NOTES

EMINENT DOMAIN—SUBSTITUTE FACILITY MEASURE OF JUST COMPENSATION IS AVAILABLE TO PRIVATE OWNERS OF NONPROFIT, COMMUNITY FACILITIES IN APPROPRIATE CASES—*United States v. 564.54 Acres of Land,* 506 F.2d 796 (3d Cir. 1974).

In the course of its land-acquisition program for the proposed Tocks Island recreational area,[1] the United States in 1970 instituted a condemnation proceeding against three separate tracts of land owned by the Southeastern Pennsylvania Synod of the Lutheran Church in America (Synod).[2] The land in question, situated along the Delaware River in Monroe County, Pennsylvania, was used by the Synod in its operation of three summer camps.[3] The United States offered compensation in the amount of $485,400, but the defendant Synod claimed that it would cost more than $5.8 million to develop new camping facilities at a different location.[4]

---

[1] The Tocks Island Project was launched in 1961 with the creation of the Delaware River Basin Compact, an agreement among the federal government and the states of New York, New Jersey, and Delaware, and the Commonwealth of Pennsylvania. Joint Resolution of Sept. 27, 1961, Pub. L. No. 87-328, 75 Stat 688-89, 711. The Compact, formed for the purpose of developing water and other natural resources of the Basin, was empowered to construct dams and reservoirs and to acquire by condemnation any lands within the basin necessary for its projects. *Id.*

Four years later Congress created the Delaware Water Gap National Recreation Area as part of the Tocks Island Project and gave the Secretary of the Army the power to acquire land for development. Act of Sept. 1, 1965, Pub. L. No. 89-158, 79 Stat. 612 (codified at 16 U.S.C. § 460 *o* (1970)).

[2] United States v. 564.54 Acres of Land, 506 F.2d 796, 798 (3d Cir. 1974). United States federal courts view an eminent domain proceeding as a suit by the Government against a landowner and not as a suit by the condemnee to collect a money payment. 6 NICHOLS ON EMINENT DOMAIN § 24.113 (rev. 3d ed. 1974) [hereinafter cited as NICHOLS]. FED. R. CIV. P. 71A governs procedure in federal condemnation actions.

[3] United States v. 564.54 Acres of Land, 506 F.2d 796, 798 (3d Cir. 1974). The appellant Synod joined with the Northeastern Pennsylvania Synod of the Lutheran Church in America in forming the Eastern Pennsylvania Lutheran Camp Corporation, a Pennsylvania nonprofit corporation which conducted the camp program. Brief for Appellant at 5-6, United States v. 564.54 Acres of Land, 506 F.2d 796 (3d Cir. 1974) [hereinafter cited as Appellant's Brief].

Camp Miller, which had been acquired in 1927, covered approximately 82 acres of land and was utilized by the Synod as a campsite for 1450 boys annually. Camp Hagan, containing 40 acres, was bought by the Synod in 1937 and was operated as a camp for nearly 1400 young girls every year. Camp Ministerium, obtained in 1945, consisted of approximately 184 acres devoted to family camping for 600 persons every year. Appendix to Brief for Appellant at 10a-11a, United States v. 564.54 Acres of Land, 506 F.2d 796 (3d Cir. 1974) [hereinafter cited as Appendix to Appellant's Brief]. The Synod is currently running Camp Hagan and Camp Ministerium as the government's lessee. *Id.* at 36a.

[4] United States v. 564.54 Acres of Land, 506 F.2d 796, 798 (3d Cir. 1974). The great

During the pretrial proceedings,[5] the trial judge, granting a request by the Government, ruled "that the cost of 'substitute facilities' is not a proper measure of compensation for the taking of defendant's property,"[6] but the court reserved ruling on the valuation standard to be applied at trial.[7] The court also held that the cost of substitute facilities was available as a measure of compensation only to a governmental condemnee.[8] In response, the Synod filed a motion requesting that the district court amend its pretrial order to include the certification necessary for an interlocutory appeal.[9] The trial judge granted this motion.[10]

In *United States v. 564.54 Acres of Land,*[11] the Third Circuit reversed the district court's pretrial order and held that in an

disparity between these two figures results from several factors. For example, the operation of certain grandfather clauses in the Pennsylvania legislation governing the construction and operation of campgrounds and public buildings exempted preexisting camps from compliance. A new campground, however, would require building an entire sewage treatment facility to replace the septic tanks in use at the condemned campgrounds. The Synod estimated that this would exceed the cost of direct reproduction of the present septic tank systems by $412,400. Appellant's Brief, *supra* note 3, at 7.

The Synod also claimed that new camps would be subject to the provisions of Chapter 191 of the Department of Environmental Resources Regulations and the regulations of the American Standard National Plumbing Code, compliance with which would add a combined extra cost of $28,065. *Id.*

In addition to compliance with state law, relocation would also require construction of a dam, access and onsite roads, and a power line in order to provide an equivalent to what was already available at the old sites. The Synod estimated the cost of these facilities to be nearly $2 million. *Id.* at 8.

[5] The action was commenced pursuant to a complaint dated June 15, 1970. Appendix to Appellant's Brief, *supra* note 3, at 1a. On December 15, 1972, the Government filed a request in the federal district court for the middle district of Pennsylvania for pretrial rulings, one of which stated that "[t]he cost of substitute facilities is not a proper measure of compensation for the taking of defendants' property." *Id.* at 5a, 7a. The Synod's answer opposed this request and asked the trial judge to rule that

> [t]he cost of substitute facilities is the proper measure of just compensation in the condemnation of a public charitable use for the replacement of which there is reasonable need.

Id. at 8a.

[6] United States v. 564.54 Acres of Land, 506 F.2d 796, 798 (3d Cir. 1974).

[7] Appendix to Appellant's Brief, *supra* note 3, at 61a.

