St. Mary's Law Journal

Volume 2 | Number 2 Article 4

12-1-1970

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Sidney K. Gibson

EMINENT DOMAIN—ENHANCED VALUE DUE TO PROJECT AS AN ELEMENT OF MARKET VALUE IN TEXAS CONDEMNATION LAW

SIDNEY K. GIBSON

During the planning period of a public project there is some uncertainty as to its exact location and usually a rise in the market value of land in the general area of the proposed project. This speculative increase may be based upon the chance that the land will not lie within the project but adjacent thereto, or it may be due to the belief that the condemning authority will be willing to pay more than the actual value of the land to avoid prolonged litigation and the attendant expenses.

The scope of this comment concerns the element of enhancement to the land being condemned which is due to the project for which it is being taken. Is such enhancement to be included in compensation paid the landowner, and, if so, is the landowner entitled to all enhancement accruing until the actual legal taking or is there a method by which the condemning agency can "cut-off" this accruing value?

CONSTITUTIONAL LIMITATIONS ON THE POWER OF EMINENT DOMAIN

The power of eminent domain is inherent in the rights and powers of a sovereign state.[1] The only limits on the exercise of this power are found in the United States Constitution and the constitutions of the several states. The purpose for which the land is condemned must be for the public use and the landowner whose land is taken must receive just compensation.[2] The legislative branch of the government determines the needs of the public and once it is determined that a project is within legislative authority under those needs, the right to realize

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1 City of Austin v. Nalle, 102 Tex. 536, 120 S.W. 996 (1909).

2 U.S. CONST. amend. V:

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TEX. CONST. art. I, § 17:

No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; . . . .

"There is, we believe, no essential difference between 'adequate compensation' under our State Constitution, and 'just compensation' under the Fifth Amendment to the Federal Constitution. . . . The two expressions, when used in this connection, are synonymous." State v. Hale, 96 S.W.2d 135, 141 (Tex. Civ. App.—Austin 1936), *rev'd on other ground*, 136 Tex. 29, 146 S.W.2d 731 (1941).

it through the exercise of eminent domain is clear.[8] The concept of public welfare is broad and inclusive. Consequently, only the justness of the compensation is usually left for the landowner to challenge.[4]

The Fifth Amendment to the United States Constitution contemplates that monies paid into the common treasury by the taxpayers be jealously guarded as a public trust against unfounded and unjust claims.[5] On the other hand, it guarantees that the government will have regard for the rights and welfare of its citizens and respect for the restraint on its authority.[6] A spuriously high award would violate the rights of the public.[7] Yet, the owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.[8] Thus, "just compensation" means the full monetary equivalent of the property taken.[9] In enforcing the constitutional mandate requiring just compensation, the concept of market value has been adopted by the federal courts[10] and Texas courts.[11]

> [T]he term "market value" is the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying.[12]

This rule, over the years, has been riddled with exceptions and refinements, yet it stands as a point of reference from which the courts must determine the amount a landowner is to be compensated for the loss of his land to a public need.

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8 Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).

4 Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas*, 44 TEXAS L. REV. 1499 (1966).

5 United States v. One Parcel of Land, Etc., 131 F. Supp. 443 (D.D.C. 1955).

6 *Id.*

7 "[I]t is the duty of the state, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose propery is taken, but to the public which is to pay for it." Searl v. School District No. 2, Lake County, 133 U.S. 553, 562, 10 S. Ct. 374, 377, 33 L. Ed. 740, 746 (1890).

8 United States v. Reynolds, — U.S. —, 90 S. Ct. 803, 25 L. Ed. 2d 12 (1970); United States v. New River Collieries Co., 262 U.S. 341, 43 S. Ct. 565, 67 L. Ed. 1014 (1923); Seaboard Air Line Ry. v. United States, 261 U.S. 299, 43 S. Ct. 354, 67 L. Ed. 664 (1923).

9 United States v. Reynolds, — U.S. —, 90 S. Ct. 803, 25 L. Ed. 2d 12 (1970); Monongahela Navigation Co. v. United States, 148 U.S. 312, 13 S. Ct. 622, 37 L. Ed. 463 (1893).

10 United States v. Reynolds, — U.S. —, 90 S. Ct. 803, 25 L. Ed. 2d 12 (1970); City of New York v. Sage, 239 U.S. 57, 36 S. Ct. 25, 60 L. Ed. 143 (1915); Kerr v. South Park Commissioners, 117 U.S. 379, 6 S. Ct. 801, 29 L. Ed. 924 (1886); Boom Co. v. Patterson, 98 U.S. (8 Otto) 403, 25 L. Ed. 206 (1878).

11 State v. Carpenter, 126 Tex. 604, 89 S.W.2d 194 (1936).

12 State v. Carpenter, 89 S.W.2d 979, 980 (Tex. Comm'n App. 1936, opinion approved). The Texas Supreme Court has more recently added to the *Carpenter* definition of market value so that it now reads: "[T]he term 'market value' is the price which the property would bring when it is offered for sale by one who desires, but is not obliged to sell, and is bought by one who is under no necessity of buying it, *taking into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future.*" City of Austin v. Cannizzo, 153 Tex. 324, 334, 267 S.W.2d 808, 815 (1954).

DATE OF TAKING—A MULTIFARIOUS CONCEPT

The general rule of compensation to a property owner whose land is condemned under the right of eminent domain is that he is entitled to the market value of his land at the date of taking.[13] Much misunderstanding stems from the practice of using the term "date of taking" when the correct term is "date of valuation." The confusion is partially justified in that we are faced with a myriad of types of "takings," among them: (1) actual legal takings; (2) possessory takings; (3) constructive legal takings; and (4) equitable takings as imposed by the courts.

There can be no actual taking or date of taking until (1) the property owner consents to the appropriation and just compensation has been paid, or (2) a court of law has determined that the condemnor is entitled to the property and just compensation has been paid.[14] Only then is there truly a date of taking and any other date which is determined for purposes of applying the market value test is merely a date of valuation, though they have often been termed "dates of taking." When designating a valuation date as "date of taking," some courts have had sufficient insight to place the word "taking" in quotation marks.[15]

The Texas Constitution provides that privately-owned property cannot be appropriated to public use without first making adequate compensation to the owner, unless he gives his consent.[16] When there is a controversy as to the constitutionality of the taking or the amount of compensation, the legislature has provided that there may be a constructive "taking" if a deposit is made by the condemnor into court which allows the condemnor to legally appropriate the property pending litigation.[17] If this is done, the value of the land is ascertained on the date of the deposit rather than the date of the subsequent trial.[18]

When no act of appropriation (a legal possessory action or deposit) occurs before the institution of the condemnation proceedings, the legislature has provided that the value of the real estate be determined as of the date of the hearing of the condemnation proceedings; that is,

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13 San Antonio & A.P. Ry. v. Ruby, 80 Tex. 172, 15 S.W. 1040 (1891).

14 "[S]trictly there can be no 'taking', within the meaning of the law, until the party seeking to condemn has been adjudged to be entitled, and has paid or secured the compensation fixed." San Antonio & A.P. Ry. v. Ruby, 80 Tex. 172, 176, 15 S.W. 1040, 1041 (1891).

15 Gillam v. State, 95 S.W.2d 1019, 1020 (Tex. Civ. App.—Waco 1936, no writ).

16 TEX. CONST. art. I, § 17.

17 TEX. REV. CIV. STAT. ANN. art. 3268 (1968).

18 The date of deposit is considered the "date of taking" for the purpose of establishing a date on which to determine market value. *See* City of El Paso v. Coffin, 88 S.W. 502 (Tex. Civ. App. 1905, writ dism'd).

