A Critique of the Position Papers on the Valuation of Land Suitable for Habitat Preservation or Mitigation

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Recently, the Federal Interagency Land Acquisition Task Force (ILAC)[1] and the Appraisal Institute (AI)[2] have issued separate position statements severely limiting real estate appraisals for public acquisitions of land suitable for habitat preservation or mitigation. The ILAC and AI papers prohibit the conclusion of a "non-economic" highest and best use for open space preservation or mitigation and the use of public agency sales comparables for valuation purposes in a real estate appraisal. The ILAC position solely applies to real estate appraisals for federal land acquisitions, whereas the AI position paper applies to any real estate appraisal of land to be acquired for conservation or environmental mitigation conducted by a member of the Appraisal Institute, whether for public or private entities.

These position statements have been issued in opposition to an informal coalition of environmental value proponents (called Proponents hereafter) who contend that: (i) the highest and best use of land purchased by public entities for environmental preservation and/or mitigation is the same as the use for which it is being acquired; (ii) land suitable for environmental habitat preservation commands a "public interest value" which is measured by the premium that public agencies often pay for such properties over market value, or even its "biotic value;" and (iii) purchases of such land by government entities and nonprofit agencies can be used as comparable sales, even sales that are geographically distant from the property in question.[3]

The published position statements of the opposing sides to this debate have left real estate appraisers "between a rock and a hard place" as to how to value land suitable for habitat mitigation or preservation. Many real estate appraisers immediately recognize that these new position statements regarding the valuation of land suitable for habitat preservation conflict with existing state administrative law, state case law, public policies, professional standards, and the workings of the market itself. This paper critically examines the polarized positions on these issues and refocuses the debate onto more critical unanswered questions than those addressed by either side. The author offers a middle-ground position that does not deny due process, and does not advocate the creation of new law, public policies, professional standards, or advocates for a special interest position on the matter.

THE SLIPPERY SLOPE ON BOTH SIDES OF THE ISSUES

1. The AI/ILAC Positions Contradict Established State Laws. The rock-hard positions of the AI/ILAC tend to turn to sand in their oversight of established law, especially dealing with non-federal land acquisitions.

a. *Evidence Code.* In the state of California where most of the debate over this issue originates, there is, in addition to prevailing case law, a provision in the Evidence Code which: (i) allows for a merger of the appraised highest and best use of a property and the use for which a public entity is acquiring it; and (ii) allows use of prices paid by public agencies for open space as comparables for valuation purposes where such purchases were voluntary and not under the "threat of condemnation." California State Assembly Bill 616 was codified as part of the *California Evidence Code*, section 822(a)(1) in 1993.

This law was originally intended to apply only to the narrow category of "public use properties where the same use will be continued" (i.e., a public water agency acquiring a private water reservoir; a public school district acquiring a private school building). However, the California Court of Appeals construed this provision to apply broadly beyond the condemnation of utility properties and existing school buildings to other properties as well, such as preservation land.

b. *Case Law on Public Open Space* Acquisitions. In the related California Appeals Court case of City and County of San Francisco v. Golden Gate Heights Investments, the court affirmed the admission of evidence of prices paid by the city for adjacent parcels of steep hillside land for preservation purposes as comparable sales as well as the price paid by the owner for a 47-acre parcel of condemned land. This court case establishes the compensation for land purchased for environmental protection as either the higher of: (i) the owner's prior sale price; (ii) the comparable sales of the city for voluntary purchase of open space acquisitions; or (iii) some other legally valid and economically feasible use. It should be noted that in this case the prices paid by the city for nearby comparable open space land were lower than the owner's appraiser's opinion of value. Nonetheless, this case opens the possibility of a public agency having to pay either a higher or lower price for open space land based on the prices it paid for similar land if the acquisitions were voluntary and negotiated. However, such government agency sales cannot be compelled as evidence of market value on other public entities.

c. *Case Law on Partial Acquisitions of Environmental Real Estate.* In another California case of People of the State of California v. Pacific Enviro Design and Coastal Magnolia Group (1994), a Superior Court judge ruled that the highest and best use of a 67-acre parcel of vacant land proximate to the beach and designated mainly as wetlands was as mitigation real estate.[4] Damages were awarded to the land owners after a partial acquisition of 7.44 acres of land for a highway widening project degraded the utility of the remainder for any future mitigation by landlocking it and making the remainder unrestorable. This case established the principle that "bad is good" to an environmental mitigator

seeking to acquire replacement acreage for the negative impacts created on other property. In other words, if the land is already "good" (i.e., environmentally restored), it is of less interest to a mitigator. Conversely, if it is degraded, it is of more interest to a mitigator who can obtain credits for enhancing the habitat. This is the opposite of the way the market normally perceives land for development purposes where the principle is that "good is better."

d. *Case Law on Merger of Public and Private Highest Use.* Additionally, in the long standing California court case of City of Los Angeles v. Decker (1977), it was determined that if the use for which the property is being acquired is a use that could be made by private citizens if the property remained in private hands, then that use may be considered as the highest and best use of the property for valuation purposes.[5] The sale of land in environmental mitigation banks, land acquisitions by nonprofit conservation agencies, and the need of land suitable for habitat mitigation by private real estate developers may establish a reasonably probable demand for habitat preservation for which a private citizen selling a property, provided that other normative tests of market value are met as well. Moreover, it is not unusual for a portion of land suitable for environmental conservation to have a highest and best use for recreation which may be similar to the use for which it is being acquired.

