#65.35 5/14/69

Memorandum 69-68

Subject: Study 65.35 - Inverse Condemnation (Intangible Detriment - Losses Caused by Highway and Street Improvement)

Earlier this week, we sent you the first section of the next part of the research study on inverse condemnation--"Statutory Modification of Inverse Condemnation: Intangible Detriment." The term "intangible detriment" is used by the consultant to denote "substantial diminutions of property value" caused by a public project or other government action but not resulting from actual physical damage. This first section deals with losses caused by highway and street improvements and provides background for discussion of impaired access (both from the landowner's property to the adjacent road as well as from that road to the general street and highway system), traffic diversion, and loss of amenities (light, air, and view) or damage from noise, fumes, dust, and so on.

The first half of the study demonstrates the inconsistencies and inequities of existing law. It would add unnessarily to the amount of material to be covered to attempt to resummarize this review of the case law but the staff hopes that you will study it carefully prior to the meeting. (For an even more emphatic criticism of these inconsistencies and inequities, you may find it valuable to reread the note or "open letter" from Gideon Kanner attached to Memorandum 69-31, distributed for the February 1969 meeting). Generally speaking, whether a cul-de-sac, frontage road, or a change in grade is involved, a substantial, but only a substantial, interference with access is compensable. Yet largely unresolved is the problem of what constitutes such a "substantial interference." Moreover, a rather arbitrary "police power" exception denies recovery where the interference, however great, is the product of traffic regulations; e.g., erection of median barriers, no left-turn signs,

one-way streets, no curbside parking, and the like. With respect to what the consultant terms the "amenities" an even more striking inconsistency exists. Where there has been a partial taking by eminent domain, noise, fumes, dust, and the like (to the extent they influence market value) are considered in determining the severance damages if the improvement causing such damage is on the property taken. In sharp contrast, in cases where the improvement is not on the property taken or where no property is formally condemned, no recovery is permitted for the identical loss in value due to the identical noise, fumes, and dust from the adjacent freeway. See, e.g., People v. Symons (1960)(no recovery where defendant's alleged injuries were attributable to the freeway built on adjoining land taken from a third person and not on the portion of land taken from the defendant).

The second half of the study presents the consultant's legislative proposals for solving or alleviating these problems. For convenience and handy reference at the meeting, these proposals have been extracted and set forth in the attached Exhibit I (pink pages). To use his own words, these proposals attempt to incorporate "a relatively simple test, with high predictability, by which cases of potential compensability can be distinguished from those beyond the pale." They "employ the present court-made rules as the core of the legislative program, modifying them to the extent warranted by sound policy considerations." In fact, the proposals are somewhat imaginative in both content and form; they should receive careful consideration both in terms of their application in this area of immediate concern and with respect to their approach for the other areas of inverse condemnation.

At the June meeting, we expect to discuss the study at some length, with a view towards providing the staff with sufficient direction to permit preparation of a tentative recommendation (or at least a draft statute) over the summer.

Respectfully submitted,

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Memorandum 69-68

EXHIBIT I

CONSULTANT'S SUGGESTIONS FOR LEGISLATIVE APPROACH TO CLAIMS ARISING FROM HIGHWAY AND STREET IMPROVEMENTS

(1) The creation of new access rights, by the construction of streets and highways in new locations in the future, should be limited by a legislative declaration that all such projects (i.e., not merely freeways or expressways) shall create no new rights of access in abutters except to the extent expressly provided by the appropriate agency of the governmental entity undertaking the project. See study at page 25.

(2) When the law recognizes the right of an abutting owner to ingress and egress, as between his property and the street or highway on which it abuts, the right should be defined as including only that minimum degree of accessibility which is reasonable under all the circumstances. The right, as so defined, should prevail over any form of governmental action, whether denominated a "police power" measure or otherwise, which is found to have taken or damaged it. See study at page 26.

(3) A set of criteria should be enacted, emphasizing factual elements, which the court is directed to consider in determining whether the claimant's preexisting right of access has been diminished below the level of reasonable need, as a result of the improvement or other governmental action, and that he has therefore sustained a compensable damaging. The factors recommended for adoption are:

(a) The extent to which the property retains direct access capabilities reasonably adequate for its highest and best use in light of (i) the nature and requirements of that use, (ii) the number, physical dimensions, and usefulness of access facilities, and (iii) any other circumstances relevant to effective utilization of the property, including reasonably available alternatives.

(b) The degree to which the property enjoys general accessibility in relationship to the surrounding community, which is reasonably adequate in relation to its highest and best use, in light of (i) increased travel time and distance to normal destinations, (ii) greater hazards of traveling alterante routes, (iii) the practical unavailability of reasonable alternate routes, and (iv) the likelihood that visits to the property by members of the public (including commercial patronage) may decline due to difficulties in traveling between the general street system and property.

(c) The extent to which the claimed impairment of access may be regarded as reasonable and thus noncompensable because (i) the challenged governmental action has a primary purpose and effect of safeguarding public health, safety and welfare by means which would be substantially impaired or deterred by the cost of making just compensation, if required, and for which equally salutary alternatives, with less capacity for interfering with private access rights, are unavailable at equal or lower cost; (ii) the adverse impact of the governmental action upon access rights is so widely shared, speculative in nature or amount, or relatively slight that the cost of distributing such losses in the form of constitutional compensation would impose an unreasonable burden upon governmental finances, or upon the judicial system, or both; or (iii) the claimant's abutting land enjoys compensating special benefits derived from the public improvement or from the practical operation of the regulatory measure.

(4) The determination of the issues identified by the foregoing proposals would remain, as under present law, a function for the court rather than the jury.

(5) To assist in the weighing of pertinent evidence and to control related arguments of counsel so that unnecessary inverse compensation costs can be avoided except where clearly established, the consultant recommends enactment of a series of presumptions. The presumptions are designed to preclude a judgment awarding compensation unless the claimant has satisfied the burden of overcoming the assumed fact of noncompensability as stated there. The following presumptions are recommended:

(a) It is presumed that "proximity damage" (damage resulting from the fact that the property is located in proximity to the highway or other improvement and is exposed to loss of light, view and air, or to noise, dust, fumes, and other deleterious influences, as a consequence of such proximity) is not sustained in a constitutionally significant degree by any property located more than _____ feet from the highway or improvement creating it.

(b) It is presumed that property damage is not sustained in a constitutionally significant degree as the result of inconvenience, hardship, difficulty, or circuity of travel caused by reasonable traffic regulations of designated types (such as weight and boulevard restrictions, no-left-turn and one-way-street regulations, median strips, roadway markings, lane divider barriers, vehicular stopping, unloading or parking controls, speed limitations, or traffic control signs and signals). There might be added to this presumption: "This presumption is overcome only if the claimant satisfies the court, by clear and convincing evidence, that the value of the subject property for its highest and best use has been depreciated, as a consequence of the traffic regulation or regulations of which complaint is made, to a degree substantially in excess of that sustained by other properties subject to the same regulation or regulations within a radius of ____

feet therefrom." For a discussion of these presumptions, see study at pages 32-34.

(6) The consultant deals with the problem of diversion of traffic by new highway construction at pages 34-36. He suggests for consideration the enactment of a requirement that the public entity purchase land at its depressed value in cases where the owner can no longer use the land for the purpose for which he used it and there is no active market for the land.

(7) The consultant recommends that the statute require consideration to be given to nonpecuniary alternatives, coupled with a grant of ample supporting authority (e.g., statutory power to condemn additional land needed to implement an alternative physical solution) to permit use of alternative or conditional judgments in inverse condemnation cases. Thus, in any case where the court finds that compensable damaging has occurred, the defendant public entity could be authorized to propose a plan, subject to the court's approval, by which the injury-producing features of the improvement will be corrected, or their harmful impact reduced, in lieu of payment of compensation, in whole or in part. See discussion in study at pages 36-37.

STATUTORY MODIFICATION OF INVERSE CONDEMNATION:
INTANGIBLE DETRIMENT #

Arvo Van Alstyne*

Governmental activities impinge upon private property interests in diverse ways. The law of inverse condemnation provides remedial procedures for identifying, and imposing financial responsibility upon government for, those impinging consequences that amount to a "taking" or "damaging" of private property. Previous studies have examined the constitutional compensability of both deliberately inflicted and unintentional physical damage to tangible private assets.[1] A third aspect of the general topic remains for treatment here: to what extent can greater consistency, rationality and social justice be achieved through legislative modification of prevailing legal rules governing constitutional compensability for intangible detriment, reflected in diminished property value, imposed upon private property by government activities?

The term, "intangible detriment," is employed to denote a range of recurring situations in which governmental action, not deliberately undertaken for the purpose, has the practical effect of compelling private persons to sustain substantial diminutions of property value, thereby making a forced contribution to the general fund of public assets, without receiving payment of just compensation.[2] Situations

of this sort are commonplace in modern society, although they may not always be recognized as such in the terms here employed. Lack of recognition is due, in part, to the fact that the relevant litigation ordinarily appears, in reported decisions, dressed in the subtle disguise of a controversy as to whether the limits of governmental "police power" have been exceeded, in the misleading cloak of an issue whether the seeker after compensation ever possessed a legally cognizable "property" right, or as a feigned dispute whether the governmental defendant was acting, in reference to plaintiff's property, in the exercise of its "eminent domain" or its "regulatory" power. Yet, in each instance, the basic clash of interests involves the same fundamental problem, the extent to which governmentally compelled indirect contributions for the general public welfare of portions of those interests which make private property "valuable" are constitutionally required to be justly compensated.

For example, in Pennsylvania Coal Co. v. Mahon,[3] the coal operators had been directed by statute to contribute valuable deposits of coal to the commonweal, by leaving it unmined in the interest of preventing surface subsidence. Similarly, in United States v. Causby,[4] plaintiff had been compelled, by action of the Air Force in repeatedly flying at low altitude over his farm, to contribute an easement for flight, ostensibly in the interest of more effective military training and operations. In other instances, like contributions have been exacted with more assertiveness, as in cases involving freeway

access[5] and traffic diversions;[6] yet, the nature of the interests at stake, and their interrelationship, are not essentially different.

A very extensive literature has developed in relationship to the problem of compelled indirect contributions, or various phases of it, much of which is devoted to a critical examination of the prevailing doctrinal positions exhibited in the relevant decisions.[7] The general verdict of the commentators, on the whole, is that the existing legal rules and distinctions, which are predominantly the product of judicial decisions interpreting and applying broad constitutional precepts, are confusing, inconsistent, and unsatisfactory.[8] In an effort to assist in the formulation of clarifying legislative measures, the present study seeks to isolate and define acceptable criteria, capable of statutory formulation, by which public officials, lawyers, judges, property owners and others may better be able to identify the line between compensability and noncompensability for intangible detriment. Since the range of potential fact situations is nearly endless, selected topics will be discussed as illustrative of the general problems being analyzed; these topics, however, appear to include most of the significant recurring forms of relevant litigation. The topics to be treated include (1) losses caused by highway and street improvements, (2) losses resulting from aircraft operations, (3) effects of land use controls.

1. Losses Caused by Highway and Street Improvements

An abutting California landowner is deemed to possess a property interest, ordinarily described as an easement of access (or of ingress and egress) to and from the street or highway immediately appurtenant to his property, and, once in the street, to and from the general community street system.[9] This interest, long protected against being taken or damaged for public use without payment of just compensation,[10] appears to have had its origins in the desire of courts to safeguard reasonable expectations of property owners that the primary purpose of the street -- that of servicing the abutting land -- would be discharged.[11] Its persistence as a basis for relief in inverse condemnation is undoubtedly due, at least in part, to the historical fact that the "or damaged" clauses introduced into state constitutional provisions assuring payment of "just compensation" were intentionally designed, by their Nineteenth Century framers, to afford protection for such interests as access rights.[12] Development of the limited access highway and freeway, as instrumentalities of transportation service rather than land service, has in recent years produced a substantial volume of litigation representing clashes between landowners seeking to vindicate their rights in the abutting street or highway, and government agencies seeking to meet ever-increasing demands for more and better highways.[13] Reconciliation

of these competing interests has proven to be extraordinarily difficult. Despite a good deal of confusion in the case law, however, the principal lines of legal development can be discerned with confidence.

