University of Baltimore Law Review

Volume 15
Issue 2 *Winter 1986*

Article 12

1986

Casenotes: Eminent Domain — Compensation — a Public Condemnee Is Entitled Only to the Market Value of a Condemned Facility When the Market Value of the Condemned Facility Is Ascertainable. United States v. 50 Acres of Land, 105 S. Ct. 451 (1984)

Steven M. Sindler
University of Baltimore School of Law

EMINENT DOMAIN — COMPENSATION — A PUBLIC CONDEMNEE IS ENTITLED ONLY TO THE MARKET VALUE OF A CONDEMNED FACILITY WHEN THE MARKET VALUE OF THE CONDEMNED FACILITY IS ASCERTAINABLE. *United States v. 50 Acres of Land*, 105 S. Ct. 451 (1984).

In *United States v. 50 Acres of Land (Duncanville)*,[1] the federal government condemned a 50 acre tract of land used by the City of Duncanville, Texas as a sanitary landfill.[2] In order to fulfill its statutory obligation to provide for the disposal of its garbage,[3] the city purchased a 113.7 acre site and developed it into a new landfill.[4] At trial, the city sought to recover the cost of developing the new site, an amount in excess of $1,276,000.00, as the proper measure of compensation for the condemned facility.[5] The government, however, contended that the proper measure of compensation should be determined by the condemned facility's fair market value.[6] In response to special interrogatories, the jury returned a verdict of $225,000.00 representing the fair market value of the condemned facility, and an alternative verdict of

1. 105 S. Ct. 451 (1984).
2. United States v. 50 Acres of Land, 529 F. Supp. 220 (N.D. Tex. 1981), *rev'd*, 706 F.2d 1356 (5th Cir. 1983), *rev'd*, 105 S. Ct. 451 (1984). The site was needed by the federal government to accommodate the United States Army Corps of Engineers Lakeview Lake Flood Control Project (subsequently renamed the Joe Pool Flood Control Project). United States v. 50 Acres of Land, 706 F.2d 1356, 1358 (5th Cir. 1983), *rev'd*, 105 S. Ct. 451 (1984). The federal government commenced this action by filing a complaint in condemnation, coupled with a declaration of taking, pursuant to the Declaration of Taking Act, 40 U.S.C. § 258a (1931). United States v. 50 Acres of Land, 105 S. Ct. 451, 453 n.3 (1984). Under that procedure, the federal government deposits the estimated value of the property in the registry of the court, whereupon title and right to possession vest immediately in the government. In subsequent judicial proceedings, the value of the property is determined and the condemnee is awarded the difference between the adjudicated value and the sum already received, plus interest on that difference. *See id.* (quoting Kirby Forest Indus. v. United States, 104 S. Ct. 2187, 2191 (1984)). Property owned by state and local governments is subject to the federal power of eminent domain. *See* Block v. North Dakota, 461 U.S. 273, 291 n.26 (1983); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 (1941). In relation to the federal government as condemnor, such property is considered to be "private property" for which just compensation must be paid under the fifth amendment. *See* Jefferson County v. Tennessee Valley Auth., 146 F.2d 564, 565 (6th Cir.), *cert. denied*, 324 U.S. 871 (1945); United States v. Wheeler TP., 66 F.2d 977, 982 (8th Cir. 1933); United States v. Town of Nahant, 153 F. 520, 521, 523 (1st Cir. 1907).
3. *See* TEX. REV. CIV. STAT. ANN. art. 4477-7 (Vernon 1982) (regulating solid waste disposal and sanitary landfills in Texas).
4. United States v. 50 Acres of Land, 105 S. Ct. 451, 453 (1984). The old site had been used as a landfill from 1969 to 1978 and had an expected remaining life of 12.8 years. The new site had an expected life of 41.6 years due to its larger size, superior soil, and superior water table conditions. *Id.* at 453 n.4.
5. *Id.* at 453.
6. *Id.* Experts for both the government and the city agreed that a market for landfill properties existed in the area. Based on an evaluation of the recent sale prices of comparable properties, the experts for the city estimated the value of the condemned facility as between $367,500 and $370,000; experts for the government estimated its value as between $160,410 and $190,000. *Id.* at 453-54 n.5 (1984).

$723,654.01 representing the reasonable cost of a functionally equivalent substitute facility.[7] The district court entered judgment for the lower amount.[8] The United States Court of Appeals for the Fifth Circuit reversed, holding that the reasonable cost of a functionally equivalent substitute facility is the proper measure of compensation in the case of a public condemnee with a duty to replace the condemned facility.[9] The Supreme Court reversed and held that a public condemnee is not entitled to compensation measured by the cost of acquiring a substitute facility when the market value of the condemned facility is ascertainable.[10]

The fifth amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation.[11] The fundamental principle underlying the just compensation clause is one of indemnity: an owner of condemned property is entitled to be placed in as good a pecuniary position as if the property had not been taken.[12] Because value is an inexact, highly subjective concept,[13] the Supreme Court has adopted the relatively objective concept of market value at the time of taking[14] as a just and equitable guideline for

7. *Id.* at 454.