[8] United States v. 564.54 Acres of Land, 506 F.2d 796, 798 (3d Cir. 1974).

[9] Appendix to Appellant's Brief, *supra* note 3, at 62a. This appeal was brought pursuant to 28 U.S.C. § 1292(b) (1970) which provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . . .

[10] Appendix to Appellant's Brief, *supra* note 3, at 62a.

[11] 506 F.2d 796 (3d Cir. 1974).

appropriate case the substitute facilities measure of just compensation "is available to private owners of non-profit community facilities as well as to public owners of such facilities."[12] Noting this to be a novel question,[13] the court first pointed out that it was concerned with the measure of indemnification imposed by the "taking" clause of the fifth amendment.[14] Judge Gibbons, writing for the court, reasoned that it was inconceivable that this clause should mandate a greater degree of compensation for public owners than for private owners.[15] Since courts have long held that a governmental entity[16] may be entitled to substitute facilities in certain circumstances,[17] and since Congress has not authorized a distinction between the measure of fair compensation for governmental and nongovernmental facilities in this particular instance,[18] the court found no basis for awarding a greater amount of compensation for public than for private property when both are devoted to public use.[19] In addition, if such a distinction were to exist, it would allow the Government to choose locations on the discriminatory basis of paying less compensation to private than to public owners of community facilities.[20]

The fifth amendment to the United States Constitution provides that no private property shall "be taken for public use, without just compensation."[21] Courts generally strive to apply this protection against confiscation by the Government in such a way as to

---

[12] *Id.* at 802.

[13] *Id.* at 800. Federal courts have on many occasions discussed the applicability of the substitute facilities doctrine to condemned *public* property. *See, e.g.,* 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); United States v. City of Jacksonville, 257 F.2d 330, 333 (8th Cir. 1958); United States v. Board of Educ., 253 F.2d 760, 763 (4th Cir. 1958).

[14] 506 F.2d at 801. U.S. CONST. amend. V provides in pertinent part: "nor shall private property be taken for public use, without just compensation."

[15] 506 F.2d at 801.

[16] The phrase "governmental entity" will be used throughout this Note to denote any unit of government whose property might be the object of a federal condemnation proceeding.

[17] *See* Town of Bedford v. United States, 23 F.2d 453, 456 (1st Cir. 1927); United States v. Town of Nahant, 153 F. 520, 524 (1st Cir. 1907). For a discussion of how various circumstances may relate to the need for a replacement see note 50 *infra.*

[18] 506 F.2d at 801. The legislature is free to establish statutory procedures for condemnation, "subject to the constitutional limitation guaranteeing the rights of the owner." 6 NICHOLS, *supra* note 2, § 24.2 (footnote omitted).

[19] 506 F.2d at 801.

[20] *Id.*

[21] U.S. CONST. amend. V. "Private property" as used in the fifth amendment has been held to include property that is publicly owned. United States v. Wheeler Twp., 66 F.2d 977, 982 (8th Cir. 1933). *See* Jefferson County v. TVA, 146 F.2d 564, 565 (6th Cir.), *cert. denied,* 324 U.S. 871 (1945); Town of Bedford v. United States, 23 F.2d 453, 454 (1st Cir. 1927); United States v. Town of Nahant, 153 F. 520, 521, 523 (1st Cir. 1907).

indemnify the property owner for his loss.[22] What this means in practical terms is that "[t]he owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken."[23] In a further refinement of this concept, courts have applied the fair market value standard as the most practical device by which to measure an owner's loss for property taken by the Government.[24]

The Supreme Court of the United States has stated "that market value is what a willing buyer would pay in cash to a willing seller."[25] In evaluating such a hypothetical transaction, courts look to the value of the tangible property interests[26] at the time of the taking.[27] Such an evaluation may involve the consideration of ancillary factors which affect the worth of the property to the average buyer and seller.[28]

Fair market value is not a measure of the personal worth of property to the owner at the time of condemnation.[29] Property will

---

[22] Westchester County Park Comm'n v. United States, 143 F.2d 688, 691 (2d Cir. 1944). *See also* United States v. Virginia Elec. & Power Co., 365 U.S. 624, 631 (1961). 4 NICHOLS, *supra* note 2, § 12.1[4].

[23] United States v. Miller, 317 U.S. 369, 373 (1943) (footnote omitted).

[24] *See, e.g.*, United States v. Fuller, 409 U.S. 488, 490 (1973); 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. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 402 (1949); United States v. Miller, 317 U.S. 369, 374 (1943); Olson v. United States, 292 U.S. 246, 255 (1934); City of New York v. Sage, 239 U.S. 57, 61 (1915); United States v. 344.85 Acres of Land, 384 F.2d 789, 791 (7th Cir. 1967); Nebraska v. United States, 164 F.2d 866, 868 (8th Cir. 1947).

[25] United States v. Miller, 317 U.S. 369, 374 (1943). One commentator has defined fair market value as

> the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses for which the land was suited and might in reason be applied.

4 NICHOLS, *supra* note 2, § 12.2[1] (footnotes omitted).

[26] Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 61 (1957); Note, *Restoration Costs as an Alternative Measure of Severance Damages in Eminent Domain Proceedings*, 20 HASTINGS L.J. 800, 801 (1969).

[27] 4 NICHOLS, *supra* note 2, § 12.23. For a discussion of the methods courts use to determine "the time of the taking," see *id.*

[28] *See, e.g.*, Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973). In *Almota* the Government condemned an underlying fee and a leasehold on the fee held by the petitioner, which had built improvements in expectation of renewal of a lease which it had held continually on successive leases since 1919. *Id.* at 470-71. The Supreme Court held that just compensation was to be measured by the fair market value of the improvements, taking into account the possibility that the lease might or might not have been renewed. *Id.* at 474, 478.