Caveat: Apparently, if a deposit is made but the condemning authority agrees to leave the owner in possession until some future date when the property will be needed, the date of evaluation will become the date of actual physical invasion and taking. *See* M. RAYBURN, TEXAS LAW OF CONDEMNATION 447 § 154 (1960).

on the hearing before the commissioners or on the jury trial, as the case may be.[19] This is no more than an enactment of pre-existing case law.[20]

In the absence of a deposit, an actual physical invasion or appropriation of property is a "taking" within the meaning of Article I, section 17 of the Texas Constitution.[21] Such a taking is complete when by reason of the taking of possession and use or detention of property by a condemning authority, the owner is prejudiced and the status quo cannot be restored.[22] This type of "taking" may be compensated for damages sustained in the partial taking.[23]

The equitable "takings" imposed by the courts are the source of most of the confusion surrounding "date of taking." Courts are prone to speak of a "second taking" in any situation when it is determined that enhanced value to the condemned property should be included in the landowner's compensation.[24]

The general rule is that the market value should not include any enhancement which is occasioned by the public facility itself.[25] This rule is subject to several exceptions imposed by the judiciary when the circumstances demand that, in fairness, a property owner be not deprived of the increase in value of his land due to some misfeasance or malfeasance on the part of the condemning authority. Land generally is to be valued as of the date of appropriation in the absence of a deposit and such value is exclusive of any enhancement that is due to the project for which the land is being condemned. If there have been earlier takings of property for the same project, the valuation date of those takings would necessarily be different (absent the exercise of the right of "cut-off" of enhancement by the condemnor)[26] from the valuation date of property taken at a later date. In this sense, the later taking might be deemed a "second taking" though it is, in fact, an original taking. Confusion in this area would be minimized if each taking were viewed as standing alone and if the question of "just compensation" be resolved by reference to whether the property owner is

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19 "When the whole of a tract or parcel of a person's real estate is condemned, the damages to which he shall be entitled shall be the market value of the property in the market where it is located at the time of the hearing." TEX. REV. CIV. STAT. ANN. art. 3265, § 2 (1968).

20 Texas Western Ry. v. Cave, 80 Tex. 137, 15 S.W. 786 (1891); San Antonio & A.P. Ry. v. Ruby, 80 Tex. 172, 15 S.W. 1040 (1891).

21 Brunson v. State, 444 S.W.2d 598, 601 (Tex. Sup. 1969).

22 *Id.*

23 TEX. REV. CIV. STAT. ANN. art. 3265, § 3 (1968).

24 *E.g.*, Trinity River Authority v. Boone, 454 S.W.2d 258 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ).

25 Barshop v. City of Houston, 442 S.W.2d 682 (Tex. Sup. 1969); Morrow v. St. Louis, A. & T. Ry., 81 Tex. 405, 17 S.W. 44 (1891).

26 *See* discussion of the rule allowing a "cut-off" of enhanced value beginning at p. 206 *infra*.

entitled to enhanced value under the equitable exceptions imposed upon the general rule of exclusion. The Texas Supreme Court has wisely refrained from the use of the term "second taking."

The Exceptions to The Exclusion of Enhancement Rule

The rule that enhanced value due to the project is excluded from compensation to property owners in condemnation proceedings was established in Texas as early as 1891.[27] The reasons advanced for this policy are sound. The condemning authority should not be obliged to pay any increase in value arising from the knowledge that the lands probably would be condemned.[28] Likewise, property owners should not be allowed to gain by speculation upon the likelihood of increase in value due to the condemnor's activities.[29] There is something manifestly unfair in forcing one to pay for a benefit he brings about. The reasoning behind the rule is set out in the frequently cited case, *City of El Paso v. Coffin*:[30]

> The reasons for this rule are apparent. To permit it [consideration of enhanced value] would be to take into consideration the condemnation proceeding itself as a factor, which is not allowed. Further, it is evident in such a case that the taking, and the effect on the value from such taking, would be concurrent, and such increase would not exist when the taking occurs. The person's property is taken and is absorbed in the purpose for which it is taken, and to allow him a compensation based on the value which the property would have had if not taken would be giving it a status it could not possibly have had in the very nature of the act. The reasoning of the Supreme Judicial District of Massachusetts is appropriate here (though not its decision, as that was controlled by a statute): "Its real value for use is not increased until the change in its surroundings comes. If the expected improvement involves the taking of the land by the right of eminent domain, the value of the land taken will never be enhanced by the improvement, for the taking precludes the probability of ever using it under improved conditions." *May v. City of Boston*, 32 N.E. 902.[31]

There are, however, cases in which the condemning authority has taken advantage of its superior position and placed the property owner in such an inequitable position of uncertainty that the courts will allow the inclusion of the enhanced value in compensation as a sort of judicial hand-slap. The application of these equitable exceptions has

27 Morrow v. St. Louis, A. & T. Ry., 81 Tex. 405, 17 S.W. 44 (1891).
28 United States v. Miller, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1943).
29 *Id.*
30 88 S.W. 502 (Tex. Civ. App. 1905, writ dism'd).
31 *Id.* at 505.

confused legal writers in determining the position of the Texas courts in condemnation proceedings. One writer points out that Texas courts have allowed the owner to recover, without qualification or condition, the enhanced value of land taken in condemnation.[82] Another writer has stated unequivocally that Texas follows the doctrine of probable scope as set forth in *United States v. Miller*.[83] Basically, the doctrine of probable scope provides that enhanced value will not be included in compensation to property owners whose property was probably within the scope of the project from the time the condemning authority was committed to it.[84] Until recently, there had been relatively little concern in Texas with the degree of certainty with which intention to condemn was made known.[85] The courts simply applied the rule excluding enhanced value except in isolated cases where the action or inaction of the condemning authority shocked the court's conscience sufficiently to induce it to include enhancement in the award to the property owner. There had been no commitment to any binding doctrine of certainty and the courts were left wide discretion in determining what constituted "just compensation" under the facts and circumstances of each case. Of course, the shortcomings of such a policy are that neither condemnors nor property owners know their rights and duties in a condemnation proceeding.

The Texas Supreme Court has summarized the circumstances calling for the application of the exception to the general rule of exclusion as being delayed takings, separate takings, or an uncertainty of taking.[86] Texas courts have included benefits and enhanced value as a result of the improvement under the equitable exception in the following instances.[87]

(a) Land Taken Due to a Change of Plans or for Subsequent Enlargement or Expansion of Project

[I]f the original project is subsequently enlarged so as to embrace

82 Annot., 147 A.L.R. 66, 70 (1943).

83 Glaves, *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 CHICAGO L. REV. 319, 349, 351 (1963).

84 "If [the lands] were within the area where they were likely to be taken for the project, but might not be, the owners were not entitled, if they were ultimately taken, to an increment of value calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the land taken." United States v. Miller, 317 U.S. 369, 379, 63 S. Ct. 276, 282, 87 L. Ed. 336, 345 (1943).

85 The issue of uncertainty as to when, if ever, the condemnor planned to take the property was dealt with by the Texas Supreme Court among the dicta in City of Dallas v. Shackelford, 145 Tex. 528, 199 S.W.2d 503 (1947). The issue lay dormant for twenty-two years until revived and settled with seeming finality in Barshop v. City of Houston, 442 S.W.2d 682 (Tex. Sup. 1969).

