# COMMENTS

## USE OF COMPARABLES IN DETERMINING CONDEMNATION AWARDS

### *Community Redevelopment Agency v. Henderson, 251 Cal. App. 2d 341, 59 Cal. Rptr. 311 (1967)*

As early as 1956 the Community Redevelopment Agency of Los Angeles had begun to plan redevelopment of the Bunker Hill Area.[1] Area residents and property owners were notified of the pending redevelopment and that the Agency would eventually purchase their property or take it by eminent domain.[2] After this notification there were no sales of area property to anyone but the Agency.

In an earlier decision, the California Supreme Court sanctioned the designation of the Bunker Hill Area as blighted and properly the subject of redevelopment, and described the area as an "incompatible mixture" of buildings of pre-1919 vintage, used primarily as rooming houses, with a scattering of businesses.[3] The streets were portrayed as inadequate and the topography as irregular. The majority of the properties, including defendant's, was zoned for maximum height, high-rise residential use.[4] It is not known whether defendant's property was improved, and if so, with what type of building.[5] Despite the general deterioration of the Area, there were

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1. The Community Redevelopment Agency's authority to acquire the property for the elimination of blight and for redevelopment purposes was established in *In re* Bunker Hill Urban Renewal Project 1B, 61 Cal. 2d 21, 389 P.2d 538, 37 Cal. Rptr. 74 (1964). The area was bounded by the Harbor Freeway on the west, the newly built Civic Center on the north, and a rapidly growing central business district to the south was to be redeveloped.

2. Brief for Appellant (Defendant) at 27, Community Redevelopment Agency v. Henderson, 251 Cal. App. 2d 341, 59 Cal. Rptr. 311 (1967) [hereinafter cited as CRA v. Henderson]:

> The undisputed facts were that in November 1956 a *lis pendens* was recorded on all property within the Bunker Hill Area notifying all persons that this property was in a redevelopment area and would eventually be purchased or taken by eminent domain. Without the recordation of the *lis pendens* this fact was well known by reason of the publicity about this project.

The veracity of this statement was not questioned by either the court or plaintiff's attorney.

3. *In re* Bunker Hill Urban Renewal Project 1B, 61 Cal. 2d 21, 33 n.2, 389 P.2d 538, 546 n.2, 37 Cal. Rptr. 74, 82 n.2 (1964).

4. The properties were zoned R-5-4. "R-5" means high-rise residential and "4" means the maximum height is unlimited.

5. Although at no point in the court's opinion on *Henderson* or in either of the attorney's briefs was the precise nature of the property indicated, two factors strongly indicate that the subject property was improved with a dwelling unit of some type. First, the defendant objected to plaintiff's submission of a property on which the building was to

some significant developments nearby. Within two blocks of the defendant's property were new high-rise office buildings, hotels, and the Los Angeles Civic Center. The southerly boundary of the Area had been drawn irregularly to exclude many new and prospering commercial structures. These facts suggested that the adjacent business district was spreading toward the Bunker Hill Area.

The Community Redevelopment Agency condemned defendant's property. Since there had been no sales within the Area after 1957 other than to the Agency, in valuing defendant's property, the trial court considered expert testimony as to comparable sales[6] outside the Area. The Agency's expert witness, testifying to the sale price of residentially zoned properties located outside the downtown area, arrived at a valuation of $72,500. Defendant, seeking a valuation of $227,000, introduced expert testimony on the sales price of the nearest commercial properties, which were located in the central business district. To support his submission, defendant attempted to show that the urban renewal area was becoming commercial in character due to its proximity to the Civic Center and the business district.[7]

The trial court accepted the Agency's arguments and exercised its discretion[8] to exclude all but one[9] of the sales upon which defendant's experts based their valuation. Although defendant's property was within two blocks of commercial development, the judge did not find sufficient similarity with respect to "character, situation, usability, and improvements"[10]

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be demolished and used as a parking lot. This might indicate that he felt comparable property must contain improvement of some kind. The second factor is linked to an accepted rule of evidence that when land is improved, such property cannot be offered in evidence to establish the value of unimproved realty. *E.g.*, Forest Preserve Dist. v. Alton Ry., 391 Ill. 230, 62 N.E.2d 701 (1945). Obviously, if the subject property were unimproved all of the attempted comparisons would be objectionable.