8. *Id.* In eminent domain proceedings, the trial court decides all issues, factual and legal, except the amount of compensation to be awarded. *See* United States v. Reynolds, 397 U.S. 14, 19-20 (1970); FED. R. CIV. P. 71A(h).

9. United States v. 50 Acres of Land, 706 F.2d 1356, 1360 (5th Cir. 1983), *rev'd*, 105 S. Ct. 451 (1984). The court of appeals held that Duncanville was entitled to reimbursement for the reasonable cost of an alternative landfill site, the reasonable cost of preparing that site for use as a landfill, plus reimbursement for use of a temporary site in excess of the costs the city would have incurred at the original site. *Id.* at 1363-64. The court of appeals, however, remanded the case for a new trial because the jury instructions were "inadequate to enable the jury to make a fair and complete determination of the costs, including consideration of benefits received, of this [new landfill]." *Id.* at 1363; *see infra* notes 71-72 and accompanying text.

10. United States v. 50 Acres of Land, 105 S. Ct. 451, 453 (1984).

11. U.S. CONST. amend. V.

12. United States v. 564.54 Acres of Land, 441 U.S. 506, 510-11 (1979) (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).

13. According to the Supreme Court:

> The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which give them a value transferable from one owner to another . . . . [The] loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it . . . is properly treated as part of the burden of common citizenship.

Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1948).

14. The general rule is that just compensation is determined as of the date of taking. United States v. Dow, 357 U.S. 17, 22-23 (1958); United States v. Miller, 317 U.S. 369, 374 (1943). Accordingly, fluctuations in property values after that date, whether attributable to activities of the government or otherwise, are irrelevant. *See* United States v. 161.99 Acres of Land, 512 F.2d 65, 66 (5th Cir. 1975). Changes in value before the date of taking caused by anticipation that there will be a taking also are not compensable. *See* United States v. 3.66 Acres of Land, 426 F. Supp. 533, 535-36 (N.D. Cal. 1977). Under the "scope of the project" rule, any increase in value resulting from the government's demand for the property is not compensable.

measuring just compensation.[15] Market value has been defined as the price a willing buyer would pay a willing seller, with neither party under a compulsion to buy or sell.[16] According to the Court, the market value standard strikes the necessary and proper balance between the government's need and the property owner's loss.[17]

In its endeavor to do substantial justice in eminent domain proceedings, the Court has developed objective working rules that refine the concept of market value.[18] For example, the determination of market value is not limited solely to the condemned property's existing use, but also takes into consideration the highest and most profitable use for which the property is adaptable in the reasonably near future.[19] Furthermore, a condemnee is not entitled to compensation for consequential damages arising from the condemnation, such as reimbursement for the relocation costs incurred as a result of the condemnation.[20] Also, the property's

---

See United States v. 320.0 Acres of Land, 605 F.2d 762, 781-82 (5th Cir. 1979). *See generally* Annot., 14 A.L.R. FED. 806 (1973) (discussing "scope of project" rule).

15. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 511-13 (1979); United States v. Commodities Trading Corp., 339 U.S. 121, 123-24 (1950); United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 402 (1949). There are essentially three methods of market valuation: sales approach; income approach; and cost approach. *See* United States v. Certain Property, 403 F.2d 800, 802 (2d Cir. 1968); Wilmington Hous. Auth. v. Greater St. John Baptist Church, 291 A.2d 282, 284 (Del. 1972). The sales approach assesses value by a comparison of sales of property with similar characteristics, and it is considered to be the most objective method of valuation. *See* United States v. 25.02 Acres of Land, 495 F.2d 1398, 1400 (10th Cir. 1974); United States v. Whitehurst, 337 F.2d 765, 775 (4th Cir. 1964). The income approach generally is applied in valuating income producing properties. *See* 4 J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 12.32[3][c] (rev. 3d ed. 1985). The income approach capitalizes the anticipated net income from a property and converts this figure into an indication of market value. *Id.* Some courts allow use of the income approach as a factor in the determination of market value by the sales approach; other courts only allow its admission in cases in which comparable sales are not available. *Compare In re* James Madison Houses, 17 A.D.2d 317, 320-21, 234 N.Y.S.2d 799, 803 (1962), *with* United States v. 49,375 Square Feet of Land, 92 F. Supp. 384, 393 (S.D.N.Y. 1950). *See also infra* notes 27-31 and accompanying text (discussing cost approach).
16. *See* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973); United States v. Virginia Elec. & Power Co., 365 U.S. 624, 633 (1961); United States v. Miller, 317 U.S. 369, 374 (1943).
17. *See* United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 402 (1940); *see also* Bauman v. Ross, 167 U.S. 548, 570 (1896) (just compensation not to be measured from the jaundiced perspective of either the public or the owner).
18. *See* United States v. Cors., 337 U.S. 325, 332 (1949); United States v. 320.0 Acres of Land, 605 F.2d 762, 781 (1979). Congress has authorized greater relief in certain areas to indemnify the property owner beyond the constitutional minimum. *See* Uniform Relocation and Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655 (1982). *See generally* Annot., 33 A.L.R. FED. 9 (1977) (analyzing cases which construe and apply the act).
19. *See* Searles, *Highest and Best Use: The Keystone of Valuation in Eminent Domain*, 45 N.Y. ST. B.J. 36, 39 (1973). The future use must be one that is reasonable. *See* Mills v. United States, 363 F.2d 78, 81 (8th Cir. 1966).
20. *See* United States v. Bodcaw Co., 440 U.S. 202, 204 (1979) (per curiam); United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261, 264 (1950).

