BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Code of Civil Procedure Sections 1235.155, 1263.320 and 1263.321; Evidence Code Sections 823 and 824; and Government Code Section 7267.9, as added or amended by Statutes of 1992, Chapter 7; Filed on August 27, 1997; By the City of San Diego, Claimant.	NO. CSM 97-TC-01 *Nonprofit, Special Use Property Requirements* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on December 17, 1998)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates was adopted on December 17, 1998.

This Decision shall become effective on December 18, 1998.

Paula Higashi
PAULA HIGASHI, Executive Director

MAILED TO: Mg. LST

DATE: 12/18/98

BY: CW

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PROPOSED STATEMENT OF DECISION

This test claim was heard by the Commission on State Mandates (Commission) on October 29, 1998, during a regularly scheduled hearing.

Ms. Debra J. Bevier, Deputy City Attorney, represented and appeared for the City of San Diego; Mr. Donald W. Detisch represented and appeared for St. Mark's Episcopal Church, an interested party; and Mr. Jim Apps and Mr. Pedro Reyes appeared for the Department of Finance. The following persons appeared as witnesses for St. Mark's Episcopal Church: Rich Thomson, Senior Warden of St. Mark's Episcopal Church; and The Reverend M.A. Collins, Rector of St. Mark's Episcopal Church.

At the hearing, evidence both oral and documentary was introduced, the test claim was submitted and the vote was taken.

The law applicable to the Commission's determination of a reimbursable state mandated program is Government Code section 17500 et seq., article XIII B, section 6 of the California Constitution and related case law.

The Commission, by a vote of 7 to 0, unanimously denied this test claim.

BACKGROUND AND FINDINGS OF FACT

Issue: Does the test claim legislation, which determines the valuation of nonprofit, special use property taken by eminent domain, impose a reimbursable state mandated program upon local agencies under article XIII B, section 6 of the California Constitution and section 17514 of the Government Code?

The test claim legislation affected several statutory provisions pertaining to the payment of just compensation when property is taken by eminent domain and the property has no relevant, comparable value. Property with no relevant, comparable value is defined as "nonprofit, special use property" such as a school, church, cemetery, or hospital.[1]

The main statute at issue in this case is Evidence Code section 824, which provides in relevant part the following:

> "(b) Notwithstanding any other provision of this article, a witness providing opinion testimony on the value of nonprofit, special use property, as defined by Section 1235.155 of the Code of Civil Procedure, for which there is no relevant, comparable market, shall base his or her opinion on the value of reproducing the improvements *without taking into consideration any depreciation or obsolescence of the improvements*. . . . "

Thus, if a governmental entity elects to condemn property that is characterized as nonprofit, special use property, the calculation of just compensation shall be based on the value of reproducing the improvements located on the land without taking into consideration any depreciation or obsolescence of the improvements.

In addition, the test claim legislation requires local agencies, prior to commencing action to acquire nonprofit, special use property through eminent domain, to make every reasonable effort to seek alternative property for the project, except as specified. (Gov. Code, § 7267.9.)[2]

In the present case, the claimant sought to condemn church property (St. Mark's Episcopal Church, hereafter St. Mark's) located in an area that had one of the highest crime rates in the

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[1] The test claim legislation defines nonprofit, special use property as "property which is operated for a special, nonprofit, tax-exempt use such as a school, church, cemetery, hospital, or other similar property." It does not include property owned by a public entity. (Code Civ. Proc., § 1235.155.)

[2] The test claim legislation also amended Code of Civil Procedure section 1263.320, subdivision (b), and Evidence Code section 823 by adding the word "comparable." No other substantive changes were made. Code of Civil Procedure section 1263.320, subdivision (b), now provides the following:

> "(b) The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable."

Evidence Code section 823 now provides the following:

> "Notwithstanding any other provision of this article, the value of property for which there is no relevant, comparable market may be determined by any method of valuation that is just and equitable."