6. Comparable sales is a term used to describe the sale price of property "sufficiently similar" to the condemned property to be of service as evidence of the market value of the condemned property.

7. Brief for Appellant (Defendant), Brief for Appellee (Plaintiff), CRA v. Henderson, 251 Cal. App. 2d 341, 59 Cal. Rptr. 311 (1967).

8. The trial judge's broad discretion is widely accepted. *See* Covina Union High School Dist. v. Jobe, 174 Cal. App. 2d 340, 345 P.2d 78 (1959); 5 P. NICHOLS, EMINENT DOMAIN § 21.31 (3d ed. J. Sackman & R. Van Brunt 1962) [hereinafter cited as NICHOLS].

9. The last sale introduced by defendant's expert was admitted. It was improved with a small parking lot and was located immediately adjacent to, but outside of, the Bunker Hill Area three blocks from the subject property. It appears that the admitted property's location, size, and zoning were not substantially different from those of the excluded comparisons. Plaintiff's attorney objected in the same manner to the introduction of this property. Brief for Appellant (Defendant), Brief for Appellee (Plaintiff), CRA v. Henderson, 251 Cal. App. 2d 341, 59 Cal. Rptr. 311 (1967).

10. CRA v. Henderson, 251 Cal. App. 2d 341, 59 Cal. Rptr. 311 (1967).

to warrant the admission of the sales prices of commercially zoned properties.[11]

In contrast, the Agency's expert witness was allowed to introduce residential sales prices on the basis that they were "sufficiently similar" to be considered by the jury.[12] Using these sales, the Agency's witness valued defendant's property at $72,500 and the jury awarded that amount.

The Court of Appeals for the Second District of California reviewed the trial judge's admission and exclusion of prices and the jury's valuation. In *Community Redevelopment Agency v. Henderson,*[13] it affirmed the award, holding that the judge had not abused his discretion, and that the evidence necessary for a proper determination had been presented to the jury.

Although *Henderson* involves one issue, it illustrates a much larger problem. The issue raised is whether evidence of allegedly comparable sales of property introduced to establish the market value of defendant's property was properly excluded. The broader question is whether adjustment can be made in the comparables approach so that it reflects a fair application of the market value technique when the subject property has been effectively removed from the open market, and if not, what technique should be used.

## I. The Use of Comparables to Establish Market Value

Private property cannot be taken pursuant to the power of eminent domain without just compensation[14] which places the owner financially in the same position as if condemnation had not occurred.[15] Courts almost uniformly base just compensation on the market value of the condemned

11. One property was excluded solely because of a great disparity in size although the court did say that there were other reasons. Prominent among the other reasons was that the allegedly comparable properties were located on through-streets and were surrounded by commercial buildings. The zoning differentiation was implicit in all of the exclusions.

12. A few of defendant's objections to the admission of these properties were sustained. Those found not comparable were improved with extremely old, deteriorated dwelling units and were zoned differently than the subject property. Brief for Appellant (Defendant), CRA v. Henderson, 251 Cal. App. 2d 341, 59 Cal. Rptr. 311 (1967).

13. 251 Cal. App. 2d 341, 59 Cal. Rptr. 311 (1967).

14. U.S. Const. amend. V. ". . . [N]or shall private property be taken for public use, without just compensation." Whether the taking is for public use is not in issue here, because public use was established in *In re* Bunker Hill Urban Renewal Project 1B, 61 Cal. 2d 21, 389 P.2d 538, 37 Cal. Rptr. 74 (1964).

