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THE INTERPRETATIONS that judicial bodies have placed on eminent domain provisions of the federal and state constitutions have caused much controversy and concern over the years, particularly concerning the insuring of fair and equitable applications of the "just compensation" limitations.

The fifth amendment to the Constitution of the United States contains the clause: ". . . nor shall private property be taken for public use, without just compensation." The fourteenth amendment to the Constitution incorporates this requirement of "just compensation" into the "due process" with which all state actions must comply.[1]

Similarly Ohio's Constitution states:

> Private property shall ever be held inviolate, but subservient to the public welfare . . . where private property shall be taken for public use, a compensation therefore shall first be made in money or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for any benefits to any property of the owner.[2]

Now as never before, with both national and state governments appropriating greater quality and quantity of land for public use for limited access highways, urban renewal projects, airports, parks, and flood control districts,[3] the courts are charged with the duty of protecting the constitutional rights of the affected property owners.

This article is devoted to analyzing the interpretations and applications that Ohio courts have given to the mandate of "just compensation." Particular emphasis will be given to the date of valuation of this "just compensation," and the relevance of a change in market value of the property to be taken due to activity or delay of the appropriating authority in the area of the taking prior to the date of taking.

The universally accepted measure of "just compensation" for property taken by an approriating authority for public use is the fair market value of that property.[4] The fair market value of property is the price at which a willing seller and willing buyer will trade, where both are aware of all the beneficial uses to which the property can be put, and neither is under any compulsion to act.[5] In the case of a total take (con-

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1 Chicago B.&O. R.R. v. Chicago, 166 U.S. 226, 236 (1897); Malloy v. Hogan, 378 U.S. 1, 4 (1964).

2 OHIO CONST. art I, § 19.

3 Glaves, *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice,* 30 U. CHI. L. REV. 319 (1963).

4 4 NICHOLS, LAW OF EMINENT DOMAIN, § 12.1, 9-17 (rev. 3rd ed. 1962).

5 BLACKS LAW DICTIONARY 716 (4th ed. 1951); SEMENOW, QUESTIONS AND ANSWERS ON REAL ESTATE 393 (5th ed. 1964); 4 NICHOLS *supra* n. 4 § 12.2 (1), 48-54.

demnation of the entire property of an owner), the property owner is entitled to the fair market value of his entire property. Where only a partial take is required for the public improvement (a taking of less than all of the property, or less than a fee simple taking of the property) the property owner is entitled to the difference between the fair market value of the land before the taking, and the fair market value of his remaining property after the taking, without deduction for any benefits from the improvement.[6]

In the market place the fair market value of property is determined at a given time by the interaction of the demand for property of that nature, and the supply of such property. The demand of property is determined by a number of factors, including but not limited to location, community development, zoning, income producing ability, physical characteristics, and anticipated future trends in surrounding developments.[7] These factors are dependent on time, and can vary considerably over a few years, therefore, the importance of an appropriate selection of date of valuation can be seen.[8] Great problems and injustices can arise when properties in certain areas are *designated* for condemnation, but not physically *taken* nor valued by the appropriating agency until after extensive delays. Where the evaluation does not occur within a reasonable time from the designation, and the property values have decreased in the interim *because of this designation,* who should bear the loss? If property values increase due to this designation, to whom should the benefits accrue?

Increased Property Values

"The rule of law is well established, in Ohio and elsewhere, that the fair market value of property appropriated, which property is a part of a program of improvement by a public body, can not be enhanced by the value of such improvement to it."[9] The Supreme Court of Ohio stated in *Nichols v. City of Cleveland*:

> Where one entire plan has been adopted for a public improvement and from the inception a certain tract of land has been actually included therein, the owner of such tract in a condemnation proceeding therefor is not entitled to an increased value which may result from the improvement, where its appropriation is a condition precedent to the existence of the improvement.[10]

The Sixth Circuit Court of Ohio, in *Gibson et al v. City of Norwalk,* said:

> In determining the market value of the various tracts of land sought to be appropriated, the jury is precluded from considering their enhanced value, if any they may have, on account of the contemplated improvement in the water-works by the city.[11]

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[6] OHIO REV. CODE § 163.14 (1966); OHIO CONST. art. I, § 19.

[7] AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE, 1, 2 (4th ed. 1964); SEMENOW, *supra* note 5, at 395.

[8] Glaves, *supra* note 3, at 327, 328.

[9] City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E. 2d 52 (1963).

[10] 104 Ohio St. 19, 135 N.E. 291 (1922).

