

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**  
**FOURTH APPELLATE DISTRICT**  
**DIVISION TWO**

THE METROPOLITAN WATER  
DISTRICT OF SOUTHERN  
CALIFORNIA,

Plaintiff and Respondent,

v.

CAMPUS CRUSADE FOR CHRIST, INC.  
et al.,

Defendants and Appellants.

E034248

(Super.Ct.No. SCV 35498)

OPINION

APPEAL from the Superior Court of San Bernardino County. John P. Wade,  
Judge. Reversed with directions.

Redwine and Sherill, Justin M. McCarthy, Scott R. Heil; Berger & Norton,  
Michael M. Berger, Gideon Kanner, John T. Fogarty; Matteoni, Saxe & O’Laughlin,  
Norman E. Matteoni and Peggy M. O’Laughlin for Defendants and Appellants.

Jeffrey Kightlinger, Lauren R. Brainard; Cox, Castle & Nicholson, Kenneth B.  
Bley and Edward C. Dygert for Plaintiff and Respondent.

1. Introduction

In 1997, Metropolitan Water District of Southern California (Metropolitan)

brought an eminent domain action to condemn land owned by Campus Crusade for Christ, Inc. and Del Rosa Mutual Water Company (collectively Campus Crusade) to construct a segment of a 43-mile water pipeline. Metropolitan sought to preclude Campus Crusade from presenting evidence of over \$12 million in severance damages based on various factors, including the danger of pipeline rupture, the cutting of mature trees, and potential uses of the property that were contingent upon a zone change. Metropolitan also sought to exclude evidence concerning any temporary severance damages resulting from the delay in construction.

In 2000, Judge Cynthia Ludvigsen denied most of Metropolitan's motions in limine and ruled that the evidence of severance damages was admissible. After Judge Ludvigsen's reassignment and replacement by Judge John P. Wade in 2001, Metropolitan again filed numerous motions in limine to exclude the same evidence. In 2002, after over four years of litigation, Judge Wade granted the motions and rejected Campus Crusade's claim that it had suffered any severance damages as a result of the taking. Campus Crusade waived its right to a jury trial. The trial court awarded \$479,278.45 in damages, none of which was attributable to severance damages.

In challenging the trial court's judgment, Campus Crusade claims that Judge Wade committed the following errors: violated principles of comity and judicial efficiency by overturning Judge Ludvigsen's rulings; usurped the role of the jury by excluding all evidence of severance damages; and imposed upon Campus Crusade the burden of proving severance damages contrary to the rule in Code of Civil Procedure section 1260.210. Campus Crusade claims that it was entitled to present evidence concerning

each item of damages, including evidence of a reasonable probability of a change in zoning laws, the diminution in value caused by the cutting of mature trees, the potential damage that would result from an earthquake, and the evidence of damages caused by the delay in construction.

We conclude that Judge Wade overstepped his authority by overruling Judge Ludvigsen's prior ruling. We also conclude that Judge Wade erred in placing upon Campus Crusade the burden of proof as to the existence of severance damages. Under Code of Civil Procedure section 1260.210, Campus Crusade bears only the burden of producing evidence to show a reasonable probability of injury resulting from the governmental taking. Campus Crusade satisfied its burden of production because it offered substantial evidence that should have been presented to a jury in determining the amount of just compensation.

We reverse the judgment and remand for a new trial.

## 2. Factual and Procedural History

Metropolitan is a public agency established to channel water from the inland areas to the coastal plains of Southern California. The Inland Feeder Project was a project to construct a 43-mile water pipeline from Devil Canyon to Diamond Valley Lake. The pipeline was 12 feet in diameter and constructed of welded steel that was five-eighths of an inch in width. Most of the pipeline was buried hundreds of feet below the earth's surface.

Campus Crusade owned 1,824 acres of land along the northern edge of the City of San Bernardino. Part of the land was located in the city and part of the land was in the

city's sphere of influence, which was also unincorporated territory of San Bernardino County. The property was the site of the historic Arrowhead Springs Hotel, the International School of Theology, several office buildings, a conference center, a sports field, and a village. Most of the property, however, was undeveloped. The property also contained a lake, hot and cold running springs, and several streams. Arrowhead Spring Water extracted water from the property and Campus Crusade received substantial income from Arrowhead.

In early 1996, Campus Crusade retained Thomas Thornburgh, a land developer, to assist with its comprehensive development plans for the entire property. The city seemed to be enthusiastic and supportive of Campus Crusade's plans for future development.

Campus Crusade's plans were disrupted when Metropolitan decided to construct its pipeline across Campus Crusade's property. Metropolitan initially intended to condemn certain areas, including a 10.4-acre parcel in fee (INFEDI-31-100), 18.7 acres of permanent easements (INFEDI-31-100PEA1, INFEDI-31-100PEA2, INFEDI-30-140PEA1), and 27.4 acres of temporary construction easements for a period of seven years (INFED1-100TEA1 and INFED1-100TEA2). It later added two permanent tunnel easements, one below ground and the other above ground (INFED1-31-100PEA3).

On December 10, 1996, Metropolitan's board of directors adopted a resolution of necessity. On December 23, 1996, Metropolitan deposited funds into the State Treasury, thereby setting the date of valuation.

In the following month, on January 23, 1997, Metropolitan filed its complaint in eminent domain and an ex-parte application for possession. Metropolitan's first amended complaint included the two additional permanent easements.

Campus Crusade submitted statements of valuation from three appraisers, E.R. Metcalfe, James Smothers, and Robert Swing. The appraisers estimated the value of the property interests being taken between \$1,500,000 and \$1,600,000 and the temporary and permanent damage to the remainder between \$12,600,000 and \$14,000,000.

The pipeline cut across Campus Crusade's property at a location that was most valuable and most amenable to development. One of the permanent easements ran up against some of the existing buildings. Although the pipeline was about 30 feet away, the resolution provided that Metropolitan acquired the land ". . . for the purpose of constructing, reconstructing, maintaining, operating, enlarging, removing, and replacing a line or lines of pipe at any time, and from time to time, for water transportation, with every appendage or structure necessary or convenient to be installed at any time in connection therewith; . . ."

The resolution also provided that Campus Crusade may not interfere unreasonably with Metropolitan's rights over the permanent easements. The resolution restricted Campus Crusade's ability to modify the typography, construct buildings, or plant trees in the areas covered by the easements.

As to the areas covered by the temporary easements, Metropolitan disclaimed any obligation to restore vegetation to its prior condition. Campus Crusade had a row of mature trees that served as a natural entryway for the historic hotel. Metropolitan's use

of the temporary construction easements required the cutting of all the mature vegetation in that area.

Before the taking, Campus Crusade had two ways of accessing its property. The primary access route was through State Highway 18. Campus Crusade also had secondary access rights through 40th Street over a neighboring parcel. The taking interfered with Campus Crusade's secondary access rights.

In addition to the impacts caused by Metropolitan's use of the condemned areas, the pipeline also posed the risk of rupture. As a potential significant impact, Metropolitan analyzed this risk in its environmental impact report. The pipeline crossed a branch of the San Andreas Fault at this site. Campus Crusade's experts opined that Metropolitan constructed this section of the pipeline as a "safety valve" by raising the pipeline hundreds of feet to within several feet of the earth's surface, making the pipeline accessible after a breach for any necessary repairs. A breach in the pipeline could cause a sudden outflow of millions of gallons of water onto Campus Crusade's property at a rate of 1,000 cubic feet per second.

Contrary to Campus Crusade's claim for damages, Metropolitan submitted a revised statement of valuation for \$392,000 for all the property interests with no severance and temporary damages. On October 7, 1999, Metropolitan filed a final offer of compensation for \$1,500,000 plus costs and interests, which excluded any damages related to Campus Crusade's water rights. Metropolitan subsequently increased its offer

to \$3,500,000.<sup>1</sup> Campus Crusade revised its demand to \$12,500,000 for the property interests taken and severance damages.

On January 4, 2000, Metropolitan filed the first of many motions in limine to exclude evidence. Metropolitan requested that the court exclude all references to “temporary severance damages” for construction-related interference to Campus Crusade’s conference facility. Metropolitan filed two additional motions, one involving Campus Crusade’s claim for cost-to-cure damages for Metropolitan’s interference with Campus Crusade’s right of access and the other damages related to the pipeline grade at a particular location. The parties’ trial briefs also raised other issues of temporary and permanent severance damages.

