

#36.40

9/26/69

Memorandum 69-115

Subject: Study 36.40 - Condemnation Law and Procedure (Excess Condemnation--
Physical and Financial Remnants)

At the September meeting, the Commission resolved to abandon our previous attempt to specify the ratio of damages to value that must exist to justify a "remnant-elimination" taking. Accordingly, the approach of providing a post-verdict determination of the issue, with or without options to either party, was also abandoned.

The staff was directed to prepare a draft to (1) authorize the voluntary acquisition of remnants whenever severance or other damages will result and (2) clarify and make generally applicable the standard and procedure contemplated in the Rodoni decision to permit the taking of (a) true "physical" remnants and (b) "financial" remnants whenever the court determines (if the issue is raised), as a preliminary matter, that there is a "substantial risk" that the severance or other damages will be "substantially equivalent" to the value of that remnant.

Attached is a draft that would accomplish this purpose. You should pay particular attention to the proposed new Section 1266.1 of the Code of Civil Procedure and the Comment to that section. The "test" and procedure provided in that section almost assuredly will not be acceptable to the major condemning agencies for several reasons: e.g., (1) there is a preference for a "total-take-and-excess-land disposition" system to a "severance-damage" system; (2) severance damages are the "open-ended" financial exposure in land acquisition programs; (3) the agencies believe that the property owner should be put to some sort of realistic "election" in his contentions as to the condition and value of the remainder; (4) they read the Rodoni case expansively, and so on and so forth.

The only thought that occurs to the staff as to a means of making the "substantially equivalent" test less unacceptable to condemnors would be to contrive a procedure that would require the owner to commit himself in his contention as to the "after value" of the remainder. This might be as simple as making any evidence presented by him on the right-to-take issue admissible as an admission in the valuation trial.

As a matter of interest on this topic, there is attached a copy of a very recent decision (after Rodoni) by the Montana Supreme Court that deals with a statute identical to Section 104.1 of the Streets and Highways Code, except that one term is "of little market value," rather than "of little value to its owner." The idea seemingly set forth in the Montana decision--that no readily usable or generally marketable piece of property is a remnant--has been worked into proposed new Section 1266.1 of the Code of Civil Procedure and the Comment to that Section.

Respectfully submitted

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JOHN C. HARRISON, Justice.

The appellant State Highway Commission brings this appeal from a preliminary order of condemnation by the district court of the thirteenth judicial district limiting the amount of property sought to be appropriated by the State.

The real issue raised is whether under section 32-3905, R.C.M.1947, the Highway Commission can acquire entire parcels or is it restricted to that which is "public use". The question before us is one of first impression in this Court.

Section 32-3905, R.C.M.1947, reads as follows:

"Acquisition of whole parcel—sale of excess. (1) Whenever any interest in a part of a parcel of land or other real property is to be acquired for highways purposes, leaving the remainder in such shape or condition as to be of little market value, or to give rise to claims or litigation over severance or other damage, the commission may acquire the whole parcel. It may sell or exchange the remainder for other property needed for highway purposes.

"(2) Whenever a part of a parcel of land acquired for highway purposes is in such a shape or size as to come within the provisions of section 11-614, the commission shall prepare and file the required plat in the office of the county clerk and recorder."

Judge Luedke described the property as follows:

"This is an action in which the Highway Commission seeks to acquire land to accomplish the rounding-off of the southwest corner of the intersection of First Avenue South and South 27th Street in Billings, Montana. The purpose is to provide greater and safer turning areas for heavy truck traffic. Defendants are the owners of the three lots which comprise this corner and on which are located a welding shop (having second-floor apart-

ments), an office and a separate apartment building. The rear of the three lots is bounded by a public alley and some portions of two of the lots are utilized for private parking with the alley available as a mode of access thereto. Rounding-off the corner will necessitate cutting through a portion of the welding shop and the office and will bring the right-of-way line so close to the apartment house as to leave very little setback from the highway. The structural nature of the welding shop building is such that the arc of the cut through the side walls will eliminate the entire front and one-half of one side of the building and require such extensive rebuilding as to almost be the equivalent of building a new structure. Even with that accomplished, the reduced size of the building and the loss of the front entrance thereto will render it unsuitable for the same use to which it is now being put. The same result may also exist as to the separate apartment house because the closer proximity of the highway to the building could destroy its desirability for residential habitation."