15. United States v. Miller, 317 U.S. 369 (1943); United States v. Fort Smith River Develop. Corp., 349 F.2d 522 (8th Cir. 1965); United States v. Certain Property, 306 F.2d 439 (2d Cir. 1962); Jacksonville Expressway Auth. v. DuPree Co., 108 So. 2d 289 (Fla. 1958); Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950); Monmouth Consol. Water Co. v. Blackburn, 72 N.J. Super. 377, 178 A.2d 377 (1962).

property.[16] Market value is "an objective value which is measured by studying comparable sales, income produced by the property, and reconstruction costs."[17] Most courts have held that the comparables method is the most reliable approach in fixing value; it is the method most frequently employed by professional appraisers.[18] There are two uses for comparables: (1) as independent substantive evidence of value; and (2) to establish a foundation for an expert's valuation based on his personal and professional experience.[19] California, along with the vast majority of jurisdictions, admits comparables for either purpose.[20]

It is within the discretion of the trial court to exclude certain evidence regarding the sales price of other properties. To admit every sale each party or expert thinks relevant would be time consuming, and the introduction of obviously irrelevant prices might obscure the issue. Courts cannot, however, restrict consideration to sales of identical property because identical properties, let alone identical conditions of sale, are often hard to find. Therefore, courts must decide which properties are "sufficiently similar" to the subject property to be admitted.[21]

Although courts have established no fixed or general rule governing the degree of similarity,[22] they have developed some guidelines. Generally, courts consider the following factors as they relate to both the subject property and the property introduced as evidence: present use, relative size,

16. 5 NICHOLS § 21.1.

17. Sengstock & McAuliffe, *What Is The Price of Eminent Domain?: An Introduction to the Problems of Valuation in Eminent Domain Proceedings,* 44 J. URBAN LAW 185, 191 (1966) [hereinafter cited as Sengstock & McAuliffe]. Since neither the court nor the attorneys in *Henderson* discussed the use of the rental value or reconstruction costs techniques, they will not be considered in evaluating the court's decision.

18. Rollins, *Selection of the Proper Appraisal Approach in Condemnation Suits,* SIXTH ANNUAL INSTITUTE ON EMINENT DOMAIN 47, 53-54 (1964) [hereinafter cited as Rollins].

19. United States v. Certain Interests in Property, 186 F. Supp. 167 (N.D. Cal. 1960), *aff'd sub nom,* Likins-Foster Monterey Corp. v. United States, 308 F.2d 595 (9th Cir. 1962).

20. County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957); 5 NICHOLS § 21.3(1); Sengstock & McAulliffe 194. A small minority of courts hold that evidence of comparable sales is inadmissible on direct examination for the purpose of establishing values. 5 NICHOLS § 21.3(1). But even these minority jurisdictions allow the introduction of comparables on cross-examination to test the competence of an appraiser. *In re* Civic Center in City of Detroit, 335 Mich. 528, 56 N.W.2d 375 (1953); Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick, 201 Minn. 442, 277 N.W. 392 (1937).

21. County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957); 5 NICHOLS § 21.31.

22. City of Chicago v. Vaccarro, 408 Ill. 587, 601, 97 N.E.2d 766, 773 (1951); *see* Covina Union High School Dist. v. Jobe, 174 Cal. App. 2d 340, 352, 345 P.2d 78, 84 (1959); City of Evanston v. Piotrowicz, 20 Ill. 2d 512, 170 N.E.2d 569 (1960).

nature of the improvements, geographical distance relation, proximity of the sale to the date of valuation, voluntariness of the sale of the comparable properties.[23]

In most jurisdictions the burden of proving similarity is on the party introducing the allegedly comparable sales price.[24] The trial judge has discretion[25] to decide whether sufficient similarity exists to warrant the admission of the price.[26] The trial judge in *Henderson* did not abuse his discretion; since each admission and exclusion had legal precedent, his rulings were not arbitrary or capricious.[27] Thus, while the appellate court committed no reversible error in affirming the trial court,[28] there are reasons for disagreeing with its result.

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23. Although not using these exact terms there are several comprehensive articles treating the use of these elements. *See* 5 NICHOLS § 23.31; Sengstock & McAuliffe 197-206; Note, *Valuation Evidence in California Condemnation Cases,* 12 STAN. L. REV. 766 (1960).

24. State v. Boyd, 271 Ala. 584, 126 So. 2d 225 (1961); San Francisco v. Tillman Estate Co., 205 Cal. 651, 272 P. 585 (1928); People v. Thomas, 108 Cal. App. 2d 832, 239 P.2d 914 (1952); *see* C. MCCORMICK, EVIDENCE § 166, at 348 (1954).