[11] 13 Ohio C.C.R. 6 (1896).

In Ohio it is well established that the jury must assess the "just compensation" due the property owner, without regard to any enhancement in value to his property caused by the designation of the public improvement. The increased value resulting from the public improvement must be extracted from the market value determination at whatever point in time the property is valued.

Decreased Property Values

Since the property owner is not entitled to any increased value which may result from a proposed improvement, it seems only just that he should not be penalized for any detrimental effects to the value caused by an improvement. A valuation date should be selected which would preclude adverse effects acting upon property value due to acts or delays of the appropriating body prior to the taking. The problem arises because the "rule of law probably the most solidly entrenched in eminent domain evaluation (save the fair market value rule), is that damages to the land owner are to be assessed as of the date of taking (or 'date of take' as it is called in Ohio). This rule arose from the necessity to freeze fluctuating market values at a definite date. The rule is plagued, however, by that age old legal paradox that hard and fast standards can be both necessary and futile." [12]

The date of take is variously designated among different jurisdictions. In the federal courts it is the date at which a "Declaration of Taking" is filed with the court.[13] In various state jurisdictions, it can be the date the petition for condemnation is filed, the date of issuance of summons, the time of trial, the date of deposit of assessed damages, or the time of final decree of condemnation.[14] In all jurisdictions it is no later than the date of actual possession by the condemnor.[15]

In Ohio the date of take is the earlier of either the date of trial, or date of actual possession.[16] This inflexible "date of valuation equals date of take" rule can lead to unjust results. The following situations clearly illustrate this possibility:

> 1. Property owner is prohibited from making necessary improvements to a structure on his property, because it is in an area designated for an improvement. Because of this prohibition, his property becomes a hazard to the community necessitating removal of the structure before the physical *taking* by the appropriating authority. In such a situation the owner loses the value of the structure, for only the fair market value of his barren property is determined.

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[12] Duffy, *Depreciation Damages in Eminent Domain Proceedings*, 18 CLEV.-MAR. L. REV. 106, 108 (1969).

[13] 40 U.S.C.A. § 258(a), n. 129.

[14] Glaves, *supra* n. 3 at 326.

[15] *Id.*

[16] Stribley v. City of Cincinnati, 6 Ohio C.C.R. 54 (1st Ohio Cir. Ct. 1894); Ornstein v. Chesapeake & Ohio Ry., 26 Ohio L. Abs. 78, 36 N.E. 2d 521 (Ohio Ct. App. 1937); City of Cleveland v. Kacmarik, 17 Ohio Op. 2d 135, 177 N.E. 2d 811 (C.P., Cuyahoga County 1961); Henle v. City of Euclid, 97 Ohio App. 258, 118 N.E. 2d 682 (1954); Long v. Director of Highways, 15 Ohio App. 2d 226, 240 N.E. 2d 569 (1968).

2. Because of haphazard purchasing and demolition procedures employed by the appropriating agency, the neighborhood surrounding an owner's property degenerates, greatly devaluing the property before *his* taking occurs.

The first situation usually results from a local *municipality* refusing to issue building repair permits or to approve zoning change applications for properties located within an area designated for a *county* or *state* highway improvement, in an attempt to keep eventual acquisition costs down. Without a permit the property owner can not add to or improve his property after an intention for the improvement is made known.[17] The property will generally fall into such a condition as to render it uninhabitable, and the local municipality duly exercising its police power to abate nuisances, can have the building razed.[18] Because the municipality is not the appropriating body (the county or state that will eventually acquire title to the property), the demolition orders cannot be considered a *taking by the appropriating authority*.[19] The property owner would then bear the loss to the value of the structure including the demolition costs, as was the case in *Director of Highways v. Olrich*.[20] The facts are briefly as follows: In June of 1960 the property owner, pursuant to instructions from the city to make repairs on his premises, made application for a building repair permit. The application was refused on the grounds that the property was to be taken for a state highway. In October, 1960, the city's Urban Renewal Director certified the property for abatement with full knowledge that it was to be taken for the highway, on the grounds that it was inadequate, unsafe, and unhealthful. In 1963, the Ohio Department of Highways took possession of the property but the trial was not held until later.

