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Chapter 19: Eminent Domain: Damages

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C H A P T E R 1 9

Eminent Domain: Damages

§19.1. **Introduction.** Under the power of eminent domain, private property may be taken for public purpose without the owner's consent¹ through condemnation proceedings.² The federal and most state constitutions, usually reinforced by statute, attach to the power of condemnation a requirement that no property may be taken by the government without "just compensation."³ The courts have generally construed "just compensation" to mean the fair market value of the property at the time of the taking.⁴ Fair market value has been defined as the highest price which a hypothetical willing buyer would pay to a hypothetical willing seller in a free and open market.⁵ Since fair market value is the highest price the hypothetical seller would pay, it is assumed that this price reflects the highest and best use of the property.⁶

Generally, fair market value of property may be demonstrated in three ways: (1) by evidence of sales of property comparable to the property taken, (2) by evidence of income produced by the property, or (3) by evidence of replacement or reproduction costs of structures on the realty adjusted for depreciation and obsolescence (where such reproduction or replacement would be reasonable).⁷ The problems of when and how to use these different methods of property valuation in the determination of "just compensation" for property condemned are often quite difficult.

The Supreme Judicial Court was presented with this type of difficult determination during the 1967 SURVEY year. In *Commonwealth v.*

§19.1. 1 *Boom Co. v. Patterson*, 98 U.S. 403 (1878); see 1 Nichols, *The Law of Eminent Domain* §§1.1-1.44 (3d ed. rev. 1964).

2 The scope of this article is limited to valuation in general and will not discuss the special problems involved in particular kinds of takings or property interests, such as partial takings, leaseholds, or easements. For a discussion of these and other problems, see Spies and McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 Va. L. Rev. 437 (1962); Browder, *The Condemnation of Future Interests*, 48 Va. L. Rev. 461 (1962); Cromvell, *Loss of Access to Highways: Different Approaches to the Problem of Compensation*, 48 Va. L. Rev. 538 (1962).

3 E.g., U.S. Const. amend. V; Mass. Const. art. 10. The obligation of providing compensation for property taken by eminent domain is now included in the constitution of every state except North Carolina. The courts of North Carolina, however, recognize this obligation. 1 Nichols, note 1 *supra*, §4.8.

4 E.g., *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266 (1943); *Tigar v. Mystic River Bridge Authority*, 329 Mass. 514, 109 N.E.2d 148 (1952).

5 *Tigar v. Mystic River Bridge Authority*, 329 Mass. 514, 517, 109 N.E.2d 148, 150 (1952).

6 *Olson v. United States*, 292 U.S. 246, 255-256 (1934).

7 See 4 Nichols, *The Law of Eminent Domain* §§12.311-12.313 (3d ed. rev. 1964).

Massachusetts Turnpike Authority,⁸ the Court was confronted with the problem of evaluating "special purpose" property. Special purpose property may be defined as that property which is developed to meet the particular needs of its owner, usually a non-profit, charitable, or religious organization.⁹ The difficulties presented in evaluating special purpose property lie in the fact that such property does not produce income, nor does it have an active market. Usually, therefore, there will be no evidence of comparable sales or income to determine the value of special purpose property.¹⁰

The *Turnpike* case involved the taking of an armory built during the nineteenth century. The armory was becoming obsolete and probably would have been replaced within fifteen years. The trial court held that the building was most valuable as an armory, but that it was not marketable for that purpose. The trial court also held that since there was no other evidence of value, evidence of reproduction cost of the armory, adjusted to reflect depreciation and obsolescence, was admissible to show value.¹¹ The Turnpike Authority excepted to admissibility of the adjusted reproduction cost of the armory and appealed to the Supreme Judicial Court, asserting that because the armory was so obsolete, reproduction was unrealistic. The Authority contended that under these conditions, reproduction cost was irrelevant to determine value.¹² The problem confronting the Court was that by not allowing adjusted reproduction cost of the armory as evidence of value, the Commonwealth was left without any of the traditional methods of demonstrating "just compensation." If the traditional methods of showing property value in condemnation proceedings are irrelevant, the question arises as to what approaches should be allowed. In deciding such a question, a consideration must be given not only to what is relevant, but what is meaningful and understandable to an ordinary jury.

The *Turnpike* case illustrates the magnitude of the problem confronting the courts in formulating damages for condemnation proceedings. Even in cases which do not involve the valuation of special purpose property and in which the traditional approaches to valuation are appropriate, there is great difficulty in determining value. The problems are growing with the expansion of urban renewal and other governmental development programs which have initiated an increase in the number of people involved in condemnation.¹³ The problems

⁸ 1967 Mass. Adv. Sh. 389, 224 N.E.2d 186.

⁹ See *Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority*, 335 Mass. 189, 138 N.E.2d 769 (1956).

¹⁰ See 4 Nichols, note 7 *supra*, §12.32.

¹¹ 1967 Mass. Adv. Sh. at 389-391, 224 N.E.2d at 187-189.

¹² *Id.* at 394-395, 224 N.E.2d at 190-191.

¹³ See Hershman, *Compensation—Just and Unjust*, 21 *Business Lawyer* 285, 289-290 (1966). An average of 111,080 families and 17,860 business and nonprofit organizations per year are expected to be displaced by federal and federally aided construction programs. Subcommittee on Real Property Acquisition, House Committee on Public Works, 88th Cong., 2d Sess., *Study of Compensation and As-*

of condemnation, as construed by one eminent practitioner, are caused by the fact that condemnation concepts and procedures which were developed in nineteenth century agrarian society are being applied to evaluate property in an urban society with a different economy.¹⁴

The Association of the Bar of the City of New York has voiced great concern over the present confusion in the law of eminent domain:

The condemnation law and procedure which developed in an agrarian period can no longer adequately protect the rights of our citizens. Wide variances exist between appraisers and the courts as to market value and the meaning of "just compensation." Furthermore, there are numerous items of damages resulting from a taking for which there is presently no compensation to a property owner. There are inconsistencies and inequities which have today no reason. Different allowances are granted, depending upon the agencies doing the condemning. Business losses are payable in certain communities and not in others in the State. The courts have recognized that in many respects the present law is unfair and inequitable. This is further evidenced, for example, by the decline in the value of properties following public announcements of possible acquisition. . . .¹⁵

The purpose of this chapter will be to examine the means of awarding compensation for property taken in eminent domain. It will first be necessary to discuss the constitutional basis from which the right to compensation for property taken is derived. Then, the evolution of the fair market value concept as the method to best effect "just compensation" will be described and the different methods of measuring fair market value will be demonstrated. The discussion will include a critique of the conventional fair market value concept. Possibilities for further compensation, such as consequential damages, will be considered. Although the rules of the state and federal courts of Massachusetts will be emphasized,¹⁶ an examination of other jurisdictions is necessary for a complete understanding of the problem.

The right to just compensation in a federal taking is derived from the Fifth Amendment to the United States Constitution: "nor shall private property be taken for public use without just compensation." In state or municipal takings, however, the right to just compensation is guaranteed by the Fourteenth Amendment. Therefore, every condemnor, federal, state, or municipal, can only exercise its power of

sistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs 15 (Com. Print 1964).

¹⁴ Hershman, note 13 *supra*, at 291.

¹⁵ The Association of the Bar of the City of New York, The Committee on State Legislation, Bulletin No. 6, Memo 90, at 369 (1964).