The total area within the 3 lots was 10,500 square feet. The area actually needed by the Highway Commission to round off the corner came to 1,052 square feet leaving 9,448 square feet in the remainder. The remainder is therefore almost nine times the size of the actual taking. It is to this taking that the respondent objects, stating that if for no other purpose the land had "a sentimental value" to him.

The trial judge found that in the preliminary order of condemnation the taking was to be limited to that portion of the property actually needed for the proposed highway improvement.

The State Highway Commission in its appeal sets forth 3 issues for review:

1. The constitutionality of section 32-3905, R.C.M.1947.
2. The scope of review by the trial court of the Commission's resolution of taking.
3. That the preliminary order of the trial court limiting the amount of appropri-

tion to that actually required for the construction of the city street improvements is not supported by the evidence; that a preponderance of the evidence at the hearing on the preliminary order of condemnation supports the entire taking of the whole ownership, a part of which is a financial remnant of such condition so as to be of little market value and give rise to claims over severance or other damages.

In view of the trial court's well reasoned memorandum enlightening this Court on how he arrived at his decision, we will consider first the appellant's third issue. As noted by the appellant only four witnesses testified at the hearing, one for Mr. Chapman and three for the State, one of which was Mr. Chapman. In reviewing the evidence introduced at the hearing and subsequently set forth in the trial judge's memorandum opinion, we are at a loss to understand what more evidence could have been introduced. The only disagreement was the question raised concerning how the taking affected the separate apartment house. The Highway appraiser-negotiator's opinion was to the effect that the separate apartment house would remain intact and not be depreciated by the construction, while Mr. Chapman's view was to the contrary.

The appellant relies upon a recent California opinion where a like statute was upheld—*People ex rel. Department of Public Works v. Superior Court of Merced County*, 65 Cal.Rptr. 342, 436 P.2d 342. In considering this case it should be noted, as did the trial court, that there is a difference in the two statutes in that the California statute requires the remainder to be left be "of little value to its owner" while the Montana statute provides that the remainder be "of little market value". In asking this Court to follow the California court in the Merced County case, *supra*, the appellant argues that we should adopt the "financial remnant theory" and declare that "public use" and "public interest" are synonymous at the judicial review stage when the Commission's action on necessity is under consideration.

The language of the Montana constitution which is concerned here reads as follows:

"Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner". Art. III, Sec. 14.

[1] This provision of our constitution is recognized as the restrictive power in condemnation in taking only for public use. See *Butte, A. & P. Ry. v. Montana U. Ry. Co.*, 16 Mont. 504, 41 P. 232, 31 L.R.A. 298; *Billings Sugar Co. v. Fish et al.*, 40 Mont. 256, 106 P. 565, 26 L.R.A., N.S., 973. As noted by the trial judge, Montana courts have not previously had occasion to declare the limits to which "public use" can be stretched in its application to the taking of lands in excess of that physically used for highway purposes.

[2] Three theories have been set forth by the jurisdictions supporting excess taking, these being "protective", "recoupment", and "remnant". 6 A.L.R.3d 311-318. Our statute section 32-3905(1), R.C.M.1947, provides for the taking of a whole parcel whenever condemnation of a part actually needed leaves the remainder in such a shape or condition, (a) to be of little market value, or (b) to give rise to claims or litigation over severance or other damage. The facts here do not apply to the law set forth in (a) because there is no physical remnant in the usual sense and there is not a showing of a total loss of value. (b) purports to authorize the taking where the taking of a part of the parcel would give rise to claims or litigation over severance or other damages thereby broadening the "remnant" theory and raising serious constitutional questions. The trial court noted "The possibilities of coercion which could result from this unbridled authority in bargaining for highway lands are both awesome and of doubtful validity".