The trial court, in an attempt to prevent an injustice, set the date of take as October, 1960 (the date that the property was condemned or certified for abatement). The Ohio Supreme Court reversed this decision, reaffirming the date of trial or actual possession standards of valuation, and set the date of take in 1963 the time of actual possession stating: "A valid order directing that a property be vacated as unfit for human habitation is not a taking for public use, requiring eminent domain proceedings or amounting to a taking for the purpose of establishing a date of valuation in a pending eminent domain proceeding."[21] The court justified this ruling on the basis of causation, contending that the appropriating body (the Highway Department) was not the cause of the certification for abatement. The Court stated that the abatement order was not grounded on the highway taking, but was a valid exercise of police power which was not formally appealed from at the time. The Court further stated that whether or not a building permit can be denied

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[17] OHIO REV. CODE § 715.26(a) (1965).

[18] *Id.* at (b); OHIO REV. CODE § 3707.01 (1953).

[19] Director of Highways v. Olrich, 5 Ohio St. 2d 70, 213 N.E. 2d 823 (1966).

[20] *Id.*

[21] *Id.*

because a property lies within the path of a proposed highway was not in issue, because appellee Olrich had failed to make this formal appeal.[22]

Only in those cases where the *same* agency that eventually does the appropriating issues the certification of abatement or refuses the zoning change would the courts relent.[23] In *City of Cleveland v. Kacmarik,* the Common Pleas Court of Cuyahoga County let the property owner offer evidence of the property value just before the razing by the City where the City *itself* appropriated the property for urban renewal.[24]

The refusal to approve zoning change applications, because of a proposed public project, can also lead to a deprivation of property rights. The owner is prevented from realizing the benefits from the highest and best use of his land—an inherent right of property ownership. Zoning change applications however, were also denied by municipalities when the property was in a designated area, on the basis that to allow rezoning and private improvements on such properties would be a burden on the appropriating authority, because of the eventual increased market value of the improved properties. Only if a zoning board denied such applications in areas that were not *formally* designated for improvement, would the courts protect the inherent property rights.[25]

The Legislature of Ohio has found a partial solution to some of the injustices involved by enacting Section 5511.01 of the Ohio Revised Code, effective 11-14-67. This section provides that upon the submission of an application for zoning change, permit for land use, alteration or erection of a structure, or moving of structure, effecting any land within 300 feet of the centerline of a proposed highway, or within 500 feet from the point of intersection of said centerline with any public road, the authority authorized to approve these submissions must notify the Director of Highways by registered mail at once. Within 120 days from this action, the Director shall either proceed to acquire any land needed from the submitter, or find that an acquisition at such time is not in the public interest. If the latter occurs, the authority having power to issue such permits shall proceed to do so. Improvements allowed will be compensated for in any later acquisition of the subject property by the Highway Department. These provisions solve some of the problems in highway takings by providing that there will be no more than a 120 day delay.

The second situation discussed previously has not and probably can not be easily remedied. The problem stems from the difficulty in organizing effective programs of large scale acquisitions and demolition of private property for public use. The overall public welfare must be weighed against individual property rights, and a balance struck to reach the fairest and most equitable result. As soon as a highly ur-

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[22] *Id.* at 73, 213 N.E. 2d at 825.

[23] City of Cleveland v. Kacmarik, 17 Ohio Op. 2d 135, 177 N.E. 2d 811 (C.P., Cuyahoga County 1961).

[24] *Id.* at 138, 177 N.E. 2d at 814.

[25] Henle v. City of Euclid, 97 Ohio App. 258, 118 N.E. 2d 682 (1954).

banized area is slated for taking for a public improvement (usually for urban renewal or highway purposes), it becomes subject to "planning blight" [26] and property values start falling. This designation has essentially had the effect of taking the affected properties out of the normal market. Delays in acquisition can result in these properties being greatly devalued by the date of take. As one court stated the problem:

> Beyond any doubt it is possible for much injustice to creep into the proceedings particularly when there is a wholesale taking of property in a given area. The very size of the problem of taking many parcels places a heavy burden on the condemnor, the property owners, and the courts. Each separate parcel must be appraised, its owners called in to confer about settlement, and in the absence of agreement, its value must be determined by a jury. As houses begin to come down, tenants in nearby homes move out, the neighborhood deteriorates or is deserted, vandalism often sets, in appearances and values depreciate with the result that frequently the property owner is greatly handicapped in presenting his case to the jury by the time his land gets into court.[27]

Even when the exact areas of take of the urban properties are known, it is very difficult to achieve safe, expedient methods of acquisition and clearing. The areas slated for urban renewal are often the higher crime rate ghetto areas. During the renewal operations essential services such as rubbish removal, and police protection must not only be maintained, but increased to insure the protection of property rights as well as the well-being of the residents of the affected area.