¹⁶ Condemnation proceedings for federal takings are generally initiated in federal courts which may formulate their own concepts of value and follow their own standards, 4 Nichols, note 7 *supra*, §12.1[3], at 34.

eminent domain by paying “just compensation” for private property taken by condemnation.¹⁷ The United States Supreme Court, however, has applied minimal standards when applying the standard of “just compensation” to the states. The Court has stated that only when a state court ruling prevented a landowner from obtaining substantially any compensation at all, will the case be overturned, even though a condemnee received much less than he should have.¹⁸ Hence, when a state court only awarded nominal damages of one dollar, but expressly recognized the right to recovery through its allowance of proof, the decision has been upheld.¹⁹ Since the last review by the United States Supreme Court of due process requirements of “just compensation” appears to have occurred over thirty years ago,²⁰ the question remains whether the present Court would make the requirement more stringent today.

Just compensation, as required by the Fifth Amendment, has been defined as an amount of money equal to the value of the property taken.²¹ In Massachusetts, the criterion for determining the value of property taken in condemnation proceedings is the fair market value of the property at the time of the taking.²² Through this standard, the courts attempt to discern the price the property would sell for in the free and open market.²³ Fair market value has traditionally been the rule, even with special purpose properties which do not have a market, such as the armory in *Commonwealth v. Massachusetts Turnpike Authority*.²⁴

Massachusetts has adopted the generally accepted definition of fair market value.²⁵ Fair market value is equated with the price that could be obtained for the property under fair conditions as between a willing buyer and a willing seller, when neither is acting under compulsion, necessity, or peculiar and special circumstances.²⁶ Value to a particular owner or purchaser is rejected, and the value is that which the property would have in the hands of any owner.²⁷

Since the value of property in the open market is based upon speculation as to what it can be best used for, fair market value must reflect the highest and best use of the property.²⁸ For this reason all available

¹⁷ See 1 Nichols, note 1 *supra*, §4.8.

¹⁸ *McGovern v. New York*, 229 U.S. 363 (1913).

¹⁹ *Provo Bench Canal and Irrigation Co. v. Tanner*, 239 U.S. 323 (1915).

²⁰ *Roberts v. New York City*, 295 U.S. 264 (1935).

²¹ *United States v. Miller*, 317 U.S. 369, 373 (1943).

²² *Tigar v. Mystic River Bridge Authority*, 329 Mass. 514, 517, 109 N.E.2d 148, 150 (1952).

²³ See e.g., *Epstein v. Boston Housing Authority*, 317 Mass. 297, 58 N.E.2d 135 (1944).

²⁴ See e.g., *Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority*, 335 Mass. 189, 138 N.E.2d 769 (1956).

²⁵ 4 Nichols, note 7 *supra*, §12.2[1].

²⁶ *Maher v. Commonwealth*, 291 Mass. 343, 197 N.E. 78 (1935).

²⁷ E.g., *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 566, 137 N.E.2d 462, 473 (1956).

²⁸ *Olson v. United States*, 292 U.S. 246, 255 (1934). See also *Valley Paper Co. v.*

uses and purposes which are reasonably probable must be considered.²⁹ This rule was stated by the United States Supreme Court in *Olson v. United States*:

The sum required to be paid to the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.³⁰

In Massachusetts, a judge has reasonable discretion in determining the extent to which a witness may explain his consideration of the uses to which the condemned property might have been put.³¹ The Massachusetts courts have considered, for the determination of value, the possibility of securing necessary licenses to operate a gasoline filling station³² and the possibilities of residential subdivision.³³ As the *Olson* case asserts, such possibilities may not necessarily be used as the measure of value, but may be used to show the full extent that the potential use has upon the market.³⁴

In order to understand the derivation and reasoning behind the fair market value rule, one must realize there are three possible approaches to the valuation of property: value to the owner, value to the taker, or a hypothetical market value which is objective and reflects the general market rather than the subjective needs of the individual parties.³⁵ It is the last of these three approaches which has been adopted by Massachusetts as the fair market value concept.³⁶

Although it seems fair that value to the taker should be rejected as a measure of value so that a landowner may not take advantage of the government's special need for property,³⁷ consideration of value to the owner may better effect just compensation.³⁸ It may be argued

Holyoke Housing Authority, 346 Mass. 561, 194 N.E.2d 700 (1963), noted in 1964 Ann. Surv. Mass. Law §§14.25, 14.26, 22.4.

²⁹ See *United States v. Certain Property*, 306 F.2d 439 (2d Cir. 1962).

³⁰ 292 U.S. 246, 255-256 (1934).

³¹ *In re Boston Edison Co.*, 341 Mass. 86, 166 N.E.2d 902 (1960).

³² *Wenton v. Commonwealth*, 335 Mass. 78, 138 N.E.2d 609 (1956).

³³ *Aselbekian v. Massachusetts Turnpike Authority*, 341 Mass. 398, 169 N.E.2d 863 (1960), noted in 1961 Ann. Surv. Mass. Law §12.7.

³⁴ 292 U.S. 246, 255 (1934); *Southwick v. Massachusetts Turnpike Authority*, 339 Mass. 666, 669-671, 162 N.E.2d 271, 274-275 (1959).

³⁵ *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5-6 (1949).

³⁶ E.g., *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 566, 137 N.E.2d 462, 473 (1956).

³⁷ See e.g., *United States v. Cors*, 337 U.S. 325 (1949).

³⁸ See Huber, *Legal Rights of Persons Whose Businesses Are Displaced* (1962); Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 Yale L.J. 61 (1957).

that the objective of just compensation should be to indemnify the property owner, putting him in the same position that he would have been in had the condemnation not occurred.³⁹ In *Boston Chamber of Commerce v. City of Boston*,⁴⁰ Justice Holmes discussed the “just compensation” clause of the Fifth Amendment accordingly:

It [the Fifth Amendment] merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained.⁴¹

Nevertheless, except in cases where there is absolutely no market, exemplified by special purpose property cases such as the *Turnpike* case, the courts have refused to determine the value of property taken as value to the owner.⁴²

Accordingly, losses incurred by the owner, which are incidental to the taking of the realty itself, have traditionally been excluded from value determination in condemnation proceedings. These non-compensable losses include business expenses, such as loss of goodwill and moving expenses.⁴³ The rationale advanced in favor of denying compensation for incidental losses usually includes the argument that these interests are not property rights vis-à-vis the government.⁴⁴ The reasoning is that the Fifth Amendment only provides compensation for what the government takes and since the condemnor usually takes only the realty, it need only pay for what it has gained, rather than for what the landowner has lost.⁴⁵ A second argument for denying recovery of incidental losses is that such losses are speculative and susceptible to fraud, resulting in exaggerated awards.⁴⁶ It appears, however, that the real underlying reason for denying compensation for incidental losses is a desire to keep the cost of public improvements down. In many cases, recovery for incidental losses would substantially increase the costs of condemnation.⁴⁷

³⁹ *United States v. Miller*, 317 U.S. 369, 373 (1942).

⁴⁰ *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189 (1910).

⁴¹ *Id.* at 195.

⁴² I Orgel, *Valuation Under the Law of Eminent Domain* §§37-46 (2d ed. 1953).

⁴³ *United States v. General Motors Corp.*, 323 U.S. 373, 379-380 (1945). In many instances statutes have mitigated incidental losses. E.g., G.L., c. 79, §6A; G.L., c. 79A, §§7, 10 (compensation for relocation expenses); 15 U.S.C. §636(b)(3) (1965) (loans for economic injury suffered as a result of displacement by a federally aided urban renewal or highway construction program). See Huber, note 38 *supra*.

⁴⁴ Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 *Yale L.J.* 61, 66-67 (1957).

⁴⁵ E.g., *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 281-284 (1943).

⁴⁶ E.g., *Sawyer v. Commonwealth*, 182 Mass. 245, 247, 65 N.E. 52, 53 (1902).

⁴⁷ In England, where “value to the owner” was the original standard of compensation adopted, it was felt that exaggerated awards resulted. For this reason the standard was modified but still considers value to the owner in the sense that compensation is allowed for incidental losses. See *Land Compensation Act of 1961*, 9 & 10 Eliz. 2, c. 33, §5; Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 *Yale L.J.* 61, 65-66, 72 (1957).