[3] However, recognizing the problem created by the statute both the trial court and this Court recognize that the presump-

tion of validity attends every legislative enactment and all possible doubts are to be resolved in favor of validity with such construction given as will render them constitutional whenever possible.

The recent California case, *People ex rel. Department of Public Works v. Superior Court of Merced County*, supra, relied upon by the appellant upheld a similar constitutional and statutory provision on the basis of the "remnant" theory principles. The California court stated:

"There is no reason to restrict this theory [remnant theory] to the taking of parcels negligible in size and to refuse to apply it to parcels negligible in value."

However, there the taking landlocked an area many times the size of the taking, and in the opinion of the majority of that court making the separate parcel valueless due to the complete loss of accessibility. There the excess land was considered a "financial remnant" although not a physical one. There the cost of condemning the entire parcel was no greater than the taking of the part needed and paying damages for the remainder. The court set forth the guidelines for what is a proper and an improper application of the statute as follows:

"We also hold, however, that it [the lower court] must refuse to condemn the property if it finds the taking is not justified to avoid excessive severance or consequential damages".

Judge Luedke noted in his memorandum:

[4,5] "In the instant case, the excess land attempted to be taken is not landlocked by the taking of the portion actually needed. It is, therefore, distinguishable from the situation considered by the California decision. Assuming that the taking of the small parcel actually devoted to highway use totally destroys the land and existing improvements for their present use, the remaining land is not rendered valueless through nonaccessibility since alley access exists from the rear as well as pedestrian access from the front and side. Additionally, it is not conclusive that its present use

is the highest and best use attributable to the site. In the circumstances, and accepting the California decision as controlling, the facts in this case bring the land involved within the limitation prescribed by the California court as an improper application of the statute. With the excess land retaining value as a separate parcel, it is not that type of property which the Court can validly order to be condemned under the authority of Section 32-3905." We find no merit to the appellant's exception to the trial court's order.

[6,7] Concerning the second issue, the "scope of review" allowed the trial court under section 32-3905, R.C.M.1947, we find no merit to appellant's position that the trial court acted beyond its statutory powers. Relying on two recent cases of this Court—*State Highway Commission v. Crossen-Nissen Co.*, 145 Mont. 251, 400 P.2d 283, and *State by and through Highway Commission v. Danielsen*, 146 Mont. 539, 409 P.2d 443, the appellant contends there was a lack of clear and convincing proof showing an abuse of discretion or arbitrary action on the part of the Commission as set forth in these cases. We believe that what was said in *State Highway Commission v. Yost Farm Co.*, 142 Mont. 239, 384 P.2d 277, is controlling. There this Court said that under our statutes and case law on eminent domain, "the trial judge not only has the power to determine the question of necessity, but has been directed to make a finding that the public interest requires the taking of the lands before he has power to issue an order of condemnation."

[8] We agree with the California court's position as set forth in the case of *People ex rel. Department of Public Works v. Superior Court of Merced County* supra, that the issue of public use is a justiciable issue, and if the trial court determines that the excess condemnation is not justified it must find that it is not for public use.

[9,10] Having resolved the case within the provisions of the statute we do not deem it necessary to discuss the first issue.

It is conceded that the Act is presumed to be valid and its constitutionality will not be condemned unless its invalidity is shown beyond a reasonable doubt. The burden of proving its invalidity rests upon the one attacking the statute. No such an attack has been made here.

The preliminary order of condemnation made by the trial court is affirmed.

JAMES T. HARRISON, C. J., and
ADAIR, HASWELL and CASTLES, JJ.,
concur.