subjective value to its owner arising from its adaptability to a particular use may not be considered in the determination of just compensation.[21]

That the market value standard fails to compensate for all the values an owner may derive from his property is justified by the need to have "relatively objective valuation standards" and a "workable measure of valuation."[22] The rationale for this failure to indemnify the condemnee completely is that condemnation proceedings are considered to be against the property and not against the property owner;[23] therefore, compensation is "for the property and not to the owner."[24]

The Supreme Court has recognized, however, that in certain circumstances the application of the market value standard may deviate too significantly from the indemnity principle to fulfill adequately the intent of just compensation.[25] Departure from the market value standard is necessary when the market value of condemned property is unascertainable, or when the application of the market value standard would result in "manifest injustice" to the condemnee.[26]

Departure from the market value standard is appropriate where the condemnation involves special purpose property — property of value to its owner because of its peculiar characteristics or uses.[27] Property of this unique nature is difficult to valuate by the market value standard because it is rarely bought or sold on the open market; therefore, the courts have turned to alternate methods of valuation to determine a condemnee's loss when such property is condemned.[28]

The courts have applied different methods of special purpose property valuation, depending upon whether the special purpose property is

21. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 511-12 (1979); Kimball Laundry Co. v. United States, 338 U.S. 1, 5-6 (1949).
22. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 516-17 (1979).
23. *See* A. W. Duckett & Co. v. United States, 266 U.S. 149, 151 (1924); United States v. Dunnington, 146 U.S. 338, 352-53 (1892).
24. Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).
25. *See* United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950); United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 402 (1949).
26. *See* Kirby Forests Indus. v. United States, 104 S. Ct. 2187, 2194 n.14 (1984); United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950).
27. *See, e.g.*, United States v. 84.4 Acres of Land, 348 F.2d 117 (1965) (golf course); Redevelopment Agency v. First Christian Church, 140 Cal. App. 3d 690, 189 Cal. Rptr. 749 (1983) (church); Trustees at Boston Univ. v. Commonwealth, 286 Mass. 57, 190 N.E. 29 (1934) (college property). *See generally* Level, *Evaluation of Special Purpose Properties in Condemnation Proceedings*, 3 URB. LAW 428 (1971) (discussing special purpose property); Note, *Eminent Domain: The Problem of Damages Where Land Has Been Adapted to a Special Use*, 37 B.U. L. REV. 495 (1957) (discussing special purpose property).
28. *See, e.g.*, United States v. Certain Land, 346 F.2d 690, 694 (2d Cir. 1965) (market value abandoned when nature of property produces wide discrepancy between value to owner and market price); Idaho-Western Ry. Co. v. Columbia Synod, 20 Idaho 568, 572, 119 P. 60, 63-64 (1911) (market value not applicable to special purpose property); Rochester Urban Renewal v. Patchen Post, 45 N.Y.2d 1, 8-9, 407 N.Y.S.2d 641, 644 (1978) (some other method of valuation necessary for special purpose property).

owned privately or publicly. When the government condemns privately owned, special purpose property, the courts generally have applied the "cost approach" as an approximation of market value, to determine the just compensation due a private condemnee.[29] The cost approach entails four major steps: (1) estimating the reproduction costs of improvements;[30] (2) estimating the amount of depreciation present in the improvements;[31] (3) deducting the total depreciation from the estimated reproduction costs, thereby arriving at an indication of the improvements' value; and (4) adding the estimated market value of the land to the value of the improvements, arriving at an approximation of the property's market value.[32] Although the cost approach has been criticized as inherently inflationary and confusing to apply,[33] it is often the only method available for special purpose property.[34]

When the government condemns publicly owned special purpose property, the courts generally have applied the substitute facilities doctrine to determine the just compensation due a state or municipality.[35]