The arguments advanced for denying compensation for incidental losses are subject to criticism. Denial of incidental losses on the basis that interests lost are not taken as property conflicts with Justice Holmes' view that the Fifth Amendment deals with persons and not tracts of land.⁴⁸ Also, the just compensation clause of many state constitutions is formulated in terms of compensating the "person" rather than in terms of compensation for the property taken.⁴⁹

Although the courts uniformly deny using value to the owner or value to the taker as a measure of compensation, such values are often considered in the flexible application of the fair market value concept.⁵⁰ In frankly admitting that strict application of the fair market value concept is harsh, courts have often considered value to the owner to avoid injustice.⁵¹ Since many courts, however, do not exercise their discretion to consider evidence of value to the owner under the guise of market value, there results unequal treatment of different condemnees.⁵² Some landowners are fully indemnified, including compensation for incidental losses, while others are not. These inconsistencies in indemnification open to question whether the fair market value standard should be maintained as the measure of just compensation for property taken in eminent domain.⁵³

§19.2. Comparable sales. This section will cover the use of comparable sales to evaluate the opinion testimony of an expert appraiser or as direct evidence of the condemned property's value.¹ There are two problems in using the comparable sales approach to property valuation. One danger is using the sales of properties which are not comparable to the condemned parcel.² A second difficulty lies in the use of a sale which has not been freely made.³ The courts, therefore, require that an adequate foundation be established to demonstrate the comparability of the properties and lack of compulsion in the sales before alleged comparable sales can be admitted

⁴⁸ *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910). But see, *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325-326 (1893).

⁴⁹ E.g., Mass. Const. art. X: "And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore."

⁵⁰ See *United States v. Cors*, 337 U.S. 325, 332 (1942).

⁵¹ *Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority*, 335 Mass. 189, 138 N.E.2d 769 (1956).

⁵² Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 *Yale L.J.* 61, 74 (1957).

⁵³ For statistics on inconsistencies in Massachusetts and New York showing that appraisals based on fair market value may vary by more than one hundred percent, see *id.* at 73 nn.53-56.

§19.2. ¹Although there is a conflict of authority, see e.g., *Frontage, Inc. v. Allegheny County*, 413 Pa. 31, 195 A.2d 515 (1963), most courts follow the Massachusetts rule admitting evidence of comparable sales as substantive evidence of value. ⁵ Nichols, *The Law of Eminent Domain* §21.3 (3d ed. rev. 1964).

² See 5 Nichols, note 1 *supra*, §21.31, at 430.

³ See *Amory v. Commonwealth*, 321 Mass. 240, 72 N.E.2d 549 (1947); 5 Nichols, note 1 *supra*, §21.32, at 463.

into evidence.⁴ In determining comparability of sales the courts apply a number of tests to determine the similarity of the sales and properties. Such tests include: (1) geographical proximity of the realty; (2) similarity in the quality, the size, and the use of the realty; and (3) proximity in time of the sale.⁵

In determining whether properties are comparable in terms of geographical proximity, two factors are generally taken into consideration: (1) the distance between the two properties; (2) their relative situations with respect to business or residential advantages or disadvantages.⁶ Generally, for properties to be comparable they must be in the same immediate vicinity.⁷ It appears, however, that no precise rule as to what constitutes immediate vicinity has been formulated. The fact that lands are in different towns does not make them non-comparable per se.⁸ In *Boyd v. Lawrence Redevelopment Authority*,⁹ where there were no sales of comparable property nearby, the Supreme Judicial Court upheld the discretionary admission of sales of substantially similar properties several miles away in a different municipality. The properties were all zoned for industrial use and had similar access to high speed highways. The Court allowed the sales as comparable because of this similar access to transportation facilities, an important consideration for industrial development.¹⁰

As the *Boyd* case indicates, the concept of economic use is the rationale for disregarding a purely mathematical measure to determine whether properties are geographically comparable. The mitigation of the distance differential by modern facilities has diminished the importance of geographical proximity as a criterion of comparability.¹¹ Vicinity is significant only to demonstrate that the properties have access to the same residential and business advantages.¹² Highway access is important for business and industrial property, while shopping center proximity is advantageous for residential parcels. Proximity to desirable business or residential advantages may so greatly affect values as to cause properties otherwise comparable to be held non-comparable. In *Brush Hill Development, Inc. v. Commonwealth*,¹³ the Supreme Judicial Court upheld the trial court's exclusion of sales of properties which were several miles away in a different municipality,

⁴ E.g., *Congregation of the Mission of St. Vincent de Paul v. Commonwealth*, 336 Mass. 357, 145 N.E.2d 681 (1957); 5 Nichols, note 1 *supra*, §21.31.

⁵ 5 Nichols, note 1 *supra*, §21.31.

⁶ E.g., *Teale v. Boston*, 165 Mass. 88, 42 N.E. 506 (1896); *City of Chicago v. Harbecke*, 409 Ill. 425, 100 N.E.2d 616 (1951).

⁷ *City of Chicago v. Harbecke*, 409 Ill. 425, 430, 100 N.E.2d 616, 619 (1951).

⁸ *Knollman v. United States*, 214 F.2d 106 (6th Cir. 1954); *Gardner v. Brookline*, 127 Mass. 358 (1879).

⁹ 348 Mass. 83, 202 N.E.2d 297 (1964), noted in 1965 Ann. Surv. Mass. Law §14.26.

¹⁰ *Id.* at 85-86, 202 N.E.2d at 299.

¹¹ Hershman, *Compensation — Just and Unjust*, 21 *Business Lawyer* 285, 310-311 (1966).

¹² 5 Nichols, note 1 *supra*, §21.31[1], at 448.

¹³ 338 Mass. 359, 155 N.E.2d 170 (1959).

because the offered properties lacked equality with the condemned property in distance from public highways. Similarly, courts have denied admissibility for sales where the properties differ in access to convenient shopping areas.¹⁴

The second test of the comparability of two parcels of property for purposes of determining fair market value, involves determining differences with respect to the quality, size, and use of the properties. To determine whether such disparities exist, consideration must be given to factors like zoning, subdivision and the presence or lack of improvements.¹⁵ Both properties must have comparable potential for their highest and best use even though they may not be so utilized. In looking to *potential* for highest and best use, rather than actual utilization, the courts recognize that future development of real estate has a great effect on market value.¹⁶ All of these considerations lead to the question of determining when the differences are so great as to prohibit a finding that the properties are comparable.

Differences in zoning and use can make two properties, otherwise comparable, non-comparable.¹⁷ Generally, however, the trial judge has great discretion in determining whether to admit evidence of comparable sales.¹⁸ For example, sales of nearby property zoned for less restrictive use may in the discretion of the court be either admitted or excluded. In *Gregori v. City of Springfield*, The Supreme Judicial Court held:

[T]he sale price of other property . . . situated in a different zone (whether more or less restrictive) from that of the property taken is a factor to be considered by the trial judge in ruling on its admissibility. But there should be no hard and fast rule that a difference in zones in and of itself renders such evidence inadmissible.¹⁹

Another problem in determining comparability is whether subdivided land may be found comparable with land which is not subdivided. Although there appear to be no cases in Massachusetts on point, there is a strong trend in the decisions of other jurisdictions indicating that land which is subdivided into lots cannot be found comparable with undeveloped acreage.²⁰ These holdings are generally based on the fact that the sale price of land which is not subdivided does not reflect the costs of subdivision development. Such costs might include planning, sewer, pipeline, and street expenses, depend-

¹⁴ E.g., *Winepol v. State Roads Commission of Maryland*, 220 Md. 227, 151 A.2d 723 (1959).