#36.40

Revised September 26, 1969

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION
TENTATIVE RECOMMENDATION

relating to

EXCESS CONDEMNATION--PHYSICAL AND FINANCIAL REMNANTS

PRELIMINARY STAFF DRAFT

CALIFORNIA LAW REVISION COMMISSION
School of Law
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WARNING: This tentative recommendation has been prepared by the staff of the Law Revision Commission to effectuate the Commission's tentative decision to revise the statutes relating to the acquisition of financial and physical remnants of parcels acquired by eminent domain. The draft has not been considered by the Commission and therefore may not reflect the views of the Commission.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. For the most part, the Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

EXCESS CONDEMNATION--PHYSICAL AND FINANCIAL REMNANTS

BACKGROUND

In the broadest sense, "excess condemnation" includes any taking of property that is not to be actually devoted to the particular public work or improvement for which property is being acquired. In the more narrow sense usually intended by courts and legal writers, the term refers only to the taking of property which the condemnor intends, at the time of the taking, eventually to sell or otherwise dispose of to private persons. Excess takings of this latter type are generally recognized to fall within one of three categories, depending upon the situation of the land and the purpose of the condemnor: (1) "protective" condemnation, (2) "remnant" condemnation, and (3) "recoupment" condemnation. In protective condemnation, the condemnor acts to protect the utility, safety, or beauty of a public improvement by taking adjacent land, sometimes for resale to private persons on condition that future owners refrain from deleterious uses of the property. In remnant condemnation, the condemnor needs only a portion of a parcel for the improvement, but takes the entire parcel to avoid leaving a useless remainder or the payment of severance damages. In recoupment condemnation, the condemnor takes land it considers to be "benefited" by the proposed improvement in an effort to recoup the value of such benefits through resale to private persons.

This recommendation relates only to the second of these categories: "remnant" or "remnant-elimination" condemnation. It does not deal with

"protective" condemnation as authorized in California by Section 14-1/2 of Article I of the Constitution and various statutory provisions. Neither does it consider the theory or practice of "recoupment" condemnation--an activity generally denounced as unconstitutional for lack of the requisite public use, benefit, or purpose.

The land actually needed for a public improvement often consists of only a portion of various individual parcels. This is most often the case where the location and physical extent of the project are determined by engineering and functional considerations. For example, condemnation of only the portions actually required for the construction of a new street or highway often would leave a string of relatively small, odd-shaped strips and wedges in private ownership. These "physical" remnants would be virtually useless in private hands; but, if the entire parcels were condemned, the condemnor could often consolidate the remnants and return them to private ownership in usable condition. Occasionally, remnants of appreciable size would be rendered economically useless if only the portion of the parcel needed for the public improvement were acquired. This situation arises, for example, where a large portion of a parcel is landlocked or waterlocked by a highway or water project. Condemnation of these "financial" remnants permits the condemnor to avoid having to pay severance damages substantially equal to market value and, at the same time, acquire substantially less than the entire parcel. Nonetheless, providing the proper scope and a means of implementing an appropriate authority to condemn such physical and financial remnants has not proven to be an easy matter for either courts

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or legislatures...

Generally speaking, California's condemnors with any substantial need therefor have been granted specific statutory authority to engage in remnant condemnation.² However, these statutes vary from agency to agency, often with little or no apparent reason for the difference.³ Nevertheless, all of these statutes clearly authorize takings of physical remnants and takings of this sort rarely cause the courts much difficulty.⁴

On the other hand, the California Supreme Court has recently recognized the authority to take remnants of appreciable size. In the recent case of People ex rel Dep't of Public Works v. Superior Court, commonly known

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1. The material presented here only highlights the most critical aspects of the relevant background. For a more complete presentation of this background, the reader is referred to the study--entitled "Excess Condemnation in California: Proposals for Statutory and Constitutional Change"--prepared for this purpose for the Commission by Michael J. Matheson. See also Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L.J. 571 (1969).
 2. E.g., Code Civ. Proc. § 1266 (city and county highway authorities); Sts. & Hwys. Code § 104.1 (Department of Public Works); Water Code § 254 (Department of Water Resources), § 43533 (water districts).
 3. For example, the remnant-condemnation authority of the following adjoining flood control and water districts varies with no apparent justification. Compare San Diego County (Water Code App. § 105-6(12)) and Orange County (Water Code App. § 36-16.1); Alameda County (Water Code App. § 55-28.1) and Santa Clara County (Water Code App. § 60-6.1).
 4. E.g., Kern County Union High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919); People v. Thomas, 108 Cal. App.2d 832, 239 P.2d 914 (1952).