A spokesperson for the ILAC position cites the public acquisition of a parcel of land for a rock-borrow site as a classic example of when an appraiser cannot legally consider the highest and best use of a vacant parcel of land as the same use for which the agency is acquiring it.[6] However, in People ex rel Department of Water Resources v. Andresen (1987,) a California court ruled the opposite the case of an unused rock quarry to be acquired as a borrow site for a nearby dam and reservoir repair project.[7] The court found the value of the land was incorrectly based on agricultural values rather than quarry site values. Evidently, the fact that there was no other private market demand for the quarry site did not matter as much as the fact that the owner was denied just compensation for a property he was holding for speculation to undercut the bids of other contractors on future dam and construction projects. The holding of a parcel of land for anticipated environmental mitigation may be similarly treated under state law, although a legal opinion may be needed to clarify this issue.

While the written debate over the valuation of land suitable for habitat mitigation has been mainly focused on federal appraisal policies, no mention is made in either of the position statements of the above cited state laws. Even though state laws probably cannot dictate federal just compensation policy, the broad position statements issued by the AI and the ILAC are ignorant of other jurisdictional law and thus cannot be considered universal pronouncements.

2. The AI Position Fails to Mention That Existing Federal Appraisal Policies Allow for Consideration of the Use for Which Property Is to Be Taken in Certain Situations. The ILAC Position Tends to Rule Out Consideration of any Merged Public and Private Highest Use in an Appraisal Contrary to Existing Land Appraisal Policies.

a. *Existing Exception Provision in Federal Land Appraisal Policies Allows for Merger Of Public and Private Highest Use.* Typically, the demand created by the public project for which the property is taken cannot be the highest and best use upon which an appraisal is predicated for land acquisition purposes. However, the AI position statement fails to acknowledge that the Uniform Appraisal Standards for Federal Land Acquisitions contains an exception which permits an appraiser to consider the use for which the government is acquiring the property when "there is a prospect and demand for that use by others than the government."[8] Unless they choose to ignore it, the framers of the AI position statement are unaware that federal land appraisal standards contain such an exception.

While the ILAC position statement cites the exception to federal land appraisal rules, it makes no mention of how an independent appraiser would go about determining if the planned public use of a property is the same as the demand in the private marketplace. Although federal land appraisal standards provide for consideration of the same use for which the government

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acquires the property when there is a demonstrated demand for such uses, the ILAC has ruled that use for environmental preservation, mitigation, rock quarries, and/or other so-called "uneconomic" speculative investment uses cannot be considered. This raises the question: if the above types of uses are not allowed, then what uses would ever be acceptable, if any? The ILAC position creates an appearance of arbitrariness that would deny any exceptional situation from meeting the requirements to the rule.

b. *Omission of Scope of the Project Rule.* A negligent oversight of the ILAC position statement is whether the prospective demand for the same use for which the property is being acquired may be considered when there is a reasonable probability that a government agency other than the acquiring agency has a demand for such property. Federal land appraisal standards specify only that "there be a demand by others than the government." Nowhere does it explicitly state that demand by other levels of government or nonprofit conservation agencies, should necessarily be ruled out. The federal "Scope of the Project Rule" limits an appraisal from considering any effect the public project has on the enhancement or diminution to the value of the property (i.e., project influence) within the sphere of influence of the public project. But this rule typically does not restrict consideration of any value enhancement or diminution caused by other adjacent or coterminous public or private projects. Does the demand of a property for environmental mitigation/preservation by another public agency for a separate unrelated public project or by a non-profit conservation agency fall outside the "scope of the project" rule? There is also no legal clarification provided as to whether the demand must be "actual" or "reasonably probable," although the law customarily defines it as the latter. The position statement of the ILAC offers no guidance on these all important legal issues.

3. The AI/ILAC Prohibition Against Consideration of "Noneconomic Highest and Best Uses" for Environmental Preservation or Mitigation Is Ill-defined, Inconsistent, and Uninformed.

a. *Misnomer of "Noneconomic Highest and Best Use."* The AI/ILAC positions both state that environmental preservation/mitigation are not economic and, thus, cannot be considered in the highest and best use analysis of a real estate appraisal.