¹⁵ 5 Nichols, note 1 *supra*, §21.31[3].

¹⁶ Cf. *State v. Earl*, 345 S.W.2d 20 (Ark. 1961).

¹⁷ E.g., *Congregation of the Mission of St. Vincent de Paul v. Commonwealth*, 336 Mass. 357, 145 N.E.2d 681 (1957).

¹⁸ *Leen v. Assessors of Boston*, 345 Mass. 494, 188 N.E.2d 460 (1963).

¹⁹ 348 Mass. 395, 397, 204 N.E.2d 113, 114 (1965), noted in 1965 Ann. Surv. Mass. Law §14.26.

²⁰ 5 Nichols, note 1 *supra*, §21.31[3] at 459-460.

ing on how far the subdivision development of the property in question has progressed.²¹ Nevertheless, in *United States v. Iriarte*, the First Circuit denied the government's contention that lot sales of other property could not be used to indicate the value of undeveloped acreage.²² The court said that not considering the value of lot sales would be ignoring the highest and best use of the property for subdivision development. The First Circuit did qualify its holding by warning that evidence of the sale price of lots could be misused in evaluating undeveloped acreage and that the lower court would have erred if it had simply multiplied the number of square meters in the land to be condemned by the average price per square meter of developed land, as that method of valuation would not have accounted for the development costs of subdivision.²³

The dangers inherent in decisions like *Iriarte* lie in the fact that comparison of the sales price of subdivided property with that of raw acreage is very speculative. The jury must speculate as to the value of lots which do not yet exist and how that should affect present value. It appears that the admission of evidence of subdivided property should be carefully limited to a demonstration of highest and best use and to the effect that the possibility of development may have on market value.²⁴

Another degree of similarity which must be considered to test the comparability of properties is the size of land. Some courts, including those in Massachusetts, have excluded evidence of allegedly comparable sales where the size of the properties has varied substantially.²⁵ The theory is that large and small pieces of land cannot be applied profitably to the same use.²⁶

The third test for determining whether comparable sales may be offered as evidence of fair market value concerns proximity of the time of the sale to the date of valuation. The time of the sale is important in determining its comparability because, within a short time period, there may be a change in the real estate market or the economy.²⁷ Using the test of relevance, however, a sale before the date of taking may be admissible if it can be shown that it furnishes a test of present value.²⁸ Hence, in Massachusetts, and generally elsewhere, there is no fixed space of time within which sales must have taken place in order to be admissible. The circumstances of each case, including the degree of economic change, will control.²⁹

²¹ See *State Roads Commission v. Wood*, 207 Md. 369, 114 A.2d 636 (1954).

²² 166 F.2d 800 (1st Cir. 1948).

²³ *Id.* at 804.

²⁴ See *Olson v. United States*, 292 U.S. 246 (1934).

²⁵ E.g., *Teale v. Boston*, 165 Mass. 88, 42 N.E. 506 (1896).

²⁶ 5 Nichols, note 1 *supra*, §21.31[3], at 458.

²⁷ Hershman, *Compensation—Just or Unjust*, 21 *Business Lawyer* 285, 313 (1966).

²⁸ 5 Nichols, note 1 *supra*, §21.31[2].

²⁹ E.g., *Bowditch v. Boston*, 164 Mass. 107, 41 N.E. 132 (1895).

Generally, sales made after the date of taking are inadmissible.³⁰ In Massachusetts, most takings occur under General Laws, Chapter 79, which provides, in part, that "the damages for property taken under this chapter shall be fixed at the value thereof before the taking. . . ."³¹ These words have been construed to mean "before the beginning of the public work which necessitates the taking."³² Thus, the value of the property will not be affected by the taking itself.³³ Sales made after the date of taking might reflect an increment of enhancement or diminution due to the taking, and, thus, should not be considered comparable.³⁴ There are some Massachusetts cases, however, which have held contrary to the general rule and allowed sales after the date of taking where there was no showing of enhancement.³⁵ In the recent case of *Alden v. Commonwealth*,³⁶ the Supreme Judicial Court sustained an exception to the exclusion of evidence demonstrating the enhancement of certain sales due to the anticipated benefits of the government highway project. The sales which had occurred subsequent to the beginning of the project were admitted as evidence of the value of the property taken. In sustaining the exception the court stated that even subsequent sales which reflected enhancement need not always be excluded. The Court said that with careful, limiting instructions, knowledge of such a sale may aid the jury's valuation.³⁷

An additional criterion for determining whether a sale is admissible as evidence is whether it was effected freely and not under compulsion. Unless sales are made in a free and open market, they cannot be considered comparable.³⁸ A sale made as the result of judicial process, such as execution, foreclosure, or condemnation, is considered forced and not free.³⁹ In Massachusetts, however, there is a rebuttable presumption that every sale is voluntary.⁴⁰

The rule is well stated in *Epstein v. Boston Housing Authority*,⁴¹ where exception was taken to the admission of a sale which had been made by a bank as the result of a mortgage foreclosure. The objection was made that the sale was only for the amount of the mortgage and

³⁰ *International Paper Co. v. United States*, 227 F.2d 201 (5th Cir. 1955).

³¹ G.L., c. 79, §12.

³² *Connor v. Metropolitan District Water Supply Comm'n*, 314 Mass. 33, 49 N.E.2d 593 (1943).

³³ *Cole v. Boston Edison Co.*, 338 Mass. 661, 157 N.E.2d 209 (1959), noted in 1959 Ann. Surv. Mass. Law §20.7.

³⁴ *Id.*

³⁵ *E.g., Zambarano v. Massachusetts Turnpike Authority*, 350 Mass. 485, 215 N.E.2d 652 (1966).

³⁶ 351 Mass. 83, 217 N.E.2d 743 (1966), noted in 1966 Ann. Surv. Mass. Law §§15.27, 25.2.

³⁷ *Id.* at 87, 217 N.E.2d at 746.

³⁸ *Suburban Land Co. v. Arlington*, 219 Mass. 539, 107 N.E. 432 (1914).

³⁹ 5 Nichols, note 1 *supra*, §§21.32, 21.33.

⁴⁰ *Ramacorti v. Boston Redevelopment Authority*, 341 Mass. 377, 170 N.E.2d 323 (1960).

⁴¹ 317 Mass. 297, 58 N.E.2d 135 (1944).

not made freely for fair market value. However, no evidence was introduced on this point except that the Court was asked to take judicial notice that property held by a bank is not sold for fair market value since a bank is only interested in recovering the amount of its mortgage. The Court refused to take such notice and overruled the exception.⁴² The Court asserted that although the burden of proof that a price was fixed by fair bargaining and not by compulsion is on the party offering the price as evidence of value, there is a presumption of a free sale in favor of such party.⁴³ The Court found that there was not sufficient evidence offered in this case to rebut the presumption.⁴⁴

A problem raised by the admissibility of comparable sales data is whether a foundation of firsthand knowledge of the sale will be required to avoid violating the hearsay evidence rule. Generally, comparable sales data, when used as direct evidence of the condemned property's value, will not be admitted unless the testimony is based on firsthand knowledge.⁴⁵ When comparable sales data is offered only to evaluate the opinion testimony of an expert appraiser, however, courts are in disagreement as to its admissibility.⁴⁶ Three states, including Massachusetts, take the position that evidence of comparable sales obtained from secondary sources is hearsay evidence, although used only to establish a basis for an expert's opinion or to challenge the opinion.⁴⁷ Justice Holmes asserted the rationale for this view in *National Bank of Commerce v. New Bedford*: "An expert may testify to value although his knowledge of details is chiefly derived from inadmissible sources, because he gives the sanction of his general experience. But the fact that an expert may use hearsay as a ground of opinion does not make the hearsay admissible."⁴⁸

The First Circuit has made discretionary the admissibility of the sales price of comparable sales on direct examination without requiring a foundation of firsthand knowledge when used only to substantiate an appraisal opinion.⁴⁹ Other courts have adopted this view, but the weight of authority, including most federal courts, readily admits evidence of the sales price of comparable sales without a showing of firsthand knowledge if used to substantiate the expert appraiser's opinion.⁵⁰

The Massachusetts rule that evidence of comparable sales obtained from secondary sources is hearsay under all conditions appears to be

⁴² *Id.* at 298, 58 N.E.2d at 137.