as the Rodoni case, the California Supreme Court upheld a remnant taking for the single purpose of "avoid[ing] a substantial risk of excessive severance or consequential damages." The Department of Public Works condemned 0.65 acres of a parcel which exceeded 54 acres in size for the construction of a freeway through farmland in Madera County. In doing so, however, the Department had to cut across the only access road to the parcel, rendering it landlocked and presumably of little economic value. Fearing that it would have to pay severance damages for the remainder equal to its original market value, the Department sought to condemn the 54-acre remainder under Section 104.1 of the Streets and Highways Code. That section authorizes the taking of an entire parcel in the course of state highway construction whenever "the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage"

According to the majority opinion:

Although a parcel of 54 landlocked acres is not a physical remnant, it is a financial remnant: its value as a landlocked parcel is such that severance damages might equal its value There is no reason to restrict . . . [remnant takings to] parcels negligible in size and to refuse to apply it to parcels negligible in value.

In the present case the entire parcel can probably be condemned for little more than the cost of taking the part needed for the highway and paying damages for the remainder. It is sound economy for the state to take the entire parcel to minimize ultimate costs.

Under these circumstances excess condemnation is constitutional.

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5. Roy and Thelma Rodoni were owners of the parcels in question, and the initial stages of the litigation were conducted under their names. See People v. Rodoni, 243 Cal. App.2d 771, 52 Cal. Rptr. 857 (1966). When the Rodonis' contentions were upheld by the trial court, the condemnor petitioned for a writ of mandate ordering that court to proceed with the trial of the original complaint or in the alternative for a writ of prohibition forbidding the court from proceeding in accordance with its original order. People v. Superior Court, 68 Cal.2d 206, 210, 436 P.2d 342, 345, 65 Cal. Rptr. 342, 345 (1968).
 6. Id. at 212-213, 436 P.2d at 346-347, 65 Cal. Rptr. at 346-347.

The Rodoni decision necessitates substantial revision of California
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remnant-condemnation statutes. According to the court:

[These statutes] may reasonably be interpreted to authorize only those excess condemnations that are for valid public uses; namely, condemnation of remnants . . . [citations omitted] or condemnations that avoid a substantial risk of excessive severance or consequential damages.

Certain provisions of the statutes referred to appear clearly to violate the Rodoni constitutional standards, as where authority to take depends only
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on a mere assertion of severance damage claims or a mere showing of damage to the remainder.
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Other provisions appear to fall within the Rodoni criteria, as where the condemnor may take only remainders that are of little
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or no value to the owner or are in such damaged condition as to require
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payment of compensation equal to the value of the entire parcel, but may fall short of the full scope of remnant-condemnation powers now recognized by the California Supreme Court. In any case, all of these provisions are in need of revision to achieve uniformity and to eliminate purposeless differences among the powers of various condemnors.

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7. Id. at 212, 436 P.2d at 346, 65 Cal. Rptr. at 346.
 8. Sts. & Hwys. Code § 104.1 (Department of Public Works), § 943.1 (county highway authorities); Water Code § 254 (Department of Water Resources), § 8590.1 (Reclamation Board), § 11575.2 (Department of Water Resources), § 43533 (water districts).
 9. Water Code App. § 28-16 5/8 (Los Angeles County Flood Control District), § 36-16.1 (Orange County Flood Control District), § 48-9.2 (Riverside County Flood Control and Water Conservation District), § 49-6.1 (San Luis Obispo County Flood Control and Water Conservation District), § 51-3.4 (Santa Barbara County Water Agency), § 60-6.1 (Santa Clara County Flood Control and Water Conservation District), § 74-5(12.1) (Santa Barbara County Flood Control and Water Conservation District); see also Water Code App. § 28-16 3/4 (Los Angeles County Flood Control District).
 10. Sts. & Hwys. Code § 104.1 (Department of Public Works), § 943.1 (county highway authorities); Water Code § 254 (Department of Water Resources), § 8590.1 (Reclamation Board), § 11575.2 (Department of Water Resources), § 43533 (water districts).
 11. Code Civ. Proc. § 1266 (city and county highway authorities); Water Code App. § 105-6(12) (San Diego County Flood Control District).