City of San Diego for purposes of redevelopment. St. Mark's was located in the center of the multi-block area and was needed by the City for use in the construction of the proposed police station.[3]

At the hearing, Mr. Rich Thomson, Senior Warden for St. Mark's Episcopal Church, and Ms. Debra Bevier, Deputy City Attorney for the City of San Diego, testified that the City of San Diego initiated an eminent domain action against St. Marks. The church property and the improvements on the property were appraised, without consideration of depreciation and obsolescence of the improvements on the land as required by the test claim legislation, at $700,000. If depreciation and obsolescence of the improvements had been taken into account, however, the value of the church property would be $300,000.

Judgment in the eminent domain action has not yet been entered. Instead, the City of San Diego and St. Mark's Episcopal Church have entered into a settlement agreement. In exchange for the church property and improvements thereon, plus St. Mark's support of this test claim filing, the City has agreed to pay, as just compensation, $525,000 to St. Mark's. The balance of the just compensation owed to St. Mark's under the test claim legislation is contingent upon approval of the test claim.

In order for a statute to impose a reimbursable state mandated program, the statutory language must first direct or obligate an activity or task upon local governmental entities. If the statutory language does not direct or obligate local agencies to perform a task, then compliance with the test claim statute is within the discretion of the local entity and a reimbursable state mandated program does not exist. In addition, the required activity or task must be new or create an increased or higher level of service over the former required level of service. To determine if a required activity is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately prior to the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must be state mandated.[4]

The Exercise of the Power of Eminent Domain is Discretionary.

California's eminent domain law, as provided in Code of Civil Procedure section 1230.030, states that:

> "*Nothing in this title requires* that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by *eminent domain is a decision left to the discretion of the person authorized to acquire the property.*" (Emphasis added.)

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[3] Declaration of Michael R. Steffen, Deputy Director of the Real Estate Assets Department of the City of San Diego; Claimant's Response to Draft Staff Analysis, submitted on October 6, 1998.

[4] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *City of Sacramento* v. *State of California* (1990) 50 Cal.3d 51, 66; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835.

Despite the express statutory provisions of California law, the claimant argued that the exercise of eminent domain is "not necessarily a discretionary act" and thus, reimbursement is required under article XIII B, section 6. The claimant contended that:

- while there is some discretion involved in a local agency's decision, that discretion should not prevent a local agency from receiving proper reimbursement for state mandates,
- even if the Commission determines that all condemnation actions are discretionary and not mandated for the public good, the local agency's costs are multiplied, not because of the local agency's decision to condemn, but as a direct result of the test claim legislation, and
- the need to exercise a condemnation action is no different than local law enforcement agencies using their discretion to make an arrest and prosecute. The claimant cites two prior test claims approved by the Commission, namely *Search Warrant: Aids* and *Misdemeanors: Booking and Fingerprinting,* to support its contention that the Commission previously approved acts for reimbursement that were contingent upon the discretionary act of making an arrest.[5]

St. Mark's Episcopal Church (hereafter, St. Mark's) also contended that eminent domain is not always discretionary. St. Mark's stated that "eminent domain is the sole means by which the government can operate its property acquisition program where a land owner refuses to 'grant,' 'lease,' 'gift,' 'devise,' or 'contract' for the transfer of his property to the agency." St. Mark's further contended that the practical and legal constraints tied to eminent domain severely limit any discretion a local agency may enjoy. St. Mark's also stated that the "use of the phrase 'discretion' in section 1230.030 simply clarifies the fact that eminent domain is not the exclusive means by which the government is permitted to acquire private property."

However, based upon the plain and ordinary meaning of the words used by the Legislature in section 1230.030, the Commission found that the statutory provisions clearly spell out that the exercise of eminent domain is a discretionary act and not mandated by the state.[6]

In addition to the plain reading of the statutory provisions governing eminent domain, the Commission recognized court decisions, which have ruled that eminent domain is discretionary.

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[5] The test claim in *Misdemeanors: Booking and Fingerprinting* (CSM – 4436) addressed Penal Code section 853.6 which required law enforcement agencies to provide a person arrested for a misdemeanor with verification of the booking or fingerprinting. The test claim in *Search Warrant: Aids* (CSM - 4392) addressed Penal Code section 1524.1 which required the district attorney to notify crime victims of their right to request a search warrant to test a person charged with a crime for HIV. In both cases, the Commission found a reimbursable state mandated program.