The cul-de-sac cases. The leading California decision vindicating the abutter's right of access is Bacich v. Board of Control, decided in 1943.[14] Plaintiff sued in inverse condemnation to recover damages alleged to have been sustained when, during the construction of approaches to a major bridge, a street intersecting that on which plaintiff's property abutted was lowered some fifty feet, leaving plaintiff on a cul-de-sac or dead-end street. Previously, plaintiff had been able to enter the general street system by going from his residence in either direction to the first intersecting street. After the improvement, he was limited to traveling in one direction only. This deprivation, according to the majority of the court, amounted to a compensable impairment of a property right:

> The extent of the easement of access may be said to be that which is reasonably required giving consideration to all the purposes to which the property is adapted . . . . It would seem clear that the reasonable modes of egress and ingress would embrace access to the next intersecting street in both directions.[15]

Although the Bacich opinion contains language suggesting that all cul-de-sac situations were not necessarily alike, and that

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a non-compensable damaging could result in some instances, Bacich was generally considered as establishing both a rule of compensability where access to the next intersecting street was cut off,[17] as well as a corollary rule of no compensation where the interference with through travel occurred beyond the first intersection.[18] This "cul-de-sac" rule, however, was manifestly an arbitrary one that could be invoked to support an award of compensation, at least in principle, even though actual loss was highly doubtful; but it also required denial of relief in cases where the closing of a street beyond the first intersection imposed a serious hardship upon owners whose access to the general street system was thereby made substantially more difficult and time-consuming.[19] Like most rules of thumb, it improved predictability at the expense of logic and substantial justice.

The cul-de-sac problem again came to the attention of the Supreme Court in People ex rel. Dept. of Public Works v. Symons, decided in 1960.[20] This was an action to condemn a small portion of the defendant's land to form a cul-de-sac and turn-around, made necessary by the construction of a freeway on condemned land immediately adjoining defendant's property. So far as access rights were concerned, the factual circumstances were within the "next intersecting street" rule of Bacich; but defendant's right to compensation in this regard was partially obscured by the fact that recovery

was sought as part of claimed severance damages also including loss of light, air, view, and privacy. Treating all the claimed losses together, the court relied upon a familiar rule limiting recovery of severance damages to injurious consequences resulting from improvement work on the property taken from the claimant.[21] Since all of the defendant's alleged injuries were attributable to the freeway built on adjoining land taken from a third person, and not from defendant, they were not recoverable.[22]

Manifestly, Symons could readily be distinguished from Bacich in its procedural setting; it involved a claim of severance damages, while Bacich had sued in inverse condemnation. But that was obviously a distinction without a difference, for inverse condemnation had traditionally been regarded as merely a remedial device to implement the self-enforcing language of the just compensation clause, by which a claim to constitutionally required damages could be enforced judicially at the initiative of the property owner when the public entity had failed to commence eminent domain proceedings for that purpose.[23] The basic assumption underlying inverse condemnation was that the property owner's substantive rights were identical to those recognized in eminent domain proceedings.[24] Symons thus became recognized, rightly or wrongly, as a declaration that interference with access rights, by an improvement on property other than that taken from the claimant, was noncompensable.[25] It

appeared that Bacich, to this extent, had been severely qualified by Symons, sub silentio.

The "substantial interference" test. The uncertainty as to the status of Bacich was broken after four years, when the court decided Breidert v. Southern Pacific Company.[26] Rejecting the view that substantive compensability was different in eminent domain proceedings from inverse condemnation actions, the court reaffirmed the cul-de-sac rule as fully applicable in the latter form of action, even when none of the property owner's land had been taken. The troublesome difference between Bacich and Symons, the court explained, was merely one of degree; in Symons, the owner had simply failed to allege facts showing that his right of access had been impaired in a substantial degree.[27] The mere fact, standing alone, that the improvement which caused the cul-de-sac was not upon land taken from the complaining owner had not been controlling.

The general rule emerging from Breidert is that the creation of a cul-de-sac is not actionable per se, but may become actionable on a further showing that the abutting owner's access to the general street system has been interfered with in a substantial way. One can also read Breidert as supporting the conclusion by implication that the termination of a street beyond the first intersection is not per se noncompensable, but may constitute an actionable impairment of access if shown substantially to interfere with use of the general street system.[28]

Whether or not the creation of a cul-de-sac effects a "substantial" interference with an abutting owner's easement of access is regarded as a question for the court to determine, while the pecuniary extent of the owner's loss is a question of fact for the jury.[29] Little guidance can be found, however, as to the factual criteria that enter into the judicial determination whether the adverse consequences have been "substantial." In Breidert, the court intimated that it was impossible to adduce any usable abstract definition, since the question necessarily must be resolved in light of the facts of the particular case.[30] In the companion case of Valenta v. County of Los Angeles,[31] however, where the complaint for inverse condemnation had insufficiently pleaded substantial interference resulting from a cul-de-sac in a rural setting, the court pointed out that plaintiff should have alleged such pertinent facts as the use being made of plaintiff's property, the added distance of travel caused by the cul-de-sac, the unavailability of alternate routes to get to the general road and highway system, and the extent to which the use of the property was impaired by reduced access to the general road system. Other cases,[32] following this lead, have likewise concluded that additional circuity of travel, with attendant inconvenience and expense, are relevant to the inquiry, being factors which would influence an informed buyer's judgment as to the market value of the property burdened by the cul-de-sac.

Impaired access and amenity: the frontage road cases. The Breidert case made it clear that a cul-de-sac is merely a special instance of impaired access, where the public improvement does not curtail the abutting owner's right to enter the street from his property but only curtails his ability to reach a desired destination after he has entered the street. Modern freeway construction programs often involve a more direct impairment, actually cutting off the abutting owner's right to enter the new limited access highway where it passes in front of his land. Three general situations of this sort may be identified:

(1) The state may construct a new freeway on a right of way not previously employed for street or highway purposes, and in so doing, leave abutting owners along the path of the new freeway without direct access to it except at planned interchanges.[33] Since the transportation service concept that motivates the freeway program necessarily contemplates limitations upon access, no private right arises from the construction of a freeway abutting property which did not, prior to such construction, enjoy any such right. No previously existing property right having been taken or damaged, lack of access to the new freeway is not a basis for inverse condemnation recovery.[34]

(2) The freeway construction program may leave an existing street or highway in use as a frontage or service road, while the new freeway is constructed parallel to it on the opposite side of the street

from the claimant's land. In this situation, the new freeway is intended to, and in effect does, supplant the former highway as the principal transportation corridor past the property. Although the abutting owner still has exactly the same access to the old highway which he formerly possessed, his access to the new highway, and ingress from the new highway to his property, are profoundly altered, for the only feasible means for getting to a point on the freeway opposite his land, or from that point to his land, may entail an additional journey, with attendent delay and expense, through the closest interchange in either direction. Here, as in the cul-de-sac cases, the California courts have recognized a right in the owner to just compensation if the impairment of egress and ingress between the freeway and the abutting property is substantial in light of the uses to which the property reasonably may be put.[35] For example, if the new highway is built, in part, upon the old one, leaving only a portion of the latter as a frontage road, the owner may find it difficult or impossible to realize the maximum value of his property for commercial purposes because the narrow service road cannot accommodate large modern truck transportation equipment essential to that use.[36] On the other hand, if the diminished width of the abutting street does not adversely affect optimum use of the adjoining land,[37] or the additional journey made necessary by the improvement is not shown to be a substantial detriment to its full profitable use,[38] no compensation is warranted.

Two well-defined limitations upon recoverability of inverse compensation in this class of frontage road cases have been recognized.

One, predicated upon the view that a private owner has no right to the maintenance of a particular volume of traffic flow past his property, denies recovery for any part of the diminished value of the claimant's land which is attributable to diversion of traffic from the old highway (now a frontage road) to the new freeway, or to the related loss of business profits resulting from the diversion.[39] This view appears to represent a judicial conviction that the power to route, reroute, and divert traffic in the interest of preventing congestion and delay must be kept flexible and undeterred by fear of potential inverse liabilities.[40] Implicit, also, may be the belief that the adverse economic consequence of new highway routing is a risk impliedly assumed by the business community when a commercial location is selected and developed.[41]

The second limitation denies compensation for diminution of property values as a result of noise, fumes, dust, discomfort and annoyance attributable to the normal functioning of the new freeway so far as constructed upon land not taken from the claimant.[42] Adverse consequences of these kinds are regarded, also, as the price which must be paid generally for the public advantages derived from freeways. It is not entirely clear, from the decisional law, however,

whether substantial interference with light, air and view, (as distinguished from noise, fumes and dust) caused by a nearby freeway, is deemed compensable in an inverse condemnation suit, absent a partial taking of the claimant's land for freeway purposes.[43]

A third type of frontage road situation arises when the highway authorities condemn part of the abutting owner's property to construct a new frontage road thereon in conjunction with the freeway, leaving the claimant's property abutting on the new frontage road. In practical terms, the claimant is in precisely the same situation as in the second type of case, except that in this instance the total extent of his physical domain has been reduced by the partial taking. In such instances, the law grants the claimant compensation consisting of the value of the land actually taken, plus a sum (severance damages) representing any loss of value to the remainder, so far as attributable to the partial taking, which is not offset by special benefits flowing therefrom.[44] Here again, the courts have announced that diminished property values caused by mere traffic diversion or circuity of travel are not includable in severance damages,[45] but that a substantial interference with the abutting owner's rights of ingress and egress, between his property and the freeway, is compensable.[46] (The key term, "substantial", apparently reconciles possible inconsistencies between the rule of noncompensability for circuity of travel and the rule of compensability for interference with access.) In these respects,

the rules governing compensation in the second and third classes are alike. But, in the ascertainment of severance damages, the courts have also permitted consideration to be given to a variety of additional matters which would be taken into account by a careful buyer, including loss of light, air and view[47] and increased noise, dust and fumes,[48] if these unfavorable influences are caused by the improvement (or its use) constructed on the parcel actually taken. As noted above,[49] these elements of loss are not all admissible, in the absence of a severance, on the issue of inverse compensation.

Other diminished access cases. A street improvement project that entails a change of grade may impair the value of abutting property by making access thereto less convenient or even impossible. The case law recognizes such situations as a typical setting for inverse liability.[50] Since the degree of impairment will ordinarily vary with the magnitude of the change of grade, the operative legal rule appears consistent with the "substantial interference" test employed in the cul-de-sac and frontage road cases. The closing of a street, which may deprive an abutting owner of convenient access to the general street system of the community in like manner to the creation of a cul-de-sac, is likewise subject to a "substantial interference" analysis.[51]

There are two major lines of decisions, however, which involve diminished access rights but in which compensation is almost uniformly denied.

The first, predicated upon the concept that the abutting owner's right of access does not include a right to get to the street, and return, at every point along the frontage of his property, recognizes that the state, in the exercise of its police power, may limit the points at which access is allowed, provided reasonable access rights, consistent with the use of the property, are retained by the owner.[52] On a corner lot, for example, this principle may authorize the denial of any curb cuts at all on one of the fronting streets, as long as reasonable entrance is permitted on the other, if justified by considerations of traffic control and accident prevention.[53]

The second line of cases, likewise postulated upon the ascendency of the police power to deal with the practical exigencies of local traffic problems, denies compensation for losses caused by circuity of travel and inconvenience due to "traffic regulations", a term which includes the erection of median barriers, no-left-turn signs, one-way-street regulations, traffic signals, and prohibition upon curbside parking of motor vehicles.[54] A peculiar feature of this second group of decisions is that the courts appear to regard it as an independent legal category which induces an automatic judicial response of "no compensation", without regard for or attempt to assess the practical consequences of the particular regulation upon adversely affected private interests. For example, the construction of a median barrier in an abutting highway may have exactly the same practical

impact upon an abutting owner as the creation of a cul-de-sac by closing of the highway to his left; in either case, on leaving his property, the owner is forced travel in one direction only--*i.e.*, to the right--to reach the general street system that will take him to his destination. Yet, even extreme circuity of travel, more than enough to satisfy the substantial interference test if the pertinent governmental action were a cul-de-sac, is routinely denied judicial relief when caused by this kind of "traffic regulation".[55] Moreover, the rationale of these decisions--which excuses the normal duty to pay just compensation because the loss was inflicted in the exercise of the police power--is circular and spurious, hiding beneath the facile label, "police power", the real question why substantial private property losses should here go uncompensated.[56]

The need for legislative clarification. The California courts have long noted the absence of comprehensive statutory guidance with respect to the elements of value that are embraced by the property interests of owners of land abutting streets and highways.[57] The competence of the legislature to promulgate statutory standards seems reasonably clear,[58] however, while the need is apparent.