In the Rodoni decision, the Court explicitly recognized the two problems that have most often been thought to inhere in a broad authority to engage in remnant-elimination condemnation: (1) the possibility that the power will be used coercively by the condemnor in all partial taking cases and (2) the sub rosa opportunity afforded condemning agencies to engage in "recoupment" condemnation and, in effect, in land speculation. With respect to the first matter, the court concluded:

We also hold, however, that it [the trial court] must refuse to condemn the property if it finds that the taking is not justified to avoid excessive severance or consequential damages. The latter holding will assure that any excess taking will be for a public use and preclude the department from using the power of excess condemnation as a weapon to secure favorable settlements.

The Court dismissed the question of "recoupment" as follows:

Nor does section 104.1 authorize excess condemnation for recoupment purposes, as the term is used in those cases that disfavor it. The statute does not authorize the state to condemn for the sole purpose of taking lands enhanced by the improvement in order to recoup that increase in value or for the sole purpose of developing the area adjacent to the improvement for a profit. [Citation omitted.] The department's purpose is to avoid the windfall to the condemnee and the substantial loss to the state that results when severance damages to a severed parcel are equal to its value.

RECOMMENDATION

The authority to acquire physical or financial remnants can be of substantial benefit both to public entities and their taxpaying citizens and to the owners of such property. The Commission concludes, therefore, that public entities should be given such authority but that a procedure should be provided to assure that the authority will not be abused. Accordingly, the Commission recommends:

1. Uniform statutory provisions, covering all public entities, should be enacted to replace the numerous and diverse statutes that now provide specific authority to engage in remnant condemnation. Both the number and diversity of these statutes lack any justification. There appears to be no need to include nongovernmental condemnors (essentially public utilities). Most of their takings are not of fee interests and they would have no advantage over other owners in disposing of the remnants.

2. Public entities should be given express statutory authority to acquire, by voluntary transactions, and to dispose of both physical and financial remnants and to credit the proceeds therefrom to the fund available for the acquisition of property being acquired for the public project. Inasmuch as this authority would only permit voluntary acquisitions, it could hardly be detrimental to either side. On the contrary, it could substantially benefit both the public entity and the property owner. The process of appraising, negotiating, and--if necessary--litigating the elements of severance damage in a partial taking case often proves considerably more difficult and costly than determining and paying the fair market value of the entire parcel. Authority to acquire the entire parcel permits both sides to avoid this expense. In addition, this authority will be of assistance in cases where the property owner otherwise would be left with property for

which he has no use and would himself have to bear the cost of disposition of the property.

3. A public entity should be authorized to condemn the remainder, or a portion of the remainder, of a larger parcel of property if it is a true physical remnant or if the taking poses a substantial risk that the entity will be required to pay in compensation an amount substantially equivalent to the value of the entire parcel. The Rodoni opinion held that "condemnations that avoid a substantial risk of excessive severance or consequential damages may constitutionally be authorized." However, it is difficult to determine what the court meant to include within the term "excessive severance or consequential damage." The Court seemed to make clear that total parcel takings are not justified merely (1) to avoid the cost and inconvenience of litigating damages; (2) to preclude the payment of damages, including damages substantial in amount, in appropriate cases; (3) to guard against the mere possibility that the determination of values, damages, or benefits will "miscarry"; or (4) to afford to the condemnor an opportunity to "recoup" damages or unrecognized benefits by speculating as to the future market for the property. The statutory test should make it clear that, in general, a usable and generally saleable piece of property is neither a physical nor financial remnant even though its "highest and best use" has been downgraded by its severance or a controversy exists as to its best use or value after severance. However, if it is totally landlocked, reduced beneath minimum zoning size, rendered unusable for any of its plausible applications, or made to be of significant value to only one or a few persons (e.g., adjoining landowners), it should be considered a "remnant" irrespective of its size.