86 Barshop v. City of Houston, 442 S.W.2d 682, 685 (Tex. Sup. 1969).

87 It will be seen in the development of this comment that some of these instances would no longer bring about the inclusion of enhancement if through a definite manifestation of purpose to take particular property, the condemning authority provides the requisite "certainty of taking."

additional property, such additional property as is involved in the supplemental taking is entitled to the benefit of any enhancement in value which resulted from the original taking.[38]

(b) Increase in Value is Due to a Prior and Separate Improvement

While the decisions of courts are not in accord on the question of whether an enhancement in value caused by the very improvement for which the land is taken should be considered, they would probably all agree that an increase in value of land resulting from a prior and separate improvement should be allowed.[39]

(c) Owner Has Purchased Property at Its Enhanced Value

In *Barshop v. City of Houston*,[40] there existed a state of uncertainty as to the inclusion of a particular tract of land in an airport project for some fourteen years. During this period, the land was sold twice at its enhanced value. The first sale was for $79,000 and the second, to Barshop, at the enhanced value of $90,000. Barshop refused the city's offer of $63,192 for the tract. The jury awarded him $168,152. It would have been an injustice to pay a property owner less than his purchase price in a situation where there had been no certainty that the land would be included in the project. Such a ruling would freeze prices upon the mere contingency that land might be included in a project and would place an undue restraint on alienation of property. In the *Barshop* case, the value of the land would have been in a state of limbo for a period of fourteen years.

(d) Related Projects or One Project Under Two Condemning Authorities

Although no case has turned on the fact there were two condemning authorities, the circumstance has been duly considered in determining whether the exception to the exclusionary rule should apply.[41]

(e) An Unnecessary or Unreasonable Delay in the Acquisition of Property for Project

The rule is now established that even though a specific parcel of land may have been considered by the condemnor to be a part of the original project, if the condemnor proceeds with acquisition

38 4 NICHOLS, EMINENT DOMAIN 127, § 12.3151(3) (3d ed. 1951), quoted with approval by Texas courts. City of Dallas v. Rash, 375 S.W.2d 502, 508 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.); State v. Willey, 351 S.W.2d 900, 902 (Tex. Civ. App.—Waco 1961, no writ).

39 1 ORGEL, VALUATION UNDER EMINENT DOMAIN 443, § 104 (2d ed. 1953), quoted with approval in City of Dallas v. Rash, 375 S.W.2d 502, 508 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.).

40 442 S.W.2d 682 (Tex. Sup. 1969).

41 City of Dallas v. Rash, 375 S.W.2d 502 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.); City of El Paso v. Coffin, 88 S.W. 502 (Tex. Civ. App. 1905, writ dism'd).

> of some portions of the project and unnecessarily delays as to the other tracts, the owner of property later taken will be entitled to the reasonable market value of same on the date it is actually taken, including enhancement in value brought about for any proper reason, whether by preceding portions of said project or otherwise.[42]

(f) Any Time Lag Between Announcement of Project and Date of Taking

There has been a strong inference made by some courts that any delay in taking is due to negligence or a lack of diligence by the condemning authority and therefore unnecessary.

> If [the condemnor] is now compelled to pay more for a right of way than it would have been compelled to pay had condemnation been made at an earlier day, this results from its own failure to take such steps at an earlier period as it might and ought to have taken. . . .[43]

The exception would apparently be applied by some courts when land is taken in stages, even though the proceedings are pursued on a sustained and diligent basis.

> The decision as to when specific property will be legally taken is with the condemnor, and if it is decided to take and construct independent segments of a project, the delay as to property later taken is chargeable to the condemnor, and the owner of such property should not by instruction or otherwise be deprived of its reasonable market value on the date it is actually taken.[44]

(g) Separate and Disassociated Proceedings to Take Land Incidental to Original Project

An example of this type of taking would be a subsequent proceeding to condemn land for the supply of earth, rock, and gravel used in constructing an adjacent road.[45] The condemnation of the land to supply the road materials is incidental to the roadway project and considered independent of the prior condemnation proceedings instituted to acquire the land for the road itself. The exception to the general rule of exclusion applies to "cases in which the land taken was not within

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42 Uehlinger v. State, 387 S.W.2d 427, 432 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).

43 Texas Western Ry. v. Cave, 80 Tex. 137, 140, 15 S.W. 786, 787 (1891); City of Dallas v. Rash, 375 S.W.2d 502, 509 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.).

44 Uehlinger v. State, 387 S.W.2d 427, 432 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).

45 *E.g.*, McChristy v. Hall County, 140 S.W.2d 576 (Tex. Civ. App.—Amarillo 1940, no writ).

the original scope of the project, but was needed for expansion or for the purposes which might be regarded as incidental to the project."[46]

(h) Substantial Uncertainty as to the Date Land Will Be Taken for Project

The exception has been applied when a resolution failed to designate with some degree of certainty the time when the land was to be taken for the project. Enhancement was allowed under the following circumstances:

> Although appellees' property was within the general ten-block-area designated in the resolution . . . for the location of a public market, yet it was not to be presently taken; nor did it then appear when, if ever, it would be taken for the public purpose.[47]

(i) Uncertainty of the Location or Extent of a Project

This exception has been applied when it was known that some lands surrounding a reservoir project would be condemned for park sites from the outset of the project, but six years passed before the location or extent of the park sites was made certain by the adoption of a resolution. The enhancement due to the project which accrued during the period of uncertainty was included in the compensation.[48] The exception to the general rule of exclusion applies to "cases in which the general location of the project is fixed, but the exact location or the extent thereof is uncertain."[49]

(j) Previous Steps Taken Toward Improvement

When a condemning authority[50] condemns a portion of the property designated for taking and takes steps toward the completion of the improvement, the enhanced value accruing to lands taken in subsequent proceedings shall be included in compensation paid the property owner.[51] The Texas Supreme Court recognized this application of the exception in *City of Dallas v. Shackelford.*[52]

A collection of Texas cases dealing with the application of the ex-

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46 Barshop v. City of Houston, 442 S.W.2d 682, 685 (Tex. Sup. 1969).

47 City of Dallas v. Shackelford, 145 Tex. 528, 531, 199 S.W.2d 503, 505 (1947).

48 Trinity River Authority v. Boone, 454 S.W.2d 258 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ).

49 Barshop v. City of Houston, 442 S.W.2d 682, 685 (Tex. Sup. 1969).

50 This exception is dealt with in more detail in the subsection on "The Coffin Rule" *infra.*

51 City of El Paso v. Coffin, 88 S.W. 502 (Tex. Civ. App. 1905, writ dism'd).

52 "[I]n fixing the value of appellees' property as of the date it was taken, . . . it was entirely proper for the jury to take into consideration its enhanced value due to the previous steps taken by the City towards the establishment of a public municipal market." 145 Tex. 528, 533, 199 S.W.2d 503, 506 (1947).

ception to the rule of exclusion is footnoted.[53] In some cases, only one of the factors listed is present, while in others there is a combination of the factors which convinced the court that the equitable remedy which allows the property owner to profit by the very improvement for which his land is taken should be employed. In other cases, pertinent material is found among the court's dicta. Whether the rules are material to the decision of the case or mere dicta, the court's rationale is to the effect that if the enhancement, though due to the project itself, is allowed to accrue through some misfeasance or inaction on the part of the condemnor, then the condemnor, through the payment of the enhanced value, must bear the responsibility for that which it brought about. It is seen that no hard and fast rule for the application of the exception had been laid down by the Texas courts. The rules from the *Barshop*[54] opinion (discussed *infra*) have finally enabled the condemnor to proceed with the knowledge that it is possible to incur the general rule of exclusion, at least, after a definite point in time.