The preceding survey of decisional law demonstrates the unsatisfactory nature of the existing rules defining the obligation of governmental agencies to pay just compensation for private losses to abutting property caused by highway improvements. The cul-de-sac

adduced in the Bacich case, together with its limitation to the "next intersecting street", was somewhat arbitrary and overly rigid, leading to possible overcompensation in some cases and undercompensation in others, to the extent that courts failed to assess the actual degree of interference, relative to needs of the property owner, caused by the improvement. Moreover, the assumption that the next intersecting street would provide an adequate connecting link to the general street system, and thus a sufficient basis for withholding of compensation to one who had access to it, was at best questionable. A street dead-ended just beyond the next intersection might, in fact, have provided the only efficient and direct route to the principal thoroughfares in the community or to the local business and commercial district; all alternate routes might well be substantially longer, more difficult, or physically inadequate.[59] Indeed, access to the next intersecting street could be meaningless, as one decision points out, if the intersecting street itself is also blocked off against through traffic.[60]

Introduction of the more refined test of "substantial interference", by Breidert, while useful to mitigate the most unsatisfactory aspects of the cul-de-sac rule, scarcely improves predictability. The courts have never undertaken the task of identifying relevant factual criteria pertinent to the content of the critical term, "substantial", other than to observe that its meaning must be determined in light of

the facts of each individual case. While this approach may have merit from a prudential standpoint, and provides latitude for the gradual development of judicial wisdom and understanding, it also has the defect of suggesting that nearly every controversy relating to impairment of access may, with at least some hope of success, be worth litigating. The additional cost of litigation, or of prolonged bargaining and negotiation to avoid litigation, must be regarded as a social cost which also deserves legislative consideration. Moreover, the substantial interference approach has, so far, failed to produce any satisfactory reconciliation of the competing rules which deny compensability for mere circuity or inconvenience of travel to and from the claimant's property but, at the same time, allow compensation for substantial interference with access as shown by excessive circuity and inconvenience of travel.[61]

Judicial handling of the frontage road cases exhibits many of the difficulties already mentioned; but, in addition, these decisions expose in a dramatic way the basic inconsistencies and irrationalities which permeate the legal rules governing the determination of severance damages as compared to damages awardable as inverse compensation. Thus, whether an owner whose land is left upon a frontage road by a freeway construction project may recover for resulting diminution of property value, depends, under present law, principally upon whether any part of his land was taken and used in

the freeway project. One whose land was so taken in part may, for example, recover for the reduced value of the remainder caused by such factors, apparent to an informed prospective buyer, as the noise and dust from the adjoining freeway.[62] An adjoining land owner exposed to precisely the same, or even greater, detriment from the freeway traffic, recovers nothing, merely because none of his land was taken and devoted to the freeway project.[63] Likewise, a third owner, whose land was taken in part, but was not used for freeway construction as such (i.e., it may have been used for collateral purposes, such as a frontage road or the construction of a turn-around in a cul-de-sac created by the freeway embankment), is without remedy for the same economic loss.[64] Even in those cases in which the resulting losses are regarded as compensable, it is difficult to discern the underlying logic of some of the prevailing rules of damages. In determining severance damages, for example, loss of amenity from increased traffic on the abutting freeway may be taken into account,[65] but loss of profitability due to diminished traffic passing on the abutting highway is regarded as irrelevant.[66] It is submitted that legislative consideration should be given not only to the clarification and improvement of substantive standards but also to the elimination of deficiencies in current rules of damages.

Finally, as already suggested, the "police power" rubric employed to justify denial of compensation in cases where alleged

property value depreciation has been caused by "traffic regulations",[67] actually only describes the result without advancing supporting reasons. By concentrating on the classification of the problem (i.e., whether the facts comprise a "traffic regulation" case or not), rather than an objective effort to isolate and evaluate the competing governmental and private interests, this "police power" approach lends itself to mechanical application with potentially irrational results. Moreover, since the principal injurious effects of traffic regulations ordinarily are a consequence of the reduced capacity of the street or highway to service the abutting land, it appears that any difference between a regulation case and a freeway case (i.e., a case involving nearly complete rejection of the land service road concept) is really only a matter of degree. As techniques for ordering traffic flow, improving traffic safety, and reducing traffic accidents, freeways undeniably constitute an expanded, albeit indirect, exercise of the police power.[68] This relationship emerges most strikingly in the decisions denying compensability for loss of business profits occasioned by diversion of traffic from an existing highway to a new freeway.[69] It is also clear that limitations on access to modern high-speed highways are supported by considerations of safety and accident reduction as much as by traffic expediting policies.[70] Once it is recognized that inverse compensation claims growing out of freeway projects, and those stemming from traffic regulations, are

merely factual variants on a common legal spectrum, the task of formulating acceptable statutory criteria for drawing of lines between compensability and noncompensability may be approached unembarassed by conceptual irrelevancies.

Developing statutory standards: preliminary concepts. A useful starting point is to recognize that the moral imperative behind the constitutional mandate for payment of just compensation--the ideal of equitable loss distribution--can be only partially achieved in an imperfect world. Many claims that might satisfy the theoretical requirements for compensability are *de minimis* in amount, and are so widely distributed throughout the community already, that efforts at further redistribution would cost more, in administrative expense, than would be gained in distributive justice. Moreover, the imperfections of the fact-finding process with respect to property values, the principal issue in controversy once compensability is admitted, suggest the social utility of rules of law which will reduce incentives to initiation of battles of expert witnesses, so typical of condemnation litigation, inverse or not, unless the stakes are substantial. These considerations support the desirability of incorporating in any proposed statutory standards a relatively simple test, with high predictability, by which cases of potential compensability can be distinguished from those beyond the pale.

It will be observed that the courts have, in fact, worked out a series of practical tests of this sort, although, as already indicated, their substance is subject to criticism. The "next intersecting street" limitation upon the cul-de-sac rule, for example, has been said to incorporate an implicit judicial declaration "that the next intersecting street is the dividing line between injuries peculiar to oneself and those which one suffers in common with the general public."[72] Similarly, the judicially developed rule which denies severance damages for loss of amenity due to construction or use of an improvement on land other than that taken from the claimant,[73] observes a line between compensability and noncompensability that, in many if not most instances, probably differentiates with rough equity between those losses that are broadly distributed throughout the community and those which are special and peculiar to the claimant. At the very least, when the injurious activity takes place on land comprised by a partial taking, there is a greater likelihood that it will be closer to and more intense in its impact upon the occupant of the remainder parcel, than is the case with respect to other owners from whom no land was taken. Even the "traffic regulation" cases may be said to imply a judicial belief that, in the generality of instances, the burdens of such regulations will be distributed with approximate fairness over the population at large, at least in the long run, or are likely to be comprised so predominantly

of claims of a de minimis order as not to warrant the social costs of isolating and administering relief in the rare instances where this is not the case. The objective of the judicially developed rules appears sound; their chief defect lies in the fact that they represent an uneven approach to important issues that deserve disposition under principled rules characterized by greater equality, insight and precision.

Statutory precedents from other jurisdictions provide little or no assistance in the development of acceptable criteria. As in California,[74] legislation in several states recognizes that existing rights of access cannot be destroyed by construction of a limited access highway without payment of just compensation, absent voluntary relinquishment by the owner.[75] These statutes, however, typically employ broad and general language which, in practical effect, delegates to the courts the task of defining the extent of the rights statutorily protected. Only in somewhat rare instances have legislatures attempted to supply significant descriptive detail. A Wisconsin statute, for example, requires severance damages, in partial takings for highway purposes, to include elements reflecting not only "deprivation or restriction of existing right of access," but also "loss of air rights" and "proximity damage to improvements remaining on condemnee's land."[76] Pennsylvania, too, makes explicit provision for compensation to include

damages "specially affecting the remaining property due to its proximity to the improvement for which the property was taken."[77] A particularly interesting Oregon statute, addressed to the cul-de-sac problem, authorizes suit to recover damages by the owner of land abutting on the cul-de-sac only if his property lies within 300 feet of the point of closing, and also between the latter point and the next intersecting street.[78] In no jurisdiction, so far as present research has found, has there been enacted any reasonably comprehensive set of statutory criteria defining the extent of compensable property interests of landowners abutting public highways.

A useful approach to the development of acceptable statutory standards, and one which would least disrupt existing institutional arrangements and practices, might seek to employ the present court-made rules as the core of the legislative program, modifying them to the extent warranted by sound policy considerations.[79] This incremental approach to statutory reform, for example, could seek to relieve the rules of their all-or-nothing characteristics, in the interest of more equitable treatment of peripheral and exceptional cases, by recasting existing case developed standards as presumptions rather than inflexible substantive norms. California law already provides a useful illustration of this technique in Section 30631 of the Public Utilities Code which, in authorizing use by the Southern California Rapid Transit District of existing

streets for rapid transit purposes (including elevated railways and monorails), declares that "it shall be presumed" that such use "constitutes no greater burden on adjoining properties" than preexisting uses.[80]

A preliminary assessment of the competing interests involved in inverse claims arising from typical highway improvement projects suggests that consideration should be given to enactment of legislation along the following lines:

(1) The creation of new access rights, by the construction of streets and highways in new locations in the future, should be limited by a legislative declaration that all such projects (i.e. not merely freeways or expressways) shall create no new rights of access in abutters except to the extent expressly provided by an appropriate agency of the governmental entity undertaking the project. Oregon statutes, quoted in the margin, provide useful models.[81] No constitutional impediment to such a change in the law, operative _in futuro_, is known to exist.[82] Such a measure would limit the scope of the access problem to preexisting rights, or to those intentionally conferred in the future. It would also permit long-range plans for future freeway or expressway developments to be coordinated more adequately with temporary street and highway construction programs, as well as with local land-use planning and zoning considerations. Ultimate financial savings would also, in reasonable likelihood, be substantial.

(2) When the law recognizes the right of an abutting owner to ingress and egress, as between his property and the street or highway on which it abuts, the right should be defined as including only that minimum degree of accessability which is reasonable under all the circumstances. This rule is consistent with the view, already taken by the courts, that a right to a right of access does not exist at all points along the frontal perimeter, as long as some reasonable access is provided.[83] It assumes that in our modern complex society, which places high rewards upon mobility, private rights that might impede transportation advances should be defined at the minimal level consistent with the interests they serve. Moreover, it reconciles a theoretical discrepancy in the case law, by directing attention not to the misleading question whether the right of access has been substantially interfered with, but to the somewhat different issue whether, as a result of governmental action, the claimant has been left with means of access to his property which are reasonably adequate in light of all the circumstances. The definition should also make it clear that the right, as so defined, prevails over any form of governmental action, whether denominated a "police power" measure or otherwise, which is found to have taken or damaged it.[84]