But see United States v. Fuller, 409 U.S. 488 (1973). *Fuller* held that the fifth amendment required no compensation for any value derived from a condemnee's use of his land in conjunction with adjoining federal land for which he held grazing permits. *Id.* at 489, 493-94.

[29] 4 NICHOLS, *supra* note 2, § 12.22[2]. This treatise states:

not be valued in terms of the income which it produces[30] or any sentimental value which it might hold for the owner.[31] However, the owner is free to prove that any special value that the property has to him would influence the price a buyer would be willing to pay on the open market.[32]

> Condemnation proceedings are *in rem* and just compensation must be based upon the value of the rights taken, without regard to the personality of the owner or his personal relationship to the property taken. The value of the property for his personal purposes must be disregarded.

Id. (footnote omitted).

Losses of intangible interests are referred to as " 'incidental' " or " 'consequential.' " Denial of compensation for such losses seems to deviate from the indemnity theory behind the fifth amendment's taking clause. 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 14, at 75 (2d ed. 1953). *See also* Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain,* 48 VA. L. REV. 437 (1962) (advocating compensation for consequential losses wherever practical).

[30] 4 NICHOLS, *supra* note 2, § 12.22[2]. Nor will the condemnee-owner of commercial property generally be compensated for any good will or going concern value which his property might carry. Banner Milling Co. v. State, 240 N.Y. 533, 540-41, 148 N.E. 668, 670 (1925). *See also* Comment, *supra* note 26, at 74-76; Note, *Eminent Domain: The Problem of Damages When Land Has Been Adapted to a Special Use,* 37 B.U.L. REV. 495, 501 (1957). *Contra,* UNIFORM EMINENT DOMAIN CODE § 1016.

Nor is the cost of relocating a business compensable when the Government has appropriated the entire underlying leasehold or fee. United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261, 264 (1950); United States v. Petty Motor Co., 327 U.S. 372, 378 (1946).

The situation is different when the taking is of a temporary nature. In Kimball Laundry Co. v. United States, 338 U.S. 1 (1949), the Government condemned petitioner's laundry plant for use by the Army during World War II, rendering the condemnee unable to service a clientele developed over the years. *Id.* at 3-4. The Supreme Court ruled that this temporary taking was a compensable interest because the laundry held a reversion in the property, and that property would come back to the condemnee minus the value of the trade routes appropriated by the Government. *Id.* at 14-16. The Court distinguished this from the taking of an entire fee, where the going concern value is not compensable. Since the temporary condemnee cannot dispose of his property and his future alternatives are made uncertain, he is therefore eligible for compensation. *Id. See* Comment, *supra* note 26, at 83. *See also* United States v. General Motors Corp., 323 U.S. 373, 383 (1945).

[31] 4 NICHOLS, *supra* note 2, § 12.22[2].

[32] In so doing, the condemnee-owner would be offering proof of the "highest and best use" of his property. Highest and best use has been defined as " 'that available use and program for future utilization of a parcel of land that produces the highest present land value.' " Searles, *Highest and Best Use: The Keystone of Valuation in Eminent Domain,* 45 N.Y.S.B.J. 36, 39 (1973).

In Olson v. United States, 292 U.S. 246 (1934), the Supreme Court discussed highest and best use as follows:

> The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.

Id. at 255.

Courts limit this concept by requiring that the use in question not be too speculative. *See* 4 NICHOLS, *supra* note 2, § 12.32[1]; Note, *supra* note 30, at 501-02; *cf.* United States v. Easement

Courts frequently rely on evidence of comparable sales to arrive at market value,[33] but if land is improved in order to serve a unique purpose there will not be an active market to supply information as to the going rate for the property in question. Schools, churches, and roads are examples of property that carries worth to the owner but is not included in a market for land adapted to a more common use.[34] When such property is condemned, the courts must turn to alternate methods of valuation to determine the actual loss to the owner.[35]

Capitalization of earnings and cost of reproduction less depreciation are the two compensation standards used by courts when privately owned special use property is involved. The former method capitalizes rental income of land and improvements and converts it into an indication of present value which is then added to the separate value of the land.[36] The reproduction method estimates the cost of building a replacement for the condemned structure and subtracts from that amount a charge for depreciation of the condemned property.[37] Both of these methods are intended to provide a rough approximation of fair market value, but they tend to stray from the indemnification theory upon which the concept of just compensation rests. For example, in the case of a business, the capitalization approach ignores the owner's profits[38] which, although not property in the technical sense, often constitute the major portion of the loss. Reproduction cost similarly ignores the theory that reimbursing the owner for his initial cost

---

and Right of Way 100 Feet Wide, 447 F.2d 1317, 1319-20 (6th Cir. 1971). Thus there is no compensation for lost opportunities. *See, e.g.,* United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 281 (1943).

[33] *See, e.g.,* United States v. 13,255.53 Acres of Land, 158 F.2d 874, 876 (3d Cir. 1946); United States v. 206.82 Acres of Land, 205 F. Supp. 91, 93 (M.D. Pa. 1962).

[34] *See* 506 F.2d at 799; Note, *Just Compensation and the Public Condemnee,* 75 YALE L.J. 1053, 1053 (1966); Note, *supra* note 30, at 495-96.

[35] Fair market value is not the exclusive measure of valuation by which the courts arrive at just compensation. The Supreme Court has stated that

> fair market value . . . is "not an absolute standard nor an exclusive method of valuation." . . . The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as its [*sic*] does from technical concepts of property law.

United States v. Fuller, 409 U.S 488, 490 (1973) (quoting from United States v. Virginia Elec. & Power Co., 365 U.S. 624, 633 (1961)) (citations omitted). The Court "has refused to make a fetish . . . of market value, since that may not be the best measure of value in some cases." United States v. Cors, 337 U.S. 325, 332 (1949).