Speculative Enhancement

The conditions necessary to invoke the equitable exception to the general rule of exclusion of enhancement due to the project need be considered only if the enhanced value is of a speculative nature. If the enhancement is due to other factors[55] or is more certain than pure speculation,[56] then it is a necessary element of market value even when

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[53] Various combinations of the factors which are considered in determining whether to apply the exception to the "exclusion of enhancement due to the project rule" are found in Barshop v. City of Houston, 442 S.W.2d 682 (Tex. Sup. 1969); City of Dallas v. Shackelford, 145 Tex. 528, 199 S.W.2d 503 (1947); San Antonio & A.P. Ry. v. Ruby, 80 Tex. 172, 15 S.W. 1040 (1891); Texas Western Ry. v. Cave, 80 Tex. 137, 15 S.W. 786 (1891); Trinity River Authority v. Boone, 454 S.W.2d 258 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ); Haley v. State, 406 S.W.2d 477 (Tex. Civ. App.—Beaumont 1966. writ ref'd n.r.e.); Uehlinger v. State, 387 S.W.2d 427 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.); City of Dallas v. Rash, 375 S.W.2d 502 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.); State v. Cartwright, 351 S.W.2d 905 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.); State v. Willey, 351 S.W.2d 900 (Tex. Civ. App.—Waco 1961, no writ); McChristy v. Hall County, 140 S.W.2d 576 (Tex. Civ. App.—Amarillo 1940, no writ); Panhandle & G. Ry. v. Kirby, 94 S.W. 173 (Tex. Civ. App. 1906, no writ); City of El Paso v. Coffin, 88 S.W. 502 (Tex. Civ. App. 1905, writ dism'd); Gulf, C. & S.F. Ry. v. Brugger, 59 S.W. 556 (Tex. Civ. App. 1900, no writ); and Allen v. Missouri, K. & T. Ry., 25 S.W. 826 (Tex. Civ. App. 1894, no writ).

[54] Barshop v. City of Houston, 442 S.W.2d 682 (Tex. Sup. 1969).

[55] "[I]t is common knowledge that land in the . . . area has been appreciating in value at a steady rate annually irrespective of any city projects. Consequently, it would be unfair to seal off this increment at the date of announcement of the project and declare that any additional value accruing subsequently would be due solely to the announced project. . . . The condemnee should not be held to lose what is rightfully his because of lag time between the date of announcement of a project and the date of taking."

City of Austin v. Bergstrom, 448 S.W.2d 246, 254 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

[56] Steps taken toward establishing an improvement, in so far as they indicate with reasonable probability such establishment in the immediate future, provides sufficient certainty to remove the "speculative" status of an increase in value to adjoining land. City of El Paso v. Coffin, 88 S.W. 502, 505 (Tex. Civ. App. 1905, writ dism'd).

conditions do not invoke the equitable exception. It is therefore necessary to distinguish between types of enhancement.[57] One must determine what factors need be present to remove the stigma of pure speculation and place the enhancement in the category of real or actual enhancement, and thus included in compensation.

The Texas Supreme Court, in *City of Austin v. Cannizzo*,[58] has affirmed a refinement of the *Carpenter* definition of market value.[59] The *Cannizzo* refinement allows a consideration of all the uses to which the property is reasonably adaptable and for which it is, or in reasonable probability will become, available within a reasonable time. It was the opinion of the court that such an instruction to the jury would exclude consideration of purely speculative uses to which the property might be adaptable, but wholly unavailable.[60] This concept of market value was employed in *City of El Paso v. Coffin*[61] nearly fifty years prior to the *Cannizzo* case.

The Coffin Rule[62]

In *Coffin*, the functional portion of the public project was a railroad depot and the subject property was an attendant park site. The project was described in a resolution specifically designating the land to be taken.[63] This resolution was passed in November of 1902 and the "date of taking" of the park land was October 6, 1904, the date the deposit was paid into court. In the interim, the land for the depot had been acquired and was being graded and leveled, that is, it was in the early stages of construction. The trial court awarded the full increase in value, including that due to the project, to the "date of taking," October 6, 1904. The sole question was the correctness of allowing the jury to consider enhanced value due to the project. The jury was instructed to consider any increase or development of the property that might have been *reasonably expected* in the immediate future at the time of taking. In ascertaining the market value, the jury was not to consider "speculative or merely possible contingencies."[64] In explaining

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57 "[A]n important distinction must be observed between enhancement in market value of the property being condemned resulting from a previous improvement on the one hand, and an increase in such market value resulting from the very improvement, contemplated or projected, for which the land is being acquired, on the other." Uehlinger v. State, 387 S.W.2d 427, 432 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.). *Accord*, State v. Cartwright, 351 S.W.2d 905, 906 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.).

58 153 Tex. 324, 267 S.W.2d 808 (1954).

59 *See* n. 12 *supra*.

60 City of Austin v. Cannizzo, 153 Tex. 324, 333, 267 S.W.2d 808, 814 (1954).

61 88 S.W. 502 (Tex. Civ. App. 1905, writ dism'd).

62 *Id.*

63 Under the rule of "cut-off" (discussed on p. 206 *infra*), now employed by the Texas court, this resolution probably would have been sufficient to stem the accrual of enhanced value.

64 City of El Paso v. Coffin, 88 S.W. 502, 504 (Tex. Civ. App. 1905, writ dism'd).

its approval of the charge and affirmance of the judgment, the court, speaking through Chief Justice James, stated:

> It must be admitted, from a fair reading of the charge. . . , that it does nothing more than instruct the jury, in arriving at the market value on October 6, 1904, to consider the conditions surrounding the property at that time, the charge specifying its locality with reference to business and demand for property at that time existing, including any increase or development thereof that might then have been reasonably expected in the immediate future.[65]
>
> We see no reason why, under the proven facts and circumstances of this case, the jury were not warranted in concluding that the completion and use of this depot adjoining the property in question were on October 6, 1904, assured facts to occur in the immediate future, and based on conditions then in progress pointing directly to such completion and use, in such manner as to directly have effect upon the market value of the property in question at the time. To have excluded such consideration, and to have confined the jury to the condition the property was in at the time, and the use to which it was then applied by the owner, independent of its value as then affected by such consideration, would have been error.[66]

The effect of this holding, which has been approved and followed by the appellate courts of this state,[67] is to distinguish between purely speculative enhancement due to the project and enhancement in value due to the project which, though speculative, has basis in a reasonable certainty that the project will be completed. The reasonable certainty is established by the actions of the condemning authority. The steps taken in constructing the project provide the "reasonable expectation" necessary to remove the value increase from the "speculative or merely possible contingency" concept.[68] There are, then, different types of speculative enhancement and a very narrow definition of the type which is to be excluded from market value.

The *Coffin* rule, succinctly stated, is that enhancement due to the project is allowed when the reasonable probability of the establishment of the project is evidenced by steps taken toward completion on property acquired in an earlier proceeding. Only enhancement due to pure speculation, as limited by *Coffin*, comes within the general exclusionary rule and is not a proper element of market value.

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[65] *Id.*

[66] *Id.* at 504, 505.