On August 24, 2000, after conducting an evidentiary hearing, Judge Ludvigsen denied most of Metropolitan’s motions and allowed Campus Crusade to present evidence to support its claims for severance damages, including damages caused by the removal of mature trees, the restrictions on use, the risk of rupture, and the cost-to-cure expense of constructing an alternative entrance road. Judge Ludvigsen also allowed plaintiff to present evidence of construction-related damages if those damages were excessive and beyond the ordinary annoyances associated with a public works project.

On May 1, 2001, in the first of two additional motions in limine, Metropolitan requested the exclusion of evidence of damages related to the construction of the

---

<sup>1</sup> On October 28, 2004, Metropolitan moved to augment the appellate record with its second revised Final Offer of Compensation, which was omitted from the Clerk’s Transcript. The motion is granted.

Arrowhead west tunnel. In the second motion, Metropolitan requested that the court require Campus Crusade to determine the amount of just compensation based on the existing circumstances at the time of trial.

After considering Campus Crusade's opposition, Judge Ludvigsen granted both motions. The court noted that the parties essentially agreed that the damages should be determined based on the conditions at the time of trial, but disagreed as to what those conditions were. The court ruled that the trier of fact would make that determination.

Based on the court's rulings, Campus Crusade submitted a new list of expert witnesses and statements of valuation. The new list of experts included another appraiser, Michael Waldon, who relied solely on severance damages as opposed to temporary damages as a basis for recovery.

After Judge Ludvigsen was reassigned and replaced by Judge John Wade, Metropolitan filed 10 additional motions in limine. Metropolitan previously asked Judge Ludvigsen to clarify her most recent ruling, but she was reassigned before responding to the request. In its motions, Metropolitan requested the exclusion of evidence of temporary and permanent severance damages, including damages caused by the delay in construction. Metropolitan also asked the court to exclude valuation evidence based on future development that did not conform with the zoning restrictions at the date of value. Some of Campus Crusade's property was in an area zoned for resource conservation, but Campus Crusade's valuations anticipated a change in zone to permit commercial development. In another motion, Metropolitan sought to prevent Campus Crusade from presenting evidence concerning its access to the property from 40th Street. Metropolitan

also asked the court to reconsider the admission of evidence concerning the risk of rupture.

Campus Crusade opposed each of Metropolitan's motions in limine. Campus Crusade specifically noted that Judge Ludvigsen previously had addressed the same or similar issues and decided many of them in its favor.

On August 21, 2002, Judge Wade reviewed Judge Ludvigsen's decision and acknowledged the prior rulings as the law of the case. After conducting an evidentiary hearing, however, Judge Wade reversed many of Judge Ludvigsen's rulings. Judge Wade granted all of Metropolitan's motions, except one concerning comparable sales. Judge Wade's rulings effectively precluded Campus Crusade from presenting evidence of severance damages because those damages were either not allowed, too speculative, or assumed circumstances that did not exist on the date of value.

Based on Judge Wade's rulings, Campus Crusade submitted its third amended list of experts and statement of valuation. Campus Crusade reduced its demand for compensation to \$5,380,000.

Campus Crusade waived its right to a jury because Judge Wade's decisions to exclude evidence of severance damages effectively limited its recovery to compensation for only the actual taking. The case proceeded to trial before Judge Wade. On June 12, 2003, Judge Wade issued its judgment awarding Campus Crusade \$478,278.45, which did not include any amount for severance damages.

### 3. The Judges' Rulings

Campus Crusade claims that Judge Wade erred in overturning Judge Ludvigsen's evidentiary rulings. Campus Crusade argues that Judge Wade violated the judicial rules of comity and efficiency and disturbed the parties' settled expectations.

Metropolitan contends that Judge Wade's evidentiary rulings were not inconsistent with Judge Ludvigsen's earlier rulings. Metropolitan alternatively argues that Judge Wade was not bound by the earlier rulings because the evidentiary issues presented pure questions of law and Judge Wade's rulings were correct as a matter of law.

Both parties acknowledge that the rulings of one judge may not be reconsidered by another judge. (*Wyoming Pacific Oil Co. v. Preston* (1958) 50 Cal.2d 736, 739; *Curtin v. Koskey* (1991) 231 Cal.App.3d 873, 876; *Greene v. State Farm Fire & Casualty Co.* (1990) 224 Cal.App.3d 1583, 1588-1590.) This rule is not based on the doctrine of res judicata, but on the more fundamental principles of judicial comity, efficiency, and the rule of law. (See *People v. Riva* (2003) 112 Cal.App.4th 981, 991; *In re Alberto* (2002) 102 Cal.App.4th 421, 427; *Curtis, supra*, at p. 876.) "For one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court." (*Alberto, supra*, at p. 427.)

A successor judge may review an interlocutory ruling of another judge under a few narrow circumstances. One such circumstance is when the facts have changed or when the judge has considered further evidence and law. (*People v. Riva, supra*, 112 Cal.App.4th at pp. 992-993; *Tilem v. City of Los Angeles* (1983) 142 Cal.App.3d 694,

706; *Travelers Ins. Co. v. Superior Court* (1977) 65 Cal.App.3d 751, 760.) The successor judge also may review the ruling after the party has requested reconsideration from the predecessor judge and that judge is not available. (*Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1232.) Additionally, the ruling may be reversed if the record shows that it was based on inadvertence, mistake, or fraud. (*Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 1069, citing *Sheldon v. Superior Court* (1941) 42 Cal.App.2d 406, 408.) Mere disagreement with the prior ruling, however, is not enough. (*Riva, supra*, 112 Cal.App.4th at p. 992.)

Campus Crusade's demand for compensation was based largely on its theory that the taking caused about \$12,000,000 in severance damages. Campus Crusade's case, therefore, hinged upon its ability to present evidence of severance damages. The evidentiary issues were hotly contested. In addition to the motions and responses, the parties also filed additional points and authorities on the subject of severance damages. During two days of evidentiary hearings, Judge Ludvigsen considered the testimony of several witnesses, including three of Campus Crusade's valuation experts. Eight months after Metropolitan filed its first motion in limine, Judge Ludvigsen issued her nine-page ruling on the evidentiary issues.

Based on the principles discussed above, Judge Wade had no authority to reconsider Judge Ludvigsen's rulings on the same issues unless there was a change in law or facts. Judge Wade's action was particularly inappropriate because the evidentiary issues were fully litigated through written motions and noticed hearings. (See *Greene v. State Farm Fire & Casualty Co., supra*, 224 Cal.App.3d 1589.) After Metropolitan

presented some of the same evidentiary issues in a new round of motions in limine, Judge Wade held another evidentiary hearing for five days. Judge Wade reversed most of Judge Ludvigsen's decisions in a 10-page ruling. As noted by Campus Crusade, the ruling significantly affected the parties' settled expectations. Judge Wade's ruling came five years after Metropolitan filed its complaint in eminent domain and over two years after Judge Ludvigsen ruled that Campus Crusade could present evidence on severance damages.

Metropolitan contends that Judge Wade's rulings were proper because they did not contradict Judge Ludvigsen's prior rulings and they were correct as a matter of law. Metropolitan discusses the rulings regarding three specific items of damages: the danger of pipeline rupture; the loss of mature trees; and the delay in construction. Although most of Judge Wade's rulings were complete reversals of Judge Ludvigsen's rulings, we find some merit to Metropolitan's contention that their decisions on the mature trees were not inconsistent.

#### A. Danger of Pipeline Rupture

In regards to the danger of pipeline rupture, the two rulings were clearly inconsistent. Judge Ludvigsen found that, "Defendant also presented testimony about severance damage as a result of use restrictions on the permanent easement site and risk from rupture of the pipeline on defendant's property, particularly where it cross [*sic*] the San Andreas Fault. The court considers these elements of permanent, not temporary, severance damage. The parties insisted that they did not dispute permanent severance damages, except as to value, so the court assumes the parties will present valuation

testimony on this issue as part of permanent severance damage.” After finding the evidence insufficient to support the risk of rupture, Judge Wade concluded that, “any evidence that the potential buyers of the subject property would be affected by the underground water pipelines is inadmissible as clearly speculative.” Both judges heard similar testimony from Campus Crusade’s valuation experts, but arrived at different conclusions concerning this evidence. While Judge Ludvigsen allowed Campus Crusade to present the valuation testimony to the trier of fact, Judge Wade excluded this evidence as speculative. Judge Wade’s action, therefore, cannot be characterized as anything other than a complete reversal of Judge Ludvigsen’s prior ruling.