⁴³ *Id.* at 301, 58 N.E.2d at 138.

⁴⁴ *Id.* at 302, 58 N.E.2d at 139.

⁴⁵ 5 Nichols, note 1 *supra*, §21.3[1], at 431-432.

⁴⁶ *State v. Oakley*, 356 S.W.2d 909, 911-912 (Tex. Civ. App. 1962).

⁴⁷ Missouri and Colorado concur with the Massachusetts rule. *Id.* at 912.

⁴⁸ 175 Mass. 251, 257, 56 N.E. 288, 290 (1900).

⁴⁹ *Bailey v. United States*, 325 F.2d 571 (1st Cir. 1963).

⁵⁰ E.g., *United States v. Lowrie*, 246 F.2d 472 (4th Cir. 1957); *Delaware, Lackawanna & Western R.R. v. Hoboken*, 16 N.J. Super. 543, 556-558, 85 A.2d 200, 206-207 (1951).

unreasonable. In an urban community, an expert appraisal witness cannot possibly be a party to every sale of realty. At least, the courts should have discretion to admit evidence of comparable sales obtained from secondary sources, especially when requiring first hand knowledge would place a hardship on the party offering the evidence.

The use of comparable sales as a criterion of valuation has been assailed on a number of grounds. First, it has been said that the introduction of such evidence obscures with irrelevant issues the main issue of "just compensation."⁵¹ The basis of this contention is that the trial becomes concerned with the properties offered for comparable sales as opposed to the specific property to be valued.⁵² Secondly, it has been contended that past sales, no matter how comparable, cannot truly reflect market value of the property in question.⁵³ In addition, the argument has been asserted that to allow evidence of comparable sales is inconsistent with the theory that all property is unique.⁵⁴ Despite these objections, comparable sales still appear to be the best and most workable evidence in establishing the value of condemned property.⁵⁵

In Massachusetts eminent domain cases, it is well settled that the admissibility of sales offered as comparable is entirely discretionary with the trial judge.⁵⁶ The judge may admit evidence of the sale of such land if he feels it will aid the jurors in their determination and will not tend to mislead and confuse them.⁵⁷ Nevertheless, the discretion is not unlimited and will be reversed when shown to be manifestly erroneous.⁵⁸ Such error has been construed to mean denying a party the power of proving the value of the property.⁵⁹ Where there are reasonable similarities between properties sold freely, sales offered as comparable should be admitted, with the dissimilarities affecting only the weight of the testimony as opposed to its competency.

§19.3. Income analysis. Many real estate parcels located in urban areas are owned specifically for the rental income they produce. Expansive urban renewal programs have greatly increased the number of takings which involve such properties. For this reason, the problems of evaluating income producing properties have become more signifi-

⁵¹ See *In re Thompson*, 127 N.Y. 463, 28 N.E. 389 (1891).

⁵² *Id.*

⁵³ Lum, *Comparison and Use of Market Data in Preparation for Expert Testimony*, 31 *Appraisal J.* 178, 181 (1963).

⁵⁴ Sengstock and McAuliffe, *What is the Price of Eminent Domain?* 44 *J. of Urban Law* 185, 193 (1966).

⁵⁵ American Bar Association, 1966 Report of Committee on Condemnation and Condemnation Procedure, Section of Local Government Law pt. I, at 28 (1966). Even in jurisdictions whose common law originally did not allow comparable sales, statutes have been enacted which now allow this evidence. E.g., N.Y. Court of Claims Act §16 (McKinney 1963).

⁵⁶ *Wright v. Commonwealth*, 286 Mass. 371, 190 N.E. 593 (1934).

⁵⁷ E.g., *Iris v. Hingham*, 303 Mass. 401, 22 N.E.2d 13 (1939).

⁵⁸ *Id.*

⁵⁹ *Cf. Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority*, 335 Mass. 189, 138 N.E.2d 769 (1956).

cant. The capitalization of rental income is an approved approach for determining the value of income producing properties taken in eminent domain.¹ The income capitalization technique involves capitalizing net rental income.² This technique may be used as the sole criterion for determining value when there are no comparable sales available, or in conjunction with comparable sales as a check on their validity.³ The following discussion will describe the income capitalization technique for determining the value of revenue producing properties and the problems which this approach raises.

The theory of income capitalization is an investor's concept predicated on the principle that the value of property is established by expected income to the owner.⁴ Accordingly, the value of property is equal to the investment which, given the normal rate of return on similar investments in the same location, yields the same annual net income.⁵ Net income is the revenue received after deducting the expenses of maintaining the property. An example will best illustrate the basic method.

Assuming a rate of return at five percent on capital investment, what is the amount of investment necessary to return the sum of \$2500 in net income? Generally, annual net income may be computed by multiplying capital investment by a predicted rate of return. Therefore, when annual net income and the capitalization rate are known, the investment required to generate the annual net income may be obtained by dividing the annual net income by the capitalization rate.

In algebraic terms:

$$(\text{Capital Investment}) (\text{Capitalization Rate}) = \text{Net Income}$$

$$\text{Capital Investment} = \text{Net Income} / \text{Capitalization Rate}$$

Applied to the example:

$$(\text{Capital Investment}) (.05) = \$2500$$

$$\text{Capital Investment} = \$2500 / .05$$

$$\text{Capital Investment} = \$50,000$$

Thus, a \$50,000 capital investment is required to yield an annual net income of \$2500 where there is a five percent rate of return (capitalization rate). It can be seen that the validity of the capitalization technique depends on the accuracy of the income and capitalization figures.

It is generally held that rental income is admissible to determine

§19.3. 14 Nichols, *Law of Eminent Domain* §§12.312-12.3122 (3d ed. rev. 1964), 5 id. §§19.1-19.23.

² Id. §19.23.

³ American Bar Association, 1966 Report of Committee on Condemnation and Condemnation Procedure, Section of Local Government Law pt. I, at 35 (1966).

⁴ See Wagner, *A Defense of the Income Approach*, 3d Ann. Inst. on Eminent Domain 151, 178-179 (1961).

⁵ See *Burritt Mutual Savings Bank of New Britain v. City of New Britain*, 20 Conn. Sup. 476, 140 A.2d 324 (C.P. 1958).

the value of the property taken,⁶ while business income is inadmissible.⁷ Rental income is allowed because it inheres in the property itself. Since it results directly from the realty, the rental income indicates a transferrable value which is stable and predictable.⁸ Business income, on the other hand, does not inhere in the property. Rather, this income might well be derived on other premises also. Business income is determined to a great extent by managerial talents and, therefore, is unpredictable as a measure of realty value.⁹ Thus, in *Amory v. Commonwealth*, the Supreme Judicial Court stated:

The income received from the use and occupation of land is evidence of its market value . . . but income derived from a business conducted upon the premises depends upon various factors not attributable to the land and furnishes no criterion for the determination of the market value of the land.¹⁰

In utilizing the income capitalization technique, it is important that the rental income figure be accurate. The appraiser must be certain that a net rental income is used whereby all the expenses of maintaining the rental property, including taxes, vacancy allowances and depreciation are deducted.¹¹ Also, the rental income figure must reflect normal market rentals. If it is shown that the income used in capitalization does not represent normal market levels, such evidence may be inadmissible.¹²

There are many reasons why the actual net rent may be above or below the normal market levels. The lease may reflect a high or low rental demand at the time of its writing.¹³ The existence of a tenant

⁶ E.g., *Chicago, B. & O. R. Co. v. North Kansas City Dev. Co.*, 134 F.2d 142 (8th Cir. 1943); *Amory v. Commonwealth*, 321 Mass. 240, 72 N.E.2d 549 (1947); *Marjal Realty Corp. v. State*, 23 App. Div. 2d 941, 259 N.Y.S.2d 915 (1965).