Although the claimant urged the Commission to consider these prior final decisions as precedent, the Commission noted that test claims previously approved by the Commission have no precedential value. (72 Ops.Cal.Atty.Gen. 173, 178, fn.2 (1989), which states: "It is long settled that due process permits substantial deviation by administrative agencies from the principles of stare decisis. [Citation omitted.] An agency may disregard its earlier decision, provided that its action is neither arbitrary or unreasonable. [Citation omitted.]")

[6] Where the meaning of a statute is plain, its language is clear and unambiguous, and there is no uncertainty or doubt of legislative intent, there is *no* need for statutory construction. (See, *City of Merced* v. *State of California* (1984) 153 Cal.App.3d 777, 780; *Marin Hospital Dist.* v. *Rothman* (1983) 139 Cal.App.3d 495, 498-499; and *County of Los Angeles, supra*, 43 Cal.3d at 55.)

Similar to the test claim legislation, the *City of Merced* case[7] involved increased costs incurred by a local agency resulting from the exercise of eminent domain. At issue in *City of Merced* was Code of Civil Procedure section 1263.510, a statute enacted in 1975 that required the compensation for the loss of goodwill in eminent domain proceedings.

City of Merced analyzed California's eminent domain law and found that the power of eminent domain is not state mandated and, thus, the payment for the loss of goodwill is likewise not state mandated. The court stated:

> " . . . the Legislature made clear the discretionary nature of acquisition of property by eminent domain by passage of Code of Civil Procedure section 1230.030. Section 1230.030 was included within Chapter 1275, Statutes of 1975, the same legislation that changed the law of eminent domain to require compensation for business goodwill. . . ."
>
> "We agree that the Legislature intended the payment of goodwill to be discretionary. . . . [W]hether a city or county decides to exercise eminent domain is, essentially, *an option* of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is *not required* to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is *not* a state-mandated cost." (Emphasis added.)[8]

A subsequent court decision, *County of Contra Costa,* affirmed the ruling in *City of Merced* by stating:

> ". . . the decision to proceed in eminent domain is *optional* with the local government. Since the *state does not mandate* that the local agency incur the costs it claims, the agency is not entitled to reimbursement from the state. (Emphasis added.)[9]

Both the claimant and St. Mark's argued that *City of Merced* does not apply in this case. The claimant stated the following:

> "*City of Merced* dealt with a very specific area of eminent domain law regarding the payments for loss of goodwill and the facts and circumstances of that case do not apply to all eminent domain actions. An important difference between *City of Merced* and the test claim legislation is what *City of Merced* did not do. *City of Merced* did not mandate the manner in which the loss of goodwill was to be calculated, and it did not mandate that the value of the affected businesses could not be lowered based on obsolescence or depreciation."

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[7] *City of Merced* v. *State of California, supra,* 153 Cal.App.3d 777.

[8] *Id.* at 783.

[9] *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 79-80.

St. Mark's stated the following:

> "....the *Merced* case is flawed. First, *Merced* relies on the same incorrect interpretation of Code of Civil Procedure section 1230.030 that staff is propounding. That statute simply does not support the sweeping proposition that all exercise of the power of eminent domain is 'discretionary.' Second, *Merced* relied on budget control language to demonstrate 'legislative intent.' Thus, the discussion by the Court of discretionary versus mandatory is not relevant. The legislature had spoken and the Court was merely following its pronouncement.
>
> "Finally, *Merced* relies in part on a statute that has now been repealed. The statute at issue, Revenue and Taxation Code section 2207, was repealed in 1989 based on 'obsolescence.' Thus, the repeal of this section further erodes the precedential value of the decision. If anything, the repeal of this statute instead strengthens the City of San Diego's claim. Since Revenue and Taxation Code section 2207 was repealed for 'obsolescence,' it stands to reason that the legislature believed that its provisions were subsumed within other provisions of the present statutory reimbursement framework. Since the present case would have been reimbursable under the express law existing at the time of the *City of Merced* decision, this case only stands for the proposition that the City of San Diego's claim should be approved."