(3) If access rights are redefined as suggested in (2), it would be helpful to enact concurrently a set of criteria,

emphasizing factual elements, which the court is directed to consider in determining whether the claimant's pre-existing right of access has been diminished below the level of reasonable need, as a result of the improvement or other governmental action, and that he has therefore sustained a compensable damaging. The stated considerations should leave a measure of latitude for judicial discretion in their application, so as to avoid undue rigidity and inflexibility in adjudicating unusual or unique claims. It seems appropriate that consideration be given to adoption of such factors as these:

a. The extent to which the property retains direct access capabilities reasonably adequate for its highest and best use in light of (i) the nature and requirements of that use, (ii) the number, physical dimensions, and usefulness of access facilities, and (iii) any other circumstances relevant to effective utilization of the property, including reasonably available alternatives. The premise of this proposal is that direct access rights influence value primarily, if not exclusively, in relationship to use or potential use of the property. Commercial and industrial premises are largely dependent upon direct accessability to customers and freight; on the other hand, property in residential use may actually be harmed by too much accessability.[85] Moreover, access

suitable for one type of property utilization may be inadequate for another. A narrow cul-de-sac may be ideal as a location for a quiet residential lot, and may be adequate for the moderate level of traffic generated by certain specialized businesses or professional offices; the same means of access, however, could be totally insufficient for an extensive commercial business dependent upon transport from large truck-trailer combinations. The relationship between highest and best use and direct accessability is thus a critical element in balancing of the interests presented.[86]

b. <u>The degree to which the property enjoys general accessability in relationship to the surrounding community, which is reasonably adequate in relation to its highest and best use, in light of (i) increased travel time and distance to normal destinations, (ii) greater hazards of traveling alternate routes, (iii) the practical unavailability of reasonable alternate routes, and (iv) the likelihood that visits to the property by members of the public (including commercial patronage) may decline due to difficulties in travelling between the general street system and the property</u>. These factors are intended to direct attention to the effect on property value of the relationship between use and general community accessability (as distinct from direct ingress and egress between street and property). For certain kinds of property uses, including many residential properties, moderate

circuity of travel probably has little or at best slight impact on property values.[87] The same degree of circuity, on the other hand, may for certain commercial undertakings mean the difference between success and failure, and affect materially the value of the property on which the business is being conducted.[88] The present approach seeks to avoid the conceptual disparity in the present case law between judicial reluctance to award compensation for mere circuity of travel and judicial willingness to grant relief for substantial interference with access.[89] It is believed to be consistent with the general position articulated by the Supreme Court in Breidert[90] and Valenta,[91] but eliminates the rigidity of the "next intersecting street" rule in cul-de-sac situations.[92] Under it, community inaccessability, like unreasonably impaired direct access capability, would be judged on the basis of all of the relevant circumstances, rather than by application of arbitrary rules of thumb.

c. The extent to which the claimed impairment of access may be regarded as reasonable and thus noncompensable because (i) the challenged governmental action has a primary purpose and effect of safeguarding public health, safety and welfare by means which would be substantially impaired or deterred by the cost of making just compensation, if required, and for which equally salutary alternatives, with less capacity

<u>for interfering with private access rights, are unavailable at equal or lower cost; (ii) the adverse impact of the governmental action upon access rights is so widely shared, speculative in nature or amount, or relatively slight that the cost of distributing such losses in the form of constitutional compensation would impose an unreasonable burden upon governmental finances, or upon the judicial system, or both; or (iii) the claimant's abutting land enjoys compensating special benefits derived from the public improvement or from the practical operation of the regulatory measure.</u> This three-fold factor is intended to provide specific criteria, to which argument and anlaysis can be addressed, by which the courts may evaluate judicially the nebulous element of "reasonableness" in the "reasonably adequate" standards embodied in suggestions a and b, immediately preceding. Since relevance of "all the circumstances" is here assumed, the notion of "reasonable adequacy", it is submitted, should not be predicated solely upon an estimate of three-dimenstional, physical accessability, but should also undertake to weigh, as against the claimed private detriment, the importance of the underlying governmental objects and feasibility of possible alternate means for achieving them[93] as well as the extent to which the claimed private losses are rationally ascertainable,[94] discernably unique,[95] quantitatively significant,[96] and administratively manageable,[97] and not compensated by offsetting benefits.[98]

4. Assuming that determination of the issues identified by the foregoing proposals would remain, as under present law, a function of the court rather than of the jury,[99] judicial weighing of pertinent evidence and related arguments of counsel could be controlled, in the interest of avoiding unnecessary inverse compensation costs except where clearly established, by enactment of carefully devised statutory presumptions. For example, consideration might be given to presumptions along the following lines, designed to preclude a judgment awarding compensation unless the claimant has satisfied the burden of overcoming the assumed fact of noncompensability as stated therein:[100]

a. It could be rebuttably presumed that "proximity" damage (i.e., damage resulting from the fact that the property is located in proximity to the highway or other improvement and is exposed to loss of light, view and air, or to noise, dust, fumes, and other deleterious influences, as a consequence of such proximity) is not sustained in constitutionally significant degree by any property located more than ______ feet from the highway or improvement causing it.

b. It could be rebuttably presumed that property damage is not sustained in constitutionally significant degree as the result of inconvenience, hardship, difficulty, or circuity of travel caused by reasonable traffic regulations of designated types, including weight and boulevard restrictions,

no-left-turn and one-way-street regulations, median strips, roadway markings, lane divider barriers, vehicular stopping, unloading or parking controls, speed limitations, or traffic control signs and signals.

The first of these suggested presumptions assumes acceptance of the premise that the right to recover for proximity damages should not depend on the fortuitous circumstance of a partial taking vel non nor on the equally arbitrary fact that the harm-producing improvement is located on property taken from the claimant.[101] To supplant these aspects of existing law, a distance test is suggested as the fairest way to approximate the distinguishing line between special damages to particular property (which should be treated as compensable) and damages shared generally by the community at large (which are noncompensable). The distance to be selected has been left to legislative discretion, since opinions will necessarily vary as to an appropriate figure; testimony from competent land economists should assist in adducing a reasonable distance.[102] Since the proposed distance test is formulated as a rule of evidence,[103] it lacks the all-or-nothing characteristic that mars the prevailing decisional law in this regard, and permits recovery by a deserving claimant who can make a convincing case on special circumstances, demonstrating peculiar interference

with use and enjoyment of his property, sufficient to overcome the presumption.[104]

The second suggested presumption postulates a general (but not conclusive) priority of police power "traffic regulations" over incidental inconveniences caused by such regulations in the use of abutting property. Consistent with prevailing legal tradition,[105] property owners may be fairly assumed to include within the framework of their expectations regarding the streets and roads on which their property abuts an appreciation of the likelihood of reasonable traffic controls, and a general understanding that adverse economic consequences of such controls are widely shared by all abutters, in varying degrees, with a roughly compensating advantage of enhanced personal and community safety of street use.[106] To deny relief in such cases by an absolute rule of noncompensability, however, is to lose sight of the fact that a traffic regulation which appears reasonable in the abstract may, when viewed in a specific factual context, seem unnecessarily harsh or arbitrary in its practical impact. Demonstrably capricious or arbitrary traffic regulations are presumably rare. However, the channels of litigation (and settlement negotiations) should be left open to an owner who claims an adverse impact upon his property, due to special circumstances, which would make application of an otherwise reasonable regulation constitutionally compensable as to him. To provide added guidance

in determining whether the presumption against compensability has been overborne, the statute could provide further, if desired, that "this presumption shall be deemed overcome only if the claimant satisfies the court, by clear and convincing evidence, that the value of the subject property for its highest and best use has been depreciated, as a consequence of the said traffic regulation or regulations of which complaint is made, to a degree substantially in excess of that sustained by other properties subject to the same regulation or regulations within a radius of _____ feet therefrom."

5. Diversion of traffic by new highway construction poses a particularly troublesome problem. Decisional law amply documents the fact that, in certain kinds of cases, the construction of a new freeway may bring economic disaster to commercial businesses formerly dependent upon traffic which has been diverted to the freeway.[107] On the other hand, entrepreneurial reliance interests are probably slight in this context, for changes in traffic flow patterns due to highway improvements are an obvious business risk to the roadside enterpriser.[108] In addition, exposing the state to inverse liability for all adverse economic consequences of its modern highway program might well mean fiscal paralysis in an aspect of the public business already hard-pressed to keep abreast of transportation needs.[109] The difficulty of proving proximate cause also appears formidable, suggesting

that speculation and guesswork would, to an unacceptable degree, intrude into the decisional process.[110]

A possible legislative approach, of course, is simply to codify the present decisional rule that damages due to traffic diversions are not compensable under any circumstances.[111] The difficulty with this solution is that it excludes significant social losses attributable to the freeway (or other project) from the accounting of total costs which, in an economic sense, should be attributed to the project in the interest of a fair and responsible allocation of community resources.[112] In addition, it would perpetuate a logical gap in the system of legal responsibility, since, under existing interpretations of the just compensation clause, depreciated property values significantly grounded in certain forms of traffic pattern modifications (e.g., circuity of travel and diminished community accessability due to cul-de-sacs) are presently compensable.[113]

A possible intermediate position may be suggested. Conceding on policy grounds that diminished property values due to traffic diversions should ordinarily remain noncompensable, it is still probable that some highway projects may result in substantial economic distress for a relatively few property owners who thereby bear a disproportionately large share of the burdens of the project.[114] The owner's plight, however, may not be simply one of depreciated property value.

It may also involve the lack of an active market for the land itself, where marketability is primarily dependent upon estimated profitability, thereby preventing a relocation of the affected business to a more suitable site.[115] The state could, in the interest of fairness, restore a market for the land, at the owner's option, by declaring itself obligated to purchase it at its current appriased market value on demand of the owner made within a fixed period of time (e.g. six months) set by statute following completion of the freeway project. By hypothesis, the state would realize full value in the forced purchase of the property, and, in the long run, would presumably be made substantially whole upon resale to private interests or by utilization for public purposes. Massachusetts statutes have, for many years, included a somewhat similar procedure in analogous circumstances.[116]

(b) State and local officials responsible for highway and street improvements could be empowered, by clear statutory language, to minimize and compensate for private property losses by optional means other than payment of damages. For example, if the claimant in an inverse condemnation action satisfies the court that a compensable damaging has occurred, the defendant public entity could be authorized to propose a plan, subject to the court's approval, by which the injury-producing features of the improvement will be corrected, or their harmful impact reduced, in lieu of payment of compen-

sation, in whole or in part.[117] For example, the construction of a bridge over, or an underpass beneath, a highway could well, in certain cases, remove nearly all of the owner's basis for inverse damages, and yet be substantially less costly to the state than payment of adequate compensation.[118] Moreover, physical restoration of the premises to maximum usefulness may, in other cases, be essential to full compensation of the owner, since there is no assurance that damages calculated according to diminution of market value will necessarily correspond to the owner's actual out-of-pocket loss.[119] The use of "physical solutions" in appropriate inverse litigation, often implemented in the form of alternative or conditional judgments, has received widespread judicial approbation.[120] A statutory requirement that consideration be given to non-pecuniary alternatives, coupled with a grant of ample supporting authority (e.g., statutory power to condemn additional land needed to implement an alternative physical solution),[121] would regularize the practice and thereby assist in reducing the net cost of vindicating private property rights.[122]

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1. See Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L. J. 431 (1969); Van Alstyne, Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction, 20 Stan. L. Rev. 617 (1968). The California Constitution, art. I, § 14, like the constitutions of about half the states, requires payment of just compensation when private property is "taken" or "damaged" for public use. 2 P. Nichols, Eminent Domain § 6.44 (rev. 3d ed. 1963).

2. This way of looking at what are usually described, in more traditional terminology, as "police power" measures, is believed to be a useful contribution to analysis of the problems with which the present paper is concerned. Its principal development appears to be in the work of Professor Allison Dunham. See Dunham, A Legal and Economic Basis for City Planning, 58 Colum. L. Rev. 650 (1958); Dunham, From Rural Enclosure to Re-Enclosure of Urban Land, 35 N.Y.U. L. Rev. 1238 (1960). A modification of the same concept forms the basis of Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

3. 260 U.S. 393, at 415 (1922), Holmes, J.: "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support we see no more authority for supplying the latter without compensation than there was for taking

the right of way in the first place and refusing to pay for it because the public wanted it very much."

4. 328 U.S. 256, at 265, (1946), holding frequent low-level overflights a compensable "taking" of private property, since such flights amounted to "an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." See also, Griggs v. Allegheny County, 369 U.S. 84 (1962).

5. See, generally, Netherton, Control of Highway Access (1963).

6. See Note, Freeways and Rights of Abutting Owners, 3 Stan. L. Rev. 298 (1951).

7. See, e.g., Klein, Eminent Domain: Judicial Response to the Human Disruption, 46 Univ. Detroit J. Urban L. 1 (1968); Netherton, Implementation of Land Use Policy: Police Power v. Eminent Domain, 3 Univ. Wyo. Land & Water L. Rev. 33 (1968); Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964); Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Supreme Court Rev. 63; Spies & McCoid, Recovery of Consequential Damages in Eminent Domain, 48 Va. L. Rev. 437 (1962); Comment, Distinguishing Eminent Domain From Police Power or Tort, 38 Wash. L. Rev. 607 (1963). See also, Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation, 80

Harv. L. Rev. 1165 (1967). For a review and analysis of the principal lines of doctrinal analysis, see Van Alstyne, Modernizing Inverse Condemnation: A Legislative Prospectus, 8 Santa Clara Law. 1 (1967).