29. *See, e.g.*, Orleans Parish School Bd. v. Pasternostro, 236 La. 223, 226, 107 So. 2d 451-54 (1958) (no comparable sales data available, therefore cost approach applicable); Mayor & City Council of Baltimore v. Concord Baptist Church, Inc., 257 Md. 132, 262 A.2d 755 (1970) (cost approach required by statute when church condemned); Grace & Hope Mission, Inc. v. Providence Redevelopment Agency, 100 R.I. 537, 217 A.2d 476 (1966) (cost approach proper in absence of market value).
30. Reproduction costs and replacement costs are distinct. Reproduction costs refer to costs of reconstructing the improvements using the same or similar materials; replacement costs are the costs of providing a substitute facility of equal functional utility. *See* UNIFORM EMINENT DOMAIN CODE § 1111 (1974).
31. Estimation of the depreciation of special purpose properties has presented problems. Both physical and functional depreciation must be included. The functional depreciation of such properties is difficult to estimate accurately because, generally, functional obsolescence is measured by using market data. Thus, the estimation of depreciation in the case of special purpose properties depends largely upon the appraiser's judgment. *See* J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 12.32[3][b] (rev. 3d ed. 1985).
32. *See* J. EATON, REAL ESTATE VALUATION IN LITIGATION 101 (1982). Some courts have allowed the use of the cost approach in the determination of market value as evidence of the property's highest and best use; other courts exclude consideration of the cost approach viewing the market approach and the cost approach as totally independent of one another. *Compare In re* Oakland Street, N.Y., 13 A.D.2d 668, 669, 213 N.Y.S.2d 973, 975 (1961) (reproduction cost relevant to determination of market value) *and* State v. Wilson, 6 Wash. App. 443, 447, 493 P.2d 1252, 1257 (1972) (reproduction cost relevant to determination of market value), *with* United States v. 70.39 Acres of Land, 164 F. Supp. 451, 488-90 (S.D. Cal. 1958) (reproduction cost has little bearing on market value) *and* Denver Urban Renewal Auth. v. Pogzeba, 38 Colo. App. 168, 170, 558 P.2d 442, 443-44 (1976) (error to allow evidence of reproduction cost in determining market value). *See also* UNIFORM EMINENT DOMAIN CODE § 1111 (1974) (reproduction cost may be used for purpose of providing market value).
33. *See* United States v. Benning Hous. Corp., 276 F.2d 248, 250 (5th Cir. 1960).
34. *See* 4 J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 12.32[3][b] (rev. 3d. ed. 1985).
35. *See, e.g.*, Caporal v. United States, 577 F.2d 113 (10th Cir. 1978) (compensation for taking of streets and alleys is cost of providing necessary substitutes); United States v. Streets, Alleys, & Public Ways, 531 F.2d 882 (8th Cir. 1976) (government must

The substitute facilities doctrine requires that just compensation be measured by the reasonable cost of a functionally equivalent substitute facility in order to finance a replacement of the condemned facility by the public condemnee.[36] The doctrine is not actually a valuation technique, but a method of compensation that has evolved from court decisions.[37] The doctrine is based upon recognition that the loss to a community occasioned by the condemnation of a public facility is not only the value of the property itself, but also the loss of the services previously provided by the condemned facility.[38] Thus, a public condemnee cannot be made

---

supply cost of constructing necessary substitute), *cert. denied*, 328 U.S. 842 (1946); United States v. Arkansas, 164 F.2d 943, 944 (8th Cir. 1947) (proper measure of damages for taking of public highways is cost of substitute). The doctrine also is applicable when a state condemns municipal property. *See, e.g.*, City of Witchita v. Unified School Dist. No. 259, 201 Kan. 110, 114, 439 P.2d 162, 166-67 (1968) (compensation is cost of providing equivalent substitute where property devoted to a public use by one agency of government is condemned by another agency); City of Tulsa v. Mingo School Dist. No. 16, 559 P.2d 487, 492-95 (Okla. App. 1976) (substitute facilities doctrine appropriate method of compensation for taking of school property); State Road Comm'n v. Board of Park Comm'rs, 173 S.E.2d 919, 926-27 (W. Va. 1970) (park commissioners entitled to compensation by payment of cost of substitute facility). *See generally* Annot., 40 A.L.R.3d 143 (1971) (discussing substitute facilities doctrine).

36. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 517 (1979) (White, J., concurring) ("The substitute-facilities doctrine is unrelated to fair market value . . . it unabashedly demands additional compensation over and above market value in order to allow the replacement of the condemned facility."); Town of Clarkville v. United States, 198 F.2d 238, 242 (4th Cir. 1952), *cert. denied*, 344 U.S. 927 (1953); UNIFORM EMINENT DOMAIN CODE § 1004(b) (1974). The replacement facility does not have to be an exact duplicate, only a functional equivalent. *See* United States v. Board of Educ., 253 F.2d 760, 764 (4th Cir. 1958); United States v. Certain Lands in Red Bluff, 192 F. Supp. 725, 726-27 (N.D. Cal. 1961). A replacement may be furnished in kind. *See* Jefferson County v. Tennessee Valley Auth., 146 F.2d 564, 566 (6th Cir. 1945).

37. *See generally* State Comm'r of Transp. v. Township of S. Hackensack, 65 N.J. 377, 381, 322 A.2d 818, 822 (1974) ("The inadequacy and incongruity of [the market value standard] as compensation for the taking of . . . public facilities . . . led to the development of the [substitute facilities] doctrine . . . ."). According to the Supreme Court:

> [The doctrine's] genesis is in language written by Chief Justice Taft in Brown v. United States. In *Brown*, three-quarters of the town of American Falls, Idaho, was to be inundated and destroyed by the waters of a reservoir on the Snake River. In that extreme situation the Chief Justice observed, 'a method of compensation by substitution would seem to be the best means of making the parties whole.'

United States v. 50 Acres of Land, 706 F.2d 1356, 1359 (5th Cir. 1983) (citations omitted) (quoting Brown v. United States, 263 U.S. 78, 83 (1923)), *rev'd*, 105 S. Ct. 451 (1984).

38. *See* United States v. Certain Property, 403 F.2d 800, 804 (2d Cir. 1968); City of Fort Worth v. United States, 188 F.2d 217, 222 (5th Cir. 1951); United States v. Des Moines County, 148 F.2d 448, 449 (8th Cir.), *cert. denied*, 346 U.S. 743 (1945); Town of Bedford v. United States, 23 F.2d 453, 454 (1st Cir. 1927). No compensation is due when reasonable alternative facilities already exist or are provided by the taker. United States v. Certain Lands, 246 F.2d 823, 824 (3d Cir. 1957).

whole, as required by the just compensation clause,[39] unless sufficient damages are awarded to replace the condemned facility, enabling the public condemnee to provide anew the disrupted services to the public.[40]

A public condemnee is entitled to the cost of a substitute facility, however, only if a replacement facility is necessary to enable the public condemnee to continue providing services to the community.[41] Early decisions limited the substitute facilities doctrine to cases in which the public condemnee was obligated by statute to replace the condemned facility.[42] Later decisions, recognizing that many services provided by a governmental body legally are not compelled, required only that the replacement be "in fact" necessary.[43] This factual obligation rule, which depends upon a finding that the condemned facility is reasonably necessary for the public welfare, "looks to the pragmatic needs and possibilities, and not just to the technical legal minima."[44] A public condemnee's legal or factual obligation to replace a condemned facility avoids the risk of a resulting windfall "if the substitute facilities were never acquired, or if acquired, were later sold or converted to any other use."[45]

---

39. *See* Olson v. United States, 292 U.S. 246, 255 (1934) ("[condemnee] must be made whole but is not entitled to more").

40. *See* United States v. Certain Land, 346 F.2d 690, 695 (2d Cir. 1965); Washington v. United States, 214 F.2d 33, 40 (9th Cir.), *cert. denied*, 348 U.S. 862 (1954). The substitute facilities doctrine is applicable regardless of whether it produces an award greater or less than the market value of the property; *see* United States v. Des Moines County, 148 F.2d 448, 449 (8th Cir.), *cert. denied*, 346 U.S. 743 (1945).

41. *See* United States v. Certain Property, 403 F.2d 800, 803 (2d Cir. 1968); United States v. Certain Land, 346 F.2d 690, 695 (2d Cir. 1965); Note, *Just Compensation and the Public Condemnee*, 75 YALE L.J. 1053, 1053 (1966). The determination of necessity is a matter for the judicial trier of fact. United States v. Streets, Alleys, & Public Ways, 531 F.2d 882, 886 (8th Cir. 1976); United States v. Los Angeles County, 163 F.2d 124, 125 (9th Cir. 1947). The courts have reached varied results applying the substitute facilities doctrine in cases in which there is no longer a public need for the condemned property. A majority of the courts have held that the public condemnee sustains no loss from the taking because the obligation to replace a condemned facility is premised on a determination of public need; therefore, the public condemnee is entitled only to nominal compensation. *See* United States v. Stoutsville, 531 F.2d 882, 885-86 (8th Cir. 1976); United States v. City of New York, 168 F.2d 387, 391 (2d Cir. 1948). A minority of courts have held that a public condemnee is entitled to the condemned facility's market value, although there is no longer a public need. *See* United States v. 3,727.91 Acres of Land, 563 F.2d 357, 359 (8th Cir. 1977); California v. United States, 395 F.2d 261, 266-68 (9th Cir. 1968).