The Commission disagreed with the above contentions. Although the issue in *City of Merced* was the payment of goodwill, the Commission found that the court looked at the law of eminent domain, including section 1230.030, which describes the power of eminent domain as discretionary, to support its conclusion.

The Commission noted that the State in the *City of Merced* case supported its argument to deny reimbursement for the payment of loss of goodwill in eminent domain cases, *in part*, on budget control language, which rejected payment of such claims. However, the State also contended that the "*more significant*" reason to deny reimbursement was the plain and ordinary language of section 1230.030, which describes the power of eminent domain as discretionary. Thus, the Commission found that the court recognized section 1230.030 and relied on *both* the plain and ordinary language in section 1230.030 and the Legislature's pronouncement in the budget, when it concluded that eminent domain was optional and not mandated by the State.

Further, the Commission found that St.Mark's reliance on *former* Revenue and Taxation Code section 2207 to support its contention that reimbursement is required under section 6 was misplaced. Former section 2207, defining "costs mandated by the state", was enacted as part of Senate Bill 90 and became effective on July 1, 1981, one year *after* the City of Merced incurred costs for the payment of goodwill through its eminent domain action. Subdivision (h) of former section 2207 extended state liability by requiring reimbursement for increased costs incurred by a local agency due to a statute that added new requirements to an existing *optional* program, if the local agency had no reasonable alternative other than to continue the optional program.

The court in *City of Merced* noted that local agencies, including the City of Merced, would not receive the benefit of section 2207 until it became effective in 1981. The court stated that "until [SB 90] was enacted, increased costs incurred in an *optional program such as eminent domain* were not state-mandated."

Former Revenue and Taxation Code section 2207 was expressly repealed by the Legislature in 1989.[10] The Commission found that there is no evidence to support St. Mark's proposition that the provisions of former section 2207 "were subsumed within other provisions of the present statutory reimbursement framework." Rather, the Commission recognized that when the Legislature expressly repeals an existing statute and enacts a new statute on the same subject that contains a material change, it is presumed that the Legislature intended to change the law.[11]

Today, Government Code section 17514 defines "costs mandated by the state" as any increased costs which a local agency is required to incur as a result of a statute that mandates a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.[12] The Commission noted that under Government Code section 17514, reimbursement is *not* required for increased costs incurred in an optional program.

In addition, Government Code section 17552 provides that "[t]his chapter [beginning with Government Code section 17500] shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." The Commission noted that section 17552 does not include any references to the former reimbursement scheme under the Revenue and Taxation Code.

Thus, the Commission found that if the Legislature intended to require state reimbursement for increased costs in optional programs, it would have kept the language of Revenue and Taxation Code 2207, subdivision (h).

Furthermore, the Commission found that the repeal of section 2207 does not erode the precedential effect of the *City of Merced* case. As noted above, the court in *City of Merced* also

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[10] Stats. 1989, c. 589.

[11] *Union League Club* v. *Johnson* (1941) 18 Cal.2d 275; *Clements* v. *T.R. Bechtel Co.* (1954) 43 Cal.2d 227.

[12] Government Code section 17514 was enacted by the Legislature in 1984. (Stats. 1984, c. 1459.) From 1984 until former Revenue and Taxation Code section 2207 was repealed in 1989, both statutes, which defined "costs mandated by the state" differently, were in effect. However, when the Legislature enacted Government Code section 17514, it also enacted Government Code section 17552, which, at that time, provided the following guidance to the Commission:

> "This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by section 6 of Article XIII B of the California Constitution ***or*** for costs mandated by the state, as defined in Section 2207 or 2207.5 of the Revenue and Taxation Code, pursuant to a statute enacted, or an executive order implementing a statute enacted, *before* January 1, 1975."

In 1986, the legislature amended Government Code section 17552 (Stats. 1986, c. 1459) by deleting all references to Revenue and Taxation Code section 2207 and 2207.5.

relied on Code of Civil Procedure section 1230.030, which defines eminent domain as discretionary. That section still exists.