[36] 4 NICHOLS, *supra* note 2, § 12.32 [3] [c].

[37] *Id.* § 12.32 [3] [b]. To that amount is added the present fair market value of the land. Wilmington Housing Authority v. Greater St. John Baptist Church, 291 A.2d 282, 285 (Del. 1972).

[38] *Cf.* 4 NICHOLS, *supra* note 2, 12.32 [3] [c].

does not indemnify him for his true loss[39] since it fails to measure compensation by the value of the property to the condemnee.[40]

When a governmental entity owns condemned property for which a ready market does not exist, such as roads or schools, courts have recognized that the public welfare may require compensation in the form of substitute facilities.[41] Under this theory, the Government is obliged to finance a replacement that will provide a functional equivalent to the condemned property.[42] Only in this way can the entire community be indemnified for the loss occasioned by the taking. Here the courts depart from the concept of market value and look instead to the cost of whatever equivalent facilities will restore the community's welfare to its former level.[43]

City of Fort Worth v. United States[44] provides a good example of how the courts have applied the substitute facility doctrine to the condemnation of a public road.[45] After condemning a major traffic artery in Fort Worth, Texas, the federal government took the position that it would not have to provide any additional roads as

---

[39] United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 403 (1949); Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 123 (1924).

The reproduction cost standard of just compensation has been subject to criticism. United States v. Benning Housing Corp., 276 F.2d 248, 250 (5th Cir. 1960).

> Courts which do use the cost approach often require the existence of certain conditions: (1) the interest condemned must be one of complete ownership; (2) there must be a showing that a substantial reproduction would be a reasonable business venture and (3) a proper allowance be made for depreciation.

NICHOLS *supra* note 2, § 12.32 [3] [b] (footnotes omitted).

[40] Reproduction cost may not reflect value to the condemnee because "under the circumstances of a particular case, no one might wish to reproduce the improvement." United States v. 55.22 Acres of Land, 411 F.2d 432, 435 (9th Cir. 1969).

[41] *See* Level, *Evaluation of Special Purpose Properties in Condemnation Proceedings*, 3 URB. LAW. 428, 432 (1971); Note, *supra* note 34, 75 YALE L.J. at 1053.

[42] United States v. Certain Property, 403 F.2d 800, 804 (2d Cir. 1968); Town of Clarksville v. United States, 198 F.2d 238, 242-43 (4th Cir. 1952); City of Fort Worth v. United States, 188 F.2d 217, 221 (5th Cir. 1951).

The functional equivalent need not be an exact duplicate. United States v. Certain Property, *supra* at 804. *See* United States v. Arkansas, 164 F.2d 943 (8th Cir. 1947), wherein the Government was obliged to finance the cost of a temporary ferry which the state operated pending completion of a bridge to replace a road taken in a dam project. *Id.* at 944-45.

[43] The substitute facility doctrine is not an exception to the fair market value test. United States v. Certain Property, 403 F.2d 800, 803 (2d Cir. 1968). "When circumstances warrant, it is another arrow to the trier's bow when confronted by the issue of just compensation." *Id.*

[44] 188 F.2d 217 (5th Cir. 1951).

[45] Courts have engaged in extensive discussion of the need for substitute roadways in compensation cases. *See, e.g.*, United States v. Certain Lands, 246 F.2d 823 (3d Cir. 1957); Washington v. United States, 214 F.2d 33 (9th Cir.), *cert. denied*, 348 U.S. 862 (1954); City and County of Honolulu v. United States, 188 F.2d 459 (9th Cir.), *cert. denied*, 342 U.S. 849 (1951); United States v. City of New York, 168 F.2d 387 (2d Cir. 1948).

long as there were adjacent highways which could handle the total traffic flow in the area.[46] The city maintained that the "adjacent facilities" referred to by the Government had been built in order "to provide *additional*" traffic arteries and therefore could not be considered a substitute for the condemned road.[47]

The United States Court of Appeals for the Fifth Circuit agreed with Fort Worth and held that the city was entitled to new traffic facilities that would be of "the same status of utility"[48] as those prior to the condemnation. The court noted the obligation of a municipality to provide necessary traffic facilities and reasoned that any well-planned thoroughfare aids in the discharge of that duty.[49] The fact that the alternate routes managed to carry traffic that once used the condemned roadway was not dispositive of the issue—the true test of compensation was the amount needed to ensure that the roads in the area of the condemnation would serve community "needs in as adequate a manner" as the old highway.[50]

The Supreme Court of Kansas has applied similar concepts in

[46] 188 F.2d at 219.

[47] *Id.* at 219-20.

[48] *Id.* at 221.

[49] *Id.*

[50] *Id.* at 222. The situation would have been different had the government project obviated the need for a roadway. In Washington v. United States, 214 F.2d 33 (9th Cir.), *cert. denied,* 348 U.S. 862 (1954), the Government condemned a stretch of state highway that traversed a rural area to be used in the development of an atomic energy project. 214 F.2d at 38. The entire installation was closed to the public and all residents living in the project area were moved. *Id.* The state claimed the need for a substitute facility, *id.* at 41, but the court found that there was no need for the construction of a new highway. *Id.* at 44. The condemned road had been unpaved and involved a ferry crossing, whereas an alternate route provided a paved highway and bridge. In addition, the traveling time between the towns served by the roads in question was the same. *Id.* at 42. In holding as a matter of law that there was no need for a substitute highway, *id.* at 44, the court affirmed a lower court ruling which had allowed nominal damages only. *Id.* at 36, 47. *See also,* United States v. City of New York, 168 F.2d 387, 389 (2d Cir. 1948); Woodville v. United States, 152 F.2d 735, 737 (10th Cir.), *cert. denied,* 328 U.S. 842 (1946); United States v. Des Moines County, 148 F.2d 448, 449 (8th Cir.), *cert. denied,* 326 U.S. 743 (1945); Mayor and City Council of Baltimore v. United States, 147 F.2d 786, 791 (4th Cir. 1945); Jefferson County v. TVA, 146 F.2d 564, 565 (6th Cir.), *cert. denied,* 324 U.S. 871 (1945).