42. *See, e.g.*, United States v. Board of Educ., 253 F.2d 760, 763 (4th Cir. 1958) (condemnee must be compelled legally to provide substitute property); United States v. Wheeler TP., 66 F.2d 977, 985 (8th Cir. 1933) (town must be compelled legally to maintain roads); United States v. Alderson, 53 F. Supp. 528, 530-31 (S.D. W. Va. 1944) (state must be compelled legally to provide road system).

43. *See* United States v. 3,727.91 Acres of Land, 563 F.2d 357, 359 n.2 (8th Cir. 1977) (substitute facility must be reasonably necessary); United States v. Certain Property, 403 F.2d 800, 803-04 (2d Cir. 1968) (public condemnee entitled to substitute facility if obligated to replace).

44. United States v. Certain Land, 346 F.2d 960, 965 (2d Cir. 1965).

45. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 515-16 (1979).

The courts have utilized the substitute facilities doctrine primarily to compensate a public condemnee for the taking of streets, bridges, sewers, and similar nonsalable, publicly owned special purpose properties that have only nominal value independent of their present use.[46] The courts, however, also have applied the doctrine to compensate for the taking of other public facilities regardless of whether a market value existed for the condemned properties.[47] In the leading case of *United States v. Certain Property (Borough of Manhattan)*,[48] the United States condemned a public bath and recreation center owned and operated by the city of New York.[49] On appeal to the United States Court of Appeals for the Second Circuit, the federal government argued that the substitute facilities doctrine is an exception to the market value standard to be applied only when the market value of a condemned facility is unascertainable.[50] The Second Circuit dismissed this argument, stating that a public condemnee obligated to replace a condemned facility is entitled to be awarded the cost of replacing the condemned facility, whether that cost is more or less than the condemned facility's actual market value.[51] According to the court, the substitute facilities doctrine is an alternative method of compensation available to the public condemnee obligated to replace a condemned facility.[52]

Until the 1979 Supreme Court decision in *United States v. 564.54 Acres of Land (Lutheran Synod)*,[53] there was little doubt that the substitute facilities standard was the proper measure of compensation when a publicly owned facility was condemned. In *Lutheran Synod*, the Court examined whether compensation measured by the substitute facilities standard is proper when the government condemns facilities owned by a private nonprofit organization operating the facilities for a public purpose when the market value of the condemned facilities is ascertainable.[54]

---

46. *See, e.g.*, Caporal v. United States, 577 F.2d 113 (10th Cir. 1977) (alleyway); Town of Clarksville v. United States, 198 F.2d 238 (4th Cir. 1952) (sewer system), *cert. denied*, 344 U.S. 927 (1953).
47. *See, e.g.*, United States v. Certain Property, 403 F.2d 800 (2d Cir. 1968) (public bath and recreation center); United States v. Certain Land, 346 F.2d 690 (2d Cir. 1965) (playground); United States v. Certain Land in Red Bluff, 192 F. Supp. 725 (N.D. Cal. 1961) (parking lot). *But see* United States v. South Dakota Game, Fish, & Parks Dept., 329 F.2d 665 (8th Cir. 1964) (allowing market value only).
48. 403 F.2d 800 (2d Cir. 1968).
49. *Id.* at 801. The district court held that the substitute facilities doctrine was inapplicable because the city, although authorized by law, was not required legally to replace the condemned building; consequently, compensation was based on the condemned building's market value. *Id.* at 801-02. The Second Circuit reversed, holding that replacement need only be reasonably necessary for the public welfare, and remanded "to determine whether the 'substitute facilities' doctrine should be applied." *Id.* at 804.
50. *Id.* at 803.
51. *Id.*
52. *Id.*
53. 441 U.S. 506 (1979).
54. *Id.* at 508-09. The Southeastern Pennsylvania Synod of the Lutheran Church in America owned and operated several summer camps on land condemned by the

The Third Circuit had held that the substitute facilities doctrine was available as a measure of compensation to a private, nonprofit owner of facilities operated for a public purpose.[55] The Supreme Court rejected this extension of the substitute facilities doctrine, holding that a private owner's nonprofit status does not require a departure from the usual market value standard.[56] In a footnote, the Court explicitly reserved the issue of substitute facilities compensation as applied to public condemnees.[57] In a concurring opinion, however, Justice White expressed "substantial doubt" as to the propriety of the doctrine.[58]

Consistent with its holding in *Lutheran Synod*, the Supreme Court in *United States v. 50 Acres of Land (Duncanville)*[59] held that the market value standard, when ascertainable, achieves a fair result for the public condemnee as well as the private owner.[60] The Court dismissed the city's argument for substitute facility compensation based on its statutory obli-

---

government. Campers included underprivileged and emotionally disturbed children who received scholarships, as well as many campers who were not deprived financially and did not receive financial assistance. By virtue of grandfather clauses, the camps were allowed to operate in noncompliance with state and federal housing and environmental legislation, but replacement would require compliance with this legislation. The church's expert witnesses estimated replacement costs to be approximately $4,361,000, whereas the jury returned a verdict of $240,000 representing the fair market value of the camps. United States v. 564.54 Acres of Land, 576 F.2d 983, 985-86 (3d Cir. 1978), *rev'd*, 441 U.S. 506 (1979).