Additionally, the court's recognition in *City of Merced* that the claimant was not entitled to state reimbursement for increased costs incurred in an optional program such as eminent domain still applies. The City of Merced experienced increased costs at a time when the statutory scheme did not require reimbursement for optional programs. Similarly, the present statutory scheme does not require reimbursement for optional programs.

Therefore, the Commission found that Code of Civil Procedure section 1230.030 and the court's decision in *City of Merced* are relevant to this test claim and supported the conclusion that acquiring nonprofit, special use property through eminent domain is optional and not mandated by the state.

Moreover, the Commission noted recent court decisions which explain that when a local agency performs a permissive act, or has alternatives other than performing the action under the test claim statute, the "downstream" or consequential activities, although statutorily required, are *not* state mandated. For example, in *Lucia Mar,* the California Supreme Court found that a newly enacted ten percent payment by a school district was a "new program" when the district sent its disabled pupils to a state school for the severely handicapped. While the ten percent payment was required by the Education Code, the court, however, did *not* find that sum was state mandated and, therefore, reimbursable. The court recognized that school districts may have several options for furnishing special education to its disabled pupils, only one of which is sending them to a state school. Thus, the court remanded to the Commission the question of whether the ten percent payment was state mandated.[13]

Similarly, the Commission found that local agencies have several options in acquiring property that contains nonprofit, special use property, only one of which is taking the property by eminent domain. Although the City of San Diego in the present case felt that it was necessary to redevelop the area in question, it had the option of allowing the church to remain and build the proposed police station in another location within the area. Thus, once the City of San Diego, or any other local agency elects to acquire property that contains nonprofit, special use property, the downstream activities, including the statutory requirement to seek alternative property before negotiating with the owner and the payment of just compensation for the property taken, are *not* state mandated.

Based on the foregoing authorities, the Commission found that the taking of nonprofit, special use property through eminent domain is optional, and not state mandated. Therefore, the Commission found that the additional costs incurred by a local agency resulting from the non-deductibility of depreciation for nonprofit, special use property, and the investigation into alternative property, are likewise not state mandated.

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[13] *Lucia Mar Unified School Dist.* v. *Honig, supra,* 44 Cal.3d at 836-837; *County of Los Angeles* v. *Commission on State Mandates* (1995) 32 Cal.App.4th 805, 818.

Evidence of Additional Costs Alone Without a Corresponding Increase in the Level of Service Performed by Local Agency Does Not Result in Reimbursement.

The claimant's primary contention was that the statutes in question caused local agencies to incur increased costs because a depreciation deduction is disallowed when appraising nonprofit, special use property. However, the Commission noted the California Supreme Court's ruling that evidence of additional costs alone does not automatically equate to a reimbursable state mandated program under section 6, article XIII B.[14] Rather, it is paramount that the additional costs result from new programs or increased levels of service mandated by the state.

In the situation at hand, the power to exercise eminent domain is a long-standing discretionary governmental right. The test claim legislation did not mandate any higher level of service upon local agencies. Although the claimant can show additional costs corresponding to the non-deductibility of depreciation and the requirement to seek alternative property, the Commission found that there is no new service or activity that must be provided by the local agency upon the exercise of eminent domain.

Payment of "Just Compensation" in Eminent Domain is Mandated by the U.S. Constitution.

The Commission further found that the appraisal method specified in the test claim legislation is federally mandated by the U.S. Constitution.[15] The Fifth Amendment to the federal Constitution mandates that private property must not be taken for public use without "just compensation." The general measure of just compensation is "fair market value": i.e., the highest price that would be agreed to by a seller willing to sell, and a buyer who is ready, willing and able to buy, each dealing with the other under circumstances totally free from external pressures.[16]

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[14] *County of Los Angeles* v. *State of California, supra,* 43 Cal.3d 46, 56.

[15] Government Code section 17556 provides in pertinent part the following:

> "The commission shall *not* find costs mandated by the state, as defined by Section 17514....if the commission finds that:
>
> "....."
>
> "(b) The statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts."
>
> "(c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation."