The confusing concept of "noneconomic highest and best use" stated in both position papers is an obvious self contradiction in terms. By definition, there cannot be a highest and best use that is noneconomic. It appears that what the AI position statement means by the term "noneconomic" is "noncommercial" or "nonincome producing." This contradicts massive market evidence and professional literature which emphasizes the intrinsic value of such non-income generating amenities such as land ownership, water frontage and views, streams and ponds, wooded lands, seclusion, historic improvements, archaeological resources, environmental buffers, and even uneconomic "hobby farmland."

b. *Misapplied Definition of Highest Use of Open Space.* The AI position statement has miscomprehended its own definition of highest and best use of open space. Essentially, the AI position states that "the benefit a real estate development produces for a community or the amenity contribution provided by a planned project (i.e., the public space in a park-like area) are not to be considered in the appraisers' analysis of highest and best use."[9] This statement makes perfect sense for open space land in which there is a legally established nexus for dedication as part of a property within a larger real estate development (i.e., parks, open space, flood channels, roadways, etc.). However, it does not apply to the independent amenity value of open lands, the value of buffer zones, greenbelts, etc., the transferability of real property rights for mitigation, and recent U.S. Supreme Court law which limits the dedication of land for public purposes for which there is no legal nexus without just compensation (Dolan v. City of Tigard).

c. *Undefined Criteria of Highest Use.* Additionally, a developer may purchase replacement (i.e., offsite mitigation) acreage to lessen the environmental impacts created on another piece of land. The price the developer is willing to pay may be more than the highest use of the land for uses other than mitigation. This poses a crucial question: why does this not meet the criterion of a "more profitable use" specified under the definition of highest and best use? What about the

valuation of potential development rights transferred from one property where it may be uneconomic (i.e., unprofitable) for development to another property where it is economic? Are such development transfer rights to be considered "non-economic"? A recent U.S. Supreme Court case defined "land" precisely in economic terms as follows: "For what is land but the profits thereof?"[10] To argue that the buying and selling of land for environmental preservation purposes, which otherwise meets all the tests of fair market value, is "uneconomic" (i.e., unprofitable) appears ill-defined to say the least and, at worst, may deny a property owner just compensation. The use which produces the highest market bid price based on anticipated cash flow or desirable amenities is typically considered the highest use (not considering public agency sales which do not happen to meet the tests of fair market value).[11]

d. *"Noneconomic Highest Use" Criteria Would Rule Out Most "Speculative" Land Sales Comparables.* Another difficulty with the AI/ILAC's proscription against appraising noneconomic highest uses is that if carried to its logical conclusion, such a restriction would inevitably result in appraisers having to avoid the valuation of most land purchased for holding purposes or even pre-development land. The very definition of "speculative" land is that it is "uneconomic" to develop. Land speculators often buy several parcels of land on the gamble that they will make a big profit on one property even if they lose on others. There is even a tier of the market that speculates in "environmental real estate" by buying privately-owned, in-holding parcels within federal forests and state preserves, land rich in rare natural resources, or land which can be traded for environmental mitigation credits. Federal land appraisal standards do not go so far as to preclude the use of land sales where the buyer motivation involves "holding for long-term investment purposes." And honest real estate appraisers will acknowledge that even predevelopment land is speculative.

e. *The AI/ILAC Positions Would Eliminate Consideration Of The "Perfect" Sales Comparables: Buffer Zone Land.* If "use" or "non-use" is the criteria by which to evaluate whether the highest and best use conclusion in a real estate appraisal is legitimate, then what is an appraiser to do with land which is purchased precisely for its non-utility such as buffer zones, greenbelts, drainage control, protection against encroaching development, wind rows, slope and erosion protection, view easements, land banking, prevention from lawsuit against offsite ground contamination, and so on? Such "non-uses" are also usually "non-economic". Neither the AI or ILAC position statements consider such "non-economic highest and best uses" of land.

f. *Highest Use Is Not Always The Most Intense Use.* Where the ILAC position tends to be misinformed is in its misunderstandings of the operations of highest and best use in the market. Contrary to a follow up publication by one of the spokespersons for the ILAC position, neither the real estate market nor common sense dictates that the "lower the intensity of use for a property, the lower the value of the property" in all cases.[12] Although this statement is generally true, there are notable exceptions to the contrary. Highly intense uses of land often are associated with prohibitive costs, greater environmental impacts, and frequent adverse public reaction. Less intensive uses of land are often more compatible with their surroundings and more likely to be economically feasible. Highest and best use means optimum use not maximum use.

g. *The Inconsistency of Eliminating Government-Created Highest Use for Preservation or Mitigation Land.* If the AI/ILAC position intends to eliminate all noneconomic uses of land solely because they are created by the government, this would be inconsistent with the appraisal of other properties where the demand, or highest and best use, has been stimulated or wholly created by the government (i.e., ownership housing, low income housing, conservation easements, historic building facade easements, development land made possible by government sanctioned "dirt bonds," etc.).

h. *When There Is No Relevant Market Except For Conservation or Mitigation.* Another difficulty with the vague "economic" criterion of the AI/ILAC position statements is that a property may not have an imminent "economic" use and there may be no relevant market (i.e., demand) for the property other than for environmental conservation/mitigation. Ironically, such a predicament may be

caused by governmental over-regulation of land uses in order to try to accomplish environmental preservation goals (i.e., inverse condemnation). Because of such unusual circumstances, the state of California for example, contains a provision in its Evidence Code which states that the valuation of "property for which there is no relevant market may be determined by any method that is just and equitable."[13]

4. The Environmental Value Proponents' Position Is Incorrect In Advocating for the Use of Public Agency Land Sales as Comparables for Valuation Purposes, with Some Notable Exceptions.

a. *Why Public Agency Sales Are Often Legitimately Precluded.* Public agency purchases of land for conservation purposes often involve abnormal buyer motivations such as:

(i) The avoidance of litigation costs

(ii) The avoidance of an uncertain litigation outcome

(iii) Buyer desperation in order to acquire mitigation land at any price to get environmental certification for a public project

(iv) Seller duress due to threat of condemnation

(v) Perceived difficulty by the public agency in justifying "public necessity" for a taking of land for mitigation purposes

(vi) The need to mitigate quickly to avoid an environmental lawsuit.

