presumably have involved an offer of evidence or of proof.[61]

Thus the *Lillard* case seems to have pointed the way to the admission of evidence of this character in future cases.

## CONCLUSION

As land becomes more scarce, as land values continue to rise and as condemning agencies move ever further afield in quest of land necessary for their projects, the possibility of depreciation in the value of land resulting from anticipation of eminent domain proceedings becomes greater. It has been suggested that, as between the *Partridge* case, which held evidence of such depreciation inadmissible, the *Lillard* case, which indicated that such evidence was admissible, the latter represented the better rule.

Perhaps in the near future a California court will have occasion to consider these cases together and to overrule or disapprove *Partridge*. Until that time, the *Partridge* case, along with the cases upon which it relied, will remain as a skeleton in the already well populated closet of California precedent.

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[61] Because witnesses for the condemnor may not always be able to testify with respect to the effect of the proposed project or to a depression in values attributable to it, it may be difficult for counsel for the condemnee to lay the appropriate foundation on cross-examination and he may wish to ask leave of court, either to call his own witnesses out of order for this purpose, or to recall the condemnor's witness for further cross-examination at the conclusion of his own case.