B. Loss of Mature Trees

As to the damages claimed for the loss of mature trees, Judge Ludvigsen observed: “[T]here also was testimony regarding certain aesthetic impacts on the remainder parcel. These impacts result from the landscape restrictions on the permanent easement acquired by plaintiff and from the removal of trees and other landscaping along the fee parcel acquired by plaintiff at the entrance to defendant’s property, as well as the exposure to view of both the improvements and construction activities at that fee site. The court finds that this is an appropriate element of severance damage, although part is temporary . . . and part is permanent . . . .” In its motion in limine No. 16, Metropolitan requested an order prohibiting Campus Crusade from presenting evidence for the cost of replacing the trees. Judge Wade granted the motion, thereby limiting Campus Crusade’s recovery to the diminution in value caused by the loss of the mature trees, rather than the cost of replacement.

The two rulings were not inconsistent. Judge Wade did not prevent Campus Crusade from seeking damages for the trees. Judge Wade simply found that the damages must be measured by the diminution in value caused by the cutting of the trees, rather than the cost of replacement. (See *Ventura County Flood Control Dist. v. Security First National Bank* (1971) 15 Cal.App.3d 996, 1001.) Although Judge Wade later found that the loss of trees had no effect on the value of the remainder, the court did not contradict Judge Ludvigsen's decision by excluding evidence of the cost of replacement.

C. Delay in Construction

Judge Wade's ruling on the delay in construction was inconsistent with Judge Ludvigsen's earlier ruling. Judge Ludvigsen recognized that construction-related damages, including traffic, noise, dust, and fumes generally were not compensable. (See *People ex rel. Department of Public Works v. Symons* (1960) 54 Cal.2d 855, 858-859.) Judge Ludvigsen, however, found that "the scope of work projected on defendant's property rises above the level of mere annoyance and defendant is entitled to compensation for the severance damage inflicted." Because Campus Crusade was unable to quantify the damages, Judge Ludvigsen could not determine the appropriate scope for construction-related damages. Metropolitan sought clarification of Judge Ludvigsen's ruling. Judge Ludvigsen was reassigned before she had an opportunity to consider Metropolitan's request.

Metropolitan again moved to exclude the evidence. Judge Wade granted the motion and excluded all construction-related damages. Although both judges agreed that Campus Crusade was not entitled to compensation for ordinary annoyances associated

with the construction of a public works project, Judge Ludvigsen had allowed Campus Crusade to present evidence of temporary severance damages because of the unusually lengthy delay in construction. Judge Wade's total exclusion of the evidence, therefore, was inconsistent with Judge Ludvigsen's decision.

#### 4. Burden of Proof

Campus Crusade claims that the trial court erred in requiring it to bear the burden of proving severance damages. The question is whether the property owner must prove the existence of severance damages although neither party bears the burden of proof on the issue of compensation under Code of Civil Procedure section 1260.210.

Code of Civil Procedure section 1260.210 specifically provides:

“(a) The defendant shall present his evidence on the issue of compensation first and shall commence and conclude the argument.

“(b) Except as otherwise provided by statute, neither the plaintiff nor the defendant has the burden of proof on the issue of compensation.”

The Law Revision Commission Comment for this statute explains, “The rule as to burden of proof provided by subdivision (b) changes former law. [Citation.] Assignment of the burden of proof in the context of an eminent domain proceeding is not appropriate. The trier of fact generally is presented with conflicting opinions of value and supporting data and is required to fix value based on the weight it gives to the opinions and supporting data. [Citations.] Absent the production of evidence by one party, the trier of fact will determine compensation solely from the other party's evidence, but neither party should be made to appear to bear some greater burden of persuasion than the other. . . .”

(Cal. Law Revision Com. com., 19 West's Ann. Civ. Proc. Code (1982 ed.) foll. §1260.210, pp. 745-746.)

Campus Crusade argues that Code of Civil Procedure section 1260.210 applies to severance damages because severance damages are a key element of compensation. Although Metropolitan agrees that Code of Civil Procedure section 1260.210 applies to severance damages, it argues that the statute refers only to the parties' burden of proof as to the amount of compensation. The statute, according to Metropolitan, does not prevent courts from imposing upon the property owner the burden of proving his entitlement to severance damages.

Neither party disputes that severance damages generally are a key component of just compensation for a partial taking. Both the federal and state Constitutions require that a property owner be provided just compensation for any government taking. (U.S. Const., 5th Amend.; Cal. Const., art. 1, § 19.) Just compensation is the amount that would make the landowner whole for the loss sustained as a result of the taking. (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 704, 715.) Just compensation includes the fair market value of the land taken. (Code Civ. Proc., § 1263.310; *City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 744.) It also includes an award to reimburse the owner for the damage caused by the taking to the remaining land, reduced by the amount of any benefit. (Code of Civ. Proc., § 1263.410; *City of San Diego v. Neumann, supra*, at p. 744.) The latter is commonly referred to as severance damages. (*City of Carlsbad v. Rudvalis* (2003) 109

Cal.App.4th 667, 679.) Severance damages, therefore, are statutorily-included component of compensation for a partial taking by eminent domain.

Before 1976 the courts assigned to the property owner the burden of proving the value of the land or the amount of compensation. (See *People v. Loop* (1954) 127 Cal.App.2d 786, 801; *City & County of San Francisco v. Tillman Estate Co.* (1928) 205 Cal. 651, 654-655.) In the earlier cases, the courts imposed upon the property owner not only the burden of proof on the amount of compensation, but also the “burden of proof” as to the existence of certain preliminary facts. (See, e.g., *People ex rel. Department of Public Works v. International Telephone & Telegraph Corp.* (1972) 22 Cal.App.3d 829, 839; *People ex rel. Department of Public Works v. Arthofer* (1966) 245 Cal.App.2d 454, 463 (hereafter *Arthofer*).)

In *Arthofer*, the court stated that the property owners bore the burden of proof as to the reasonable probability of a zone change. (*Arthofer, supra*, 245 Cal.App.2d at p. 463.) In that case, the state condemned the defendants’ property for freeway purposes. Although the property was zoned R-1 (single family residential), the property owners claimed that the zone might have been changed to R-3, which would have allowed for the construction of apartments, private schools, and other similar improvements. The record, however, contained no evidence to support the property owners’ claim. A prior application for a zone change had been denied. The experts also failed to discuss the matter with the city planners and conduct a full investigation into the possibility of a zone change. (*Id.* at pp. 459-460, 466.) Based on these facts, the trial court precluded the

property owners' experts from giving their opinion as to the reasonable probability of a zone change.

Although the *Arthofer* court referred to the "burden of proof," the test applied was a preliminary determination concerning the evidence. "[T]he evidence must at least be in accordance with the usual minimum evidentiary requirements, and that which is purely speculative, wholly guess work and conjectural, is inadmissible. [Citation.]" (*Arthofer, supra*, 245 Cal.App.2d at p. 463.) The court found that there was insufficient evidence to require a factual determination by the jury. (*Id.* at p. 468.) The evidence presented in *Arthofer*, therefore, would have failed to satisfy the defendant's burden of production under Code of Civil Procedure section 1260.210, subdivision (a).

The California Supreme Court subsequently quoted *Arthofer* and, specifically, the "burden of proof" language in a 1977 case, *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860 (hereafter *Decker*). The court acknowledged the change in the law when it disapproved the language in BAJI No. 11.98, which previously placed upon the defendant the burden of proof on the issue of compensation. (*Decker, supra*, at p. 872.) It nevertheless appears that the court assumed that, under the new law, the defendant still bore the burden of establishing a reasonable probability of a zone change. (*Id.* at p. 868.)

The court in *Decker*, however, did not address the distinction between the burden of proof and the burden of persuasion. The property owner sought to introduce evidence of a zone change that would have allowed her property to be used as a parking lot. The primary issue was whether the city committed misconduct in arguing against the need for additional parking when it knew that the property would be used for exactly that purpose.

Notably, the parties were allowed to present conflicting evidence on the issue of whether there was a reasonable probability of a zone change. (*Decker, supra*, 18 Cal.3d at pp. 864-865, 868.)