[67] City of Dallas v. Shackelford, 145 Tex. 528, 199 S.W.2d 503 (1947); City of Dallas v. Rash, 375 S.W.2d 502 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.).

[68] City of El Paso v. Coffin, 88 S.W. 502, 505 (Tex. Civ. App. 1905, writ dism'd).

Community Enhancement

A different, but closely related, rationale for inclusion of enhancement was earlier applied in *Panhandle & G. Ry. v. Kirby*.[69] The court held that if the value of land condemned is *enhanced in common* with other lands in the community by the proposed construction of a project, the owner is entitled to its benefits in estimating the value of the land taken.

The *Coffin* court also felt there was some basic unfairness in allowing the condemnee's neighbors to benefit from the improvement when, in providing such community enhancement, the condemnee was required to sacrifice not only the monetary gains, but his right and title to the land as well. *In Re Condemnation of Certain Land*[70] is cited by the *Coffin* court as the reasoning adopted for the *Coffin* rule allowing the landowner to share in the enhancement with his neighbors. The Rhode Island Supreme Court approved an award by commissioners which included the enhanced value due to the project accruing to the date of taking. The Rhode Island court approved the commissioners' report which stated:

> We have earnestly endeavored to so make our award that all persons whose lands have been taken shall be no worse off than their neighbors whose lands have not been taken.[71]

The "enhancement in common" concept was recently utilized in connection with the requirement of certainty of location in *Trinity River Authority v. Boone*.[72] The court recognized that activity in connection with the project affected values in the neighborhood. In allowing the enhanced value to be included in the property owner's compensation, the court held that such general enhancement in value may be considered, at least until such time as it became certain that the tract would be taken. The opinion makes it clear that the includable enhancement value is limited to the general enhancement occasioned in the neighborhood. Evidence that the land, upon completion of the project, will have a higher and better use, is not allowed. In other words, only evidence of its market value at the time of taking, including enhancement shared in common with the general community, will be included. Evidence that the value will be higher upon the completion of the project is not to be included in market value determined at the date of valuation.

The fact that it may have become a water front lot [upon comple-

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69 94 S.W. 173 (Tex. Civ. App. 1906, no writ).
70 33 A. 523 (R.I. 1896).
71 *Id.* at 524.
72 454 S.W.2d 258 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ).

> tion of the project] may not be considered, but the enhancement in value is limited to general enhancement in value of lands in the neighborhood of the facility.[73]

This concept of market value is completely in harmony with the *Coffin* rule which includes such enhancement due to the project which has accrued to the date of valuation. The date of valuation concept has undergone a change since the *Coffin* case, but not the elements of market value. The date of valuation in the *Coffin* case was the date of deposit of compensation into the court, whereas under recent holdings, the date of valuation, in effect, is the date the resolution which specifically designated the land to be taken is passed; at least, when there is no unnecessary delay in the taking following designation.

Definite Manifestation of Purpose by the Condemnor—a "Cut-off" of Enhancement Due to Project

It is obvious, from a study of the cases applying the many equitable exceptions to the exclusionary rule and the narrow definition of speculative enhancement, that the widely-quoted general rule excluding enhanced value due to the project itself from compensation was all but swallowed by its exceptions. Strict enforcement of the *Coffin* rule, as there applied, would render condemnors liable for enhanced value in all large projects which, from a practical standpoint, require condemnation in stages.[74] It is difficult to conceive of a code of condemnation procedure which would comply with the stringent demands imposed by the courts. The condemnor no longer had the bargaining advantage in condemnation proceedings. The scales had tilted out of balance in favor of the condemnee. It was becoming economically unfeasible to proceed with public projects of magnitude. State condemning authorities could be required to pay ten times the property's value prior to the project.[75] It was difficult to reconcile the fact that a federal condemning authority might acquire identical land at one-tenth the cost to a state condemning authority though the condemnation pro-

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[73] *Id.* at 265.

[74] The nature of some public projects precludes any method of procedure other than a series of condemnation proceedings. An example is land which is acquired for recreational facilities for public use around a proposed reservoir project. The reservoir lines must be finalized before there can be a practical final determination as to the number and location of the recreational sites. United States v. Crance, 341 F.2d 161 (8th Cir. 1965).

[75] In Trinity River Authority v. Boone, 454 S.W.2d 258 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ), the value of land taken for recreational facilities adjacent to a reservoir had increased in value from $300 per acre to $3000 per acre.

cedure followed was precisely the same.[76] The present rule in Texas eases this burden upon the state condemning authorities.

Presently, all enhancement accruing prior to some definite manifestation of purpose by the condemning authority to take particular property for the project is included in compensation, and that portion of enhancement due to the project accruing after the definite manifestation is excluded from compensation. The rules of the *Shackelford*[77] opinion as discussed and interpreted by the Texas Supreme Court in *Barshop v. City of Houston*[78] is the authority for this rule. It is necessary to study the facts in the *Shackelford* and *Barshop* cases and to analyze the opinion in each to understand how the new "cut-off" rule has evolved.

City of Dallas v. Shackelford[79]

In the *Shackelford* case, the City of Dallas sought to condemn ten city blocks for the construction of a public market. The resolution describing the project was passed three days after the bombing of Pearl Harbor. It set out the entire plan, but stated that due to the declaration of war and the generally unsettled conditions, only a portion of the plan would be instituted at that time. The Shackelford property was not within the two blocks that were condemned. Almost three years later, a second resolution was passed and condemnation proceedings were filed for appropriation of the additional property. The court pointed out that, under the original resolution, it was not known when, if ever, the property would be condemned and that Dallas did not manifest a definite purpose to take the additional property until November of 1944.

The case reached the Texas Supreme Court on certified questions, the essence of which was whether, under the peculiar facts of the case, Shackelford was entitled to recover the enhanced value of the prop-

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[76] If there is a mere likelihood that land will be taken, though it might not be, and such likelihood exists at the time the condemnor becomes committed to the project, no increase in the value of the property taken may be included in the compensation paid the condemnee provided the condemning authority is federally authorized. United States v. Miller, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1943).

"The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction it became evident that land so situated would probably be needed for the public use." United States v. Reynolds, — U.S. —, 90 S. Ct. 803, 807, 25 L. Ed. 2d 12, 18 (1970).

[77] City of Dallas v. Shackelford, 145 Tex. 528, 199 S.W.2d 503 (1947).

[78] 442 S.W.2d 682 (Tex. Sup. 1969).

[79] 145 Tex. 528, 199 S.W.2d 503 (1947).

Due to the Texas Supreme Court's opinion in the Shackelford case consisting of portions adopted from the lower court's tentative opinion, it is important to consult the lower court's opinion as well. It is reported at 200 S.W.2d 869 (Tex. Civ. App.—Dallas 1946), *certified questions answered*, 145 Tex. 528, 199 S.W.2d 503 (1947).

erty due to the project. As authorized by statute,[80] the certified questions submitted by the Dallas Court of Civil Appeals (hereafter the Dallas court) were accompanied by a tentative opinion setting forth the views of the lower court on the questions certified. The Texas Supreme Court adopted portions of the opinion for the stated reason that the Dallas court correctly decided the law questions presented. To understand the paragraphs adopted, one must read them in context with the entire opinion of the Dallas court.