The reason for not awarding compensation in these cases is given in United States v. City of New York, *supra* at 389-90, as follows:

> The rationale is clear. If the municipality has not had to provide substitutes, then it has suffered no financial loss and hence is not entitled to substantial damages. Indeed, the taking relieves it of the burden of maintaining such roads.

Also, the Government need not pay the cost of a replacement if it provides an adequate substitute as part of its own project. Note, *supra* note 34, 75 YALE L.J. at 1057.

It should be noted that a governmental entity can still collect the fair market value of its land even if there is no need for a substitute. United States v. Certain Land, 346 F.2d 690, 695 (2d Cir. 1965). *See* California v. United States, 395 F.2d 261, 263 (9th Cir. 1968); United States v. City of Jacksonville, 257 F.2d 330, 333 (8th Cir. 1958). *Contra,* United States v. City of New York, *supra* at 389.

evaluating just compensation for the condemnation of a public school building. In *City of Wichita v. Unified School District No. 259*,[51] a forty-year-old school building was condemned to make way for the construction of an interstate highway.[52] After the schoolhouse was closed, the children were allocated among three local schools, where either additional facilities had been built or the existing classrooms were sufficient to accommodate the influx of students.[53] The dispute centered around the method of ascertaining compensation: The school district claimed that it was entitled to substitute facilities while the city contended that it should pay either fair market value or the cost of constructing a similar building less a charge for depreciation and obsolescence.[54]

The court held that the district was entitled to the cost of a substitute,[55] and, after reviewing several authorities, pointed out that a special purpose property such as a school, "not ordinarily bandied about in the market place," carries a value that must be tested by a standard other than fair market value.[56] The court cited prior cases which relied on the " 'equitable concept of justice and fairness that accords with the Fifth Amendment's mandate' "[57] and which emphasized the principle that the condemnee was entitled to compensation that provided a replacement of "equal utility" for that which was taken.[58] On this basis, the fact that the cost of the

---

[51] 201 Kan. 110, 439 P.2d 162 (1968).

[52] *Id.* at 111, 439 P.2d at 164.

[53] *Id.* at 117-18, 439 P.2d at 169.

[54] *Id.* at 112, 439 P.2d at 165. The parties had agreed for trial purposes that it would cost $307,184 to replace the buildings. The trial court held that the cost of a substitute facility was to be the measure of compensation and therefore directed a verdict in that amount. *Id.* at 112, 117, 439 P.2d at 165, 168-69.

However the trial court granted a directed verdict regarding the payment to be made for the land upon which the schoolhouse had been located. *Id.* at 117, 439 P.2d at 169. This amount took into consideration only the land required for the additional classroom space at the one school which had built new facilities. The school district claimed that this was only a temporary measure and insisted on its right to show the need for more land. *Id.* at 118, 439 P.2d at 169. The state supreme court, noting that the substitute facility doctrine applies to land as well as to buildings, *id.*, remanded the case for a new trial on the issue of the school district's need for additional land. *Id.* at 121, 439 P.2d at 171.

[55] *Id.* at 117, 439 P.2d at 168.

[56] *Id.* at 113, 439 P.2d at 166.

[57] *Id.* at 115, 439 P.2d at 167 (quoting from Town of Clarksville v. United States, 198 F.2d 238, 242 (4th Cir. 1952)).

[58] 201 Kan. at 115, 439 P.2d at 167. The court cited United States v. Board of Educ., 253 F.2d 760 (4th Cir. 1958), and State v. Waco Independent School Dist., 364 S.W.2d 263 (Tex. Civ. App. 1963), as cases which supported the proposition that condemned school properties should be replaced with the functional equivalent of their precondemnation condition. 201 Kan. at 115, 439 P.2d at 167.

The court could also have relied on United States v. Certain Land, 346 F.2d 690 (2d

substitute facility was more than the original price for the condemned property was considered irrelevant.[59]

Important to the holdings in *Fort Worth* and *Wichita* was the fact that the cities had respective legal obligations to provide necessary traffic and educational facilities. This emphasis on the public condemnee's legal duty to replace was softened somewhat in *United States v. Certain Property.*[60] In that case the federal government condemned an entire city block for use by the Post Office Department. Included in this taking was a public bath and recreation building owned and operated by the City of New York and used free of charge by over 200,000 people annually.[61] Although the city had the requisite statutory authority to maintain a bath and recreation center, it was under no legal obligation to do so.[62] In response to the city's claims for compensation in the amount of funds adequate to provide a replacement, the trial court pointed to the lack of legal compulsion to provide such a facility and awarded only fair market value.[63]

In reversing, the United States Court of Appeals for the Second Circuit rejected the distinction between legal compulsion and social necessity as a standard by which to determine whether a public condemnee is entitled to the cost of replacement facilities as just compensation, holding that "the distinction has little practical significance in public condemnation."[64] Rather, the court noted that consideration should be given to pertinent opinions and deci-

Cir. 1965), wherein the Government condemned land which the City of New York had acquired and cleared for a playground which the city was required by law to provide at a school facility. The Second Circuit reasoned that such a case called for application of the substitute facility doctrine in order to provide facilities " 'necessary' to carry out the public function served by the condemned property." *Id.* at 695. The decision did not rely on the legal compulsion to build a playground but pointed out that " 'necessity' . . . looks to the pragmatic needs and possibilities, not just to technical legal minima." *Id.* (citations omitted).