Even in cases involving eminent domain actions that were brought after 1976, the courts continued to impose upon the property owner the initial burden of making some sort of showing in regards to the existence of certain preliminary facts. (See, e.g., *City of San Diego v. D.R. Horton San Diego Holding Company, Inc.* (2005) 126 Cal.App.4th 668, 680 [burden of showing a change in property restrictions]; *Redevelopment Agency v. Contra Costa Theatre, Inc.* (1982) 135 Cal.App.3d 73, 84 [burden of establishing a change in zoning laws].)

Based on these cases, it remains unclear whether the property owner bears the “burden of proof” as to the preliminary facts necessary to support his claim for compensation in light of the 1975 statute. The statute, which became effective in 1976, changed the former law by relieving the property owner of the burden of proof on the issue of compensation. (Cal. Law Revision Com. com., 19 West’s Ann. Civ. Proc. Code, *supra*, at p. 745.) Compensation, as described above, includes both the fair market value for the land taken and any severance damages.

To be consistent with Code of Civil Procedure section 1260.210, we conclude that the property owner still bears the burden of showing his entitlement to compensation for a specific item of severance damages, but that his burden is more accurately characterized as a burden of production. While subdivision (b) of Code of Civil Procedure section 1260.210 refers to the burden of proof on the issue of compensation, subdivision (a)

addresses the party's burden of producing evidence to show his entitlement to compensation. "The initial burden placed on an eminent domain defendant by section 1260.210, subdivision (a), is simply *the burden of going forward with (or producing) some evidence of a material fact* - in this instance, the existence of a loss. Once that burden has been met by the defendant, however, subdivision (b) of section 1260.210 makes it clear that neither party to the action bears *a particular burden of persuasion* with respect to convincing the trier of fact as to the precise amount of that loss. (See 1 Witkin, Cal. Evidence (3d ed. 1986) Burden of Proof and Presumptions, §§ 127-129, pp. 113-115.)" (*Redevelopment Agency v. Metropolitan Theatres Corp.* (1989) 215 Cal.App.3d 808, 811, fn. 3.) The defendant or property owner, therefore, bears the burden of producing evidence of his entitlement to compensation by showing the existence of certain facts that are essential to his claim.

When there is a dispute over the existence of a preliminary fact, the court may conduct an evidentiary hearing to decide whether the property owner has presented evidence sufficient to satisfy his burden of production. (See Evid. Code, § 402.) Because this initial burden is the burden of going forward, the property owner satisfies this burden by presenting substantial evidence to support his claim. (See generally *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1666-1667 [discussing burden of production].) The property owner does not have to prove his claim. The court need only be convinced that the property owner has presented admissible evidence sufficient to go before a jury. The jury decides the ultimate fact. "The practical effect of the distinction [between the burden of production and the burden of proof] is that (1) the

burden of going forward or initially producing evidence calls the judge's powers into play . . . , while (2) the burden of proof in the fundamental sense operates when the case finally reaches the jury. [Citations.]” (1 Witkin, Cal. Evidence (4th ed. 2000) § 2, p. 156.)

If the property owner presents substantial evidence and the evidence is relevant to the question of just compensation (i.e., may affect the value of the property), the court should not exclude the evidence from the jury's consideration. Where the preliminary facts are in dispute, they also present a question of fact for the jury. (See *Arthofer, supra*, 245 Cal.App.2d at p. 467.) The jury should have access to all evidence relevant to the determination of the fair market value of the property on the date of valuation.

(*Coachella Valley Water District v. Western Allied Properties, Inc.* (1987) 190

Cal.App.3d 969, 976.) The property owner, therefore, should not bear the burden of proof on the amount of compensation or any preliminary facts that may affect the jury's determination of that amount.

The business goodwill cases do not require a different result. Although the property owner bears the burden of proof as to his entitlement to compensation for loss of goodwill, that standard is set by statute. (Code Civ. Proc., § 1263.510.) Accordingly, courts have held that Code of Civil Procedure section 1263.510 specifically imposes upon the property owner the burden of proof for the loss of goodwill. (See *Redevelopment Agency of City of San Diego v. Attisha* (2005) 128 Cal.App.4th 357, 367; *Regents of the University of California v. Sheily* (2004) 122 Cal.App.4th 824, 830; *Emeryville Redevelopment Agency v. Harcross Pigments, Inc.* (2002) 101 Cal.App.4th

1083, 1119; *Redevelopment Agency v. Thrifty Oil Co.* (1992) 4 Cal.App.4th 469, 474; *People ex rel. Department of Transportation v. Salami* (1991) 2 Cal.App.4th 37, 42-43.)

But even in the context of business goodwill, the “burden of proof” does not require that the property owner prove the ultimate fact, namely, the specific amount that would constitute just compensation for the taking. (*Redevelopment Agency v. Metropolitan Theatres Corp.*, *supra*, 215 Cal.App.3d at p. 811; *Salami*, *supra*, at p. 45.)

Section 1260.210 provides that neither party bears the burden of proof on the issue of compensation “[e]xcept as otherwise provided by statute.” Unlike business goodwill, there is no statutory exception for severance damages. Before the enactment of Code of Civil Procedure section 1263.510, property owners were not reimbursed for the loss of goodwill. (*Redevelopment Agency v. Thrifty Oil Co.*, *supra*, 4 Cal.App.4th at p. 474, citing *People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 270; *Community Redevelopment Agency v. Abrams* (1975) 15 Cal.3d 813, 817.) The Legislature authorized compensation and, for this new item of damages, effectively imposed, whether intentionally or not, a greater threshold for recovery. Unlike business goodwill, severance damages were always compensable when the action involved a partial taking. (Code Civ. Proc., § 1263.410.) Because there is no exception, Code of Civil Procedure section 1260.210 establishes the burdens of production and proof for severance damages.

We conclude that, under Code of Civil Procedure section 1260.210, subdivision (a), the property owner bears the burden of producing evidence to show that the necessary conditions exist which entitle him to compensation for severance damages. In

*City of San Diego v. Neumann, supra*, 6 Cal.4th 738 at page 745, the California Supreme Court described the property owner’s responsibility as follows: “Because severance damages are intended to compensate the property owner for the destruction of the integrity of his land [citation], the property owner must be able to demonstrate both how his property functions as an integrated unit and how the value of what remains has been injured by the taking of a part.”

As applicable here, Campus Crusade bore the burden of demonstrating (i.e., producing substantial evidence such that a reasonable juror could find in its favor) how the value of the remainder had been injured by the taking. Campus Crusade was required to make the initial showing as to the existence of severance damages. The trial court erred because it not only imposed upon Campus Crusade the burden of production but also the burden of proof. The court considered the disputed evidence and found that Campus Crusade failed to meet its burden. Therefore, although Campus Crusade presented substantial evidence of severance damages, the court prevented the trier of fact from considering the evidence in its determination of just compensation.

##### 5. Role of the Jury

Campus Crusade next claims that Judge Wade’s evidentiary rulings invaded the jury’s role. Metropolitan argues that the court properly performed its gatekeeping function in determining the admissibility of evidence, and particularly the testimony of Campus Crusade’s valuation experts on severance damages.

Our conclusion in the preceding section does not imply that the court did not have the authority to determine the admissibility of the evidence of severance damages. As

stated above, the property owner bears the initial burden of producing substantial evidence to show that he is entitled to severance damages.

The jury's role is to determine the amount of just compensation. (See Cal. Const., art. 1, § 19; *Coachella Valley Water District v. Western Allied Properties, Inc.* (1987) 190 Cal.App.3d 969, 976; *Redevelopment Agency v. Contra Costa Theatre, Inc.* (1982) 135 Cal.App.3d 73, 80.) The court's role is to determine all other issues of law and fact. (*Coachella Valley Water District, supra*, at p. 974; *People v. Ricciardi* (1943) 23 Cal.2d 390, 402; *Pacific Gas & E. Co. v. Peterson* (1969) 270 Cal.App.2d 434, 438.) In an eminent domain proceeding as in any other judicial proceeding, the court's role includes determining the admissibility of evidence, whether the proffered evidence is relevant and not unduly prejudicial. (See *City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900-901; *Redevelopment Agency v. Tobriner* (1989) 215 Cal.App.3d 1087, 1097, fn. 5.) Evidence may be excluded as unduly prejudicial if it is too speculative. (See *People ex rel. Department of Water Resources v. Andresen* (1987) 193 Cal.App.3d 1144, 1162-1163.)