8. Van Alstyne, _supra_ note 7, _passim_.

9. People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943); Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942).

10. See Eachus v. Los Angeles Consolidated Elec. Ry. Co., 103 Cal. 614, 37 Pac. 750 (1894). Abutters' access rights are recognized as compensable property interests by Cal. Sts. & Hwys. C. § 100.3

11. _Cf._ Sauer v. City of New York, 206 U.S. 536 (1906); Colberg v. State ex. rel. Dept. of Public Wks., 67 Cal. 2d   , 62 Cal. Rptr. 401, 432 P.2d 3 (1967). See, generally, R. Netherton, Control of Highway Access 35-59 (1963).

12. See City of Chicago v. Taylor, 125 U.S. 161 (1888); McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139 (1931); Rigney v. City of Chicago, 102 Ill. 64 (1882). See also, Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 Stan. L. Rev. 727, 771-75 (1967); Lenhoff, Development of the Concept of Eminent Domain, 42 Colum.

L. Rev. 596, 610 (1942); 2 P. Nichols, Eminent Domain § 6.44, at 486 (rev. 3d ed. 1963).

13. The most thorough account is R. Netherton, supra, note 11. Other useful treatments of various aspects of the problem include Mayberry & Aloi, Compensation for Loss of Access in Eminent Domain in New York, 16 Buffalo L. Rev. 603 (1967); Stubbs, Access Rights of an Abutting Landowner, Proceedings of the Fifth Annual Institute on Eminent Domain 59 (Southwestern Leg. Found. 1963); Cromwell, Loss of Access to Highways: Different Approaches to the Problem of Compensation, 48 Va. L. Rev. 538 (1962); Covey, Highway Protection Through Control of Access and Roadside Development, 1959 Wis. L. Rev. 567; Covey, Control of Highway Access, 38 Neb. L. Rev. 407 (1959); Note, California and the Right of Access: The Dilemma Over Compensation, 38 So. Calif. L. Rev. 689 (1965); Note, Control of Access Roads - Police Power on Eminent Domain, 11 Kans. L. Rev. 388 (1963).

14. 23 Cal. 2d 343, 144 P.2d 818 (1943). See also, Beals v. City of Los Angeles, 23 Cal. 2d 381, 144 P.2d 839 (1943).

15. Bacich v. Board of Control, supra note 14, at 352, 144 P.2d at 824.

16. Id. at 355, 144 P.2d at 826.

17. See, e.g., Blumenstein v. City of Long Beach, 143 Cal. App. 2d 264, 299 P.2d 347 (1956); People v. Sayig, 101 Cal. App. 2d 890, 226 P.2d 702 (1951); Constantine v. City of Sunnyvale, 91 Cal. App. 2d 278, 204 P.2d 922 (1949).

18. People ex rel. Dept. of Public Works v. Russell, 48 Cal. 2d 189, 309 P.2d 10 (1957); Beckham v. City of Stockton, 64 Cal. App. 2d 487, 149 P.2d 296 (1944).

19. Cf. People ex rel. Dept. of Public Works v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966); Note, 38 So. Calif. L. Rev. 689, 695 (1965).

20. 54 Cal. 2d 855, 9 Cal. Rptr. 363, 357 P.2d 451 (1960).

21. 4 P. Nichols, Eminent Domain § 14.21[1], at 514 (rev. 3d ed. 1962). Prior California decisions expressing the rule include People v. Emerson, 13 Cal. App. 2d 673, 57 P.2d 955 (1936); County Sanitation Dist. No. 2 v. Averill, 8 Cal. App. 2d 556, 47 P.2d 786 (1935). The leading case is Campbell v. United States, 266 U.S. 368 (1924).

22. People ex rel. Dept. of Public Works v. Symons, supra note 20. This result seems contrary to the literal language of Cal. Code Civ. Proc. § 1248, subd. 2, which authorizes inclusion in severance damages of an amount to offset losses to the

remainder caused by "the construction of the improvement in the manner proposed by the" condemnor, without reference to the location of that improvement.

23. Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942); Van Alstyne, supra note 12, at 730-31.

24. See, e.g., Breidert v. Southern Pacific Co., 61 Cal. 2d 659, 663 n. 1, 39 Cal. Rptr. 903, 905 n. 1, 394 P.2d 719, 721 n. 1 (1964): "The principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action."

25. See, e.g., Rosenthal v. City of Los Angeles, 193 Cal. App. 2d 29, 13 Cal. Rptr. 824 (1961). Cf. People ex rel. Dept. of Public Works v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966).

26. 61 Cal. 2d 659, 39 Cal. Rptr. 903, 394 P.2d 719 (1964).

27. Id. at 666, 39 Cal. Rptr. at 908, 394 P.2d at 724: "Thus we denied recovery [in Symons] because defendants' bare showing that their property was placed in a cul-de-sac did not of itself satisfy the requirement of substantial impairment of access . . . . Although destruction of access to the next intersecting street in one direction constitutes a significant

factor in determining whether the landowner is entitled to recovery, it alone cannot justify recovery in the absence of facts which disclose a substantial impairment of access."

28. See People ex rel. Dept. of Public Works v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966).

29. Highland Realty Co. v. City of San Rafael, 46 Cal. 2d 669, 298 P.2d 15 (1956); People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943); Riverside County Flood Control & Water Cons. Dist. v. Halman, 262 Cal. App. 2d   , 69 Cal. Rptr. 1 (1968); People ex rel. Dept. of Public Wks. v. Giumarra Vineyard Corp., 245 Cal. App. 2d 309, 53 Cal. Rptr. 902 (1966). Intimations, in People ex rel. Dept. of Public Wks. v. Becker, 262 Cal. App. 2d   , 69 Cal. Rptr. 110 (1968), that the substantial impairment issue is a "mixed" issue of law and fact, for jury determination, must be regarded as inadvertent, being contrary to the great weight of authority.

30. Breidert v. Southern Pacific Co., supra note 26, at 664, Cal. Rptr. at 906, 394 P.2d at 725. To the same effect, see People ex rel. Dept. of Public Wks. v. Russell, 48 Cal. 2d 189, 309 P. 2d 10 (1957).

31. 61 Cal. 2d 669, 39 Cal. Rptr. 909, 394 P.2d 725 (1964).

32. People ex rel. Dept. of Public Wks. v. Guimarra Vineyards Corp.,

245 Cal. App. 2d 309, 53 Cal. Rptr. 902 (1966) (additional distance of travel of several miles in either direction from commercial ranch to main highway leading to markets). Compare People ex rel. Dept. of Public Wks. v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966) (added travel of one-third mile from commercial property held not substantial impairment under circumstances of case).

33. Cal. Sts. & Hwys. C. § 23.5 defines "freeway" to mean "a highway in respect to which the owners of abutting lands have no right or easement of access to or from their abutting lands or in respect to which such owners have only limited or restricted right or easement of access." For a general review of access-control legislation in the United States, see R. Netherton, Control of Highway Access 82-119 (1963).

34. Schnider v. State, 38 Cal. 2d 439, 241 P.2d 1, 43 A.L.R.2d 1068 (1952); People v. Thomas, 108 Cal. App. 2d 832, 239 P.2d 914 (1952). See Covey, Control of Highway Access, 38 Neb. L. Rev. 407, 427-28 (1959).

35. People ex rel. Dept. of Public Wks. v. Renaud, 198 Cal. App. 2d 581, 17 Cal. Rptr. 674 (1961). See also, People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943). Accord: State ex rel. Herman v. Jacobs, ___ Ariz. App. ___, 440 P.2d 32 (1968).

36. Goycoolea v. City of Los Angeles, 207 Cal. App. 2d 729, 24 Cal.

Rptr. 719 (1962). See also, Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942).

37. People ex rel. Dept. of Public Wks. v. Russell, 48 Cal. 2d 189, 309 P.2d 10 (1957).

38. Cf. People ex rel. Dept. of Public Wks v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966); Beckham v. City of Stockton, 64 Cal. App. 2d 487, 149 P.2d 296 (1944).

39. See Holloway v. Purcell, 35 Cal. 2d 220, 217 P.2d 665 (1950) (dictum), cert. denied, 340 U.S. 883 (1950); People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943) (dictum); Blumenstein v. City of Long Beach, 143 Cal. App. 2d 264, 299 P.2d 347 (1956). Accord: State ex rel. State Highway Comm'n v. Meier, 388 S.W. 2d 855 (Mo. 1965); Pennysavers Oil Co. v. Texas, 334 S.W. 2d 546 (Tex. Civ. App. 1960).

40. See Holloway v. Purcell, supra note 39.

41. See People ex rel. Dept. of Public Wks. v. Ayon, 54 Cal. 2d 217, 9 Cal. Rptr. 151, 352 P.2d 519 (1960).

42. People ex rel. Dept. of Public Wks. v. Symons, 54 Cal. 2d 855, 9 Cal. Rptr. 363, 357 P.2d 451 (1960); People v. Elsmore, 229 Cal. App. 2d 809, 40 Cal. Rptr. 613 (1964); Sacramento & San

Joaquin Drainage Dist. ex rel. State Reclamation Bd. v. Reed, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963); City of Berkeley v. Von Adelung, 214 Cal. App. 2d 791, 29 Cal. Rptr. 802 (1963). See also, Lombardy v. Peter Kiewit Sons' Co., 266 Cal. App. 2d ___, 72 Cal. Rptr. 240 (1968) (private deed restrictions limiting the purposes for which land may be used do not constitute a compensable interest supporting recovery for loss of amenity due to freeway project in violation thereof).

43. Compare People ex rel. Dept. of Public Wks. v. Symons, supra note 42 (impairment of light and view held nonrecoverable, as part of alleged severance damages, where improvement causing impairment was constructed on land other than that taken from condemnee) and People ex rel. Dept. of Public Wks. v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966) (accord; alternative ground) with Goycoolea v. City of Los Angeles, 207 Cal. App. 2d 729, 24 Cal. Rptr. 719 (1962) (inverse condemnation judgment, including recovery for loss of light, air and view, affirmed). See also, People ex rel. Dept. of Public Wks. v. Presley, 239 Cal. App. 2d 328, 48 Cal. Rptr. 672 (1966) (abutter's right of light, air and view, as well as right of access, described as property rights protected by just compensation clause of constitution).

44. Cal. Code Civ. Proc., § 1248, subd. 2; Pierpont Inn, Inc. v. State, 70 Cal. 2d ___, 74 Cal. Rptr. 521, 449 P.2d 737 (1969).

See also, Sacramento & San Joaquin Drainage Dist. v. W. P. Roduner Cattle & Farming Co., 268 Cal. App. 2d ___, 73 Cal. Rptr. 733 (1968). As to the rule permitting setoff of special benefits against severance damages only, see Note, Benefits and Just Compensation in California, 20 Hastings L. J. 764 (1969). See also, Annot., 13 A.L.R.3d 1149 (1967).

45. People ex rel. Dept. of Public Wks. v. Russell, 48 Cal. 2d 189, 309 P.2d 10 (1957); People ex rel. Dept. of Public Wks. v. Becker, 262 Cal. App. 2d ___, 69 Cal. Rptr. 110 (1968); People ex rel. Dept. of Public Wks. v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966).

46. People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943). See also, People ex rel. Dept. of Public Wks. v. Symons, _supra_ note 42 (dictum).

47. Pierpont Inn, Inc. v. State, 70 Cal. 2d ___, 74 Cal. Rptr. 521, 449 P.2d 737 (1969) (impaired scenic view from remainder parcel); People v. Ricciardi, _supra_ note 46 (impairment of right that travellers on highway have reasonable view of premises); Sacramento & San Joaquin Drainage Dist. ex rel. State Reclamation Bd. v. Reed, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963) (impaired view of connected farm lands due to construction of intervening levee).