(vii) Prior to purchase by a public entity, the value of the acquired property has been established by a mysterious insider sale to a developer for a price which establishes a new plateau for its perceived market value.[14]

For these reasons and others, purchase prices by public agencies of lands for conservation or mitigation are typically not legally admissible in an appraisal under state evidence codes and federal land appraisal standards. The environmental value proponents are wrong in their advocacy for the indiscriminate use of the prices paid for public agency acquisitions of land for preservation purposes.

b. *Why Public Agency Sales Should Not Automatically Be Precluded.* The admissibility of public agency sales may not always be precluded. What both the AI/ILAC or environmental value proponents position statements have overlooked is the situation where a public agency buys land for conservation or mitigation where it has no jurisdiction to use its eminent domain powers. Sometimes a public agency must find mitigation land in a distant location to replace the environmental habitat affected by a public project. Such remote mitigation land may be outside the jurisdiction of the public agency. Such sales transactions may be voluntary and meet all the other tests of fair market value as defined by the laws governing the public agency. This author has been involved in several such purchases by government entities where all the requisite tests of market value have apparently been met and where the public agency lacked jurisdiction to acquire by condemnation.

c. *None of the Sides to the Issue Adequately Address Third Party Sales.* Both the AI and ILAC position statements fail to recognize that the demand for land suitable for habitat mitigation by public agencies other than the federal government, by nonprofit preservation groups, and by private developers has changed from a rare to an occasional event both in the private and public real estate markets. Neither position acknowledges that it is the government and the environmentalists working in concert that have themselves often created the third party market for mitigation real estate. The mitigation real estate market may sometimes be artificial, but it is no less legal or real, depending on the laws of which jurisdiction apply to any given situation. Often a nonprofit environmental conservation group must pay a premium over private market values in order to induce a property owner to sell. When this price premium is paid by a private conservation group, it may not always be related to the influence of a legally designated public project or the public project for which the property is to be taken.

d. *The Problem of Stealth Sales and Evidentiary Blight.* Nonprofit land conservation trusts sometimes act as stealth buyers of land suitable for preservation and then flip the properties to the federal government for a markup price. The backleg of such flip sales should not be considered a market value transaction. However, this market preemption strategy by nonprofit conservation groups working in concert with the government may lead to a situation where there are no land sales of a given property type or in a

specific market area from which to measure market value because environmental purchases have usurped the market. In such situations, to preclude the use of such preemption sales when they are the only market data available may result in an evidentiary blight on market value, if not in diminished marketability of the property (i.e., inverse condemnation). Such nefarious practices as the use of shill buyers to purchase land suitable for habitat preservation may require judicial review when the law matures on these issues.

e. *The Problem of Chain Sales to Developers, Land Conservation Trusts, and Subsequent Conveyance to State Environmental Management Agencies.* Another problem not addressed in any of the position statements is chain sales prior to a public acquisition of land for preservation purposes with the apparent intent to puff-up the subsequent sales price to the public agency. The scenario these sales usually follow goes something like this:[15]

(i) A public entity shows preliminary interest in the land.

(ii) A developer buys the land, threatens development, and raises the plateau of expected value for the property. Economic feasibility for development is never established, nor is any due diligence conducted by the developer/buyer.

(iii) The public entity still expresses a desire to buy the land for preservation purposes.

(iv) A nonprofit conservation agency or land trust steps in to help purchase the land for the public agency.

(v) The market value of the land is reappraised at a value well-beyond what was paid (sometimes using public agency sales comparables).

(vi) The developer sells the land to the nonprofit preservation agency for less than its appraised value but more than the purchase price.

(vii) The developer then gets a tax write-off between the appraised value and the sales price.

(viii) The nonprofit agency then proceeds to sell the property to the state or public entity for a mark-up price to cover administrative costs.

(viii) The front-end transaction is used as a comparable sale by real estate appraisers for other purchases of land suitable for habitat mitigation.