[16] California has codified these principles in Code Civil Procedure sections 1263.310 and 1263.320, subdivision (a). Historically, the courts have appraised fair market value in one of three ways: (1) the market data approach which values property by comparing recent sales of comparable properties (2) the income approach which recognizes the reasonable rental value of the land and its existing improvements and (3) the reproduction or replacement approach which takes into account the value of the land plus the cost of replacing or reproducing existing improvements, less depreciation or obsolescence of the improvements. (*United States* v. *Toronto, Hamilton and Buffalo Nav. Co.* (1949) 338 U.S. 396, 402-403; *United States* v. *100 Acres of Land in Marin County* (9th Cir. 1972) 468 F.2d 1261, 1265; and *Redevelopment Agency* v. *First Christian Church* (1983) 140

However, the U.S. Supreme Court recognized that fair market value, as the measure of just compensation is not an absolute standard or an exclusive method of valuation. An exception arises when the fair market value is not ascertainable. Such cases, for the most part, involve properties that are seldom, if ever, sold in the open market.[17] When a type of property is so infrequently traded, it is difficult to predict whether the prices previously paid would be repeated in a sale of the condemned property.[18] Thus, under the constitutional requirement of just compensation, basic equitable principles of fairness dictate that other valuation methods be employed to determine an appropriate condemnation sum.

When addressing condemned properties that are seldom traded on the open commercial market and are operated for nonprofit, the federal courts apply the "substitute facilities" doctrine or formula to insure that sufficient payment is owed to the condemnee to finance a replacement of the condemned facility.[19]

In *United States* v. *Board of Education,*[20] the federal court applied the "substitute facilities" doctrine to school premises taken by eminent domain in connection with a flood control project. Although the court noted that the school premises had no market value, the court stated that:

> "[a]ny reasonable [person] would say that where the government takes a part of the property necessary to the proper operation of a school, the government should make it possible for the school to acquire other property to use in *substitution* for the property taken.[21]

The court went on to reference a passage from a U.S. Supreme Court decision where a town's property was taken for reservoir purposes: "If three-quarters of it is to be destroyed by [eminent domain] both those ousted and those in the remaining quarter, as well as the state . . . are injured. A method of compensation by *substitution* would seem to be the best means of making the parties whole."[22]

Moreover, *United States* v. *Board of Education* says that:

> ". . . we are not here dealing with a rigid, blind measure, that grants compensation only on a pound of flesh basis, but rather with an equitable concept of justice and fairness that accords with the *Fifth Amendment's mandate.* Accordingly, the equivalence requirement which must be met

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Cal.App.3d 690, 705. In 1965, California codified these three approaches in Evidence Code sections 816, 819, and 820.)

[17] *United States* v. *50 Acres of Land* (1984) 469 U.S. 24, 30.

[18] *United States v. 564.54 Acres of Land in Monroe and Pike Counties, Pennsylvania* (1979) 441 U.S. 506, 513.

[19] *State of Washington* v. *United States* (9th Cir. 1954) 214 F.2d 33; *State of California* v. *United States* (9th Cir. 1968) 395 F.2d 261; *United States* v. *Los Angeles County* (9th Cir. 1947) 163 F.2d 124.

[20] *United States* v. *Board of Education* (4th Cir. 1958) 253 F.2d 760.

[21] *Id.* at 763.

[22] *Id.*

with respect to the *substitute facility* is more that of utility than of mere dollar and cents value. [Citations omitted.][23],[24] "(Emphasis added.)

In the instant matter, the Commission found that the test claim legislation resembles the federal "substitute facilities" doctrine. Under new Evidence Code section 824, a just and equitable method of determining the value of nonprofit, special use property, for which there is no relevant, comparable market, is the cost of purchasing land and the reasonable cost of making it suitable *for the conduct of the same* nonprofit, special use, together with the cost of *constructing similar* improvements. The value of reproducing the substitute facility will not take into consideration any depreciation or obsolescence of the condemned property.

The Commission recognized that the exclusion of depreciation or obsolescence from the eminent domain valuation is designed to avoid short changing the condemned owner from establishing the same facility in a new location.