The problem is further aggravated in the case of highway construction. The centerline of the proposed highway must first be established.[28] Several potential corridor locations of the proposed highway are presented by the Director of Highways or his representative at public hearings, and any and all proponents and opponents of the various routes are given a chance to present their views. The Director of Highways then takes all these factors into consideration, and makes a determination as to the location of the proposed highway's centerline. The centerline is thus established and recorded in the Highway Director's Journal.[29] Parcels of land within a certain distance of this centerline will be needed in their entirety, and acquisition of these may begin at once. Properties on the fringes, however, may or may not be needed in part or in total. Final plans determining the exact location of access roads, grade elimination, drainage facilities, utility relocations etc., must be prepared. The approval of these plans by all the agencies that may be involved—the Federal Bureau of Public Roads, the State, the County, and any local municipalities through which the proposed

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[26] Glaves, *supra* note 3 at 327, 328.

[27] City of Cleveland v. Kacmarik, 17 Ohio Op. 2d 135, 137, 177 N.E. 2d 811, 813 (C.P., Cuyahoga County 1961).

[28] 23 U.S.C. § 128 (as amended 1968); OHIO REV. CODE § 5511.01 (1967).

[29] U.S. DEPT. OF TRANSPORTATION POLICY AND PROCEDURE MEMORANDUM 20-8, Transmittal 147 (outlining public hearing procedures for federally funded highway projects) (1969); OHIO REV. CODE § 5511.01 (1967).

highway passes must be obtained.[30] Until all these actions are complete, the areas (if any) of the fringe properties that will be needed remains undetermined.

Waiting until the complete plans are prepared and approved (often a period of three or four years), before starting acquisition of the properties in the definite take areas, would be too costly and inefficient to the appropriating authority. Once the centerline of the new highway is determined, the property owners likewise desire quick action. If one knows his property is to be taken, he normally would not make improvements, or take as much time or expense in maintaining his property. He would like to relocate as soon as possible, especially in times of rapid increases in mortgage rates and property values. Therefore "advance acquisition" is practiced, where properties within the definite take areas are appraised, acquired, and cleared. However properties in the fringe areas, just across the street perhaps, are not acted upon until final plans are prepared and approved. This procedure can be very costly and frustrating to fringe area owners.

With the various complexities in mind, let us observe how the courts have either disregarded or adjusted the "date of valuation equals date of take" rule to avoid "*un*just compensation."

As early as 1873, it was noted by the Federal Circuit Court for Ohio that strict adherence to this rule could lead to an unjust result during a temporary depression.[31] The court adjusted the date of valuation to two months before the trial to fix value stating:

> While the language of the law or its construction is that its value must be fixed as at the time of its appropriation or the taking of the property, still it is not right that you should subject these properties to the consequences of what we all suppose to be a temporary depression and stringency of the money market. If this were permitted, it might have a great effect upon the value of this property. Therefore, you will not take into consideration the state of affairs existing today, but of, say two months ago, relieving it from the pressure which may now be upon it.[32]

Thus the court recognized the general rule, but made an exception to it. A sudden, temporary, economic effect, not any fault of the property owner should not be made to work to his detriment.

In 1894 however, the Court of Appeals for Hamilton County overruled a common pleas court decision to set the date of take at a time other than at the time of trial or actual possession, reinforcing the strict application of the general rule.[33] In that case, the value of the subject property had decreased through *normal* market fluctuations from the time of passage of an ordinance authorizing the city to appropriate certain property, until the date of trial. The Common Pleas Court had charged the jury that the value of the property to be taken in the case at hand was to be ascertained as of the day when the city had passed this

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[30] 23 U.S.C. § 103(e) (as amended 1968); OHIO REV. CODE § 5511.01 (1967).

[31] United States v. In-Lots, 4 Ohio F. Dec. 268 (S.D.O. 1873).

[32] *Id.* at 277.