48. Pierpont Inn, Inc. v. State, _supra_ note 47; People ex rel.

Dept. of Public Wks. v. Symons, 54 Cal. 2d 855, 859-60, 9 Cal. Rptr. 363, 366, 357 P.2d 451, 454 (1960) (dictum). Contra: People ex rel. Dept. of Public Wks. v. Presley, 239 Cal. App. 2d 328, 48 Cal. Rptr. 672 (1966).

49. See notes 42 and 43, supra.

50. Sala v. City of Pasadena, 162 Cal. 717, 124 Pac. 539 (1912); Eachus v. Los Angeles Consolidated Ry. Co., 103 Cal. 614, 37 Pac. 750 (1894); Anderson v. Fay Improvement Co., 134 Cal. App. 2d 738, 286 P.2d 513 (1955). The compensability of property losses due to changes of grade is recognized by statute. See Cal. Sts. & Hwys. C., §§ 858, 869, 6121.

51. See Simpson v. City of Los Angeles, 4 Cal. 2d 60, 47 P.2d 474 (1935) (no substantial impairment); Norcross v. Adams, 263 Cal. App. 2d ___, 69 Cal. Rptr. 429 (1968) (dictum); Constantine v. City of Sunnyvale, 91 Cal. App. 2d 278, 204 P.2d 922 (1949) (no damaging since small extension street provided as substitute for vacated street). See also, Beals v. City of Los Angeles, 23 Cal. 2d 381, 144 P.2d 839 (1944).

52. See Smith v. County of San Diego, 252 Cal. App. 2d 438, 60 Cal. Rptr. 602 (1967); People ex rel. Dept. of Public Wks. v. Di Tomaso, 248 Cal. App. 2d 741, 57 Cal. Rptr. 293 (1967). Accord: Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W. 2d 755, 73 A.L.R.2d 680 (1957).

53. City of San Antonio v. Pigeonhole Parking of Texas, 158 Tex. 318, 311 S.W.2d 218 (1958). See Note, 11 Kans. L. Rev. 388 (1963).

54. People ex rel. Dept. of Public Wks. v. Ayon, 54 Cal. 2d 217, 9 Cal. Rptr. 151, 352 P.2d 519 (1960); People ex rel. Dept. of Public Wks. v. Presley, 239 Cal. App. 2d 328, 48 Cal. Rptr. 672 (1966); City of Berkeley v. Von Adelung, 214 Cal. App. 2d 791, 29 Cal. Rptr. 802 (1963); People ex rel. Dept. of Public Wks. v. Renaud, 198 Cal. App. 2d 581, 17 Cal. Rptr. 674 (1961); People v. Sayig, 101 Cal. App. 2d 890, 226 P.2d 702 (1951); Holman v. State, 97 Cal. App. 2d 237, 217 P.2d 448 (1950). Accord: City of Phoenix v. Wade, 5 Ariz. App. 505, 428 P.2d 450 (1967); Snyder v. State of Idaho, ___ Idaho ___, 438 P.2d 920 (1968); State v. Williams, 64 Wash. 2d 842, 394 P.2d 693 (1964).

55. See, e.g., People ex rel. Dept. of Public Wks. v. Renaud, supra note 54.

56. Note, 38 So. Calif. L. Rev. 689, 696 (1965).

57. See, e.g., People v. Ricciardi, 23 Cal. 2d 390, 395, 144 P.2d 799, 802 (1943): "Neither in the Constitution nor in statutes do we find any declaration of the incidents of ownership or elements of value which specifically creates or defines or limits the two rights of access and visibility which are involved here."

58. Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 Stan. L. Rev. 727 (1967).

59. See, e.g., Beckham v. City of Stockton, 64 Cal. App. 2d 487, 149 P.2d 296 (1944).

60. People ex rel. Dept. of Public Wks. v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966).

61. See cases cited supra, notes 45 and 46; compare cases cited supra, note 54. An attempt was made, some twenty-six years ago, to predicate the distinction (which, at root, seems based on differences of degree of "police power" significance attached by courts to the purpose of the governmental action) on whether there was a "compelling emergency" or "public necessity" for the public entity's decision. See Bacich v. Board of Control, 23 Cal. 2d 343, 351, 144 P.2d 818, (1943). Compare id. at 359, 144 P.2d at (Edmonds, J., concurring opinion). Although more recent decisions often speak of the "police power" concept as lending support to a conclusion of noncompensability, the notion of emergency or necessity is seldom, if ever, mentioned.

62. Cases cited supra, note 48.

63. Cases cited supra, note 42.

64. People ex rel. Dept. of Public Wks. v. Symons, 54 Cal. 2d 855,

9 Cal. Rptr. 363, 357 P.2d 451 (1960); People v. Elsmore, 229 Cal. App. 2d 809, 40 Cal. Rptr. 613 (1964).

65. Pierpont Inn, Inc. v. State, 70 Cal. 2d ___, 74 Cal. Rptr. 521, 449 P.2d 737 (1969).

66. People ex rel. Dept. of Public Wks. v. Becker, 262 Cal. App. 2d ___, 69 Cal. Rptr. 110 (1968). Conversely, increased profitability due to an increase in traffic volume passing a commercial location may be considered as a special benefit which, by offset against severance damages, reduces the abutting owner's recovery. City of Hayward v. Unger, 194 Cal. App. 2d 516, 15 Cal. Rptr. 301 (1961).

67. Cases cited supra, note 54.

68. See Netherton, Control of Highway Access 78-81 (1963), indicating that control of highway access promotes multiple objectives (e.g., expediting traffic flow, protecting highway investment, controlling roadside improvements, obtaining balanced transportation facilities, promoting safety, and achieving community amenity) consistent with advancement of the public welfare.

69. See Holloway v. Purcell, 35 Cal. 2d 220, 217 P.2d 665 (1950), cert. denied, 340 U.S. 883 (1950).

70. Covey, Highway Protection Through Control of Access and Roadside Development, 1959 Wis. L. Rev. 567, 567-69.

71. As to the general policy criteria deemed relevant to the development of a legislative program for modernizing inverse condemnation law, see Van Alstyne, Modernizing Inverse Condemnation: A Legislative Prospectus, 8 Santa Clara Law. 1, 30-36 (1967).

72. Rosenthal v. City of Los Angeles, 193 Cal. App. 2d 29, 33, 13 Cal. Rptr. 824, 827 (1961). This position is consistent with the general rule that recognizes only the compensability of damage which is peculiar to the abutting owner and not shared widely by the public. See City of Berkeley v. Van Adelung, 214 Cal. App. 2d 791, 793, 29 Cal. Rptr. 802, 803 (1963).

73. See cases cited supra, note 21. That the rule represents an effort to distinguish between damages peculiar to the claimant, and those suffered in common with adjoining landowners, is widely acknowledged in the case law. See 4 P. Nichols, Eminent Domain § 14.21[[] at 517-18 (rev. 3d ed. 1962), and cases cited.

74. Calif. Sts. & Hwys. C. § 100.3, providing that declaration by state highway commission creating a freeway "shall not affect private property rights of access, and any such rights taken or damaged within the meaning of Article I, Section 14, of the State Constitution for such freeway shall be acquired in a manner provided by law. No state highway shall be converted into a freeway except with the consent of the owners of abutting lands or the purchase or condemnation of their right of access thereto."

75. See, e.g., Ill. Stats. Anno., tit. 121, §§ 8-102, 8-103 (Smith-Hurd 1960); Mass. Laws Anno., ch. 81, § 7C (1964); Pa. Stats. Anno. tit. 26, § 1-612 (Supp. 1969); Wash. Rev. Code Anno. § 47.52.080 (1962).

76. Wis. Stats. Anno., § 32.09(6) (1964). See also, id. § 80.47 (1957).

77. Pa. Stats. Anno., tit. 26, § 1-606 (Supp. 1969).

78. Ore. Rev. Stats. § 373.060 (1963). Compare Wash. Rev. Code Anno., § 47.52.041 (1962), providing that no claim shall lie "by reason of the closing of such intersecting streets, roads or highways as long as access still exists or is provided to such property abutting upon the closed streets, roads or highways. Circuity of travel shall not be a compensable item of damage."

79. Avoidance of disruption of existing legal relationships, so far as possible, is an appropriate criterion of legislative reform. See Van Alstyne, Modernizing Inverse Condemnation: A Legislative Prospectus, 8 Santa Clara Law. 1, 35-36 (1967).

80. Compare the lengthy litigation which arose in New York regarding claimed deprivations flowing from the construction of the elevated railway system near the turn of the century, as

recounted in Sauer v. City of New York, 206 U.S. 536, 546-56 (1906). As to the validity of state legislation defining the scope of property rights for inverse condemnation purposes, see Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 Stan. L. Rev. 727, 758-59, 776-78 (1967).

81. See Ore. Rev. Stats. § 374.405 (1963): "No rights in or to any state highway, including what is known as right of access, shall accrue to any real property abutting upon any protion of any state highway constructed, relocated or reconstructed after May 12, 1951, upon right of way, no part of the width of which was acquired prior to May 12, 1951, for public use as a highway, by reason of the real property abutting upon the state highway." A companion section, id. § 374.410 (1963), authorizes the state highway commission, in acquiring any right of way for state highway purposes, to "prescribe and define the location, width, nature and extent of any right of access that may be permitted

by the commission to pertain to real property described in ORS 374.405." See also, Ore. Rev. Stats. §§ 347.420, 347.425 (1963) (similar provisions relating to county throughways).

82. See authorities cited in Van Alstyne, _supra_ note 80.

83. Notes 52, 53, _supra_.

84. This proposal seeks to eliminate a source of confusion found in decisions intimating, perhaps inadvertently, that any interference with access rights, if imposed under a ligitimate claim of "police power", is noncompensable. See text accompanying, and cases cited in, notes 52-56, _supra_. The sounder view, it is submitted, recognizes that an exercise of "police power" adds weighty elements to the balancing process, favoring validity of the measure and noncompensability of resulting private injury, but does not wholly preclude compensability for substantial deprivations of access not justified by considerations of public

safety or welfare. See, _e.g._, Bacich v. Board of Control, 23 Cal. 2d 343, 363, 144 P.2d 818, 830 (1943) (Edmonds, J., concurring) (circuity of travel and related inconvenience, due to traffic regulations, said in dictum to be "an element of damage for which the property owner may not complain _in the absence of arbitrary action_") (emphasis supplied); People v. Sayig, 101 Cal. App. 2d 890, , 226 P.2d 702, 712 (1951) (distinction between situations supporting compensation and those in which compensability is denied said to be "simply one of degree"); Beckham v. City of Stockton, 64 Cal. App. 2d 487, 502, 149 P.2d 296, 303 (1944) (dictum) (traffic regulations "may interfere _to some extent_ with right of access without furnishing a basis for recovery" of inverse compensation) (emphasis supplied). See also, Smith v. County of San Diego, 252 Cal. App. 2d 438, 60 Cal. Rptr. 602 (1967); People ex rel. Dept. of Public Wks. v. DiTomaso, 248 Cal. App. 2d 741, 57 Cal. Rptr. 293 (1967); Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957); Hilleredge v. City of Scottsbluff, 164 Neb. 560, 83 N.W.2d 76

(1957); Tubular Service Corp. v. Comm'r of State Highway Dept., 77 N.J. Super. 556, 187 A.2d 201 (App. Div. 1963); Beinig v. County of Allegheny, 332 Pa. 494, 2 A.2d 842 (1938); Annot., 73 A.L.R.2d 654 (1960).