Particularly in an eminent domain proceeding, the court determines the admissibility of valuation evidence. (See *City of San Diego v. Barratt American Inc.* (2005) 128 Cal.App.4th 917, 936-937.) The court determines whether the valuation evidence in support of a particular claim of compensation is sufficient to be presented to the jury. The court "typically decides questions concerning the preconditions to recovery of a particular type of compensation, even if the determination turns on contested issues of fact." (*Emeryville Redevelopment Agency v. Harcros Pigments, Inc., supra*, 101

Cal.App.4th at p. 1116.) Therefore, before the jury can consider the evidence in determining the amount of compensation, the property owner must present substantial evidence to show that he is entitled to compensation, including recovery for severance damages. (See *id.* at pp. 1117-1118 [drawing distinction between determining entitlement to severance damages and determining amount of compensation, only the latter of which was discussed in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 718].)

The court enjoys considerable discretion in determining the admissibility of valuation evidence. (*City of San Diego v. Sobke* (1998) 65 Cal.App.4th 379, 396.) The court's evidentiary rulings are reviewed for an abuse of discretion. (*City of Ripon v. Sweetin, supra*, 100 Cal.App.4th at p. 900.) Despite this considerable discretion, the court must be careful not to eliminate altogether from the jury's consideration of value the property owner's legitimate claims for damages. (See *Coachella Valley Water District v. Western Allied Properties, Inc.* (1987) 190 Cal.App.3d 969, 967; *County of San Diego v. Bressi* (1986) 184 Cal.App.3d 112, 122.)

In this case, as discussed above, the court went beyond simply determining the admissibility of evidence. We will address the court's specific evidentiary rulings in the remainder of this opinion.

#### 6. Most Injurious Use

Campus Crusade argues that the court applied the wrong standard in excluding valuation evidence. Campus Crusade argues that, in order to assess the value of the remaining property, the trier of fact must consider the most injurious use of the property

that was taken. Campus Crusade claims the trial court erred in excluding testimony concerning any potential future uses of the property.

Although Metropolitan agrees with the most injurious use standard, it contends that the trial court did not prevent Campus Crusade from presenting testimony concerning potential future uses. Metropolitan is partly right. The court did not exclude all evidence of potential future uses, but, as discussed in the sections below, it prevented Campus Crusade from presenting evidence of other potential consequences from Metropolitan's construction of the pipeline.

We begin with some well-settled principles. The damages awarded to the property owner in an eminent domain action should reimburse the owner for all property interests taken and place the owner in as good a pecuniary position as he would have been in without the taking. (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 925.) “The measure of just compensation is the fair market value of the property ([Code Civ. Proc.], § 1263.310), defined as ‘the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other *with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.*’ ([Code Civ. Proc.], § 1263.320, subd. (a), italics added.) [¶] Fair market value is the highest and best use for which the property is geographically and economically adaptable. [Citation.]” (*Ibid.*)

In determining just compensation, the trier of fact must consider the most injurious use of the property taken based on the range of uses permitted under the resolution of necessity. (*County of San Diego v. Bressi, supra*, 184 Cal.App.3d at p. 123.) The trier of fact must assume that the project will be carried to completion as proposed. (*People ex rel. Department of Public Works v. Edgar* (1963) 219 Cal.App.2d 381, 386.) On the one hand, if the proposal indicates other intended or possible future uses that may detrimentally affect the remaining land, the trier of fact may consider those uses. (*County of San Diego v. Bressi, supra*, at p. 123.) On the other hand, if the condemnor has agreed to certain limitations on development that inure to the property owner's benefit, the trier of fact also may consider those benefits. (See *People ex rel. Department of Public Works v. Edgar, supra*, at p. 386.) The trier of fact should hear all evidence relevant to the determination of the fair market value of the property on the date of valuation. (*Coachella Valley Water District v. Western Allied Properties, Inc., supra*, 190 Cal.App.3d at p. 977.)

As observed by Metropolitan, the trial court allowed Campus Crusade to present evidence to show the most injurious use of the property taken. Because Campus Crusade waived its right to a jury trial, the court was the trier of fact. The court considered the resolution of necessity which afforded Metropolitan broad discretion in using the property affected by the taking. The resolution states that Metropolitan acquired the land "...for the purpose of constructing, reconstructing, maintaining, operating, enlarging, removing, and replacing a line or lines of pipe at any time, and from time to time, for

water transportation, with every appendage or structure necessary or convenient to be installed at any time in connection therewith; . . .”

The court also considered the testimony of Campus Crusade’s valuation experts concerning the most injurious use of the land, including its overriding authority to access the pipeline, the restrictions imposed upon Campus Crusade on using the land above the pipeline, the possibility of adding other pipelines, and the effect these limitations had on the value of the remaining property. In addition to testimony provided by its own witnesses, Campus Crusade also cross-examined Metropolitan’s experts, who admitted some of these limitations.

While the record shows that the court considered the above evidence, Campus Crusade nevertheless maintains that the court erred because it failed to allow other evidence, including evidence of damages caused by the delay in construction, the interference with access rights, and the risk of rupture. As discussed below, the trial court erred in excluding evidence concerning these potential consequences. The exclusion of this evidence prevented the trier of fact from considering other injurious consequences that could have affected its determination of value. In this regard, the trier of fact failed to consider the most injurious use of the property.

#### 7. Zone Change

Campus Crusade also argues that the court applied the wrong standard in failing to consider the highest and best use of the remaining property, including uses that would be permitted after a change in land use restrictions so long as the change was reasonably probable.

Code of Civil Procedure section 1263.320 provides that the fair market value is the highest price on the date of valuation based on all of the uses for which the property is reasonably adaptable and available. “As section 1263.320 indicates, the fair market value of property taken has not been limited to the value of the property as used at the time of the taking, but has long taken into account the ‘highest and most profitable use to which the property might be put in the reasonably near future, to the extent that the probability of such a prospective use affects the market value.’ [Citations.]” (*City of San Diego v. Neumann, supra*, 6 Cal.4th at p. 744.) Where there is evidence of a reasonable probability of a zone change, this evidence may be considered in determining the fair market value.

Based on our previous discussion, the property owner bears the burden of producing evidence to show the existence of certain preconditions that entitle him to compensation. As relevant here, the property owner bears the burden of showing a reasonable probability of a zone change. (See Code Civ. Proc., § 1260.210, subd. (a); *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 868; *City of San Diego v. Barrett American, Inc., supra*, 128 Cal.App.4th 917, 934; but see 1 Matteoni & Veit, *Condemnation Practice in Cal.* (Cont.Ed.Bar 2d ed. 1995) § 9.21, p. 446.) The trial court makes the threshold determination of whether the property owner has satisfied this burden of production. (See *Emeryville Redevelopment Agency v. Harcros Pigments, Inc., supra*, 101 Cal.App.4th at pp. 1117-1118.)

In rendering his decision, Judge Wade erred in three ways. First, he failed to defer to Judge Ludvigsen’s prior ruling. In this case, Judge Ludvigsen heard the testimony of

Campus Crusade's valuation experts and essentially found that the evidence was not speculative. The court found that the jury should be allowed to consider the evidence of the conditions that existed at the time of trial in making its determination of just compensation. After hearing similar testimony, Judge Wade found: "The evidence presented at the hearing convinces the Court that, as of the date of value, as well as of the date of this ruling, it is not reasonably probable that the subject property would be rezoned in the reasonably near future. [¶] The prospect of rezoning is too remote and speculative to constitute an element of value in these proceedings." For the reasons provided earlier in this opinion, Judge Wade had no authority to reconsider and reverse Judge Ludvigsen's earlier ruling. (See *In re Alberto, supra*, 102 Cal.App.4th at p. 427.)

Second, the court deprived the jury of evidence that may have been relevant in making its determination of just compensation. "[T]he determination as to whether or not there is a reasonable probability of a [use] change is ordinarily a question of fact for the jury." [Citation.]" (*Redevelopment Agency v. Contra Costa Theatre, Inc., supra*, 135 Cal.App.3d 84.) The court's role is that of an evidentiary gatekeeper not an ultimate fact finder. The court determines the admissibility of the evidence and excludes any evidence that is purely speculative or conjectural. (*Decker, supra*, 18 Cal.3d at p. 868; *Redevelopment Agency v. Contra Costa Theatre, Inc., supra*, at p. 86.) Therefore, if there is no substantial evidence to support a reasonable probability of a zone change, the court could prevent the jury from considering uses conditioned on the zone change. However, if there is any substantial evidence, the issue must be presented to the jury.