Such collusion sales are made so that everyone makes a killing, but they conspire against the interests of taxpayers. There is no institutionalized checks-and-balances system operating between environmental interests and taxpayers interests in this frequently used public acquisition method of environmental resource land.[16] It is not unusual for the public agency to pay three times the true market value of the property, or more, through this acquisition process. There are several reasons that such sales do not meet the legal criteria of fair market value: (i) the buyers are usually held hostage to buy at a puffed price much higher than the market would actually bear; (ii) any sales occurring after public notice of a planned acquisition of land for environmental preservation may be a project-influenced sale which should not be used for valuation purposes in a real estate appraisal; and (iii) the public agency buyer in the chain of sales is desperate to buy the land at nearly any price due to political pressure from environmental special interest groups and to avoid litigation.

f. *The Failure to Understand That Mitigation Land Sales Are Often Limited Market Transactions.* Another oversight in the AI/ILAC position statements is the recognition that public agency purchases of land for environmental preservation are often limited market transactions. Often public environmental management agencies (fish and game, wildlife, forestry, environmental, etc.) will designate a pool of potential environmental mitigation properties from which a public mitigator can select for mitigation purposes. Such pre-selection of acceptable mitigation sites constitutes a limited market of properties. To use such predesignated mitigation site sales as valuation comparables for properties which have not been so designated may be inappropriate unless there is a reasonable probability of the appraised property similarly becoming such a limited market property.

5. The Valuation Concepts and Methods Proposed By Environmental Value Proponents Are Highly Questionable and Contrived.

a. *The Unit Rule and the Problem of "Cumulative Appraisals."* The environmental value proponents have proposed a host of new concepts for the valuation of land suitable for environmental preservation/mitigation such as "public interest value," "urban development avoidance value," "contingency value," "nature value," "biotic value," "value in use," etc. Use of such terms without legal validation leaves an appraiser without an objective definition to determine highest use and market value. The common thread in all of these concepts is the contention that land has a value in the market based on a pure biological basis, and/or that there is a sales price premium for land suitable for habitat preservation or mitigation. Although the damage to wildlife from some notorious oil spills has created a cottage industry of so-called experts in the valuation of wildlife resources,17 there has not been any market established for wildlife alone separated from its land habitats. The problem of adding the value of the wildlife to the value of the land is called a "cumulative appraisal." A cumulative appraisal adds up various physical aspects and legal rights rather than valuing the property as a whole unit (i.e., the "unit rule"). Adding up the value of the land, the improvements, the wildlife and vegetation, the water rights, the mineral rights, the view rights and so on ad infinitum can lead to a misleading valuation and is to be avoided where possible.18

b. *Superimposition of Biotic Criteria to Adjust Land Sales Data.* Some environmental value proponents have gone so far as to contend that adjustments can be made to land sale market data in an appraisal based on environmental criteria superimposed on the data such as species counts, environmental credits, environmental enhancements , biodiversity value, mitigation ratios, and other such concepts.[19] This nomenclature originates with the environmental impact review and mitigation process and typically has nothing to do with the actual prices paid for such properties in the real estate market, even the market for conservation and mitigation land. Mitigation credits or ratios may have a bearing on selection of one mitigation site over another, but not on market value.[20]

c. *Circular Thinking About Highest and Best Use for Conservation.* Moreover, the environmental value proponents' argument that a public agency's intent to acquire land for environmental conservation/mitigation is self-evident proof of its highest and best use in all cases is a non-sequitor. Such circular reasoning should be avoided in a real estate appraisal

because it omits any consideration of the prerequisite tests for determining highest use required by existing law and appraisal policies.

RECAPITULATION AND REASSESSMENT

The pronouncements of the Appraisal Institute and the Interagency Land Acquisition Task Force, and the propositions of the environmental value proponents, mostly beg the question of how to properly value land suitable for habitat preservation. For the most part, irrelevant answers have been provided to the wrong set of posed questions.

1. Contribution Of AI/ILAC Positions. The positions of the AI/ILAC are generally correct in their opposition against use of public agency land sales purchased for environmental preservation and mitigation. Real estate appraisers must be disabused of the view that nearly any parcel of land can have a highest use for environmental preservation and that the often higher prices paid by public agency for environmentally sensitive land reflects some sort of public interest value which appraisers should consider in a real estate appraisal.

2. Overlooked Issues in the AI/ILAC Positions. The positions of the AI/ILAC are mostly reactionary instead of dealing with the more important overlooked issues of whether the demand by third parties (i.e., private mitigators, nonprofits, environmental speculators, and other public agencies) represents a market, and whether land purchased by public entities not under the threat of condemnation, and which otherwise meet the definitional tests of market value, can be considered as valid evidence in a real estate appraisal.

There is a strong likelihood that the AI's position statement has gone too far in prohibiting the use of valid third party sales of environmental resource land by private developers/mitigators, nonprofit conservation agencies, environmental land speculators, and land bankers; and thus may have abrogated Constitutional protections. The AI position paper needs drastic revision or even retraction.

The ILAC position statement is basically a regurgitation of the policies contained in the Uniform Appraisal Standards for Federal Land Acquisition and does not address the more difficult questions posed in this paper. Except for the interjection of the dangerous term of "non-economic highest and best use," the ILAC position paper is mostly benign. However, the ILAC position paper needs to address the "scope of the project rule" and the third party sub-market as it applies to valuations for public acquisitions of land for habitat preservation or mitigation.

3. Contribution of Environmental Value Proponents' Position. The environmental value proponents have focused attention on the fact that there is a third party market operating for environmental resource land comprised of other government agencies, nonprofit preservation trusts, real estate developers looking for offsite mitigation, and speculators in environmental real estate. They have brought attention to the fact that the public ambivalently believes that natural resources are valuable, but don't always want to pay for them.