The Dallas court stated that Texas had followed the general rule denying a landowner the right to recover enhancement due to the proposed improvement in all cases "where the facts warranted its application."[81] In an attempt to devise tests which determine the facts and circumstances necessary to warrant the application of the general rule of exclusion, the court quoted liberally from two cases, *United States v. Certain Lands in Town of Narragansett*[82] and *City of El Paso v. Coffin*.[83] In a portion of the opinion adopted by the Texas Supreme Court, the Dallas court wrote:

> Now, applying the legal tests announced by the courts to the facts. . .[84]

The "courts" referred to are those rendering the decisions in the *Narragansett* and *Coffin* cases. The Dallas court continues, applying the test from the *Narragansett* case:

> . . . we do not think it can be correctly said that the resolution of December 10, 1941 necessarily and with *particular* certainty foreshadowed the taking of appellees' property for the public purpose mentioned; . . . (emphasis added.)[85]

From a study of the Dallas court's opinion and a reading of the *Narragansett* opinion, one must conclude that there was a clerical error in the transposition of the word "practical" used earlier in the opinion to the word "particular" used in applying the test. The Dallas court purports to be adopting the *practical* certainty test set forth by the *Narragansett* court. Surely, the inadvertent and unfortunate use of the word "particular" by the Dallas court did not impose a higher degree of certainty in Texas condemnation proceedings than the court intended.

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80 TEX. R. CIV. P. 466.

81 City of Dallas v. Shackelford, 200 S.W.2d 869, 871 (Tex. Civ. App.—Dallas 1946), *certified questions answered*, 145 Tex. 528, 199 S.W.2d 503 (1947).

82 180 F. 260 (C.C. R.I. 1910).

83 88 S.W. 502 (Tex. Civ. App. 1905, writ dism'd).

84 City of Dallas v. Shackelford, 145 Tex. 528, 532, 199 S.W.2d 503, 505 (1947).

85 *Id.*

The Dallas court continued applying a second test which it attributes to *Coffin*:

> . . . nor, as stated by Chief Justice James, was the property sought to be condemned simultaneously and in a common proceeding with the other lands specifically designated in the resolution for immediate acquisition.[86]

The *Shackelford* court concluded, upon application of these tests, that the taking of the Shackelford property was the result of "an entirely separate and disassociated proceeding,"[87] and the owner was entitled to the enhanced value due to the project. In other words, the facts of the case did not call for the application of the general rule of exclusion.

The test of practical certainty, which was evidently intended to be adopted, is met when circumstances are such that in the actual practice of doing things one could be practically certain—as opposed to the necessity of being legally certain—that his land would be taken.

The purpose of the "common and simultaneous test" is elusive. The term found its way into the *Coffin* opinion via dictum. In commenting upon the reasoning of the Massachusetts courts in excluding enhancement due to the project, Chief Justice James expressed the belief that the facts presented by the *Coffin* case would have been proper to invoke the exclusionary rule "if this property [taken for park land] and the other property acquired as a depot site were being condemned by the railway companies simultaneously in a common proceeding."[88] This comes upon the heels of the observation that the "real value for use is not increased until the change in its surroundings comes."[89] Under the facts of the *Coffin* case, all that was meant by the "common and simultaneous" observation was that if the park land had been taken simultaneously with the depot land, there would have been no steps taken toward the establishment of the improvement recognized by the court as sufficient probability of completion to remove the enhanced value from the speculative classification. It was not intended as a conclusive test to be established in eminent domain proceedings, but was really a rather needless afterthought.

If each of the two tests are viewed as conclusive, they are contradictory and self-destructive. If the court intended that all land must be taken for the project at one point in time before the general rule of exclusion could be applied, there would be no reason to go a step further and apply the test of practical certainty. The reason for the ex-

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86 *Id.*
87 *Id.* at 533, 199 S.W.2d at 506.
88 City of El Paso v. Coffin, 88 S.W. 502, 505 (Tex. Civ. App. 1905, writ dism'd).
89 *Id.*

istence of the practical certainty test is to permit the condemnor to take land in stages without invoking an exception to the exclusionary rule. Therefore, if any rational meaning is to be gleaned from the *Shackelford* tests, the tests must have been intended to be applied as follows: if the property is condemned simultaneously and in a common proceeding with the other project properties, the enhanced value due to the project will be excluded because it is necessarily of the purely speculative class. If the land is not taken in such a manner, then the practical certainty test may be applied as a protective measure in favor of the condemnor. The result is that even though the land was not taken in a common and simultaneous proceeding, the enhanced value due to the project will be excluded from compensation, provided the owner has been practically—as opposed to legally—certain his land would be taken for inclusion in the project.

The *Shackelford* opinion does not expressly relate the standards necessary to meet the test of practical certainty. One must look, then, to the *Narragansett* opinion from whence the test was adopted. The *Narragansett* court held that the act passed by Congress describing and authorizing the project provided a practical certainty that the land would be taken. Though the government had almost completed the improvement adjoining the landowners' property before the institution of condemnation proceedings by the filing of a petition in court, enhancement due to the project was excluded from compensation. The rule and reasoning which the *Narragansett* court set forth in 1909 is apparently the rule and reasoning applied by the Texas courts today in establishing a "cut-off" of enhanced value.

> The enhancement of price due to the public improvement, if based upon the reasonable expectation that the lands may be held by the private owner with the added advantages of adjacency to the lands improved by the public, is legitimate; but when this expectation is destroyed by the practical certainty, as distinguished from legal certainty, that the lands are not to continue in private ownership adjacent to improved public lands, then the reason fails. It is unsound to look merely at the date of filing a petition for condemnation in considering how far the value has been enhanced by the public project.[90]

Most writers agree that a requirement of practical certainty is considerably more stringent upon the condemnor than the requirement set out in *United States v. Miller*[91] under the doctrine of probable

[90] United States v. Certain Lands in Town of Narragansett, 180 F. 260, 261 (C.C. R.I. 1910).

[91] 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1942).

"We think the test was stated with admirable clarity by a unanimous Court in Miller: if the 'lands were probably within the scope of the project from the time the Govern-

scope.[92] There need be less likelihood of taking under the doctrine of probable scope than under the test of practical certainty. The federal courts have liberalized the requirements of certainty of taking even more in recent cases.[93]

Texas, in adopting the practical certainty test, was aware of the then recently decided *Miller* case and the doctrine of probable scope.[94] *Miller* and the language used therein was purposely overlooked and the Texas courts reached back to the *Narragansett* case, decided in the first decade of this century, to find a decision which applied the test of certainty desired. Texas, by so doing, necessarily rejected the condemnor-favoring doctrine of probable scope and adopted the test of practical certainty which is more favorable to the condemnee.

Texas has adopted the "definite manifestation of purpose test" to satisfy the requirement of practical certainty. The Texas Supreme Court has set out guidelines for the application of the "definite manifestation of purpose test" in *Barshop v. City of Houston.*[95]

Barshop v. City of Houston[96]

As in *Coffin* and *Shackelford,* the portion of the *Barshop* opinion dealing with the factors necessary to bring a condemnation case within the exclusion of enhancement rule is found among dicta. Barshop was allowed all enhancement in value to his property, including that due to the project, because counsel for the condemning authority consistently urged that *all* enhanced value be excluded, not allowing the court to interpose an alternative or "cut-off" date.

The *Barshop* case centered around an unreasonable delay in the taking of the property. The pertinent facts are outlined chronologically:

(a) June 14, 1950, the City of Houston initiated a study of its future airport needs;

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ment was committed to it,' no enhancement in value attributable to the project is to be considered in awarding compensation." United States v. Reynolds, — U.S. —, 90 S. Ct. 803, 807, 25 L. Ed. 2d 12, 18 (1970).