Of particular significance is the court decision in *First Christian Church,* which analyzed the taking of church property. The local agency offered $1.5 million, but the church demanded over $3 million. The major issue in the case was the value of the church building itself. By introducing evidence of other sales of church property, the local agency attempted to prove that the church building had no value. The appellate court affirmed the trial court's ruling to reject the introduction of evidence that the price offered was comparable to other sales and agreed with the replacement and reproduction approach under Evidence Code section 820. Even though section 820 takes permits the deduction of depreciation, the appellate court cautioned that public agencies should not use depreciation or obsolescence as a "back door" method to nullify the value of the church.

> "It is apparent that . . . [under the appraisal methods], depreciation and obsolescence become the major focal point of controversy. We hasten to point out, however, that in our view depreciation and obsolescence should *not* be used as a *'back door' method of nullifying* the reproduction and replacement approach to valuation. For example, a large ornate

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[23] *Id.* at 764.

[24] The claimant contended that the above analysis leads the reader to believe that the "substitute facilities" doctrine is used in all cases. That is not the case. The only cases which used the "substitute facilities" doctrine was *United States* v. *Board of Education* and the three cases cited in footnote 19.

Moreover, the cases referenced by the claimant were not cited in support of the "substitute facilities" doctrine. Rather, *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.* (see fn. 16) is cited for the court's description of the historical approach used by the courts in appraising the fair market value of property.

United States v. *50 Acres of Land* (see fn. 17) is cited for the court's recognition that fair market value as a measure of just compensation is not an absolute or exclusive method. In addition, the court in that case did not use the substitute facilities doctrine because the court determined that there *was* a market for the property taken. Here, the test claim legislation deals with nonprofit, special use property—property for which there is *no* relevant, comparable market.

United States v. *564.54 Acres of Land* (see fn. 18) is cited for the court's recognition that property infrequently traded is difficult to value. The court analyzed the substitute facilities doctrine, but did not apply it based on its finding that there *was* a market for the property taken.

> church, as here, because it is used by only a small congregation might be viewed by some as obsolete and having no value beyond that of the land itself. The church, however, does have value to the congregation and the congregation is entitled to compensation therefor. A property owner should not be penalized by application of a concept of locational or functional obsolescence simply because it happens to be in the wrong place at the wrong time when a condemning agency decides to make its move." (Emphasis added.)[25]

In response to the foregoing analysis, both the claimant and St. Mark's contended that the test claim legislation goes beyond the requirement imposed by the federal Constitution to pay "just compensation" and is thus state mandated. The Commission disagreed.

As indicated above, the "just compensation" clause of the U. S. Constitution is based on principles of justice and fairness. Evidence Code section 823, which was amended by the test claim legislation, expressly recognizes these constitutional principles and provides that "the value of property for which there is no relevant, comparable market may be determined by any method of valuation that is *just* and *equitable*."

Furthermore, the U.S. Supreme Court has described the guiding purpose of the "just compensation" clause as follows:

> "The guiding principle of just compensation is reimbursement to the owner for the property interest taken. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made *whole* but is not entitled to more."[26]

The Commission recognized that in the present case, legislative history of the test claim legislation indicates that the purpose of deleting evidence of depreciation or obsolescence of the improvements on the property is to make owners of nonprofit, special use property whole by allowing them to rebuild elsewhere.

> "...."the [replacement and reproduction approach] appeared to work in First Christian because the court identified the property as property without a relevant market for comparison purposes and instructed the jury as to alternative forms of valuation. The result was a jury award that approximated 84% of the defendant's demand. Why it does not work, assert the proponents, is that the law fails to adequately compensate the owner of special use property. *Even under the cost-analysis (or reproduction costs less depreciation) formula used in First Christian, the compensation is said to be inadequate because it does not enable the owner to rebuild elsewhere. States the sponsor: "You cannot build 'old".*"[27]

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[25] *Redevelopment Agency* v. *First Christian Church, supra,* 140 Cal.App.3d at p. 698.

[26] *State of California* v. *United States, supra,* 395 F.2d at 265, quoting from the U.S. Supreme Court's decision in *United States* v. *Virginia Electric & Power Co.* (1961) 365 U.S. 624.

[27] Report by the Senate Committee on Judiciary for SB 821, dated April 23, 1991.