⁷ E.g., *Amory v. Commonwealth*, 321 Mass. 240, 72 N.E.2d 549 (1947); *In re City of Rochester*, 234 App. Div. 583, 255 N.Y.S. 801 (1932). Only where the taking affects the business so that it is unable to be reestablished is business income admissible as evidence of value. *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

⁸ *Hershman, Compensation—Just and Unjust*, 21 *Business Lawyer* 285, 316 (1966). The rental value of property which is similar to the condemned property is not considered sufficiently relevant to be admissible. *Wenton v. Commonwealth*, 335 Mass. 78, 138 N.E.2d 609 (1956), noted in 1957 *Ann. Surv. Mass. Law* §§11.4, 33.6.

⁹ *Sauer v. New York*, 44 App. Div. 305, 308-309, 60 N.Y.S. 648, 650-651 (1899). Although, in Massachusetts, injury to business conducted on the condemned property is not compensable, *H.E. Fletcher Co. v. Commonwealth*, 350 Mass. 316, 214 N.E.2d 721 (1966), evidence of the volume of business conducted may be admissible, at the discretion of the court, to demonstrate the adaptability of the land for the use to which it was put. *Wellington v. City of Cambridge*, 220 Mass. 312, 107 N.E. 976 (1915).

¹⁰ 321 Mass. 240, 258, 72 N.E.2d 549, 560 (1947) (citations omitted).

¹¹ *Sengstock and McAuliffe, What is the Price of Eminent Domain?* 44 *J. Urban Law* 185, 212 (1966).

¹² See *Carlstrom v. United States*, 275 F.2d 802 (9th Cir. 1960); *In re City of New York*, 196 App. Div. 451, 188 N.Y.S. 197 (1921).

¹³ E.g., *United States v. 396 Corp.*, 264 F.2d 704 (2d Cir. 1959), *cert. denied*, 361 U.S. 817 (1959).

who is special, as a relative, may affect the rent.¹⁴ Also, the building may not have been put to its highest and best use and thereby not reflect its potential income.¹⁵

Like the income figure, it is important that the capitalization rate be accurate to insure the validity of the income capitalization technique. The choice of capitalization rate is very difficult because the rate of return on investments is a variable factor which changes with the time, location, and nature of the investment. The capitalization rate is necessarily an assumed figure selected by an appraiser after considering the existing earning rates on investments generally. All the vagaries of the investment market must be considered, but the most important consideration is the rental market. The appraiser must investigate the rate of return on comparable properties in the same area as the property taken.¹⁶

The difficulties of the income capitalization technique lie in determining the validity of the income figure and capitalization rate. A great variation in property value will accrue from a small variation in capitalization rate. A lower rate will produce a higher capitalized value while a higher rate will produce a lower value. For example, \$5000 of annual income capitalized at 5 percent will result in a capital sum of \$100,000, while the same income capitalized at ten percent will result in a \$50,000 capitalization. In the above example, each percentage difference in capitalization rate will represent a \$10,000 difference in property value. Consequently, many courts allow capitalization of income only where evidence of sales of comparable property is not available.¹⁷ Capitalization of income may also act as a check on other methods of valuation.¹⁸

§19.4. Reproduction costs. If the property to be valued is improved, a third approach to valuation may be employed, utilizing the reproduction costs of the improvements. The use of reproduction costs is based upon the classical economic theory that the value of any commodity is equal to its reconstruction costs reduced by depreciation.¹ Applying this theory to real estate appraisal in condemnation proceedings, compensation would be determined as the summation of the values of the land plus the reproduction costs of the structures adjusted for depreciation.² This economic theory is unsound, how-

¹⁴ *Sifuentes v. United States*, 168 F.2d 264 (1st Cir. 1948).

¹⁵ *Sengstock and McAuliffe*, What is the Price of Eminent Domain? 44 J. Urban Law 185, 213 (1966).

¹⁶ *In re James Madison Houses*, 17 App. Div. 2d 317, 234 N.Y.S.2d 799 (1962).

¹⁷ American Bar Association, 1966 Report of Committee on Condemnation and Condemnation Procedure, Section of Local Government Law pt. 1, at 35 (1966).

¹⁸ See *United States v. Eden Memorial Park Assn.*, 350 F.2d 933 (9th Cir. 1965); *Hershman*, Compensation — Just and Unjust, 21 Business Lawyer 285, 315 (1966).

§19.4. 12 Orgel, Valuation Under the Law of Eminent Domain §188 (2d ed. 1953).

² E.g., *In re City of New York — Blackwell's Island Bridge*, 198 N.Y. 84, 91 N.E. 278 (1910).

ever, because it fails to account for the impact of supply and demand upon the market. Unless a building is one in special demand, it will not be as valuable to a buyer who could buy vacant land and build a new structure suitable to his needs.³ For this reason, the market value of the property may be below the value of the land plus reproduction costs of the improvements, even after adjusting for depreciation. Unless there is a special premium on the buildings, this inflated value will set an absolute ceiling on the market price.⁴

This inflationary nature of reproduction costs has caused the courts to hold that reproduction costs can never be utilized as a direct test of value.⁵ Some courts do admit reproduction costs as evidence to be considered in determining value, but there is much confusion and many problems surrounding this admissibility.⁶ The following section will discuss the difficulties in using reproduction costs of improvements as evidence of value for property taken by eminent domain.

Since fair market value is the measure of compensation for condemned property, consideration of the value of improvements is limited to the extent that the improvements affect the market value of the property.⁷ When the cost of improvements has no ascertainable bearing on the value of property, e.g., an expensive mansion in a slum section, consideration of reproduction costs should be excluded.⁸ When it is shown, however, that the value of improvements affects the value of property because they are "reasonably adapted" to the land, reproduction costs, adjusted for depreciation, are an indication of the amount by which the improvements enhance the property.⁹ "Reasonable adaptability" means that a prudent owner of the land might wish to replace the improvement, if it were destroyed, with a substantially identical substitute.¹⁰ This concept was well expressed by the New York Court of Appeals in *In re City of New York — Blackwell's Island Bridge*:

In some cases the value of expensive structures may not enhance the value of the land at all. An extremely valuable piece of land may have upon it cheap structures which are a detriment rather than an improvement. A man may build an expensive mansion upon a barren waste, and, in such a case, the costly building may add little or nothing to the total value. In the greater number of cases, however, when the character of the structures is well

³ 2 Orgel, note 1 *supra*, §188.

⁴ *United States v. Benning Housing Corp.*, 276 F.2d 248, 250 (5th Cir. 1960).

⁵ See *Bachelor Truck Sales, Inc. v. Commonwealth*, 350 Mass. 270, 273, 214 N.E.2d 36, 38 (1966), noted in 1966 Ann. Surv. Mass. Law §§15.26, 15.27.

⁶ E.g., *Hanson Lumber Co. v. United States*, 261 U.S. 581 (1923); *Levenson v. Boston Elevated Ry.*, 191 Mass. 75, 77 N.E. 635 (1906).

⁷ 4 Nichols, *Law of Eminent Domain* §12.313, at 137 (3d ed. rev. 1964).