92 "[I]n *United States v. Miller,* a rule somewhat more favorable to the condemnor (than the rule applied in Town of Narragansett) was applied." 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN 429 § 100 (2d ed. 1953).

After discussing the rule of practical certainty, it was noted that under the Miller rule "the mere probability, without certainty, that the lands in question will be taken for the project, precludes the right to recover for an enhancement in its value due to the project. . . ." Annot., 147 A.L.R. 66, 77 (1943).

93 *See* reference to United States v. Reynolds decision in note 76 *supra.*

94 The Dallas Court of Civil Appeals demonstrated familiarity with the Miller case by quoting from "a lengthy annotation found in 147 A.L.R. p. 66 *et seq.*", the subject case of the annotation being United States v. Miller, City of Dallas v. Shackelford, 200 S.W.2d 869, 870 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.), *certified questions answered,* 145 Tex. 528, 199 S.W.2d 503 (1947).

95 442 S.W.2d 682 (Tex. Sup. 1969).

96 *Id.*

(b) November 6, 1957, a large tract of land adjacent to the Barshop tract was bought by the City;

(c) April 20, 1960, Barshop purchased the tract in question for $90,000;

(d) October 11, 1960, a City ordinance authorized an offer of $63,192 to Barshop for the tract;

(e) June 18, 1963, the City finally communicated the offer to Barshop (Thirty-two months after the authorization); and

(f) July 7, 1964, the City took the property.

Thus, for fourteen years, public information was abroad that the airport was going to be located in the area of the Barshop tract.

The *Barshop* court acknowledged the general rule that compensation paid the condemnee should not include any enhancement which is occasioned by the public facility itself. It named the specific exceptions to this general rule and attributed their recognition to the *Shackelford* opinion: (1) cases in which the land taken was not within the original scope of the project, but was needed for expansion or for the purposes which might be regarded as incidental to the project; and (2) cases in which the general location of the project is known, but the exact location or extent thereof is uncertain.[97]

In discussing the *Shackelford* opinion, the Texas Supreme Court stated that the purpose of the *Shackelford* tests was to establish the valuation date in instances of delayed takings, separate takings, and when there is an uncertainty of taking. The valuation date in these instances was held to be the date of taking and such valuation was to include the enhanced value due to the improvement up to the time the condemnor manifests a definite purpose to take the land. In a factor analysis of the *Shackelford* opinion, the *Barshop* court considered the following factors in determining whether the case came within the general rule of exclusion:

(1) were the lands to be condemned designated for immediate acquisition;

(2) did it appear the lands were to be presently taken;

(3) was there a state of uncertainty as to when, if ever, the condemnor would take the property;

(4) were there separate proceedings to take the property in stages; and

(5) were the proceedings begun simultaneously and in a common proceeding?[98]

From the confusion of the *Shackelford* opinion, the court has fashioned some objective guidelines upon which both condemning author-

[97] *Id.* at 685.

[98] *Id.*

ities and property owners may rely. Still, the *Barshop* court would make the rule more complicated than it need be. Practically speaking, there is always uncertainty as to the extent and location until there is some manifestation of purpose by the condemnor to take particular land. It follows that there will always be enhancement in value due to the project included in the landowner's compensation until this uncertainty is removed by the definite manifestation of purpose. Therefore, a better statement of the rule is that in all cases of condemnation the enhanced value of the property due to the project shall be included in the market value up to the date of the definite manifestation of purpose. The definite manifestation of purpose becomes a "cut-off" date in so far as enhancement due to the project is concerned.

The *Barshop* court denied any "cut-off" of enhancement because of Houston's failure to urge the trial court to exclude evidence of enhancement after any "cut-off" date. However, the court acknowledged that under the rule of the *Shackelford* case, Barshop was entitled to recover enhanced value to his property "for at least a number of years," thereby strongly implying that there was a sufficiently definite manifestation of purpose by Houston. The court neglected to set out the requisites of "definiteness," but it may be safely assumed that the court was referring to either (1) a resolution or ordinance passed and adopted by the condemning authority, or (2) the filing of the petition in the condemnation proceeding.

Resolution as a "Cut-off" Date

Because the *Barshop* court did not give us the requirements of definiteness in a resolution, one must look to the *Shackelford* opinion. It is manifest that the resolution remove the uncertainty as to the extent and location of land to be included in the project. The resolution must meet the test of practical certainty adopted by Texas from the *Narragansett* case, *i.e.* is the manifestation of purpose to take the property such that the land owner is reasonably assured, in the normal course of condemnation proceedings, the condemnor will take the land in question? A reasonable certainty—not a mere possibility—of taking is the degree necessary.

Under the dictum in *Shackelford,* an adequate resolution would: (1) determine that the improvement is for the public welfare; (2) determine the necessity of acquiring specifically described land for the public improvement; and (3) designate the named property for immediate acquisition.[99] The resolution must, of course, be made public. Probably, the adoption of the resolution, standing by itself, is sufficient

[99] City of Dallas v. Shackleford, 145 Tex. 528, 533, 199 S.W.2d 503, 506 (1947). The requirement of "immediate acquisition" means within a reasonable time.

without the necessity of its recording with the county clerk, provided the meeting at which it was adopted or passed was a public meeting or its results were made public.[100] If the resolution removes doubts as to the land which will be taken and the time of its taking, it is a sufficient manifestation of purpose to serve as a "cut-off" date of enhancement due to the project because it provides a practical certainty of taking.

Date of Filing as "Cut-off" date

Another acceptable manifestation of intent to condemn which will serve as a "cut-off" date is the filing of the condemnation proceeding. The action obviously meets the test of practical certainty set out in *Shackelford*; but, this "cut-off" date will not be enforced by the courts if the attorney for the condemnor consistently urges that *all* enhanced value be excluded without pleading any alternative date. For this reason, the *Barshop* court allowed enhancement until the date of filing.

Apparently, a deposit of compensation, as determined by the commissioners is not required by the courts in order to stop the accrual of enhanced value. The definite manifestation of purpose provided by an adequate resolution or the filing of the petition will cut off the flow of enhancement. The deposit would be necessary only for the purpose of allowing the condemnor to legally enter upon and appropriate the property prior to the rendition of judgment by the court in a contested situation.

At first blush, one might think that this new rule in condemnation proceedings denies the condemnee his statutory and constitutional right to have his compensation determined by the market value of his property at the time of the hearing.[101] The establishment of a

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100 "[U]ntil (the condemning authority) *adopted* its resolution . . . , there was a continuing state of uncertainty as to when, if ever, the appellee's tract would be taken. . . ." (emphasis added). Trinity River Authority v. Boone, 454 S.W.2d 258, 265 (Tex. Civ. App. —Houston [1st Dist.] 1970, no writ).

This language is to the effect that under certain circumstances the adoption of the resolution by itself is sufficient to allow a "cut-off" of enhancement, but it seems prudent to record the resolution with the county clerk.

101 The statutory right is provided by TEX. REV. CIV. STAT. ANN. art. 3265, § 2 (1968). "The owner has a constitutional right to receive the reasonable market value of his property as of the date it is actually taken by the condemnor. Such date of taking is not to be reflected back to a previous time when the taking was first contemplated by the condemnor." Uehlinger v. State, 387 S.W.2d 427, 432 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.); *accord*, City of El Paso v. Coffin, 88 S.W. 502, 505 (Tex. Civ. App. 1905, writ dism'd). *But see*, Haley v. State, 406 S.W.2d 477, 480 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.):

> In a condemnation suit the general principle is the owner has a constitutional right to the market value of the property as of the date it is actually taken. An exception to this rule is that the condemnor is not obligated to pay for an enhancement in value of the property occurring as a result of a public improvement made before the date of taking, provided certain facts appear [as set forth by Texas courts]. . . . (citations omitted).