[59] 201 Kan. at 116-17, 439 P.2d at 168 (citing Town of Clarksville v. United States, 198 F.2d 238, 243 (4th Cir. 1952), and City of Fort Worth v. United States, 188 F.2d 217, 223, (5th Cir. 1951)).

This holding recognizes the principle that the substitute facility doctrine is not a method of valuation. The courts view just compensation in a different light when a governmental entity is the victim of a condemnation proceeding and aim at putting the public in as close a position as possible to the pre-taking condition. The dollar loss to the community is not a controlling factor. United States v. Certain Property, 403 F.2d 800, 803 (2d Cir. 1968).

[60] 403 F.2d 800 (2d Cir. 1968).

[61] *Id.* at 801.

[62] N. Y. GEN. MUNIC. LAW § 121 (McKinney 1965) provides:

> Any city, village or town may establish and maintain free public baths, and any city, village or town may appropriate of its funds for the purpose of establishing such free public baths.

[63] 403 F.2d at 802.

[64] *Id.* at 803. *Cf.* United States v. Certain Land, 346 F.2d 690, 695 (2d Cir. 1965).

sions of local officials in assessing the necessity of providing certain community facilities.[65] More importantly, the court said:

> If application of the "substitute facilities" theory depended on finding a statutory requirement, innumerable nonlegal obligations to service the community would be ignored.[66]

The court, however, limited its holding by stating that not every condemned facility need be replaced[67] and that "[e]xact duplication is not essential; the substitute need only be functionally equivalent."[68]

This departure from the emphasis on a legal duty as the basis for replacement was of great import to the holding in *564.54 Acres*.[69] There was of course no legal duty on the part of the Synod to replace the camps, but if the court viewed those facilities as a necessary element in the community's efforts to provide healthful recreation for thousands of children each year, the *Certain Property* opinion provided strong support for requiring a substitute based upon local necessity.

Although no other federal appellate court had ruled on the application of the substitute facility doctrine to nongovernmental owners,[70] the Third Circuit in *564.54 Acres* was able to rely on a

[65] 403 F.2d at 803. It is important to note that the court is not suggesting that local laws should govern the condemnation proceeding. The court is merely pointing out that the criterion for replacement should be local attitude rather than legal compulsion. Federal law governs in federal eminent domain cases. United States v. 93.970 Acres of Land, 360 U.S. 328, 332-33 (1959); United States v. Certain Interests in Property, 271 F.2d 379, 384 (7th Cir. 1959), *cert. denied,* 362 U.S. 974 (1960); United States v. Mahowald, 209 F.2d 751, 752 (8th Cir. 1954).

[66] 403 F.2d at 804.

[67] *Id. See* note 50 *supra*.

[68] 403 F.2d at 804. The court also ruled that the amount of compensation should be reduced by a charge for depreciation of the old building. The opinion relied on the

> equitable principles undergirding just compensation [to] 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.

Id. The court suggested in a footnote that a mathematical formula be used to arrive at a charge for depreciation which would be deducted from the cost of the new recreation center. *Id.* n.11. The court thus adhered to the concept of compensation in the form of a substitute that would provide equivalent utility and no more.

[69] *See* 506 F.2d at 800.

[70] The appellant Synod argued that two federal district court cases had provided substitute facility compensation to private owners. Appellant's Brief, *supra* note 3, at 17-18. The first case, United States v. 43.635 Acres of Land, 183 F. Supp. 168 (W.D. Mo. 1960), involved a motion for remittitur by the Government following a negotiated settlement and consent judgment for compensation owed to a power company for an easement taken by the United States in conjunction with the condemnation of a tract of land on which the easement had been located. The motion was denied, and in the course of the decision the court mentioned in dicta that the United States had settled with the power company for the cost of providing a new right-of-way. *Id.* at 169-70.

Massachusetts case that supplied some support for the holding. *Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority*[71] involved the condemnation of a wide strip of land across a Girl Scout camp ground. The Turnpike Authority had awarded nominal damages amounting to $5, but a jury trial resulted in a judgment of $9,500 to be awarded to the condemnee.[72] The latter amount was influenced to a great extent by trial court rulings which excluded evidence offered by the condemnee to show the degree of its monetary loss.[73]

On appeal, the Supreme Judicial Court of Massachusetts held that the Girl Scout Council was entitled to receive fair compensation for the reduction in value of the remaining land[74] since the planned construction of a superhighway would render the remaining property useless for the purposes for which it had been used. The court also held that the trial judge should have impressed upon the jury[75] that the damages for a taking of such special use property could not be measured exclusively by the effect the condemnation would have on property value in terms of "ordinary real estate development."[76] The special purpose for which the property

---

The second case, United States v. 531.13 Acres of Land, 244 F. Supp. 895 (W.D.S.C. 1965), *rev'd*, 366 F.2d 915 (4th Cir. 1966), *cert. denied*, 385 U.S. 1025 (1967), held that a landowner was entitled to the cost of substitute facilities for flowage rights taken by the Government in a navigable stream. This decision was reversed by the Fourth Circuit, the court of appeals holding that the flowage rights did not represent a vested property right and were not compensable. 366 F.2d at 917. It was therefore not called upon to consider compensation in the form of a substitute.

The closest that the Supreme Court of the United States has come to ruling on the substitute facility doctrine is the case of Brown v. United States, 263 U.S. 78 (1923), in which the Court considered the constitutionality of the power of Congress to condemn land for use as a substitute site for a town that had been taken in connection with a reservoir project. *Id.* at 80. In upholding that power against a condemnee's objection that it involved the taking of one man's land for sale to another, *id.* at 81, the Court pointed out that the real thrust of the congressional scheme was a "transfer of the town from one place to another at the expense of the United States." *Id.* at 82. But more importantly, the Court held that "[a] method of compensation by substitution would seem to be the best means of making the parties whole," *id.* at 83, thus giving at least implicit approval to the substitute facilities theory as a correct measure of compensation in certain cases.