[33] Stribley v. City of Cincinnati, 6 Ohio C.C.R. 54 (1st Ohio Cir. Ct. 1894).

ordinance. The Circuit Court overruled the decision on the basis of the jury charge stating:

> It would not be right for the corporation to pass an ordinance of this kind and then wait for a considerable length of time, and after the property of the owner had enhanced greatly in value, to take it and pay the value as it was at the time of the passage of the ordinance, when at the same time they were under no obligation to the property owner to take his property. Neither would it be just to the city that it should pay the value to the owner as of that time, when at the time of the actual taking valuable improvements had been removed . . .[34]

In 1937 another Ohio Appellate court made an exception to the general rule because of an economic depression, and affirmed the trial court's decision to set the date of valuation at December, 1929, just before the "great depression." [35]

Until 1961 the courts had all recognized the general rule, and chose either to strictly enforce it,[36] or make an exception to it by allowing a valuation date before trial date when confronted by *unnatural* economic effect.[37] Then came the case of *City of Cleveland v. Kacmarik.*[38] The City of Cleveland had filed an action to appropriate Kacmarik's property because it was needed for urban renewal. While the case was pending, but before actual possession for the public improvement, or date of trial, the City's Division of Housing determined that the structures on the subject property were a hazard to the community and had them demolished.[39] The court, noting the possible injustice said:

> "The fair market value of the property subject to appropriation is to be computed as of the time of taking." . . . Turning to the instant case, the court cannot escape the conclusion that there was a taking of the property here involved . . . when the city entered thereon and razed the buildings . . . The inescapable conclusion here is that after a suit to condemn the property had been pending for about nine weeks . . . the city, for one reason or another which it considered adequate, after a four day notice to the property owners, entered upon the premises and destroyed the two buildings thereon. . . . The court is convinced that to deny the rights of the property owners to have a jury consider the question of compensation for the buildings in question would work a taking of property without due process. Concede that the city had a right to proceed as it did, still it had a duty to compensate in full for the property taken, if a jury so decides.[40]

The court held that the property was to be valued at a time just prior to the razing of the structures by the city.[41]

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[34] *Id.* at 56.

[35] Ornstein v. Chesapeake & Ohio Ry., 26 Ohio L. Abs. 78, 36 N.E. 2d 521 (Ohio Ct. App. 1937).

[36] Stribley v. City of Cincinnati, Ohio C.C.R. 54 (1st Ohio Cir. Ct. 1894).

[37] Ornstein v. Chesapeake & Ohio Ry., 26 Ohio L. Abs. 78, 36 N.E. 2d 521 (2nd Ct. App. 1937).

[38] City of Cleveland v. Kacmarik, 17 Ohio Op. 2d 135, 177 N.E. 2d 811 (1961).

[39] *Id.*

[40] *Id.* at 137, 138, 177 N.E. 2d at 813, 814.

[41] *Id.*

Thus another apparent exception to the general rule had been made. On the surface the date of valuation had been set *prior* to the date of take because of the acts of the appropriating authority. In reality however, the court had merely added *another* circumstance that was considered a "taking," beyond the two accepted prior to its decision here (date of trial and date of actual possession for the improvement). The date of valuation was then established by this date of take, that is, the date the structures were ordered demolished by the city.

At this point a closer look at the problem is necessary, and the term "taking" must be defined. What governmental acts are to be considered "takings"? The crux of the problem is the inherent conflict between society and the individual. Under the Constitution individuals have basic rights and freedoms, including the right to own and exercise dominion over property.[42] The sovereign states have the police power[43] which in the area of property control includes the power to *prevent* one land use from causing external harm to others.[44] Such lawful exercise of the police power *is not* a "taking" for which compensation is due.[45] The power of eminent domain also established by constitutional provision, is that power to *compel* certain land uses for the benefit of the public welfare. Exercise of this power *is* a *"taking"* for which just compensation must be made.[46]

In some areas, particularly in urban renewal programs, it is necessary yet extremely difficult, to distinguish between which are acts that *prevent* or *restrict* property use for the benefit of the public welfare and acts that *compel* certain property uses for the benefit of said public welfare. The court in *Kacmarik* determined that the total effect of the acts of the City of Cleveland in the clearing of the property was of a compelling rather than a restricting nature, consequently there was a "taking," and the date of take was established accordingly.[47]

Could the same logic be applied in cases where properties were not actually ordered to be cleared by the appropriating authority, but other acts of this authority equally devalued the properties to be taken prior to the time of trial? The landmark case of *City of Cleveland v. Carcione*[48] dealt with this question going one step beyond *Kacmarik*. The facts, briefly were: In 1957 the City of Cleveland passed a resolution expressing its intent to appropriate property for an urban renewal project. Over a period of the next six years, the city haphazardly appraised, acquired, and cleared properties in the immediate vicinity of appellant Carcione's

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[42] U.S. CONST. amend. V, amend. XIV.