4. Why The Environmental Value Proponents' Positions Must Be Vigorously Opposed. The environmental value proponents' resolution of the dilemma of how to fund public land acquisitions for environmental preservation is apparently to find a back-door method of taxation through the land appraisal process which circumvents the political system (i.e., hidden taxation without representation).[21] The environmental value proponents assert that traditional valuation methods cannot be applied and that nature land commands a value far above market value as measured by the higher prices paid for such lands by public agencies.

The environmental value proponents have made the worse appear the better cause by couching their proposals in abstract terminology, appeals to the public good of environmental protection, and a distorted notion of just compensation for owners of property with habitat suitable for preservation. This special interest agenda has not only manifested itself in higher prices for physical takings of property but in schemes to shift the burden of land preservation costs to land owners in the form of environmental regulations, illegal dedication requirements, and development impact fees.

The environmental value proponents' positions are without legal precedent, are one-sided, politicize the appraisal process, and are so poorly researched and thought out that they only confuse and divert attention from more important issues. The environmental value proponent's position would be less likely to evoke such vigorous opposition if it focused on the clarification of the existing rules which govern real estate appraisals instead of trying to create new law and policies outside courtrooms and government policy making venues. Moreover as reported above in this article, public agencies and non profit conservation agencies, sometimes working separately or in concert, often pay more than market value to acquire land for preservation purposes anyway. It is not the role of a real estate appraiser to make such political decisions in an appraisal unless directed by a public agency client.

5. Refocusing The Debate Onto The Central Valuation Issue. The debate inside the valuation profession over how to appropriately value land suitable for habitat preservation and mitigation all comes down to one unanswered central appraisal question: how do you establish a legally bona fide demand/nondemand for preservation or mitigation use of land and avoid wild speculation and advocacy or arbitrarily ruling out such uses or valuation evidence? It may be better to equip real estate appraisers with a legal methodology for determination or nondetermination of environmental preservation uses and a criteria for the selection of comparable sales than with position statements that micromanage the appraisal process and do not have the effect of law.

6. Need To Avoid Vaguely Defined Concepts To Resolve Issues. Awareness of the underlying positions of the stakeholders on each side of the issues can help appraisers retain a nonpartisan position. To retain objectivity in this dispute the appraiser must avoid some of the doublethink and groupthink that is found lurking within the positions of the antagonists. The attempt by parties on both sides of the issue to promote new valuation concepts for natural resource land is typical of the current political correctness. The only apparent criteria for judging whether a definition is good or bad is whether it serves my interest group. As George Orwell related in his novel, *1984*, in an authoritarian world where objective truth is ignored, definitions become the tool of the state or special interest groups and can mean almost anything. Such

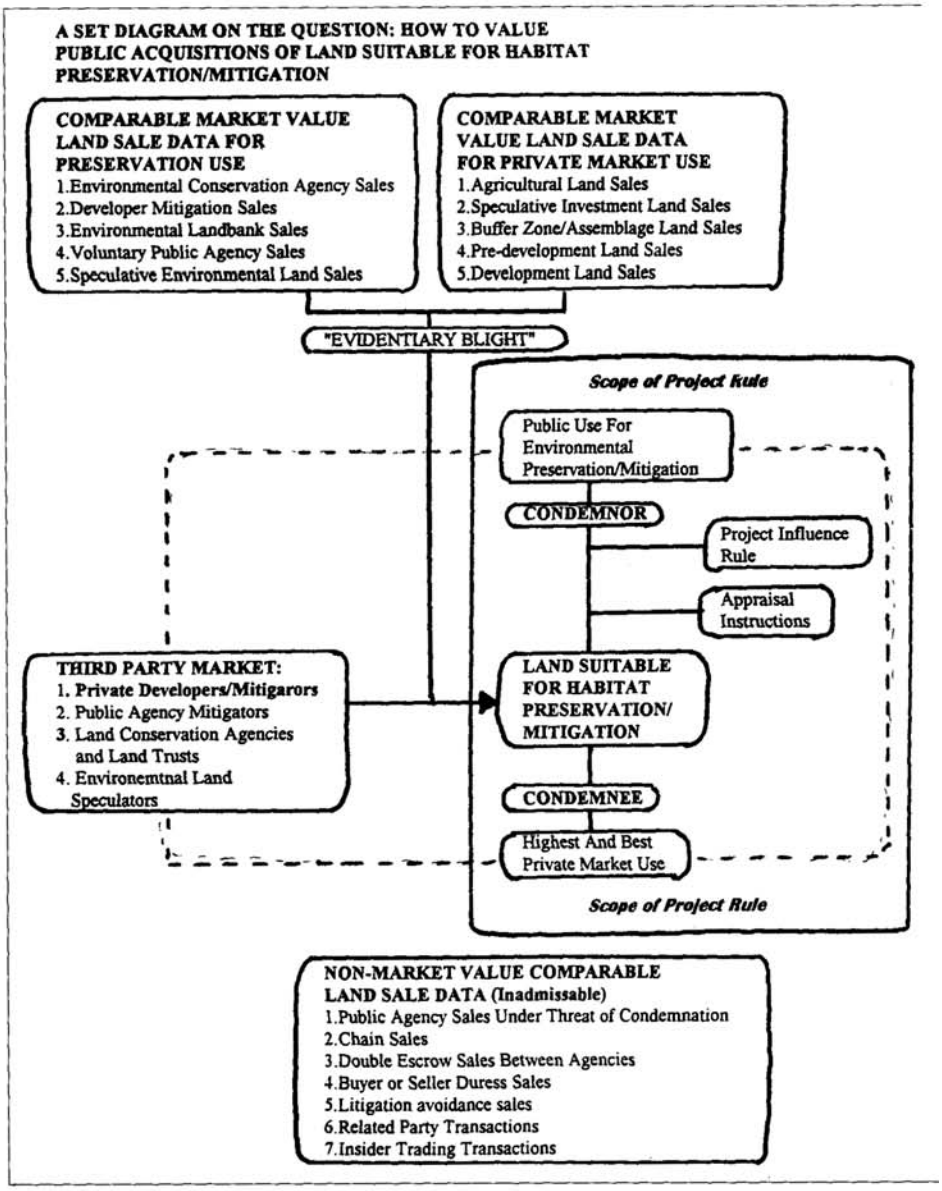
doublethink concepts as noneconomic highest and best use, public interest value, contingency value, bio-diversity value, or even the corruption of the concept of "fair market value" are reflections of such uncritical thinking. It is the responsibility of public agencies, professional associations, and valuation professionals to not confuse the public. It would be more helpful if a professional guide note was issued on this problem which better defined the terms of the debate.