25. Los Angeles City High School Dist. v. Swensen, 226 Cal. App. 2d. 574, 38 Cal. Rptr. 214 (1964); People *ex rel.* Dept. of Public Works v. City of Los Angeles, 220 Cal. App. 2d 345, 33 Cal. Rptr. 797 (1963); Lustine v. State Roads Comm'n, 217 Md. 274, 142 A.2d 566 (1958).

26. This decision is affected by the judge's basic conception of his role in the process of determining the admissibility of evidence. If a judge conceives of his role as one of sifting only the obviously irrelevant material, he is more likely to send border-line comparisons to the jury and allow them to determine whether the similarity is sufficient. But if the judge sees himself as the means for preventing disorderly, inefficient and time consuming trials, he will necessarily apply the guidelines in such a manner to exclude evidence which he feels is not sufficiently similar.

27. Each of the sales excluded had characteristics which could be said to distinguish it significantly from defendant's property. In no case did the judge rely exclusively on any single factor. He mentioned size differentiation, zoning dissimilarities, disparity in improvements, a discrepancy between highest and best uses, and generally the distinguishable nature of the neighborhoods in which the properties were located. Prior cases have applied these factors. *See* Sengstock & McAulliffe 196-210; Note, *supra* note 23, at 782-88 (1960).

28. Undoubtedly the Court of Appeals in *Henderson* had the authority to review the lower court's decision and reverse on substantive grounds. 5 NICHOLS § 23.31. Therefore the appellate court's conception of its reviewing function may affect its decision as to the correctness of a trial court's decision. Some appellate courts closely scrutinize the trial judge's admission and exclusion of comparable properties. People *ex rel.* Dept. of Public Works v. Guimarra Vineyards Corp., 245 Cal. App. 2d 342, 53 Cal. Rptr. 902 (1966); Commonwealth v. Hobson, 384 S.W.2d 314 (Ky. 1964). Generally the reviewing court will look at the evidence merely to determine whether there was a reasonable basis in the absence of error, abuse of discretion, or prejudicial misconduct. Los Angeles City High School Dist. v. Swensen, 226 Cal. App. 2d 574, 38 Cal. Rptr. 214 (1964); City of Chicago v. Vaccarro, 408 Ill. 587, 97 N.E.2d 766 (1951); Forest Preserve Dist. v. Kercher, 394 Ill. 11, 66 N.E.2d 873 (1946). In the

Whenever there is a reasonable basis for comparison, the trial judge should not exclude the evidence of the sale. The evidence should be submitted to the jury, the degree of similarity or dissimilarity affecting the weight of the testimony.[29] Some courts have gone so far as to say that only obviously irrelevant data should be excluded by the trial judge.[30] But despite judicial preference for a jury determination of valuation,[31] the judge in *Henderson* pre-empted the jury's determination by excluding all but one of defendant's comparable sales, while admitting nearly all of plaintiff's comparables.

There are two possible grounds on which the trial judge based his decision to exclude defendant's comparables: (1) all but one of defendant's comparables were so dissimilar to the subject property so as to be inadmissible; and (2) the comparables, being commercial in nature, were not relevant. The admission of the single commercial property is inconsistent with either ground.

Defendant's final submission, which was the only one admitted, was a parking lot located three blocks from defendant's property. It was no more similar to the subject property than any of the properties excluded. It was of a different size, zoned differently, and, as was the case with all of the excluded properties, was located within the adjacent central business district.[32] Therefore, the judicial guidelines appear to provide no basis for the decision to admit the one and exclude the others. The only reason for the inclusion appears to be that it was the last property introduced by defendant; perhaps the court had to include this sale or face reversal on the ground that it completely pre-empted the jury by excluding all of defendant's submissions.

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latter case if the grounds are at all reasonable, the reviewing court may, if it desires, affirm without seriously considering the effect of the judge's action on the particular property involved.