[43] U.S. CONST. amend. X. See Mandelker, *Housing Codes, Building Demolition, and Just Compensation: A Rationale for the Exercise of Public Powers Over Slum Housing*, 67 MICH. L. REV. 635 (1969), for a thorough discussion of bases of state regulatory power.

[44] Goldblatt v. Hempstead, 369 U.S. 590 (1962).

[45] *Id.*

[46] Mugler v. Kansas, 123 U.S. 623 (1887); see also Glaves, *supra* note 3 for extensive discussion of "police power-taking dichotomy."

[47] City of Cleveland v. Kacmarik, 17 Ohio Op. 2d 135, 137, 138, 177 N.E. 2d at 813, 814 (C.P. Cuyahoga County 1961).

[48] City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E. 2d 52 (1963).

sixteen-suite apartment building without contacting said property owner. At the time of the trial the Carcione property was left standing in a "vast desert" badly damaged by vandals and vermin. In the interim, the County Welfare Department, working in conjunction with the city on the renewal project, had urged relief tenants living in the area (some living in the Carcione apartment building) to relocate. The Department threatened to stop their welfare payments if they did not move. The relief tenants living in the Carcione apartment building did in fact move out pursuant to this urging. The resulting loss of income coupled with other detrimental effects caused by acts of the city and its agents greatly devalued the property. Increased vandalism and poor health standards due to the haphazard demolition procedures employed by the city took their toll on the value of the property.

At the trial in 1962 to fix the value of the Carcione property the court instructed the jury that the standard by which compensation must be measured was the fair market value of the property as of the time of trial. The Court of Appeals of Cuyahoga County in 1963 reversed on the basis of that jury instruction stating:

> Under the facts in this case and the law applicable thereto, we conclude that Mrs. Carcione was entitled to an evaluation of her property irrespective of any effect produced upon it by the action of the city in carrying out the St. Vincent Urban Renewal Project. Hence, the standard for measuring the compensation to be awarded her should have been the fair market value of it as it was immediately before the City of Cleveland took active steps to carry out the work of the project which to any extent depreciated the value of the property. As a consequence, we hold that the trial court was in error in instructing the jury that the standard by which compensation was to be measured was the fair market value of the property at the time of the trial.[49]

Although the appellate court left unclear whether it intended to disregard the date of take standard of valuation, or had merely construed the "active steps" of the condemning agency to be taking within the rule, the stage was set for a thorough inspection and possible overhaul of the general rule.

Since *Carcione* the courts have attempted the overhaul by two methods, with the somewhat consistent result of giving the property owner the benefit of the doubt when there is a property value decrease in any way causally connected with the appropriating authority's acts prior to appropriation. The two methods can be described as:

> "Method A. Separate the previously inseparable date of take and date of valuation. Set the date of valuation just prior to any acts of the appropriating agency that were detrimental to the property value, and in this way negate the effects of these acts. The date of take will still be at trial or actual possession."
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> "Method B. Retain the well established "date of take equals date of valuation" rule, but do not require that the date of take be at the date of trial or actual possession. Instead, set the date of take just prior to the detrimental effects of the acts of the appropriating

[49] *Id.* at 533, 190 N.E. 2d at 57.

authority *if* such acts could be considered a taking (as they were in *Kacmarik*)."

In January of 1966, the Supreme Court of Ohio in the *Olrich* case, chose "Method B" as a basis upon which to make its determination. Noting that the acts of the appropriating agency were not as severe as those in the *Carcione* case, the court decided that there was not a taking prior to the actual possession date.[50]

In *City of Cincinnati v. Mandel,* decided in December of 1966, the Common Pleas Court of Hamilton County chose "Method A" to stray from the general rule. The court made it clear that the date of take would be that date on which the jury returns its verdict, but that the date of valuation should be fixed as January 1, 1963, the approximate time the city had started acquisition in the area of the Mandel property.[51]

"Method B" was employed by the Court of Appeals for Trumbull County in the *In Re Appropriation for Hwy. Purposes of Land of Altshuler* case decided in November of 1967.[52] The facts were that the Director of Highways filed a resolution and finding on September 24, 1965, which set forth that the property owners, pursuant to Sec. 5519.03 of the Ohio Revised Code, were required to vacate the property within sixty days after service of said resolution and finding. This was complied with, but after the owners left the property, and prior to trial or actual possession by the Director of Highways, a third party entered upon the premises and demolished the structure located thereon. The trial court set the date of take at a time when the structure was still standing. The Director of Highways appealed the decision on the basis that the date of taking should be the date of trial. The appellate court affirmed the decision of the trial court stating:

> Under the facts and circumstances in the instant case, when the Director chose to order the appellees to vacate their property pursuant to the mandatory provisions of section 5519.03 Revised Code, and when the property owners (appellees) complied, having no other choice, there was indeed a substantial interference with property rights amounting to a "take" as of the date of the owners removal.[53]

The theory underlying "Method A" was again employed in *Long v. Director of Highways,* decided in February of 1968.[54] The court noted that with facts similar to those in the *Carcione* case, a property owner could get an "exemption" from the rule that compensation shall be awarded on the basis of value as of the date of actual possession. The court also stated that the burden of showing facts and circumstances justifying a departure from the general rule is upon the property owner.[55]

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[50] Director of Highways v. Olrich, 5 Ohio St. 2d 70, 74, 213 N.E. 2d at 826.

[51] 38 Ohio Op. 2d 157, 224 N.E. 2d 179 (C.P. Hamilton Cty. 1966).

[52] 12 Ohio App. 2d 169, 231 N.E. 2d 476 (1967).

[53] *Id.* at 172, 231 N.E. 2d at 478.

[54] Long v. Director of Highways, 15 Ohio App. 2d 226, 240 N.E. 2d 569 (1968).

[55] *Id.*

The majority of the Supreme Court of Ohio also chose "Method B" in a five-two decision of the case of *Bekos v. Mashater* decided June 19, 1968.[56] The Court stated:

> Where the value of private property appropriated for public use by the Department of Highways has depreciated due to the activity of the appropriating authority in acquiring other properties in the immediate vicinity and demolishing buildings thereon, causing deterioration of the neighborhood and depreciation of the remaining properties, a court may establish a date of take for the purpose of valuation of the property taken which is reasonably related to such activity of the appropriating authority, although prior in time to the date of trial or the actual taking of possession.[57]

The dissenting opinion written by Justice Brown with Chief Justice Taft concurring, expresses the view that the general rule should be maintained intact, and agrees with the proposition that the value of the property should be estimated irrespective of any effect produced by the public project.

Brown stated:

> The majority opinion confuses and merges the two concepts above; that is the date of valuation and the elements of valuation. In an effort to change the elements of evaluation in a difficult case, the majority allows a trial court to change the date of valuation. This holding is both unnecessary and unwise. It is unnecessary because the problem which this case raises can be adequately dealt with by adherence to the rule, stated above, that value should be estimated irrespective of any effect produced by the public project. It is unwise because it takes from the jury important questions of fact concerning whether particular aspects of depreciation were or were not caused by acts of the condemnor. By setting the date of valuation, the trial judge in this case made this decision and excluded determination of this issue by the jury.[58]

In March of 1969 the Court of Appeals for Montgomery County affirmed a decision of the trial court setting a date of valuation prior to either the date of trial or date of actual possession.[59] The Court citing *Bekos,* stated that the "proper time for valuing the property is before the value has depreciated due to the activity of the appropriating authority in acquiring other properties and demolishing buildings in the immediate vicinity causing deterioration of the neighborhood and depreciation of the remaining properties."[60] The opinion does not specifically state that there was a "taking" prior to trial or actual possession, but is based upon the *Bekos* case which did make such determination. It thus appears that "Method B" reasoning was again employed.

Within a month the same appellate court, again relying on *Bekos,* directed that a date of valuation prior to trial or actual possession be

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[56] 15 Ohio St. 2d 15, 238 N.E. 2d 548 (1968).

[57] *Id.*, 238 N.E. 2d at 549.

[58] *Id.* at 21, 238 N.E. 2d at 552.

[59] In re Appropriation for Highway Purposes, 18 Ohio App. 2d 116, 247 N.E. 2d 315 (1969).

[60] *Id.*

established where the acts of the condemning authority had devalued the subject property.[61]

In July of 1969 the Cuyahoga County Probate Court rendered a decision clearly using "Method B." [62] Four appropriation cases, all with facts very similar to those of the *Carcione* case, were consolidated for the single purpose of determining the date of valuation. In the wake of disputed facts as to the cause of the neighborhood deterioration and property devaluation, the judge set the date of take (and therefore valuation) prior to most of the alleged detrimental acts of the city engaged in an urban renewal program. Noting the intermittent demolition, "on again off again" building code enforcement, poor police protection, and lack of adequate garbage and rubbish removal, the court found that the "taking" of the parcels had occurred on August 31, 1965.[63] This date seemed arbitrarily set between the June 12, 1961 date on which the City Council had approved the renewal plan, and the hearing of the case in July of 1969. The court may have attempted to adjust the date of valuation so as to apportion the loss in value the properties had undergone to both the owners and the city.