Many of the cases denying relief on seemingly absolute "police power" grounds appear, on their facts, to be instances in which access was not wholly denied but was only made less convenient for purposes not shown to be outweighed by the private detriment asserted. See, _e.g._, People ex rel. Dept. of Public Wks. v. Ayon, 54 Cal. 2d 217, 5 Cal. Rptr. 151, 352 P.2d 519 (1960) (divider stip); Holman v. State of California, 97 Cal. App. 2d 237, 217 P.2d 448 (1950) (median barrier); City of Phoenix v. Wade, 5 Ariz. App. 505, 428 P.2d 450 (1967) (no-left-turn regulation, no-parking regulation, traffic signals, inconvenient driveway location); Dept. of Public Wks. & Bldgs. v. Mabee, 22 Ill.2d 202, 174 N.E.2d 801 (1961) (one-way traffic controlled by median barrier); State v. Gannons Inc., 275 Minn. 14, 145 N.W.2d 321 (1966) (median divider); City of San Antonio

v. Pigeonhold Parking of Texas, 158 Tex. 318, 311 S.W.2d 218 (1958) (denial of curb cut for access to corner parking facility); State v. Williams, 64 Wash. 2d 842, 394 P.2d 693 (1964) (ban on curbside parking of trucks for unloading and loading purposes). When the deprivation of access rights has been found to be excessive, and not overborne by necessity for achieving "police power" objectives, inverse compensation has been awarded. See, e.g., Weaver v. Village of Bancroft, 439 P.2d 697 (Idaho 1968); Elder v. City of Newport, 73 R.I. 482, 57 A.2d 653 (1948); Hurley v. State, 143 N.W.2d 722 (So. Dak. 1966); Annot., 73 A.L.R. 2d 689 (1960).

85. See Moore, Nature and Compensability of Access, Proceedings of the Third Annual Institute on Eminent Domain 1 (Southwestern Legal Foundation ed. 1961).

86. Goycoolea v. City of Los Angeles, 207 Cal. App. 2d 729, 24 Cal. Rptr. 719 (1962). See also, Bacich v. Board of Control, 23 Cal.

2d 343, 363, 144 P.2d 818, 830 (1943) (Edmonds, J., concurring); State v. Tolliver, 246 Ind. 319, 205 N.E.2d 672 (1965); Riddle v. State Highway Comm'n, 184 Kan. 603, 339 P.2d 301 (1959); State ex rel. Barman v. Lukens, 5 Ohio Misc. 1, 213 N.E.2d 367 (Com. Pl. 1964). See, generally, Mayberry & Aloi, Compensation for Loss of Access in Eminent Domain in New York, 16 Buffalo L. Rev. 603 (1967). Highest and best use is the suggested reference point, rather than actual use, since, as a result of the regulatory measure or improvement in question, "A particular business might be entirely destroyed and yet not diminish the actual value of the property for its highest and best use." People v. Ricciardi, 23 Cal. 2d 390, , 144 P.2d 799, 802 (1943). *Cf.* 4 P. Nichols, Eminent Domain, § 14.243, p. 578 (rev. 3d ed. 1962).

87. See Moore, note 85, *supra*; Kelly, Residences and Freeways, 36 California Highways and Public Works 23 (1957) (land economic study indicating only nominal depression in market value of

residential properties located near freeway); Hill, Glendale Report, 43 California Highways and Public Works 42 (1964) (proposed freeway route shown to promote increase in property values of adjacent residential areas through acceleration in change from single family to multiple residence units).

88. People ex rel. Dept. of Public Wks. v. Guimarra Vineyards Corp., 245 Cal. App. 2d 309, 53 Cal. Rptr. 902 (1966). See also, Pierpont Inn, Inc. v. State, 70 Cal. 2d ___, 74 Cal. Rptr. 521, 449 P.2d 737 (1969) (loss of access to beach frontage); Dunbar v. Humboldt Bay Municipal Water Dist., 254 Cal. App. 2d 480, 62 Cal. Rptr. 358 (1967) (loss of access to recreational land).

89. See text accompanying note 81, _supra_. Compare Priestly v. State, 23 N.Y. 2d 152, 242 N.E.2d 827, 295 N.Y.S.2d 659 (1968), approving adequacy of community accessability of property in light of its highest and best use as relevant to compensability. After reaffirming the rule, established by previous New York cases, that

mere circuity of access is noncompensable, the court held that compensation is required if the degree of interference with access goes beyond what is "merely circuitous, and the remaining access is "unsuitable" for the highest and best use of the land. Noting the ambuiguity in the crucial terms, "circuitous", and "unsuitable", the court offered the following definition: " 'Circuitous' . . . indicates that which is roundabout and indirect but which nevertheless leads to the same destination. 'Suitable' . . . describes that which is adequate to the requirements of or answers the needs of a particular object. The concepts are not mutually exclusive and, therefore, a finding that a means of access is indeed circuitous does not eliminate the possibility that that same means of access might also be unsuitable in that it is inadequate to the access needs inherent in the highest and best use of the property involved." 23 N.Y. 2d at , 242 N.E.2d at 829-30, 295 N.Y.S.2d at 663.

90. 61 Cal. 2d 659, 39 Cal. Rptr. 903, 394 P.2d 719 (1964).

91. 61 Cal. 2d 669, 39 Cal. Rptr. 909, 394 P.2d 725 (1964).

92. See text accompanying notes 14-32, supra.

93. Compare the proposal of Edmonds, J., in Bacich v. Board of Control, 23 Cal. 2d 343, , 144 P.2d 818, 828 (1943) (concurring opinion): "The factors to be considered are, on the one hand, the magnitude of the damage to the owner of the land, and, on the other, the desirability and necessity for the particular type of improvement and the danger that the granting of compensation will tend to retard or prevent it. . . . In addition, before compensation may be denied, the court must find that the particular improvement be not unreasonably more drastic or injurious than necessary to achieve the public objective." See also, Traynor, J., dissenting in the same case, 23 Cal. 2d at , 144 P.2d at 839: "Of recent years the growth of traffic has necessitated the construction of highways with fewer intersecting streets to expedite the flow of traffic and reduce the rate of motor vehicle accidents. . . . The cost of making such improvements may be prohibitive now that new rights are created

for owners of property abutting on streets that would be at right angles to the improvements, for these rights must be condemned or ways constructed over or under the improvements. The construction of improvements is bound to be discouraged by the multitude of claims that would arise, the costs of negotiation with claimants or of litigation, and the amounts that claimants might recover."

94. Practical difficulties in valuing access rights are reviewed in Netherton, Control of Highway Access 327-40 (1963). One reason for judicial exclusion of certain elements of loss (e.g., noise, fumes, dust, annoyance) from the calculation of inverse damages in highway cases, although the same elements are generally admissible for their bearing upon severance damages (see text accompanying notes 42-43, 63-64, supra), is the relative ease with which the claimed loss, in partial taking cases, can be reflected in the difference between "before" and "after" values of the remainder parcel when viewed from the perspective of a willing

buyer. _Cf_. Pierpont Inn, Inc., 70 Cal. 2d ___, 74 Cal. Rptr. 521, 449 P.2d 737 (1969). In inverse cases, such differences may appear to be far more uncertain and speculative, being potentially attributable to a variety of indeterminative and non-compensable factors. See Blumenstein v. City of Long Beach, 143 Cal. App. 2d 264, 299 P.2d 347 (1956); 4 P. Nichols, Eminent Domain, § 14.1 [1], pp. 490-91 (rev. 3d ed. 1962). This explanation, it is submitted, supports the view, taken in the text, that the probative weight of the claimant's proof of loss should be discounted to the extent that uncertain "proximity damage" factors are included therein; but it does not provide an adequate explanation for the prevailing rule denying compensation altogether for such elements in inverse litigation where there has been no taking, while allowing it as part of severance damages when there has been a partial taking. Adequate protection for the public fisc would be secured, it is submitted, by adherence in inverse condemnation litigation to rules, already familiar in severance damage situations, that require exclusion

of valuation evidence clearly based upon noncompensable factors (see Sacramento & San Joaquin Drainage Dist. ex rel. State Reclamation Bd. v. Reed, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963)) but authorize consideration of circumstances, attributable to the governmental action, which informed buyers would consider as bearing on the market value. Pierpont Inn, Inc. v. State of California, 70 Cal. 2d ___, 74 Cal. Rptr. 521, 449 P.2d 737 (1969). See, generally, 4 P. Nichols, Eminent Domain § 14.241, pp. 564-73 (rev. 3d. ed. 1962).

95. The general rule is that injury sustained by a property owner in common with other local landowners generally, and not peculiar to his land, is noncompensable. See People ex rel. Dept. of Public Wks. v. Symons, 54 Cal. 2d 855, 9 Cal. Rptr. 363, 357 P.2d 451 (1960); 4 P. Nichols, Eminent Domain, § 14.24, p. 561 (rev. 3d ed. 1962). This rule is usually articulated as a substantive standard of compensability _vel non_, although it manifestly requires, in practical application, a judgment based on

variations of degree. The proposal in the text is that it be accorded a more flexible treatment, as one factor to be evaluated, *inter alia*, without necessarily being given controlling importance. See Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1217-18 (1967).

96. It is assumed, by the present proposal, that administrative efficiency in the settlement of inverse claims would be impaired to a socially unacceptable degree unless the *de minimis* limitation on recoverable losses were incorporated into legislative standards. See Michelman, *supra* note 95, at 1178-80.

97. *Ibid*. The development of statutory guidelines to decision-making can directly improve administrative manageability. *Cf*. *id*. at 1245-53. Consideration should also be given, however, to authorization for statutory compensation in selected instances, according to predetermined arbitrary standards, in the interest of reducing

both administrative expense and "demoralization costs". See id. at 1253-56. Compare U.S. Advisory Comm'n on Intergovernmental Relations, Relocation: Unequal Treatment of People and Businesses Displaced by Governments (1965); Note, An Act to Provide Compensation for Loss of Goodwill Resulting From Eminent Domain Proceedings, 3 Harv. J. Legis. 445 (1966).

98. California law requires "special" benefits, but not "general" benefits, to be deducted from severance damages in eminent domain proceedings. Cal. Code Civ. Proc. § 1248; Pierpont Inn, Inc. v. State of California, 70 Cal. 2d ___, 74 Cal. Rptr. 521, 449 P.2d 737 (1969); Sacramento & San Joaquin Drainage Dist. v. W. P. Roduner Cattle & Farming Co., 268 Cal. App. 2d ___, 73 Cal. Rptr. 733 (1968). The proposal in the text assumes continued retention of this rule, and its logical applicability, in principle, to inverse claims. See 3 P. Nichols, Eminent Domain, § 8.6210, pp. 105-08 (rev. 3d ed. 1965). It is recognized that absent a partial taking, as in Pierpont Inn, *supra*, the

California inverse decisions seldom discuss the benefit problem, since special benefits are ordinarily assimilated into evidence relating to the extent of claimed diminution of value without the need for separate identification. See, e.g., Rose v. State, 19 Cal. 2d 713, ___, 123 P.2d 505, 519 (1942) (measure of inverse damages said to be "diminution in value of the property"); Enfield, The Limitations of Access in Partial Takings, 27 Appraisal J. 31, 38-39 (1959) (creation of cul-de-sacs often found to create no compensable damage due to offsetting benefits). As long as the present rule is retained, however, consistency suggests the appropriateness, at least in instances where differences in result might be significant, of seeking to isolate special from general benefits in inverse cases, excluding consideration of the latter from the computation of compensation.

It should be noted, however, that the special benefit rule, in most applications, is beset with serious ambiguities and definitional uncertainties. See City of Hayward v. Unger, 194 Cal. App. 2d 536, 15 Cal. Rptr. 301 (1961); Gleaves, Special Benefits in

Eminent Domain: Phantom of the Opera, 40 Cal. S.B.J. 245 (1965). These conceptual difficulties would be eliminated by replacing the present rule with one based on the federal "before-and-after" best for compensable loss. 33 U.S.C. § 595 (1964). See Haar & Hering, The Determination of Benefits in Land Acquisition, 51 Calif. L. Rev. 833 (1963); Note, Benefits and Just Compensation in California, 20 Hastings L. J. 764 (1969); Annot., 13 A.L.R.3d 1149 (1967). No constitutional barrier to such a change appears to exist. Bauman v. Ross, 167 U.S. 548 (1897). See also Norwood v. Baker, 172 U.S. 269 (1898) (dictum). Cf. Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083 (1902) (by implication). Adoption of the federal rule for California would avoid double compensation of the landowner (as now occurs when special benefits exceed severance damages) and, as applied in inverse condemnation, would tend to reduce both the number and amount of claims, thereby offsetting to some extent the added cost of compensating the broader class of property-owners entitled thereto under the proposals here advanced. See Note, 20 Hastings L. J. 764, 767-69 (1969).