The discretion of the trial judge may also be used to admit as well as exclude comparable properties. Whether the issue on appeal is exclusion or admission may determine the appellate court's viewpoint. The appellate court may be more willing to overrule a trial judge's admission of questionable comparisons if it fears the introduction of collateral issues and the resulting waste of time. On the other hand a reviewing court may disapprove the exclusion of evidence if it feels that the jury can render a fair decision only if it has before it a number of comparables to weigh and evaluate.

29. City of Chicago v. Vaccarro, 408 Ill. 587, 97 N.E.2d 766 (1951); Lustin v. State Roads Comm'n, 217 Md. 274, 142 A.2d 566 (1958); Rollins 47.

30. City of Chicago v. Vaccarro, 408 Ill. 587, 97 N.E.2d 766 (1951); Hays v. State, 342 S.W.2d 167 (Tex. Civ. App. 1960).

31. People *ex rel.* Dept. of Public Works v. Donovan, 57 Cal. 2d 346, 369 P.2d 1, 19 Cal. Rptr. 473 (1962).

32. Brief for Appellant (Defendant), CRA v. Henderson, 251 Cal. App. 2d 341, 59 Cal. Rptr. 311 (1967).

And, of course, the admission of one commercially zoned comparable precludes the argument that the other of defendant's offerings were inadmissible because zoned differently than the subject property. By admitting one commercial property the judge impliedly conceded the possibility that commercially zoned property might be properly admitted. The jury was to determine whether, had no public action occured, there was a reasonable probability that the zoning would have changed. It is thus plausible that the judge admitted a commercial property to provide the jury with a basis for a commercial valuation if it decided the zoning would change. The force of that admission, however, was effectively undermined by allowing only one of the defendant's properties for comparison while admitting numerous comparisons from which the jury could choose if it concluded that residential zoning was the appropriate assumption. In effect, therefore, the court forced the jury toward the position that residential zoning was the correct comparison.

In making its rulings, the court placed a great deal of emphasis on the fact that defendant's property was zoned differently than his comparison properties. While some courts exclude sales on the basis of zoning differentiation,[33] most courts hold that such dissimilarity does not render the evidence incompetent.[34] Zoning differences may be totally without significance if there is a reasonable probability that the property will be rezoned.[35] Since the potential use of the property depends upon its zoning classification, and a comparison of uses is relevant to value, the trial judge should have permitted the jury to first determine the probability that defendant's property would have been rezoned commercial, and then ascertain the relevancy of the defendant's sales.[36]

By admitting one commercially zoned comparable, and rejecting the others, the court in *Henderson* raised the general problem of using comparables in urban renewal area property valuations. The strict limitations of the court-developed standards of comparability are likely to result in the exclusion from comparison of the only reasonably comparable properties available.

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33. People v. Dunn, 46 Cal. 2d 639, 297 P.2d 964 (1956); 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 164 (2d ed. 1953).

34. City of Evanston v. Piotrowicz, 20 Ill. 2d 512, 526, 170 N.E.2d 569, 576 (1960).

35. Limerick, *The Effect of Zoning On Valuation In Eminent Doman*, 53 ILL. B.J. 956, 959 (1965).

36. Rollins 47-48, 54.

## II. Is the Comparables Method Valid in Urban Renewal Areas?

Although the market value standard was originally merely a tool in determining just compensation,[37] the courts have come to regard it as conclusive.[38] Some courts have gone so far as to hold clearly incompetent an expert's testimony based upon some concept other than fair market value, such as value for a single use or value to the owner.[39] Underlying the difficulties raised by *Henderson* is the California courts' assumption that just compensation and market value are interchangeable terms.[40]

The market value method employed by the *Henderson* court is based on the assumption that the prices of the comparison properties, as well as defendant's property, were subject to a free and active market which created a market value at the time of the taking.[41] The prices of these other properties were accepted as indicative of the market value. However, a clear distinction must be made between market value and market price.[42] Market price is the actual amount at which properties are being sold. Sales of comparable properties are indicators of the market price of the condemned property. On the other hand, market value is the amount of

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37. United States v. Certain Property, 306 F.2d 439 (2d Cir. 1962); Jacksonville Expressway Auth. v. DuPree Co., 108 So. 2d 289 (Fla. 1958). *See generally* Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 Wis. L. Rev. 3; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967).