The most recent consideration of the date of take or date of valuation standard was in the case of *Cincinnati v. Dale*.[64] The Ohio Supreme Court recognized a date of valuation of a few months prior to trial to which both parties had agreed by stipulation. After the verdict had been rendered but before the judgment entered thereon, the property owner filed a motion for interest on the amount of the verdict from the date stipulated as the date of valuation. In Ohio a condemnee property owner is entitled to receive interest on any amount of the final award which he has not received, from the time the property is taken by the appropriating authority.[65] The Court maintained the date of valuation as stipulated, but kept the date of take at the time of trial. This analysis of the problem and recognition of "Method A" by the majority was criticized by Justice Schneider in his concurring opinion. He states that a "public authority has no right to stipulate a date of valuation other than the date of take. If the value is higher on a date prior to take, what law authorizes it to pay the higher value? If the value is lower on a date prior to take, no reasonable condemnee would enter such stipulation as found herein. The majority unnecessarily complicates the law by recognizing a separate date of valuation in addition to a date of take, date of trial, and date of payment." [66]

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[61] In re Appropriation of Lands of Sproat, 20 Ohio App. 2d 166, 252 N.E. 2d 322 (1969).

[62] City of Cleveland v. Hurwitz, 19 Ohio Misc. 184, 249 N.E. 2d 562 (1969).

[63] *Id.* at 192.

[64] 20 Ohio St. 2d 32, 252 N.E. 2d 287 (1969).

[65] *Id.*

[66] *Id.* at 36, 252 N.E. 2d at 289.

Conclusions and Recommendations

Noting the criticism of and reluctance to use "Method A," and the objections to "Method B" in addition to the somewhat limited applicability of "Method B," when the acts of the appropriating authority do not amount to a "taking" yet are detrimental to value,[67] perhaps another alternative method should be employed, as noted in the dissent in *Bekos*.[68]

This writer recommends that a new method be adopted to more properly strive for the "just compensation" the law requires. "The date of take" should continue to be the later of either the date of trial or date of actual possession by the appropriating authority. This "date of take" would then be used for all purposes for which it is presently used, *except* to establish a "date of valuation." The term "date of valuation" would then merely refer to that date on which the case is tried. The standard of compensation would be established as the fair market value at time of trial or actual possession of the property to be taken irrespective of any beneficial or detrimental effects on value caused directly or as a natural and probable consequence of acts of the appropriating authority prior to taking.

The methods and procedures to be followed by the parties concerning proof of these beneficial or detrimental effects on the value of the property should conform to those evidentiary methods and procedures presently admissible to show damage or enhancement. The property owner would be given the chance to demonstrate the value of his property as it would have been were it not for the intervening acts of the appropriating authority. Again the language of the dissent in *Bekos* is noted, wherein the trial court would be instructed:

> . . . to admit evidence offered which tends to show or negate depreciation of the value of the property connected with the acts of the condemnor. Where the property owner is permitted to introduce such evidence, the condemnor should be given equally broad latitude to rebut such evidence so as to make up a proper factual issue for the jury.[69]

In situations like those present in *Carcione* and *Bekos*, especially where all the causes of the property devaluation are not apparent or undisputed, the selection of a date of valuation does not achieve the desired result.[70]

Instead of trying to fit generally complex factual situations within a rigid rule of value determination, the courts should allow the jury to decide what effects the alleged detrimental acts of the appropriating authority had on the value of the property to be taken, and extract those effects from their determination of the just compensation required. Elements of value such as physical characteristics, appearance, income

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[67] Director of Highways v. Olrich, 5 Ohio St. 2d 70, 213 N.E. 823 (1966).

[68] 15 Ohio St. 2d 15, 23, 238 N.E. 2d at 553.

[69] *Id.*

[70] *Id.* at 21, 238 N.E. 2d at 552.

producing ability, and community development should be viewed irrespective of interference from the appropriating authority.

Adoption of this method may pose some mechanical difficulties in that appraisals of property value are usually made as of a certain date (not according to the effects of various acts on the elements of valuation). Types of value evidence other than the presently accepted expert testimony of real estate appraisers may be necessarily employed. The courts may not readily relinquish their power to determine a date upon which the property must be valued. The use of this method however, would insure the most equitable result. After all, isn't an equitable result the essence of "just compensation?"