⁸ E.g., *Devou v. City of Cincinnati*, 162 F. 633 (6th Cir. 1908), *cert. denied*, 212 U.S. 577 (1908).

⁹ 4 Nichols, note 7 *supra*, §12.313, at 137-139.

¹⁰ See 2 Orgel, note 1 *supra*, §191.

adapted to the kind of land upon which they are erected, the value of the buildings does enhance the value of the land.¹¹

Thus, reproduction costs, less depreciation, are generally admissible as evidence of value if it is shown that the improvements are reasonably adapted to the land.¹² A further requirement is that the prices upon which reproduction cost is calculated are normal and not inflated.¹³ An examination of the cases discussing the competence of reproduction cost evidence, however, reveals that admissibility of such evidence is generally a matter of discretion with the trial court¹⁴ and that there is great uncertainty in this area. Some courts do not impose conditions on the admissibility of such evidence and allow it to be considered with other evidence of value.¹⁵ Other courts predicate admissibility on the jury being convinced by a preponderance of the evidence that substantial reproduction of the improvement would be a reasonable business venture.¹⁶ Many decisions have required a showing of the necessity for the use of reproduction cost as evidence before allowing admissibility.¹⁷ In these cases, evidence of reproduction cost has been allowed in the valuation of special purpose properties¹⁸ or where there are no available comparable sales or income that can be capitalized.¹⁹

A minority of courts forbid the use of reproduction costs as evidence to determine the value of condemned property.²⁰ The rationale for not allowing this evidence is based upon the unit rule of valuation.²¹ This rule prohibits consideration of the value of improvements except as integral parts of the property. Market value must be determined by viewing the land and improvements as a whole. Under the unit rule, reproduction costs are inadmissible because such evidence shows the value of the buildings separate and apart from the land itself.²²

In Massachusetts, it had been held that the admissibility of reproduc-

¹¹ 198 N.Y. 84, 86-87, 91 N.E. 278, 279 (1910).

¹² *United States v. 206.82 Acres of Land*, 205 F. Supp. 91 (M.D. Pa. 1962).

¹³ E.g., *United States v. Boston C.C. & N.Y. Canal Co.*, 217 F. 877 (1st Cir. 1921).

¹⁴ See *United States v. 206.82 Acres of Land*, 205 F. Supp. 91, 93 (M.D. Pa. 1962).

¹⁵ E.g., *Hickey v. United States*, 208 F.2d 269 (3d Cir. 1953); *In re City of New York — Blackwell's Island Bridge*, 198 N.Y. 84, 91 N.E. 278 (1910).

¹⁶ E.g., *United States v. Buhler*, 305 F.2d 319 (5th Cir. 1962).

¹⁷ *United States v. Benning Housing Corp.*, 276 F.2d 248 (5th Cir. 1960).

¹⁸ E.g., *Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority*, 335 Mass. 189, 138 N.E.2d 769 (1956).

¹⁹ E.g., *Tigar v. Mystic River Bridge Authority*, 329 Mass. 514, 109 N.E.2d 148 (1952).

²⁰ E.g., *Department of Public Works and Buildings v. Lotta*, 27 Ill. 2d 455, 189 N.E.2d 238 (1963).

²¹ 5 Nichols, *Law of Eminent Domain* §20.2[2], at 386-387 (3d ed. rev. 1964); but see *United States v. City of New York*, 165 F.2d 526, 528 (2d Cir. 1948).

²² *Department of Public Works and Buildings v. Lotta*, 27 Ill. 2d 455, 456-458, 189 N.E.2d 238, 240-241 (1963). It has been held under the minority view that an appraiser may consider reproduction costs in determining his opinion of value, although the cost of reproduction itself may not be introduced to the jury as direct evidence of value. *Department of Public Works and Buildings v. Pellini*, 7 Ill. 2d 367, 373, 131 N.E.2d 55, 59 (1955).

tion costs as evidence to determine value is discretionary,²³ although recent cases seem to limit the use of such evidence to the valuation of special purpose properties where no evidence of value in the form of comparable sales or income capitalization is available.²⁴ The problem of utilizing reproduction costs to evaluate special purpose property faced the Court in *Commonwealth v. Massachusetts Turnpike Authority*.²⁵ It will be recalled that the Authority had excepted to the admissibility of adjusted reproduction cost of the armory, contending that since the structure was obsolete, reproduction was untenable and, therefore, evidence of reproduction cost was irrelevant to determine value. The Court agreed and sustained the exception asserting that, where structures are so out-of-date that they would not be reproduced by a prudent owner, it is difficult for even an expert to make suitable allowances for depreciation.²⁶

The Court, however, recognized that although a structure taken by eminent domain has become obsolete to the extent that to allow evidence of reproduction cost would be prejudicial, it may still have a residual useful value to the owner for the special purpose which it serves.²⁷ This "residual value" might have been maintained long after the taking occurred and may exceed what the land and structures will bring in the ordinary real estate market. In applying the principle of "residual value" to the taking of the armory, the Court defined residual useful value as the fair value of having available the old structure or a reasonable replacement structure during the useful life of the old armory, plus the value of being able to postpone expenditure for a new structure.²⁸

The Court suggested that the total value of the Commonwealth's property could be computed by a summation of the land value plus the "residual useful value" of the armory. In the opinion, Justice Cutter suggested summation of the following elements for computing "residual useful value": (1) interest on the investment presently necessary to finance a suitable modern replacement structure, (2) the depreciation value that would accrue on a suitable replacement structure if it were built at the time of the taking. Both of these figures are to be computed over a period equal to the remaining useful life of the structure.²⁹ The Court, however, qualified the application of the residual useful value method by holding that any expert appraiser's computation of residual value is not to be considered by the jury as direct evidence but only states the basis of the appraiser's ultimate opinion.³⁰

²³ James Millar Co. v. Commonwealth, 251 Mass. 457, 146 N.E. 677 (1925).

²⁴ E.g., Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N.E.2d 769 (1956); but see Assessors of Quincy v. Boston Consolidated Gas Co., 309 Mass. 60, 34 N.E.2d 623 (1941).

²⁵ 1967 Mass. Adv. Sh. 389, 224 N.E.2d 186.

²⁶ Id. at 395, 224 N.E.2d at 191.

²⁷ Id.

²⁸ Id. at 396, 224 N.E.2d at 191.

²⁹ Id. at 396, 224 N.E.2d at 191.

³⁰ Id. at 396-397, 224 N.E.2d at 191-192.

The residual value theory recognized in its first elements—the interest on the investment necessary to finance a suitable replacement structure—that a property owner could invest his capital alternatively to produce income if he did not have to invest in a new structure to replace the condemned building. The theory, therefore, compensates for lost interest on a hypothetical investment. The second element recognizes the remaining useful life of the old structure which has been taken.

For example, if a building with a reasonable replacement cost of \$100,000 and a remaining useful life of five years is condemned, its residual useful value could be computed as follows (Assume five percent return on investments and depreciation of \$5000 per year on replacement):

$$\text{Interest on investment (first element)} = \$100,000 \times 5\% \times 5 \text{ years} = \$25,000$$

$$\text{Depreciation on investment (second element)} = \$5000 \times 5 = \$25,000$$

$$\text{Residual useful value} = \$25,000 + \$25,000 = \$50,000$$

In a concurring opinion, Justice Kirk agreed with the majority that admission of the reproduction cost of an obsolete building, such as the armory, to prove value would be irrelevant and confusing. Justice Kirk, however, felt that consideration of the cost of a suitable replacement structure to determine the residual value would be equally confusing and irrelevant. Since a suitable replacement structure would require completely different facilities, Justice Kirk felt that presentation of evidence of such a structure would result in a “blizzard” of facts and figures obscuring the simple question of “just compensation” to be resolved. For this reason, he favored the maintenance of a general fair market value rule which would include “residual useful value” by alluding to it without a presentation of confusing facts and figures concerning replacement value.³¹

The Court, in the *Turnpike* case, seemed to follow its opinion in *Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority*.³² *Newton Girl Scout* involved the partial taking of special purpose property in the form of a girl scout camp. Since camps of this type were not commonly bought and sold, the girl scout council was forced to prove damages by means other than comparable sales. The trial judge excluded evidence bearing on the value of the property for special uses for which it had been adapted and maintained a general market value concept. On appeal, the Supreme Judicial Court held that although market value is the test, the Girl Scouts were entitled to present evidence bearing on every use to which the property was adapted, including the specialized use for which the property was being employed, i.e., a camp, and all relevant factors pertaining to its

³¹ Id. at 397-398, 224 N.E.2d at 192-193 (Kirk, J., concurring opinion).