[71] 335 Mass. 189, 138 N.E.2d 769 (1956).

[72] *Id.* at 190-91, 138 N.E.2d at 771. The court criticized the Turnpike Authority's action in making a nominal award, pointing out that this practice disregards fair administrative procedure. Further, it "tends to coerce persons whose property has been taken to resort to litigation and to incur unnecessary expense." *Id.* at 190-91 n.2, 138 N.E.2d at 771.

[73] *Id.* at 193, 138 N.E.2d at 772.

[74] *Id.* at 192-93, 138 N.E.2d at 772.

[75] Ordinarily there is no constitutional right to a jury trial in an eminent domain proceeding. City and County of Honolulu v. United States, 188 F.2d 459, 462 (9th Cir.), *cert. denied*, 342 U.S. 849 (1951). However, if a dispute exists as to the amount of damages, the question will ordinarily be tried before a jury. 6 NICHOLS, *supra* note 2, § 26.52.

[76] 335 Mass. at 200, 138 N.E.2d at 776.

was used and for which it was best adapted resulted in an element of value that market price did not include.

The holding in *Newton* is noteworthy because of the liberal position which the court took concerning the evidence presented to establish value. The court did not use an alternative to fair market value—rather, it permitted the condemnee to show the value of the property as adapted to its special purpose.[77] Objecting to the trial court's charge as possibly misleading the jury "into believing that only market value for purposes of sale for residential or other conventional uses was to be considered,"[78] the court preferred to use a valuation standard which considered all reasonable uses of the property, "including . . . the specialized use for which the property was being employed" by the Girl Scouts.[79]

564.54 Acres is the first case wherein a federal court has held that a private owner of a nonprofit community facility should have the opportunity to prove that it is entitled to the cost of a substitute as a measure of just compensation. Judge Gibbons refused to go further than this because the case came before the court solely for a resolution of the issue of what standard of compensation would be available to the Synod at trial.[80] Such a preliminary stage of the proceeding gave the court "no occasion to decide whether this is an appropriate case" in which to apply the substitute facility doctrine to the condemnee in question.[81]

Prior to this holding, the compensation standard sought by the Synod had been available only to public condemnees by virtue of their duty to provide for the public welfare. A loss to a governmental entity was a loss to the public in general, and the only way to indemnify society was to replace the lost property.[82] *564.54 Acres* draws on this concept of community benefit and extends it to private owners.

The court made this extension in order to avoid drawing a distinction in law that does not exist in fact. The fifth amendment protection against confiscation has been interpreted as mandating any necessary substitute when the government condemns public property.[83] The court reasoned that failure to extend this same

[77] Here the court was departing from the rule which compensates only tangible property interests. *See* notes 29-31 *supra* and accompanying text.

[78] 335 Mass. at 200, 138 N.E.2d at 776.

[79] *Id.* at 194, 138 N.E.2d at 773.

[80] 506 F.2d at 798, 802.

[81] *Id.* at 802.

[82] *Id.* at 799-800.

[83] *See* Dau, *Problems in Condemnation of Property Devoted to Public Use*, 44 TEXAS L. REV. 1517, 1526-27 (1966); Level, *supra* note 41, at 431-32; Note, *supra* note 34, at 1053-54.

protection to a private owner which devotes its property to a public use would be to deny that private owner the full protection of the fifth amendment.[84]

The fact that church property was the object of the condemnation adds another dimension to the problem. A religious organization is of course entitled to full compensation if its land is taken by the Government. There appears to be no reason why this compensation cannot take the form of a substitute facility if the property had been devoted to a use which benefited the entire community on a nondenominational basis.[85] The *564.54 Acres* court saw a first amendment issue arising in this case if the Government were allowed to select the property to be condemned on the discriminatory basis of paying less compensation for the taking of church property than for condemnation of property owned by a governmental entity.[86] A choice of this nature, which has the effect of using religion as a basis for action,[87] would probably trigger establishment clause prohibitions on state activity in the area of religion.[88] Thus, a uniform application of the fifth amendment guarantee of just compensation is especially important in light of potential first amendment issues.

Prior to the *Certain Property* decision, courts often insisted that

---

[84] 506 F.2d at 801. Such a distinction might carry equal protection overtones, since the due process clause of the fifth amendment includes a guarantee of equal protection of the laws. Bolling v. Sharpe, 347 U.S. 497, 499 (1954); United States v. Pipefitters Local 562, 434 F.2d 1116, 1124 (8th Cir. 1970).

[85] Although condemnation of church property is rare, when it does occur "[t]he lack of a normal market makes valuation especially difficult." Comment, *The Lord Buildeth and the State Taketh Away–Church Condemnation and the Religion Clauses of the First Amendment,* 46 COLO. L. REV. 43, 55 (1974) (footnote omitted). The land itself will usually be valued according to market price of land in the area, while compensation for improvements is normally measured by the cost of reproduction less depreciation. Level, *supra* note 41, at 437. *See also* Wilmington Housing Authority v. Greater St. John Baptist Church, 291 A.2d 282, 284, 286 (Del. 1972); Assembly of God Church v. Vallone, 89 R.I. 1, 11, 150 A.2d 11, 16 (1959). Delaware has authorized by statute compensation in the amount of cost of replacement of the structure. DEL. CODE ANN. tit. 10, § 6108(e) (Supp. 1970).

[86] 506 F.2d at 801 & n.4.

[87] *See* P. KURLAND, RELIGION AND THE LAW 17-18 (1962), in which the author argues that the principles of the religion clauses of the first amendment

> would be impossible of effectuation unless they are read together as creating a doctrine more akin to the reading of the equal protection clause than to the due process clause, *i.e.*, they must be read to mean that religion may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations.