55. United States v. 564.54 Acres of Land, 506 F.2d 796, 802 (3d Cir. 1974) (interlocutory appeal). The court remanded the case for a determination of whether the facts of this case were appropriate for application of the substitute facilities doctrine. *Id.* On remand, the jury found that the church was not entitled to compensation determined by the substitute facilities doctrine and awarded the church the market value of the property. A different panel of the court of appeals reversed, finding the court's jury instructions in error, and ordering a new trial. United States v. 564.54 Acres of Land, 576 F.2d 983, 996 (3d Cir. 1978), *rev'd*, 441 U.S. 506 (1979). The Supreme Court reversed the Third Circuit panel. United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979). The case was the subject of two casenotes, both of which argued that the substitute facilities doctrine was applicable. *See* Note, *Cost of Substitute Facilities as a Measure of Just Compensation When There is a Private Condemnee*, 1975 DUKE L.J. 1133 (1975); Note, *Substitute Facility Measure of Just Compensation Is Available to Private Owners of Nonprofit Community Facilities in Appropriate Cases*, 6 SETON HALL L. REV. 711 (1975). Several state courts have considered the same question, reaching conflicting results. *Compare* Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Auth., 355 Mass. 189, 138 N.E.2d 769 (1956) (allowing application of substitute facilities doctrine where a Girl Scout camp was condemned), *with* State v. First Methodist Church, 6 Or. App. 492, 488 P.2d 835 (1971) (disallowing application of substitute facilities doctrine where a church youth center was condemned).

56. United States v. 564.54 Acres of Land, 441 U.S. 506, 516-17 (1979). The Court's decision "was based, in part, on a fear that a private condemnee might receive a windfall if 'substitute facilities were never acquired, or if acquired, were later sold or converted to another use.'" United States v. 50 Acres of Land, 105 S. Ct. 451, 457 (1984) (quoting United States v. 564.54 Acres of Land, 441 U.S. 506, 516 (1979)).

57. United States v. 564.54 Acres of Land, 441 U.S. 506, 509 n.3 (1979).

58. *Id.* at 517-19 (White, J., concurring).

59. 105 S. Ct. 451 (1984).

60. *Id.* at 457.

gation to provide for municipal garbage disposal as "no more compelling than the [economic] obligations assumed by private citizens."[61]

In deciding this issue, the Court first addressed the differences between the public and the private condemnee. The Court found that the loss to a public condemnee when a public facility is condemned "may be no less acute" than the loss to the private owner when private property is condemned.[62] Moreover, the Court stated that the just compensation clause, which refers only to compensation for "private property," does not require greater compensation for public condemnees than it requires for private condemnees.[63] Accordingly, "the same principles of just compensation presumptively apply to both private and public condemnees."[64]

The Court next addressed the risk of a windfall to the public condemnee under the substitute facilities doctrine. The Court stated that the city's legal obligation to replace the condemned landfill would not avoid the risk of a windfall[65] because the city necessarily would experience a windfall under the substitute facilities doctrine by receiving funds for a more costly, presumably more valuable facility.[66] Furthermore, the Court rejected the Fifth Circuit's finding that the risk of a windfall could be reduced by discounting the award to account for the superior quality of the new facility.[67] The Court reasoned that discounting was simply a more complex and speculative method of arriving at the market value of a condemned facility.[68]

---

61. *Id.*
62. *Id.* at 456.
63. *Id.* at 455; *see also supra* note 2 (state and municipal property subject to the federal power of eminent domain).
64. *Id.*
65. *See supra* text accompanying note 45.
66. 105 S. Ct. at 457. According to the Court, "any increase in the quality of the facility may be as readily characterized as a 'windfall' as the award of cash proceeds for a substitute facility that is never built." *Id.*
67. *Id.* The Fifth Circuit held that the district court's instruction regarding the substitute facilities standard was "inadequate to enable the jury to make a fair and complete determination of the costs, *including consideration of the benefits received*, of this particular substitute facility." United States v. 50 Acres of Land, 706 F.2d 1356, 1362-63 (5th Cir. 1983) (emphasis added), *rev'd*, 105 S. Ct. 451 (1984); *see also* United States v. Certain Property, 403 F.2d 800, 804 (2d Cir. 1968) ("equitable principles undergirding just compensation require that the substitution cost be discounted by reason of the benefit which accrues to the condemnee when a new building replaces one with expired useful years").
68. United States v. 50 Acres of Land, 105 S. Ct. 451, 457-58 (1984). According to the Court, under this approach, the jury would have to make at least two determinations:

> (i) the reasonable (rather than actual) replacement cost, which would require an inquiry into the fair market value of the second facility; and (ii) the extent to which the new facility is superior to the old, which would require an analysis of the qualitative differences between the new and the old. It would also be necessary to determine the fair market value of the old property in order to provide a basis for comparison.