Notably, in the cases relied upon by the trial court, even where the evidence

ultimately was found to be insufficient to support a reasonable probability of a zone change, the jury nevertheless was allowed to consider evidence of potential uses that were contingent upon a zone change. (See, e.g., *People v. Talleur*, *supra*, 79 Cal.App.3d 690; *Long Beach City High School District v. Stewart* (1947) 30 Cal.2d 763, 764-765, 769-770.)

In *Redevelopment Agency v. Contra Costa Theatre, Inc.*, *supra*, 135 Cal.App.3d 73, the court decided whether the trial court erred in allowing the property owner to present evidence of a reasonable probability of obtaining a use permit to build a multiple-screen theatre. The condemnor noted that the city denied an earlier permit only six months before the eminent domain proceedings and there had been no change of circumstances since then. The condemnor therefore argued that the evidence was “so speculative as to be inadmissible.” (*Id.* at p. 85, fn. omitted.)

The court disagreed. Although the jury ultimately found no reasonable probability that the property would be used for a multiple-screen theatre, the court held that it was “entirely proper” for the jury to consider the additional potential use. (*Redevelopment Agency v. Contra Costa Theatre, Inc.*, *supra*, 135 Cal.App.3d at p. 86.) The court explained as follows: “In condemnation proceedings, the trial court is vested with considerable judicial discretion in admitting or rejecting evidence of value. [Citation.] Only evidence of a reasonable probability which is “purely speculative, wholly guess work and conjectural, is inadmissible.” [Citations.] [¶] Here, the testimony of appellant’s experts was based primarily on customary practices in similar areas and other proper, albeit general, considerations. Despite the fact that appellant’s experts apparently

failed to thoroughly investigate or consider the conflict between appellant’s proposed use of the property and the particular land use plans in the City of Concord, such testimony did not, we conclude, descend to the level of mere speculation or guesswork. And in the absence of a clear abuse of discretion, we decline to disturb the trial court’s admission of expert testimony that the property would increase in value as a multiscreen theatre.

[Citation.]” (*Id.* at pp. 86-87, fn. omitted.)

The *Redevelopment Agency v. Contra Costa Theatre* case reveals that the court’s threshold determination on the admissibility of evidence is not a rigorous one. While it is intended to weed out purely speculative and unfounded claims, it should not prevent the property owner from presenting or the jury from considering competent evidence, particularly when such evidence is based on the customary practices employed by experts in appraising the value of property. “The jury is entitled to and should consider those factors which a buyer would take into consideration in arriving at a fair market value, were he contemplating a purchase of the property [citations], and it is manifest that plausible and probable changes in the character of the neighborhood and in zoning restrictions in an area constitute such factors.” (*People ex rel. Department of Public Works v. Donovan* (1962) 57 Cal.2d 346, 352; see also *People ex rel. State Public Works Bd. v. Talleur* (1978) 79 Cal.App.3d 690, 695-696.) In excluding the evidence, the trial court entirely eliminated from the jury’s consideration information that may have affected its determination of just compensation.

Third and lastly, Judge Wade erred in his assessment of the evidence. Although Metropolitan asks this court to apply a substantial evidence test, its request underscores

its misunderstanding concerning the trial court's role during an evidentiary hearing in an eminent domain proceeding. In determining whether the trial court abused its discretion, we are not evaluating whether the evidence was sufficient to justify the judgment or an ultimate finding in its favor. Instead, our task is to determine whether the evidence was relevant and not pure speculation or conjecture. (See *Decker, supra*, 18 Cal.3d at p. 868; *City of Ripon v. Sweetin, supra*, 100 Cal.App.4th at pp. 900-901.)

The record shows that Campus Crusade presented competent evidence of a reasonable probability of a zone change. The property owner may show a reasonable probability of a zone change by a variety of factors, including changes to the neighborhood and general changes in land use. (*Arthofer, supra*, 245 Cal.App.2d at p. 462, citing *People ex rel. Department of Public Works v. Donovan, supra*, 57 Cal.2d at p. 353.) In this case, based on the size and unique attributes of Campus Crusade's property, changes to the neighborhood are not as significant as the other factors that may indicate a reasonable probability of a zone change.

On the date of valuation, December 23, 1996, part of Campus Crusade's property was located in the City of San Bernardino and part of its property, which was unincorporated territory of San Bernardino County, was located in the city's sphere of influence. The property that was located within the city, which was approximately 320 acres, was zoned RL (rural living). The property that was located within the city's sphere of influence was under the following restrictions: approximately 10 acres were zoned RS-1 (single residential); approximately 190 acres were zoned RL-3 (rural living with a

three-acre lot minimum); and approximately 1,300 acres were zoned RC (resource conservation).

Despite the existing restrictions, Campus Crusade's witnesses testified that the highest and best use of the property would involve the continued use of the existing improvements and the comprehensive development of the entire property for residential, commercial, industrial, and recreational uses. Although development required zone changes, Campus Crusade provided evidence to support their expectation that the city or county would approve future applications for zone changes and development.

Campus Crusade's witnesses testified concerning existing nonconforming uses on its property. There are several improvements on the property, including a 154,000 square foot hotel, a village, a school, a conference center, and other buildings. Although some of the improvements are on property in the resource conservation zone, the county has allowed those uses by various permits that have been renewed routinely on an annual basis.

Campus Crusade's appraiser, Robert Swing, also testified concerning provisions of the city's general plan which encouraged further development. The city's general plan provides that, "It shall be the objective of the City of San Bernardino to provide for the evolution of the existing random patterns of land use into a network of interrelated active clusters and quarters which encompass commercial, governmental, industrial and/or high density residential uses with intervening areas developed for lower intensity residential uses and low intensity, high quality residential uses in the foothills which are cited to maintain the foothill's unique environmental character." Swing opined that, based on the

city's objectives concerning the San Bernardino foothills, Campus Crusade's plans for comprehensive development "were within the city's objectives and goals. . . . [I]t has always been the city's objective to have a viable use in that area. And it would certainly look forward to a good quality future development of uses on that site." Swing contacted city and county planners, reviewed city and county documents, and evaluated the property. Based on his research, Swing opined that the city would allow some additional uses.

In addition to Campus Crusade's general plans for development, the record shows that it had taken some initial steps to proceed with its plans before the date of valuation. Around late 1995 and early 1996, Campus Crusade retained Thomas Thornburgh to assist in the process of planning for comprehensive development. Based on Thornburgh's recommendation, Campus Crusade applied for and obtained approval to include the rest of Campus Crusade's property in the city's sphere of influence. The approval brought Campus Crusade's property under one jurisdiction, thereby paving the way for Campus Crusade to present a specific plan to the city. According to Thornburgh, Campus Crusade was moving forward with its plans for development.

Swing observed that, although the city and Campus Crusade agreed to retain the county's zoning designations until the property was rezoned, ". . . it was always the intent that the city would create rezoning. . . ." Evidence that the city considered rezoning and viewed it favorably (or at least did not reject it) may indicate a reasonable probability of a zone change. (See *People ex rel. Department of Public Works v. Donovan, supra*, 57 Cal.2d at p. 353.) In his declaration, James Funk, the present

Director of the Development Services Department for the City of San Bernardino, stated his opinion that, "...since prior to December, 1996, and to the present day there has been a probability that: (a) the Campus Crusade property would ultimately be annexed to the City; and (b) as part of that annexation it could be zoned or approved for uses compatible with the development concept which has been presented by the developer to the City; . . ."

The above evidence satisfied the threshold requirement of admissibility. The evidence did not descend to the level of pure speculation or conjecture. Even before the date of valuation, the evidence showed that Campus Crusade initiated its plans to develop the property and the city was receptive to the prospects of future development. The city's view of Campus Crusade's plans for comprehensive development was evident later in the mayor's remark that it was "one of the most exciting projects in the City of San Bernardino." Although the witnesses also testified to various limitations and hazards associated with the property, there was substantial evidence of a reasonable probability of zone change and some future development. Because Campus Crusade satisfied its burden of production, the trial court erred in excluding the evidence of the potential zone change.