THE CRUX OF THE CONFLICT: FEDERAL V. STATE RULES

The Standards of Professional Appraisal Practice (USPAP) do not mandate truly independent appraisals but only the disclosure of how an appraiser was instructed by the client and any other unusual assumptions or limiting conditions. Because the legal assumptions and defined values in real estate appraisals are legitimately always instructed by the client, it is highly improbable that the *Catch 22* situation which appraisers find themselves in regarding how to value environmental real estate can be solved by them alone. The much ballyhooed controversy over how to value public and private acquisitions for environmental preservation or mitigation may be beside the point. If such real estate appraisals are performed at the instruction of the client and disclosed by the appraiser, there may be no violation of professional standards involved. Whether the client is legally correct in their instructions is not a matter of professional standards or for professional standards committees to determine. It is a matter of law and public policy. Failure to disclose such unusual instructions and unconventional appraisal methods in a real estate appraisal is a violation of professional standards. However, because appraisals for public agencies are often submitted to legal counsel for confidentiality purposes, there is little possibility that any violation of disclosure standards will be discovered.

As described in this paper, it is not infrequent for nonfederal public agencies to communicate explicit instructions, or a set of tacit expectations, to a real estate appraiser in order to accomplish the public purpose of environmental protection. Appraisers may want it other, but it is not their role to determine law or policy. The position papers of the antagonists in this debate may be entirely misdirected at real estate appraisers. However, redirecting any position statements to public agency clientele would also be inappropriate unless the appraisal profession has an advocacy political position of its own on the issues; which is something to be avoided. A legal opinion may be the more appropriate communication vehicle, but that is not in the appraisal profession's bailiwick.

The real crux of the controversy over how to value land for environmental protection purposes, at least in the state of California, comes down to what might be called the federal rule v. state rule. As described earlier in this article, in California, the state environmental protection agencies, non profit preservation agencies, and other entities of government often accomplish public policy through the real estate appraisal process (see discussion on stealth sales and ch sales). In contrast, the federal envir mental resource agencies apparen want to resist turning the land appra process into the facilitation of such pub policy objectives. From a strictly neut legal standpoint, both federal and st policies are equally legitimate dependi on the jurisdiction involved. What t environmental value proponents may n recognize is that, at least on the state lev in California, property owners are som times already receiving many times t real market value of their property f purchases of land for environmental pr tection purposes. To push such a approach onto federal agencies is pu advocacy, not strictly a professional valu ation issue. Nonetheless, federal agenc land acquisition appraisals must sti come to grips with how to address th



third party market for environmental resource land and the limits of the scope-of-the-project rule.

WHAT REAL ESTATE APPRAISERS CAN DO IN THE INTERIM

Until there is greater legal and professional clarification on these crucial issues, the prospects for the near future are that appraisers will remain stuck in the middle of this dispute not knowing whether to appraise a property as a rock pile or a rock preserve, a mud puddle or a wetland. In the interim, the best that real estate appraisers can do is to:

- fully meet standard disclosure requirements;
- seek greater legal clarification from their clients of existing law and public policy, especially as to the scope-of-the-project rule for federal land acquisitions;
- invoke the Jurisdictional Exception to the Uniform Standards of Professional Appraisal Practice where prevailing law or policies run counter to the official positions of professional appraisal associations and standards boards;
- define terms and concepts used in a real estate appraisal carefully and avoid the invention of new advocacy terminology;
- perform a careful analysis and inventory of the environmental resources known to be on the appraised property, especially as to their uniqueness;
- conduct a market demand study to determine if there is a reasonably probable prospect and demand by others than the government for the preservation use for which the property is being acquired;
- be cautious in the use of public agency sales comparables and conservation agency sales and resales, but avoid the automatic rejection of all public agency sales without verifying the conditions of sale;
- be aware of the possibility of an "evidentiary blight" on sales data caused by environmental preservation activities;
- and, avoid the authoritarian-like temptation to push special interest or bureaucratic agendas into the valuation process without legal instruction. ❑

NOTES

1. Interagency Land Acquisition Conference, Position Paper: *On the Issue Whether a Non-Economic Highest and Best Use Can Be a Proper Basis for the Estimate of Market Value* (Washington, D.C.: April 14, 1995.)
2. Woodward S. Hanson, MAI, Chair Appraisal Standards Council, "Public Interest Value and Noneconomic Highest and Best Use: The Appraisal Institute's Position," *Valuation Insight and Perspectives*, Spring 1996, Vol. 1, No. 2, Page 27-29 & 48.
3. Donald C. Wilson, "Valuing Mitigation Real Estate," *Right of Way*, August-September 1994, p. 28-33.

Donald C. Wilson and Craig D. Hungerford, "Economic Preservation Use–Is It Highest and Best Use? Interpreting the Latest Interagency Land Acquisition Conference Position Paper," *Right of Way*, August-September 1995, p. 22-24.

Wilson and Hungerford, "Public Interest Value: Toward an Analytic Understanding of the Appraisal Institute's Proposed Definition of Value for Environmentally Significant Real Estate," *Right of Way*, February-March, 1995, p. 21-31.

Wilson and Hungerford, "How Far Away Can a Comparable Sale Be?," *Right of Way*, May-June 1996, p. 12-16.

4. People of the State of California v. Pacific Enviro Design-Coastal Magnolia Group, Orange County Superior Court, Case No. 684146, December 23, 1994. Donald C. Wilson, Arthur E. Gimmy, and Michael Yoder, "Partial Takings of Mitigation Real Estate: A Case Study of Severance Damages," *Right of Way*, April/May, 1995, p. 15-18.
5. City of Los Angeles v. Decker, 18 Cal. 3d, 860 (1977).
6. Norman H. Lee, "Acquisition In The Public Interest," Right of Way, December-January, 1995, p. 28-31.
7. People ex rel Department. of Water Resources v. Andresen (1987) 193 CA 3d 1144, 238 CR 826.
8. Interagency Land Acquisition Conference, *Uniform Appraisal Standards for Federal Land Acquisitions*, Washington, D.C.: 1992, p. 10.
9. Excerpt from The Appraisal of Real Estate, 9th Ed., Appraisal Institute quoted in Woodward S. Hanson, MAI, "Public Interest Value and Noneconomic Highest and Best Use: The Appraisal Institute's Position, Valuation Insight and Perspective, Spring, 1996, p. 28.
10. Coke cited in U.S. Supreme Court Decision on Lucas v. South Carolina Coastal Council, 112, S. Ct., 2886 (1992), not 12, at 2894.
11. Emmet Pierce, "Conservation 'Banking' Could Bring A Nice Profit," *San Diego Union Tribune*, 1996, p. 1-2..
12. Norman H. Lee, "Acquisition In The Public Interest," *Right of Way*, December-January 1995, p. 28-31.
13. *California Evidence Code*, "Evidence of Market Value of Property," Section 823, 1992.
14. Jim Matthews, "Taxpayers Suffer In Land Deals," *San Bernardino Sun Telegram*, September 19, 1996.
15. Ibid.
16. This land acquisition method is a public version of the real estate "bigger fool theory," with the taxpayer ending up being the fool.
17. Mark A. White, "Valuing Unique Natural Resources: Endangered Species," *Appraisal Journal*, July, 1996, p. 295-303.
18. See list of legal cases citations in Sec. A-13, "Unit Rule," in Uniform Appraisal Standards For Federal Land Acquisitions. Washington, D. C.: U.S. Government Printing Office, 1992, p. 42. Note: In a cumulative appraisal the sum may add up to more or less than the whole value of the property as measured by a whole-to-whole land sales comparison analysis.
19. Donahue and Jeff Kautta, "Mitigation Land Presentation."
20. One of the legal criteria for determining whether property is real estate is if it is attached to the land. Wildlife may be attached to the land but can be readily destroyed by fire, flood, or other natural disasters. In 1993 The Metropolitan Water District of Southern California purchased 2,300 acres of the Shipley Reserve in Riverside County California for mitigation of its Eastside Reservoir Project. Numerical mitigation credits were obtained for preservation of kangaroo rats, oak trees, sagescrub, and native grasslands. A natural fire destroyed all of the wildlife a year after its purchase. This is one reasons why the value of the land cannot be pegged to mitigation credits or wildlife resources on the land.
21. As one of the environmental value proponents explained his position to this author, "the public places a value on environmental real estate, but public agencies don't want to pay for it."

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