Id.

Finally, the Court addressed the need to measure just compensation by objective standards that disregard the condemned property's subjective value to its owner.[69] The Court stated that the "open-ended character of the substitute facilities doctrine" increases the possibility of a windfall to the public condemnee because the "condemnation contest is between the local community and a national government that may be thought to have unlimited resources."[70]

In a concurring opinion, Justice O'Connor stated that a public condemnee obligated to replace a condemned facility should not be limited to compensation determined by the market value when the public condemnee can prove that the market value standard in a particular case would be manifestly unjust.[71] According to Justice O'Connor, the market value standard would be manifestly unjust when "the market value . . . deviates significantly from the make-whole remedy intended by the Just Compensation Clause . . . ."[72]

The substitute facilities doctrine requires compensation greater than market value to enable the public condemnee to replace the condemned facility.[73] Historically, however, deviation from the market value standard was necessary only in two circumstances, neither of which were present in *Duncanville*: (1) when market value was unascertainable; or (2) when the market value standard would result in "manifest injustice."[74] The Court has stated repeatedly that private property's subjective value to its owner is not compensable;[75] accordingly, a public facility's value in terms of its worth to the community should not be considered when determining the just compensation owed a public condemnee. Because compensation is "for the property and not to the owner,"[76] the obligation of the public condemnee to replace the condemned facility does not necessitate a departure from the market value standard when the market value is ascertainable.

Duncanville leaves a couple of questions unanswered. The majority expressed no view concerning the availability of the substitute facilities doctrine in circumstances where application of the market value standard would be "manifestly unjust." The concurring opinion stated that the substitute facilities standard should be available to the public condemnee when the condemned facility's market value "deviates signifi-

69. *Id.* at 458; *see supra* text accompanying notes 18-21 and accompanying text.
70. United States v. 50 Acres of Land, 105 S. Ct. 451, 458 (1984). The Court, however, stated that "we express no view . . . on reproduction costs . . . when offered on the issue of fair market value." *Id.* at n.24.
71. *Id.* at 459 (O'Connor, J., concurring); *see supra* text accompanying note 26.
72. United States v. 50 Acres of Land, 105 S. Ct. 451, 459 (1984) (O'Connor, J., concurring).
73. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 517-18 (1979) (White, J., concurring); United States v. 50 Acres of Land, 529 F. Supp. 220, 222-23 (N.D. Tex. 1981), *rev'd*, 706 F.2d 1356 (5th Cir. 1983), *rev'd*, 105 S. Ct. 451 (1984).
74. *See supra* text accompanying notes 25-26.
75. *See supra* note 21 and accompanying text (discussing subjective value).
76. *See supra* text accompanying notes 22-24.

cantly from the make-whole remedy" intended by the fifth amendment,[77] but the opinion did not indicate when a deviation would be significant enough to necessitate a departure from the market value standard. The Court's preference for market value as an objective and workable measure of value,[78] however, indicates that when market value is ascertainable this exception to the market value standard rarely will be applied.

The availability of the substitute facilities doctrine when the market value of a condemned facility is unascertainable also is unclear. However, in light of the Court's rejection in *Duncanville* of the public condemnee's obligation to replace a condemned facility as a relevant factor in the determination of just compensation,[79] the viability of the substitute facilities doctrine, even when the market value is unascertainable, is doubtful. According to *Duncanville*, the government should be required to compensate the public condemnee only for the value of the property taken, not for the loss of services previously provided by the condemned facility. The courts apply the cost approach to determine compensation when privately owned, special purpose property is condemned.[80] Hence, the cost approach also should be applied when publicly owned, special purpose property is condemned.[81]

Despite these unanswered questions, the limitation of the substitute facilities doctrine in *Duncanville* is a logical application of just compensation principles. The inequity of the failure to fully indemnify the public condemnee for its loss, thereby forcing it to expend public funds to replace the condemned facility, must be viewed in light of the well-established treatment of private owners. *Duncanville* simply places the public condemnee in the same position as the private owner in the context of the just compensation clause of the fifth amendment.

Steven M. Sindler

77. *See supra* text accompanying notes 71-72.
78. *See supra* notes 15-18 and accompanying text.
79. *See supra* text accompanying notes 60-61.
80. *See supra* note 29 and accompanying text.
81. *See supra* text accompanying note 64.