#### 8. Severance Damages

We turn to Campus Crusade's challenges against the court's other rulings on the admissibility of evidence of severance damages.

Severance damages represent the diminution in fair market value of the remaining property as a result of the taking. (*San Diego Gas & Electric Co. v. Daley* (1988) 205

Cal.App.3d 1334, 1345 (hereafter *Daley*.) “In determining severance damage, the jury must assume ‘the most serious damage’ which will be caused to the remainder by the taking of the easement and construction of the property. [Citation.]” (*Id.* at p. 1345.) Because the property owner has only one opportunity to seek compensation for all foreseeable damages to his property, severance damages may include not only specific direct damages but also indirect factors that affect the property’s market value. (*Ibid.*; see also *City of Salinas v. Homer* (1980) 106 Cal.App.3d 307, 313-314.)

Generally, a reviewing court applies an abuse of discretion standard in reviewing the trial court’s ruling on the admissibility of valuation evidence. (*Daley, supra*, 205 Cal.App.3d at p. 1346.) The trial court, however, must apply the appropriate standard in making its rulings. The standard is any relevant evidence shedding light on the market value of the property is admissible. But evidence that is pure speculation, guesswork, or conjecture is inadmissible. (*Ibid.*; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1146.) If the evidence is substantial, the question should be submitted to the jury to determine the weight of the evidence. (See *Pacific Gas & Electric Co. v. Hunt* (1957) 49 Cal.2d 565, 570-571, 572.) It is neither the province of this court nor the lower court to decide matters that “. . . simply relate to the credibility of the witnesses and the weight to be given their testimony, all of which were matters for the jury to pass upon.” (*San Bernardino County Flood Control Dist. v. Sweet* (1967) 255 Cal.App.2d 889, 906.)

In granting Metropolitan’s motions in limine, the trial court excluded all evidence of certain items of severance damages. Although the court found the evidence

speculative, the record shows that the evidence was more than sufficient to satisfy the threshold question of admissibility. Because the court excluded from the jury's consideration substantial evidence that may have affected its determination of just compensation, we conclude that the court's wholesale exclusion of evidence of severance damages was erroneous and prejudicial. (See *City of Hollister v. McCullough* (1994) 26 Cal.App.4th 289, 300-301.)

A. Danger of Pipeline Rupture

Campus Crusade specifically argues that the trial court erred in excluding evidence of the risk of pipeline rupture. Judge Wade found that there was insufficient evidence to show any public fear of pipeline failure and any detrimental effect on property value. As discussed above, Judge Wade exceeded his authority in reconsidering and reversing Judge Ludvigsen's decision. The court also erred because the evidence of pipeline rupture was substantial and should have been presented to a jury.

The public's fear of danger because of a particular construction project may result in a diminution of property value and, accordingly, compensable severance damages. (See *Daley, supra*, 205 Cal.App.3d at p. 1347.) Courts have allowed recovery for different types of potential dangers. (*Daley, supra*, 205 Cal.App.3d at p. 1349 [fear of danger from electromagnetic radiation caused by power line]; *Pacific Gas & Elect. Co. v. Hunt, supra*, 49 Cal.2d at p. 572 [fear of electrocution from power line]; *Pacific Gas & Elect. Co. v. Hufford* (1957) 49 Cal.2d 545, 559 [same]; *Yolo Water & Power Co. v. Hudson* (1920) 182 Cal. 48, 52 [danger of seepage and flood from project to raise lake waters]; *Colusa & Hamilton Railroad Co. v. Leonard* (1917) 176 Cal. 109, 114 (hereafter

*Leonard*) [enhanced danger of flood from roadway construction].) One court specifically noted, “Where land is taken by eminent domain, and the manner of its use is such as to naturally and necessarily subject the land not taken to the danger of seepage and flood, a depreciation in the value of such remaining land caused by such danger of seepage and flood is a proper element of damage.” (*Yolo Water & Power Co. v. Hudson, supra*, at p. 52.)

As consistent with the general rules, the danger of flooding may not be admissible where the evidence is speculative. “Elements affecting value which are possible but not reasonably probable should be excluded. [Citation.]” (*Sacramento and San Joaquin Drainage Dist. v. Reed* (1963) 215 Cal.App.2d 60, 64 (opn. mod. 217 Cal.App.2d 611) (hereafter *Reed*)). In *Reed*, the State Reclamation Board condemned land to construct a new levee. The defendants sought compensation for the actual taking and severance damages for possible flood damage in the event of future construction of additional levees. The reviewing court held that the trial court erred in allowing evidence of potential flooding because the evidence was speculative and contingent upon the construction of other improvements. (*Id.* at pp. 68-69.) The court observed that, “[t]he valuation opinions were based not on ‘actual admitted facts’ . . . but on a conjectural buyer’s conjectural fears of conjectural flooding created by conjectural levees.” (*Id.* at p. 70.)

Unlike in the *Reed* case, the valuation evidence presented in this case was based on concrete facts. A segment of Metropolitan’s pipeline was designed and constructed across the San Andreas fault. In response to Metropolitan’s motion in limine, Campus

Crusade quoted from the environmental impact report (EIR) for the Inland Feeder Project: “The likelihood exists that the Inland Feeder pipeline and its associated facilities could be damaged in the event of a major earthquake with an epicenter along the numerous faults traversed by the project. Liquefaction, differential settlement and ground lurching are usually the seismic shaking hazards that cause the most damage and dollar loss during an earthquake. Because these seismic shaking hazards are near-surface phenomena, pipelines are particularly susceptible to damage. . . . [¶] Pipeline rupture during a seismic event could result in underground and surface spillage of delivered water supplies, with the potential for localized flooding, soil saturation and mudslides, depending on where and in what subsurface material a rupture occurs. . . .”

Robert Swing, Campus Crusade’s valuation expert, testified that Metropolitan selected to use a pipeline for this segment of the project, as opposed to tunneling. Based on the EIR, Swing opined that Metropolitan made this decision because a pipeline would be readily accessible in case of rupture. Previously another one of Campus Crusade’s valuation experts, James Smothers, noted that Metropolitan raised the pipeline to function as a safety valve because the pipeline crossed the San Andreas fault on Campus Crusade’s property. The dimensions and location of the pipeline was undisputed. The tunnel ranged between 670 to 785 feet below the surface. The pipeline, which was 12 feet in diameter, ranged between 10 to 12 feet below the surface, and at some points, was raised to about four to five feet below ground. Smothers estimated that a pipeline rupture could cause the property to be inundated with water at the rate of a thousand cubic feet per second.

The facts of the project alone may reveal the potential danger. From such evidence, the jury may assess the danger and its effect on the property's market value. (See *Yolo Water & Power Co.*, *supra*, 182 Cal. at p. 53.) In this case, Metropolitan's pipeline created a new risk of flooding over Campus Crusade's property. Metropolitan's own EIR acknowledged the risk of pipeline rupture as a potential significant impact and discussed the likelihood and consequences of such an event.

Although Metropolitan faults the developer for failing to raise this issue with the city or include the danger in its advertising brochures, such evidence does not suggest that a well-informed buyer would not discover and consider the risk in determining the property's fair market value. Certain damages, even if not otherwise compensable, may be appropriate in an eminent domain case if the issue "would make the property less desirable in the eyes of a prospective purchaser." (*Sacramento and San Joaquin Drainage Dist. v. Reed*, *supra*, 215 Cal.App.2d at p. 64.) A jury may consider the nature and severity of the risk and the likelihood of the triggering event in determining whether such risk would have evoked public fear and affected property values. (See *Colusa & Hamilton Railroad Co. v. Leonard* (1917) 176 Cal. 109, 115 [damage may occur in the event of a flood].)

We conclude that the trial court erred in excluding the evidence of the risk of pipeline rupture.

#### B. Delay in Construction

Campus Crusade argues that the trial court also erred in excluding evidence of temporary severance damages resulting from the delay in construction. Campus Crusade

argues that the delay interfered with its use of the remaining property, specifically in regards to planning, financing, and marketing the property.

Metropolitan argues that Campus Crusade was not entitled to seek compensation for damages that may have resulted during construction.

We conclude that Campus Crusade was entitled to seek compensation for the temporary construction easement and any severance damages based on the diminution in value to the remainder. Campus Crusade, however, was not entitled to compensation for additional damages for ordinary annoyances associated with the construction of the Inland Feeder project because such damages could not have been ascertained on the date of value.