³² 335 Mass. 189, 138 N.E.2d 769 (1956).

use. The Court felt that in special purpose property cases greater flexibility in presentation of evidence is necessary and asserted that the testimony should be allowed of a witness who was an expert on the value of camp property in general rather than an expert in local property values, as traditionally required.³³

Also, the Court held that evidence of reproduction cost less depreciation should be admitted because intrinsic value of the property is a proper means of ascertaining the value of special purpose property.³⁴ In asserting this attitude of flexibility toward the admission of evidence in cases involving special purpose property, the Court stated:

Special opportunities for proof of value have long been afforded in cases where it is felt that there is no market value, in the sense in which, in most communities, market value is at all times reflected by a steady volume of sales of ordinary commercial and residential properties. . . . The courts in these cases, however, may be doing no more than recognizing that more complex and resourceful methods of ascertaining value must be used when the property is unusual or specialized in character and where ordinary methods will produce a miscarriage of justice. In such cases, it is proper to determine market value from the intrinsic value of the property and from its value for the special purposes for which it is adapted and used.³⁵

Since special purpose properties usually do not produce rental income, nor are they ordinarily bought or sold, the usual means of ascertaining market value are not available for the valuation of such property. Thus, other means must be resorted to.³⁶ Although in Massachusetts the burden is on the owner to first show that it is impossible to prove the value of property without resorting to unusual methods of valuation,³⁷ it is generally proper, in evaluating special purpose property, to determine market value from the intrinsic value of the property to the owner for its special purpose.³⁸

It is the consideration of the intrinsic value of the property to the owner for its special purpose that would be effected by allowing evidence of "residual useful value." Since there was no capitalized income or comparable sales evidence available to determine the value of the armory in *Turnpike*, reproduction costs would ordinarily have been proper to demonstrate the intrinsic value of the property to the owner for its special purpose.³⁹ When the Court necessarily rejected

³³ Id. at 194-195, 138 N.E.2d at 773.

³⁴ Id. at 195-196, 138 N.E.2d at 773-774.

³⁵ Id. at 195, 138 N.E.2d at 773-774.

³⁶ *Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority*, 335 Mass. 189, 195, 138 N.E.2d 769, 774 (1956).

³⁷ *Tigar v. Mystic River Bridge Authority*, 329 Mass. 514, 109 N.E.2d 148 (1952).

³⁸ Id.

³⁹ *Commonwealth v. Massachusetts Turnpike Authority*, 1967 Mass. Adv. Sh. 389, 394, 224 N.E.2d 186, 190.

the use of reproduction costs as irrelevant, however, the Commonwealth was left without conventional means of demonstrating value. Although, as Justice Kirk suggested, the introduction of replacement value to show residual value may be confusing to the jury,⁴⁰ it seems preferable to admit such evidence in cases where general standards of market value would not allow any proof. The allowance of evidence demonstrating residual useful value would provide a means for the Commonwealth's appraiser to demonstrate the state's loss from the taking. Because of the difficulties alluded to by Justice Kirk, however, it appears that the use by an appraiser of extraordinary methods of valuation, like reproduction cost or residual value approaches, should be limited to the valuation of property for which there is a paucity of the more reliable comparable sales or capitalized income data.⁴¹

The flexible attitude toward the admissibility of evidence demonstrating intrinsic value to the owner in cases involving special purpose property should be extended to all cases to allow the introduction of evidence demonstrating incidental losses to the owner, such as damage to business or moving expenses. Only if such evidence is admitted will the owner of property taken under eminent domain be assured of full compensation. The Supreme Court has recognized that market value cannot necessarily be equated to just compensation:

The court in its construction of the constitutional provision has been careful not to reduce the concept of "just compensation" to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of "just compensation" is to be determined. . . . The Court in an endeavor to find working rules that will do substantial justice had adopted practical standards including that of market value. . . . But it has refused to make a fetish even of market value, since that may not be the best measure of value in some cases.⁴²

Much of the burden for effecting reform in the methods for providing "just compensation," however, may have to be placed on the legislature rather than the courts. Commissions should be established to study the rules and procedures for effecting full compensation for property taken by eminent domain. Statutes providing full compensation for incidental losses will effect a consistency in awards. Some states have already passed statutes which provide at least in part for incidental losses,⁴³ and a Congressional study has already recom-

⁴⁰ *Id.* at 397-398, 224 N.E.2d at 192.

⁴¹ See *Tigar v. Mystic River Bridge Authority*, 329 Mass. 514, 109 N.E.2d 148 (1952).

⁴² *United States v. Cors*, 337 U.S. 325, 332 (1949).

⁴³ See e.g., Pa. Stats. Ann., title 26 (Purdon 1966).

mended legislation to place a greater burden on the federal government to help effect "just compensation."⁴⁴

The problem of confusing the jury with complex economic facts and figures can be eliminated by using specially appointed commissioners, rather than a jury, in cases involving condemnation. Although "just compensation" is a constitutional guarantee, there is no requirement of trial by jury.⁴⁵ Under Rule 71A of the Federal Rules of Civil Procedure and the statutes of many states,⁴⁶ commissioners, learned in the problems of valuation, may be used in certain situations to determine compensation. The commissioners' award is generally treated like a master's report and is appealable to a court.⁴⁷

It appears that these statutes have not been utilized to their fullest extent. This may result from the commissioners' determination being subject to a *de novo* trial, which represents the possibility of double adjudication. If commissioners could be integrated into the judicial condemnation proceeding in lieu of a jury, this problem would be solved. As an extension of the commissioner system, an entire system of courts specifically for eminent domain proceedings should be considered. The judges would be knowledgeable in problems of compensation and could initiate effective, speedy trials with consistent holdings.⁴⁸

The problems of evaluating property taken by eminent domain are many and complex. These problems are confronting an increasing number of people as urban development and other government programs expand. The traditional rules of valuation and the market value concept, evolved in an agrarian society, are inadequate when applied in today's urban society. As Justice Holmes stated, the constitution deals with people rather than property,⁴⁹ and more attention should be given to the individual to insure his constitutional right to "just compensation." The public should bear the cost of all that is actually lost to the owner in condemnation proceedings, including incidental losses, as the price for public projects.

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⁴⁴ See Subcommittee on Real Property Acquisition, House Committee on Public Works, 88th Cong., 2d Sess., Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs (Comm. Print 1964).

⁴⁵ *Baumann v. Ross*, 167 U.S. 548, 593 (1897).

⁴⁶ E.g., G.L., c. 80A, §8; 6 Nichols, *The Law of Eminent Domain* §26.53 (3d ed. rev. 1964).

⁴⁷ E.g., G.L., c. 80A, §§9-10; 6 Nichols, note 46 *supra*, §26.531.

⁴⁸ See Searles and Raphael, *Current Trends in the Law of Condemnation*, 27 *Ford. L. Rev.* 529 (1959).

⁴⁹ *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910).