For discussion of the influence this theory has had on the Supreme Court see Kauper, *The* Walz *Decision: More on the Religion Clauses of the First Amendment,* 69 MICH. L. REV. 179, 181, 198-200 (1970).

[88] *Cf.* Comment, *supra* note 85, at 51-55.

the condemnee be under a legal obligation to replace the property.[89] That opinion reduced this standard, as applied to public owners, to a showing of reasonable necessity for a replacement.[90] The Third Circuit has now applied that standard to private owners. This leaves open the question of how courts are to determine when there is a necessity to replace a condemned private facility that had been used in the public interest. The courts should examine the purpose that the property served and the benefit derived from it by society as a whole. Such an approach would require careful examination of local need and proof that a substitute would fulfill that need.[91] In addition, an owner able to demonstrate some degree of community reliance on the condemned property would be even more likely to convince the courts of the need for a replacement.

By determining that indemnification of the community rather than value to the owner is the proper standard of just compensation for privately owned community facilities, Judge Gibbons has introduced a novel concept to eminent domain law. It is perhaps because there is little case law in the area from which to draw support that the court was constrained to rely on *Newton* as precedent. Although the *Newton* court was concerned with evidence of value and not with substitute facilities,[92] the opinion did take a liberal approach in allowing evidence that related to proof of the special value that the property held for the Girl Scouts, a nonprofit, community-oriented organization. The *564.54 Acres* court passed beyond this value theory of compensation to indemnification measured " 'in terms of . . . the loss to the community occasioned by the condemnation.' "[93] Thus, it is the spirit rather than the letter of *Newton* which supports the holding in *564.54 Acres.*

The question of the condemnee's legal duty to replace is intimately bound up with the distinction between public and private owners of condemned property. The state is charged with provid-

[89] *See* Note, *supra* note 34, 75 YALE L.J. at 1053.

[90] 403 F.2d at 804.

[91] One commentator recommends that condemnation of public property should entitle a local government to the cost of a substitute if the courts decide that the facility has served a rational governmental purpose. Note, *supra* note 34, 75 YALE L.J. at 1055. The author suggests that the courts examine the condemned facility's public purpose, the reasonableness of providing a replacement, and the cost involved, in order to determine when the need for a substitute facility exists. *Id.* at 1055-57. These standards could also be used in the case of a private owner who claims compensation in the form of a substitute facility.

[92] *See* notes 71-79 *supra* and accompanying text.

[93] 506 F.2d at 800 (quoting from United States v. Certain Property, 403 F.2d 800, 804 (2d Cir. 1968)).

ing for the public welfare and must rebuild when necessary, whereas a private owner is under no obligation to use compensation funds in any specific way. The court did not address this issue, presumably because of the preliminary nature of the proceeding. However, a genuine administrative problem will be presented whenever a private condemnee claims it is entitled to the cost of a substitute by virtue of the nonprofit, community use to which it devotes its property. Even if the Government were to agree, how could it insure that compensation funds would be used only for the construction of a functionally equivalent substitute?

One answer might be to allow the Government to supply compensation funds on a reimbursement basis. The condemnee would be required to proceed with construction and at certain designated intervals would be reimbursed for money expended on the project to date. Any disputes between the parties could be resolved by the courts. Such a system would require careful scrutiny since the purpose of the award is the indemnification of the community and not a windfall for the owner.[94]

The effect of *564.54 Acres* will be to strengthen the equitable foundation upon which the concept of just compensation is said to rest. Condemnation of the camps was a loss both to the Synod and to the eastern Pennsylvania community in general. The measure of compensation traditionally applied to private condemnees would have fallen short of providing full indemnification. The opinion is particularly appropriate when one considers that a publicly owned camp serving basically the same area would have to be replaced at government expense in the event of condemnation.[95]

Courts drawing upon the *564.54 Acres* rationale must take great care to confine themselves to the narrow principle for which this case stands. Eminent domain is a necessary power of government and it would be impossible to provide every condemnee with a perfect substitute for his property. In most cases the fair market value standard must be used and will generally furnish a reliable guide to the value of property to the owner. But where a nonprofit

---

[94] This system would have to be closely monitored in order to prevent an attempt by the Government to influence the way in which a church group spends its compensation money in building a substitute for condemned property which had been used for a secular community purpose. Such an action would probably be viewed as a governmental entanglement with religion to an extent forbidden by the first amendment. *See* Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).

[95] Philadelphia operates two comparable camps in the area. Appendix to Appellant's Brief, *supra* note 3, at 12a & 40a.

condemnee is supplying a service to the community, there is no basis for using a different standard of compensation simply because the property does not lie in public hands.[96]

Robert J. Brennan

---

[96] *See* Level, *supra* note 41, at 432; Note, *Compensation for Municipal Property Condemned by Federal Government*, 48 COLUM. L. REV. 1096, 1097 (1948). The recently drafted UNIFORM EMINENT DOMAIN CODE §§ 1004(b), (c) also takes this position:

> . . . The fair market value of property owned by a public entity or other person organized and operated upon a nonprofit basis is deemed to be not less than the reasonable cost of functional replacement if the following conditions exist: (1) the property is devoted to and is needed by the owner in order to continue in good faith its actual use to perform a public function, or to render nonprofit educational, religious, charitable, or eleemosynary services; and (2) the facilities or services are available to the general public.
>
> . . . The cost of functional replacement under subsection (b) includes (1) the cost of a functionally equivalent site; (2) the cost of relocating and rehabilitating improvements taken, or if relocation and rehabilitation is impracticable, the cost of providing improvements of substantially comparable character and of the same or equal utility; and (3) the cost of betterments and enlargements required by law or by current construction and utilization standards for similar facilities.

UNIFORM EMINENT DOMAIN CODE, § 1004.