In an eminent domain action, severance damages are determined based on date of valuation. (Code Civ. Proc., § 1263.440, subd. (b); *Orange County Flood Control Dist. v. Sunny Crest Dairy, Inc.* (1978) 77 Cal.App.3d 742, 754; *People ex rel. Department of Public Works v. Home Trust Investment Co.* (1970) 8 Cal.App.3d 1022, 1026.)

Severance damages also are set based on the project as proposed. (Code Civ. Proc., § 1263.450; *City of Carlsbad v. Rudvalis, supra*, 109 Cal.App.4th at p. 679.)

Generally, a property owner cannot recover temporary severance damages for injuries resulting from the construction of public improvements. (*People ex rel. Department of Public Works v. Ayon* (1960) 54 Cal.2d 217, 228 (hereafter *Ayon*). Such construction-related problems include any interference with the property owner's right of access and other common annoyances such as additional traffic, noise, dust, and fumes. (*Ibid.*; see also *People ex rel. Department of Public Works v. Symons* (1960) 54 Cal.2d

855, 858-859.) On the valuation date, the property owner cannot predict whether and to what extent injuries will occur during construction. (See *Ayon, supra*, at p. 228.) Accordingly, damages for such injuries are more appropriately sought after the injuries have occurred. (See, e.g., *Heimann v. City of Los Angeles* (1947) 30 Cal.2d 746, 757-758 (hereafter *Heimann*), overruled on other grounds in *Los Angeles v. Faus* (1957) 48 Cal.2d 672, 680.); *Harding v. State of California ex rel. Department of Transportation* (1984) 159 Cal.App.3d 359, 367.) “It is true that damages resulting from unnecessary and substantial temporary interference with the property owner’s rights in the property may be compensable.” (*Ayon, supra*, 54 Cal.2d at p. 228, citing *Heimann, supra*, 30 Cal.2d at p.755.)

This general rule against the recovery of construction-related damages does not bar Campus Crusade’s claim entirely. As correctly determined by both trial court judges, Campus Crusade is not entitled to damages for ordinary annoyances associated with the construction of a public works project. Campus Crusade also is not entitled to any damages that were not foreseeable from the date of valuation, including those attributable to any subsequent changes to the proposed project. Campus Crusade, however, may seek temporary severance damages for foreseeable harm caused to the remainder as a result of any substantial interference with Campus Crusade’s use of its property during construction. (See *Ellena v. State of California* (1977) 69 Cal.App.3d 245, 257.) Campus Crusade is entitled to seek full compensation for any characteristic of the project that causes a diminution in value to the remainder. (See *San Diego Gas & Electric v.*

*Daley, supra*, 205 Cal.App.3d at p. 1345; *Placer County Water Agency v. Hofman* (1985) 165 Cal.App.3d 890, 901-902; *Ellena v. State of California, supra*, at p. 258.)

The fact that the damages must be determined based on the date of value does not require that the fact finder ignore the proposed scope and duration of the construction project. In this case, in addition to the property taken in fee and the permanent construction easements, Metropolitan also condemned two temporary construction easements. The project as proposed included the use of the property for seven years to construct the pipeline, tunnel, and other related facilities. Campus Crusade should have been able to present evidence to show whether and to what extent the delay disrupted its use of the remaining property during that seven-year period.

Metropolitan argues, however, that the seven-year delay had no effect on Campus Crusade's plans to develop its property because the evidence indicated that Campus Crusade had many hurdles to overcome and was years away from any actual development. In support of its argument, *Metropolitan* cites *City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385 (hereafter *Ricards*) and *Orange County Flood Control Dist. v. Sunny Crest Dairy, Inc., supra*, 77 Cal.App.3d 742 (hereafter *Sunny Crest*). Although in both cases the courts held that there was insufficient evidence to support the property owner's claim of damages, neither case held that such damages were not recoverable as a matter of law. In fact, both courts acknowledged that recovery was available. "But where there has been a substantial impairment of use which diminishes the market value of the property, compensation is constitutionally compelled.

[Citations.]” (*Sunny Crest, supra*, 77 Cal.App.3d at p. 756; see also *Ricards, supra*, at pp. 387-388.)

In *Sunny Crest*, the district acquired both a permanent and temporary easement by eminent domain for the construction of a underground storm channel. The defendant possessed the property under a long-term lease and used the property as a cash-and-carry dairy, which was a nonconforming use. The construction prevented the defendant from continuing his dairy business. At trial, the defendant’s experts testified that the taking caused temporary severance damage because the construction also prevented the defendant from using his property as a mobile home park during the two-year construction period. (*Sunny Crest, supra*, 77 Cal.App.3d at p. 749.)

The appellate court held that insufficient evidence supported the defendant’s claim for temporary severance damages. “Indeed, the uncontroverted evidence was that because Sunny Crest had to acquire the additional 1.39-acre parcel, to secure a conditional use permit, and to negotiate the lease, the developer was not ready to commence construction until long after the district completed its work. In short, there was no evidence that anything the district did impaired the use of the remainder for a mobile home park development or any other permissible purpose other than the nonconforming use. Thus, there was no factual basis for the recovery of damages on the theory of a temporary taking of the remainder. [Citation.]” (*Sunny Crest, supra*, 77 Cal.App.3d at p. 762, fn. omitted.)

Unlike in *Sunny Crest*, Campus Crusade presented evidence that the taking and construction disrupted its plans to develop its property. Robert Swing testified that the

most significant impact on Campus Crusade's property would occur during construction. During that time, Campus Crusade would have difficulty proceeding with development, especially in regards to obtaining financing and marketing the property. Thomas Thornburgh also testified that the construction impacted the project and delayed plans to develop the property and obtain entitlements. Thornburgh specifically noted that the temporary easements directly affected Campus Crusade's access to its property and its plans to construct certain improvements, such as a golf course. Although Thornburgh's testimony may have been based on other subsequent developments in Metropolitan's project and Campus Crusade's comprehensive plan, Campus Crusade should have been allowed to present evidence to show how the project as proposed interfered with its plans for development.

Also, unlike in *Sunny Crest*, the construction in this case was projected to last for up to seven years. While the process of applying for zone changes and obtaining approval for development may have taken years, Campus Crusade's evidence indicated that the construction easement prolonged the process beyond what would have occurred without Metropolitan's interference. We conclude that Campus Crusade should have been allowed to present evidence of severance damages for the temporary construction easements.

In summary, we conclude that the property owner bears the burden of producing evidence to show his entitlement to compensation for a particular item of damages, which requires that he provide substantial evidence of the existence of certain preconditions that are necessary for recovery. The trial court's role is to consider this evidence and make

the threshold determination of admissibility by applying the usual rules of evidence, excluding all evidence that is pure speculation, guesswork, or conjecture. If, however, the evidence is relevant and not otherwise inadmissible, the court must submit the matter to the jury to determine the amount of just compensation.

In this case, the trial court in large part failed to apply the appropriate standards. We are not suggesting that Campus Crusade should have received compensation in any amount for the various items of damages, but instead, that the court should not have prevented the jury from considering a legitimate claim of damages supported by substantial evidence.

6. Disposition

We reverse the trial court's judgment and we remand for a new trial. Campus Crusade shall recover its costs on appeal.

s/Gaut  
J.

We concur:

s/Hollenhorst  
Acting P. J.

s/Richli  
J.

COURT OF APPEAL -- STATE OF CALIFORNIA  
FOURTH DISTRICT  
DIVISION TWO

THE METROPOLITAN WATER  
DISTRICT OF SOUTHERN  
CALIFORNIA,

Plaintiff and Respondent,

v.

CAMPUS CRUSADE FOR CHRIST, INC.  
et al.,

Defendants and Appellants.

E034248

(Super.Ct.No. SCV 35498)

The County of San Bernardino

ORDER

THE COURT

A request having been made to this court, pursuant to rule 978 of the California Rules of court, for publication of a nonpublished opinion heretofore filed in the above-entitled matter on December 19, 2005, and it appearing that the opinion meets the standard for publication as specified in rule 976 of the California Rules of Court:

IT IS ORDERED that said opinion be certified for publication pursuant to California Rules of Court, rule 976.

s/Gaut

J.

We concur:

s/Hollenhorst

Acting P. J.

s/Richli

J.