"cut-off" date would appear to provide a date earlier than the date of the hearing upon which market value is established. This is illusory. The statute does not stipulate the elements of market value. The condemnee's property is still valued by its market value at the date of the hearing, but exclusive of any evidence of enhanced value due to the project which accrued subsequent to the "cut-off" date. Thus, the element of enhanced value due to the project is the only element excluded from market value and the rule allows the inclusion of enhanced value which is due to causes other than the project.

Trinity River Authority v. Boone[102]

At the time the attorneys prepared this case, the *Barshop* discussion of the *Shackelford* opinion had not yet been handed down. The Houston Court of Civil Appeals (1st Dist.) withdrew a prior opinion in view of the decision in the *Barshop* case and substituted the present one.

The property in question consisted of a 4.375-acre tract which was taken for the purpose of a park site adjacent to a dam and reservoir. The pertinent facts set out chronologically are:

(a) August, 1957, the City of Houston began a study evaluating its future needs for water;

(b) November, 1957, engineers recommended the construction of a reservoir on the Trinity River;

(c) September, 1959, the City of Houston and the Trinity River Authority (hereafter TRA) entered into a contract for mutual cooperation in the construction of Livingston Reservoir;

(d) October, 1960, permits from the Texas Water Commission and the Army Corps of Engineers were granted to the City and the TRA;

(e) 1961-1965, the main portion of the proposed reservoir was surveyed, staked and platted;

(f) September, 1964, a new contract between the City and the TRA was entered into altering the terms of the agreement somewhat;

(g) December, 1964, the TRA authorized engineers to plan the recreational aspects of the project;

(h) June, 1965, the TRA sold and delivered bonds in the amount of $48,500,000 for the construction of the dam and reservoir;

(i) August, 1965, the engineers completed the recreational studies and one of the suggested park sites encompassed the appellee's land;

(j) September, 1965, the Tribunal for Condemnation[103] was appointed and the TRA began to acquire land for the project;

(k) February, 1966, the plan was made public through the record-

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102 454 S.W.2d 258 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ).

103 The condemning authority elected to proceed under TEX. REV. CIV. STAT. ANN. art. 7880-126 (1954), made available to districts operating as Water Control and Improvement.

ing with the county clerk of the resolution of January, 1966, which described the lands to be taken for park sites;

(l) April, 1966, construction began on the project;

(m) June 25, 1968, a cross-action to condemn appellee's land was filed.

The land had enhanced in value from $300 per acre to $3000 per acre. It was stipulated that the land needed for the project was acquired on a sustained and diligent basis. The landowner's basic contention was that the acquisition of lands for recreational purposes was not included in the initial project, that is, the construction of the Livingston Reservoir; but the taking for recreational purposes was an enlargement of the initial project and was, therefore, an additional or "second taking" which entitled him to the enhancement in value due to the construction of the Livingston Reservoir. This contention was sustained by the trial court. The appellate court reversed, holding that the legislation which created the TRA made it the statutory duty of the condemning authority to acquire additional land adjoining any lakes constructed on the Trinity River for the development of recreational facilities and that this statute become a part of the contract of 1959. Thus, the recreational aspects were included in the original project and not an enlargement thereof. The court, in construing the rules set out in *Barshop*, held that the exception to the general rule of exclusion, applied in cases where the land taken was not within the original scope of the project, was inapplicable; but the other exception, applied in cases where the location or extent of the project is uncertain, was applicable.

> We think the effect of Barshop is to hold that in such cases [delayed takings, separate takings, or uncertainty of taking] general enhancement in value of the property in the neighborhood in anticipation of the proposed improvement may be included in the determination of the market value as of the date of the taking. When the site of the improvement is determined by the exact extent of lands necessarily to be encompassed in the facility are not known, the general increase in the market value of land in the neighborhood due to the proposed facility may be considered until such time as it becomes certain that the particular tract will be taken.[104]

The definite manifestation of purpose requirement would be met, in the opinion of this court, when it becomes certain that the tract will be taken. The court stated:

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104 Trinity River Authority v. Boone, 454 S.W.2d 258, 265 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ).

> In the case before us until TRA adopted its resolution in January, 1966, there was a continuing state of uncertainty as to when, if ever, the appellee's tract would be taken. . . .[105]

This infers that the date of the resolution, specifically describing the land to be taken, would, in this case, serve as a "cut-off" date and no enhancement accruing after that date should be admitted into evidence of market value.

This is the first Texas case in which the dicta of *Shackelford* and *Barshop* have been applied. The court recited that the TRA relied principally on the case of *United States v. Miller* and the landowner relied upon, among others, *City of El Paso v. Coffin*. It is interesting that neither the condemnor nor the condemnee relied on the *Shackelford* case.

CONCLUSION

Prior to the *Barshop* discussion of *Shackelford*, a condemning authority risked paying the enhanced value to the property condemned, accruing to the date of taking, including that enhancement to the project itself. The exceptions to the condemnor-favoring rule of exclusion of such enhancement had consumed the general rule. The high cost of public improvements under the exceptions was not in the best interest of the public welfare. The Texas courts have seized upon a wise and equitable compromise between the general rule which excluded all enhancement due to the project and the exceptions to that general rule which included all enhancement due to the project. Now, a landowner whose land may be adjacent to a public improvement is not denied any enhanced value which is in common with other lands in the neighborhood so long as there is an uncertainty that it will be taken. When this uncertainty is removed by a definite manifestation of purpose to take particular lands for the improvement, the enhancement due to the project ceases accruing insofar as it may be included in compensation to the landowner. Thus, the condemnor may protect itself against spurious enhancement due to the project by enacting a resolution specifically describing the land to be taken, provided the land is, in fact, taken within a reasonable time. This rule serves as a spur to organize and plan a project without undue delay. A condemnor is aware that subsequent to the general notoriety of the project, values in the area of the proposed project will rise. The rule provides an incentive to be diligent in proceeding and executing the right of eminent domain. The "cut-off" rule will serve to shorten the period

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105 *Id.* at 265.

of uncertainty which the courts have found to be obnoxious to landowners. The doctrine of probable scope is rejected in favor of the test of practical certainty. A mere likelihood that land will be included will not be sufficient to exclude enhancement due to the project.

Obviously, there may be found sufficiently definite manifestations of purpose other than a resolution or ordinance.[106] The courts will have discretion in determining whether a manifestation of intent other than a resolution or filing meets the requirement of practical certainty under the facts of each case.

All exceptions to the general rule of exclusion are not completely replaced by the "cut-off" rule. If there is an undue delay between the resolution and the taking, or any uncertainty generated by the condemnor which serves to extinguish the certainty created by the resolution or other manifestation of purpose to condemn, then enhanced value shall be included till the date of taking.

The rule of "cut-off" is a just rule to landowners and condemning authorities alike.

[106] The court in Trinity River Authority v. Boone, 454 S.W.2d 258 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ) appeared to examine the contract made between the city and the Trinity River Authority concerning the construction of the reservoir to determine if it provided a sufficiently definite manifestation of purpose to take particular land.