99. Whether there has been a compensable "taking" or "damaging" is an issue for the court, although, absent waiver, the amount of loss sustained is a jury question. Breidert v. Southern Pacific Co., 61 Cal. 2d 659, 39 Cal. Rptr. 903, 394 P.2d 719 (1964); Highland Realty Co. v. City of San Rafael, 46 Cal. 2d 669, 298 P.2d 15 (1956); Riverside County Flood Control & Water Conservation Dist. v. Halman, 262 Cal. App. 2d ___, 69 Cal. Rptr. 1 (1968).

100. The present proposal contemplates the formulation of presumptions that are (a) rebuttable, and (b) affect the burden of proof. See Cal. Evid. C. § 601(b). This approach is consistent with the premise that the proposed presumptions are designed to implement a collateral public policy of avoidance of unnecessary fiscal burdens that might deter or delay essential public improvement projects. See Cal. Evid. C. § 605.

101. See text accompanying, and cases cited in, notes 21-22, 42-43, supra.

102. The distance prescribed may, of course, be geared to varying circumstances (e.g., urban or rural environment, uphill or downhill grade, residential or commercial use of land).

103. Courts have not infrequently restricted the scope of compensation for loss of amenity by taking into account the distance between the affected property and the source of the claimed loss, see, e.g., Collins v. State Highway Comm'n, 233 Miss. 434, 102 So. 2d 678 (1958), as well as by imposing a rigorous burden of proof upon the claimant. See United States v. Certain Parcels, 252 F. Supp. 319 (W. D. Mich. 1966); Comm'r. Dept. of Highways v. Cleveland, 407 S.W.2d 417 (Ky. 1966).

104. By affording claimants an opportunity to establish special circumstances justifying inverse compensability for proximity damages, the suggested presumption brings the rules governing inverse liability more closely into conformity with accepted principles governing liability based on nuisance. Governmental tort

liability for nuisance has long been recognized in California as an exception to the doctrine of sovereign immunity. See Van Alstyne, A Study Relating to Sovereign Immunity, 5 Cal. Law Revision Comm'n, Reports, Recommendations & Studies 225-30 (1963). Under the nuisance rationale, public entitles have often been held liable for proximity damages analogous to those here under consideration. See, e.g., Hassell v. City & County of San Francisco, 11 Cal. 2d 168, 78 P.2d 1021 (1938) (noxious odors from outdoor comfort station); Fendley v. City of Anaheim, 110 Cal. App. 731, 294 Pac. 769 (1930) (noise and vibrations from nearby municipal power plant); Peterson v. City of Santa Rose, 119 Cal. 392, 51 Pac. 557 (1897) (noxious odors from untreated sewage). See also, Jacobs v. City of Seattle, 93 Wash. 171, 160 Pac. 299 (1916) (smoke and noxious odors from municipal garbage incinerator). Cf. Sheridan Drive-In Theatre, Inc. v. State, 384 P.2d 597 (Wyo. 1963) (nuisance standards applied in denying inverse compensation for diminished value of drive-in theatre site due to lights from vehicles using nearby freeway). Tort recoveries for like

interferences with comfortable enjoyment of property have also been typical of private nuisance litigation. See, e.g., Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 288 P.2d 507 (1955) (dust and fumes); Gelfand v. O'Haver, 33 Cal. 2d 218, 200 P.2d 790 (1948) (noise); Johnson v. V. D. Reduction Co., 175 Cal. 63, 164 Pac. 1119 (1917) (noxious odors); Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997 (1966). No California decision has been found that undertakes to explain the anomaly of recognizing nuisance liability for property damages while denying that identical injuries are within the purview of inverse condemnation. But see Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (nuisance may amount to "taking" within meaning of Fifth Amendment). This anomaly, ironically, ignores the fact that governmental liability in nuisance appears to have originated as a specialized application of inverse condemnation law. See Van Alstyne, op. cit. supra, at 226-28. The need for reconciliation of the two lines of authority is emphasized by existing uncertainty whether, in light of the California Tort Claims Act of 1963, nuisance

liability in tort may presently be asserted against governmental entitles. A. Van Alstyne, California Government Tort Liability, § 5.10, p. 126 (1964).

105. Notes 52-54, supra.

106. The protection of reliance interests, based on reasonable expectations, as a major policy goal of the law of eminent domain, is discussed in Kratovil & Harrison, Eminent Domain -- Policy and Concept, 42 Calif. L. Rev. 596, 612-15 (1954).

107. See, e.g., Riddle v. State Highway Comm'n, 184 Kan. 603, 339 P.2d 301 (1959) (loss ranging between $5,000 and $25,000); Pennysavers Oil Co. v. Texas, 334 S.W.2d 546 (Tex. Civ. App. 1960) (economic ruin for gasoline service station).

108. See State Highway Comm'n v. Humphreys, 58 S.W.2d 144 (Tex. Civ. App. 1933); State v. Peterson, Mont. , 328 P.2d 617

(1958); Netherton, Control of Highway Access 56-57 (1963); Gibbes, Control of Highway Access, 12 So. Car. L. Q. 377, 397-98 (1960). As the California Supreme Court has suggested, it would be unreasonable for the roadside businessman to assume that he had any legal right to a changeless highway in a changeless world. Holloway v. Purcell, 35 Cal. 2d 220, 217 P.2d 665, 671-72 (1950), cert. denied, 340 U.S. 883 (1950).

109. See Bacich v. Board of Control, 23 Cal. 2d 343, 356, 144 P.2d 818, 826 (1943) (Edmonds, J., concurring); Note, 38 So. Calif. L. Rev. 689, 690-91 (1965).

110. The difficulty of identifying a reliable causal relationship between traffic diversion and loss of business profitability appears to be recognized as a supporting reason for the usual rule of noncompensability. See 4 P. Nichols, Eminent Domain, § 14.1 [1], pp. 476-91 (rev. 3d ed. 1962). Moreover, claims by individual property owners, relying on diminished profitability of existing

business operations, may not reflect accurately the impact of freeway construction upon adjacent land values. Competent studies suggest that long-term enhancement of value is the more usual by-product of such projects. Hess, The Influence of Modern Transportation on Values -- Freeways, Assessors J. 26 (Dec. 1965); Calif. Dept. of Public Works, Division of Highways, California Land Economic Studies (process, no date) (collected reprints of various land economic studies between 1949 and 1962); Kelly, Industry and Frontage Roads, 33 California Highways and Public Works 19 (July-Aug. 1954). A national survey of such land economic studies concluded that "owners of property adjacent to improved highways generally benefit greatly in terms of land value gains", particularly when a change of land use is brought about; nevertheless, "In many cases . . . it is difficult to know just who benefits from highway changes and to determine the extent of these benefits." U. S. Dept. of Commerce, Bureau of Public Roads, Highways and Economic and Social Changes 47 (1964).

111. Holloway v. Purcell, *supra* note 109. The task of drafting a statute along these lines would encounter formidable definitional problems, since there is no clearly discernible line between diversion of traffic and diminution of access. *Cf.* People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943) (distinguishing between noncompensable traffic diversion and compensable change in highway location in relation to claimant's land); People ex rel. Dept. of Public Wks. v. Guimarra Vineyards Corp., 245 Cal. App. 2d 309, 53 Cal. Rptr. 902 (1966) (loss of direct access to through highway held compensable; evidence related, in part, to economic consequences of traffic diversion); People v. Sayig, 101 Cal. App. 2d 890, 226 P.2d 702 (1951) (divided highway case; court recognizes close analogy to restricted access cases, but applies "police power" rationale to support denial of compensation for resulting traffic diversion).

112. See, generally, Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80

Harv. L. Rev. 1165 (1967); Hetherton, Implementation of Land Use Policy: Police Power v. Eminent Domain, 3 Univ. Wyo. Land & Water L. Rev. 33 (1968). _Cf_. Calabresi, The Decision for Accidents: An Approach to Nonfault Allocation of Costs, 78 Harv. L. Rev. 713 (1965).

113. See text accompanying notes 26-32, _supra_.

114. Inverse condemnation policy has consistently emphasized the goal of avoidance of unfair distribution of the burdens of public improvements. See Albers v. County of Los Angeles, 62 Cal. 2d 250, 42 Cal. Rptr. 89, 398 p.2d 129 (1965); authorities cited _supra_, note 112.

115. The federal-aid highway program includes provision for relocation assistance for persons displaced by highway projects. See Federal Aid Highway Act of 1968, 82 Stat. 830 (1968), 23 U.S.C.A. §§ 501-11 (Supp. 1969). This relocation program, which authorizes compensation

beyond constitutional requirements, appears to be based primarily upon a legislative concern for the economic and social disruptions likely to accompany major public improvement programs. See Senate Public Works Comm., 90th Cong., 2d Sess., Report No. 1340 (1968), 3 U.S. Code Cong. & Admin. News 3482, 3487-89 (1968); Staff of House Comm. on Public Works, 88th Cong., 2d Sess., Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs (Comm. Print 1964). California's matching relocation program, Cal. Sts. & Hwys. C. §§ 103.8, 103.9, 135.1, 135.2, has long emphasized the need to minimize social and economic costs of highway acquisitions through careful planning and timing of projects. See Hess, Relocation of People and Homes from Freeway Rights-of-Way: Community Effects, 28 The Residential Appraiser 3 (April 1962). A practical consequence is the probably reduction in over-all costs of right-of-way acquisition due to enhanced goodwill and reduced litigation. Waite, Property and Just Compensation, 1969 Urban Law Annual 43, 96. The existing programs, however, do not appear to extend their benefits to nearby properties in the absence of a taking.

116. See Mass. Laws Ann., ch. 80, § 3 (1964), authorizing owner of land abutting a public improvement, and assessed for its cost, to surrender it to the public entity, in lieu of payment of the assessment, and recoup its value. The public entity is authorized to sell the property, after surrender, in whole or in part.

117. See, generally, Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L. J. 431, 512-16 (1969), for a similar suggestion in related context.

118. See, e.g., State v. Wheeler, 148 Mont. 246, 419 P.2d 492 (1966) (underpass beneath highway ordered constructed in lieu of payment of full severance damages for bisecting of unitary ranch by highway).

119. The possible inadequacy of severance damages based on valuation comparisons has been relied upon to support the relevancy of evidence as to the cost of remedial measures. See Dunbar v. Humboldt Bay Mun. Water Dist., 254 Cal. App. 2d 480, 62 Cal. Rptr. 358 (1967)

(cost of bridging stream to connect recreational land access to which had been destroyed by augmentation of stream flow); Bernard v. State, 127 So. 2d 774 (La. 1961) (cost of constructing new bridge to restore access destroyed by enlargement of drainage canal). See, generally, 4 P. Nichols, Eminent Domain, § 14.22, pp. 520-28 (rev. 3d ed. 1962). Physical restoration by the public entity also provides greater assurance that community resources will be employed for their optimum use, since it deprives the owner of the option of pocketing a monetary award based on cost-to-cure, without devoting it to actual restoration or remedial work.

120. See, e.g., Mississippi State Highway Comm'n v. Spencer, 233 Miss. 155, 101 So.2d 499 (1958) (state given option to build bridge or pay compensation); Buxel v. King County, 60 Wash. 2d 404, 374 P.2d 250 (1962) (city given alternative between construction of drainage facilities or payment of compensation); cf. Harrisonville v. W. S. Dickey Clay Mfg. Co., 289 U.S. 334, 339-41 (1933) (Brandeis, J.) (injunction against sewage nuisance conditioned on failure of city to pay damages).

121. Condemnation of additional land, outside the confines of the injured owner's boundaries and not needed for the basic public improvement work, may be necessary in order to provide an adequate physical solution. This might be the case, for example, where a substitute access road or a new bridge would substantially mitigate the owner's loss. Notes 118-120, <u>supra</u>. Comprehensive power of excess condemnation, where limited to the purpose of implementing a physical solution which would reduce the economic costs of the public project by mitigating severance or consequential damages, would be fully within legislative authority to bestow. People ex rel. Dept. of Public Wks. v. Superior Court, 68 Cal. 2d 206, 65 Cal. Rptr. 342, 436 P.2d 342 (1968) (holding Cal. Sts. & Hwys. C. § 104.1 valid as for a public purpose). See, generally, Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L. J. 571 (1969).

122. See, generally, Note, Restoration Costs as an Alternative Measure of Severance Damages in Eminent Domain Proceedings, 20 Hastings