38. United States v. Miller, 317 U.S. 369 (1943). This reliance upon what originally was a tool in the determination of just compensation has produced the virtual equation of just compensation and market value. Unted States v. 190.70 Acres of Land, 300 F.2d 52 (7th Cir. 1962). This merging is reflected in the similarity of the definition of the two terms.

California courts define fair market value as the highest price which the property would bring if exposed for sale in the open market with reasonable time allowed to find a purchaser, buying with knowledge of all the uses and purposes to which the property is adapted. Sacramento So. R.R. v. Heilbron, 156 Cal. 408, 104 P. 979 (1909); *accord*, Note, *supra* note 23.

Just compensation has been defined as "what a willing buyer would pay a willing seller at the time of the taking, considering the highest and best use of the property." United States v. Certain Land in Borough of Brooklyn, 346 F.2d 690, 693 (2d Cir. 1965). Other courts use the terms interchangeably. *See, e.g.*, Board of Trustees v. B.J. Service Inc., 75 N.M. 459, 406 P.2d 171 (1965).

39. Temescal Water Co. v. Marvin, 121 Cal. App. 512, 9 P.2d 335 (1932); 1 L. Orgel, *supra* note 33, § 132.

40. People *ex rel.* Dept. of Public Works v. City of Los Angeles, 220 Cal. App. 2d 345, 33 Cal. Rptr. 797 (1963).

41. The California rule admitting comparables is based on the assumption that the market elements are the same for the subject property and the comparable property at the time of the condemnation. County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957).

42. Rollins 47, 52.

money which a willing purchaser would pay to a willing seller, taking into consideration all the uses for which the land was adapted and might reasonably be applied.[43] Therefore, market price may be equated to market value only under free, active and ideal market conditions.

The broad issue raised by *Henderson* is whether adjustment can be made in the comparables approach so that it more accurately reflects the market value of property taken by eminent domain. The Community Redevelopment Agency, by its activities since 1957,[44] had removed all Bunker Hill property from the open market, thereby eliminating the best source of comparables. And even if there had been sales in the area, they would have reflected the effect on values of urban renewal and hence have had little or no relevance in predicting what would have been at the time of taking and absent urban renewal the fair value of defendant's property.

In the absence of recent sales in the immediate area, the courts must look to comparable properties in other areas. Before admitting these other properties, the judge should determine what the character and use of the defendant's property would be if the public agency had not acted, *i.e.*, but for the designation of the Bunker Hill Area as a renewal site, what development of defendant's property could reasonably have been foreseen. Under existing precedent,[45] looking outside of the immediate area for comparables is difficult, if not impossible. *Henderson* illustrates these difficulties.

Perhaps the greatest problem in placing a value on condemned property is the difficulty in finding property sufficiently similar for purposes of comparison. The closer the properties are to areas affected by public activity, the greater the likelihood that the activity will distort the market, thereby negating the validity of a comparison. The more distant the location of the properties from the subject property, the less likely that courts will find sufficient geographical proximity.[46]

The ease with which comparable properties may be found is a function of numerous variables. The critical ones are the size of the city, the size of the renewal area in relation to the size of the city, the location of the renewal area in relation to the heart of the city, and the use of the subject property. If a city is large, the renewal area small and located away from the downtown area, and the property used as a residence, the likelihood of finding comparable properties is high. If a city is small, on the other hand, with a large renewal area which encompasses the central business district of the city, it is virtually impossible to find property sufficiently similar to be

43. 4 NICHOLS § 12.2.
44. Sengstock & McAulliffe 196.
45. 5 NICHOLS § 23.31.
46. Sengstock & McAulliffe 196.

considered comparable. The situation in *Henderson,* it appears, lies somewhere between these two extremes. Los Angles is large, but so too is the renewal area which is located in an area of development critical to the city's growth.

In light of the obvious difficulties with the comparables technique, two adjustments are suggested: (1) the relaxation of the standards for determining sufficient similarity in order to make them more sensitive to the scarcity of appropriate comparables; and (2) the relaxation of the proximity rule so as to permit venturing as far as necessary to find similar property. Despite the inadequacies of the comparables approach, if these two adjustments are made it may be the best technique presently available.