Thus, the test claim legislation attempts to prevent the deduction for depreciation or obsolescence as a technique of nullifying the just value of the nonprofit, special use property and, at the same time, allows owners to rebuild substitute facilities.

Accordingly, the Commission found that additional costs corresponding to the non-deductibility of depreciation or obsolescence under the test claim legislation falls within the Fifth Amendment's mandate of awarding just compensation to owners of nonprofit, special use property fashioned by the federal courts, and is not state mandated.[28, 29]

The Commission Has the Sole and Exclusive Authority to Determine Whether a Mandate Exists

Both the claimant and St. Mark's Episcopal Church cited the following language in the test claim legislation for the proposition that the legislature intended the test claim legislation to impose reimbursable state mandated costs:

> "SEC 9. . . . *if* the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code." (Emphasis added.)

However, the Commission found that this legislative statement is *not* determinative or controlling of the ultimate issue as to whether the test claim legislation constitutes a reimbursable state mandated program under article XIII B, section 6. Rather, the Commission has the sole and exclusive authority for deciding this issue under article XIII B, section 6 of the California Constitution and section 17514 of the Government Code.[30] Moreover, the Commission noted that the Legislature recognized these principles with its use of the phrase "*if* the Commission on State Mandates determines..." in the express language of the statute.

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[28] Also, the Commission noted that it is prevented by the California Constitution from declaring the appraisal formula under the test claim legislation unconstitutional. Article 3, section 3.5, of the state Constitution provides that "an administrative agency . . . has no power to declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional." Therefore, until an appellate court rules that the test claim legislation is wrong or unconstitutional, the Commission is required to deem the test claim formula correct and in compliance with the "just compensation" clause of the federal Constitution.

[29] For the reasons stated above, the Commission found that St. Mark's reliance on *Long Beach Unified School District* v. *State of California* (1990) 225 Cal.App.3d 155 was misplaced. *Long Beach* addressed an executive order requiring school districts to take specific steps in alleviating racial and ethnic segregation. The court recognized that school districts have a constitutional obligation to alleviate racial segregation. However, the court held that the specific requirements mandated by the executive order went beyond constitutional and case law requirements. In the present case, however, the Commission found that the test claim legislation does not go beyond the just compensation clause of the Fifth Amendment and is, thus, distinguishable from *Long Beach*.

[30] *City of San Jose* v. *State of California* (1996) 45 Cal.App.4th 1802, 1817-1818; *Kinlaw* v. *State of California* (1991) 54 Cal.3d 326, 333; and Government Code section 17552 which states that "[t]his chapter [Chapter 4 entitled "Identification and Payment of Costs Mandated by the State] shall be the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution."

CONCLUSION

Based on the foregoing, the Commission concluded that the test claim legislation does not impose a reimbursable state mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514 because:

- the exercise of the power of eminent domain is discretionary and not state mandated,
- once a local agency elects to acquire property that contains nonprofit, special use property, the downstream activities, including the statutory requirement to seek alternative property before negotiating with the owner and the payment of just compensation for the property taken, are *not* state mandated,
- evidence of additional costs alone without a corresponding increase in the level of service performed by a local agency does not result in reimbursement, and
- payment of "just compensation" under eminent domain is mandated by the U.S. Constitution.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment and business address is 1300 I Street, Suite 950, Sacramento, California 95814.

On December 18, 1998, I served the attached adopted *Statement of Decision* for test claim **CSM-97-TC-01 - *Nonprofit, Special Use Property Requirements*** of the Commission on State Mandates by placing a true copy thereof in an envelope addressed to each of the persons listed on the **attached mailing list,** and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 18, 1998, at Sacramento, California.

CHRISTINE A. WEIN

Commission on State Mandates

Mailing List

18-Dec-98

CSM/SB# and Claim Title 97-TC-01 {97-238-01} Claim of the City of San Diego
Government Code Sec. SB 821 wherein Code of Civil Proc. sections 1235.155 & 1263.321
Chapters Evidence Code section 824 was added and section 823 was amende **Originated:** 09-Sep-97
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Issue Nonprofit, Special Use Property Requirements

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