In those situations in which it is found impossible to find comparable sales, alternative methods of valuation must necessarily be used. Since the capitalization of rents and reproduction cost techniques assume that the subject property is in an active market, they are likewise inappropriate.[47] When faced with a non-existent or unascertainable market value, some courts have used the loss to the owner as the standard of just compensation.[48] If indemnification is what the framers of the Constitution had in mind in requiring compensation, it follows that loss to the owner is the standard that should be used in determining value in condemnation.[49]

The loss test has been used infrequently because courts have admitted their inability to find a market value in only a few special situations.[50] The only properties considered to have no market are churches and historical structures. Even in such cases, courts have held that market value represents the maximum which the owner may recover.[51] The holdings of these cases have not been extended. They dealt with a viable real estate market in the community; the problems arise from a lack of willing buyers or sellers for the particular property involved due to the uniqueness of the

47. United States v. Miller, 317 U.S. 369 (1942); United States v. 287.89 Acres of Land, 241 F. Supp. 456 (W.D. Pa. 1965); *In re* City of New York, 197 Misc. 70, 89 N.Y.S.2d 855 (Sup. Ct. 1949); L.G.N. Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S.W.2d 22 (1929).

48. Sengstock & McAuliffe 190.

49. 4 NICHOLS § 12.22(2); *see* People *ex rel.* Dept. of Public Works v. City of Los Angeles, 220 Cal. App. 2d 345, 33 Cal. Rptr. 797 (1963); Anderson, *Consequence of Anticipated Eminent Domain Proceedings—Is Loss of Value a Factor?,* 5 SANTA CLARA LAW. 35 (1964); Sengstock & McAuliffe 190.

50. United States v. 190.71 Acres of Land, 300 F.2d 52 (7th Cir. 1962); Glaves, *Date of Valuation in Eminent Domain: Irreverence For Unconstitutional Practice,* 30 U. CHI. L. REV. 319, 324 (1963).

51. Glaves, *supra* note 50; Note, *Challenging the Condemnor's Right to Condemn: Avoidance of Peripheral Damages,* 1967 WASH. U.L.Q. 436, 439.

building. Though the situation in the *Henderson* case is different, the doctrine could be profitably employed. Here the building is not unique; it is a type normally bought and sold. However, in both cases market value is undeterminable because of the absence of willing buyers and sellers.

If abandoning the market value standard is too radical a proposal, adjustments may be made in the application of that standard which would insure more equitable treatment for property owners. One possible adjustment is to roll back the date of taking to the time when the area was designated as blighted.[52] The property is then valued at the date of the first public act affecting value. Neither loss nor gain attributable to public action is passed on to the land owner. Furthermore, the problem of finding comparables is removed, because sales in or near the urban renewal area just prior to announcement will not have been distorted by public action. The problem with this method is that it does not give the owner credit for appreciation in value that might have occurred (due to inflation, for example) between designation and taking. The time span is often long enough to make the loss (or gain) significant.

Another adjustment is to enlarge the market considered relevant for comparison purposes. A flexible application of the "sufficiently similar" standard will allow a wider search for comparable sales, not limiting it to properties in the same area or of the approximate value of the condemned property. As a basis for extrapolation, sales might be introduced to indicate value prior to the designation of the area as a possible urban renewal site. Either adjustment is in accord with the spirit of the *Miller* rule: "an eminent domain award is to be adjusted so that it reflects neither an enhancement nor a depreciation in value attributable to the improvement for which the property was taken."[53]

*Henderson* illustrates the difficulties of applying the market test in a context in which public activities have seriously impeded the function of the market. *Henderson* compounds the problem by limiting the extent to which comparables can be utilized by the condemnee. Either a more sensitive use of the comparables approach or an alternative to it is called for in such cases.

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52. Note, *supra* note 51, at 436-43. This Note makes it clear that, even if the "time of taking" is the time of designation, the actual viewing and valuation does not occur until the trial, many months or years later.

53. D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 546 (1966). This is a clear statement of the rule established in United States v. Miller, 317 U.S. 369 (1943).