4. The resolution, ordinance, or declaration authorizing the taking of a remainder, or portion of a remainder, should be given the effect of a

presumption affecting the burden of producing evidence (Evidence Code Sections 603, 604). The basic burden of proof as to the facts that bring the case within the ambit of the authority should be left with the plaintiff (i.e., the condemnor).

5. The condemnee should be permitted to contest the "excess" taking upon the grounds that the condemnor has a reasonable and economically feasible means of avoiding the leaving of a remnant that is either unusable or value-¹²less. If the court should find that such a practicable "physical solution" is available, the remainder, or portion of the remainder, sought to be taken should be deleted from the proceeding.

6. Finally, existing procedures should be clarified by specifying that either party may obtain a resolution of the right-to-take issue in excess takings before the valuation trial, and that the trial court may invoke that procedure on its own motion.

12. For example, condemnees should be permitted to avoid the taking of the entire parcel where the condemnor, through the taking of access easements or the construction of access roads or structures, could economically reduce or eliminate the damage to the remainder. The condemnation of property by a public agency to provide access to a parcel landlocked by its own project would be a valid taking for a public use, and separate proposals have been prepared to make California's statutory authority for such takings explicit and uniform. See Tentative Recommendation Relating to Condemnation Law and Procedure: The Right to Take (Byroads), 9 Cal. L. Revision Comm'n Reports 000 (1969).

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by the enactment of the following legislation:

An act to add Sections 1225, 1226, 1266, and 1266.1 to, and to repeal Sections 1266 and 1266.1 of the Code of Civil Procedure, to repeal Sections 104.1 and 943.1 of the Streets and Highways Code, to repeal Sections 254, 8590.1, 11575.2, and 43533 of the Water Code, to repeal Sections 28-16 5/8, 28-16 3/4, 36-16.1, and 48-9.2 of, to amend Sections 49-6.1 and 51-3.4 of, to repeal Sections 55-28.1 and 60-6.1 of, and to amend Sections 74-5 and 105-6 of, the Water Code Appendix, relating to the acquisition of property for public use.

The people of the State of California do enact as follows:

Code Civ. Proc. § 1225 (new). "Public entity" defined

Section 1. Section 1225 is added to the Code of Civil Procedure, to read:

1225. As used in this title, "public entity" includes the state, the Regents of the University of California, a county, city, district, public authority, public agency, or any other political subdivision or entity in the state.

Comment. For a comparable definition of "public entity," see Section 811.2 of the Government Code. The definition in this section is provided for convenience in distinguishing governmental from nongovernmental condemnors; it does not enlarge or diminish the power of condemnation of any condemnor.

Code Civ. Proc. § 1226 (new). "larger parcel" defined

Sec. 2. Section 1226 is added to the Code of Civil Procedure,
to read:

(To be drafted later)

[Comment. As used in Sections 1266 and 1266.1, "larger parcel" has the same meaning as those words in Section 1248 and the decisional law construing that term. See People v. Ocean Shore R.R., 32 Cal.2d 406, 196 P.2d 570, 6 A.L.R.2d 1179 (1948); People v. Nyrin, 265 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967).]

Code Civ. Proc. § 1266 (repealed)

Sec. 3. Section 1266 of the Code of Civil Procedure is repealed.

~~1266.--Whenever land is to be condemned by a county or city for the establishment of any street or highway, including express highways and freeways, and the taking of a part of a parcel of land by such condemning authority would leave the remainder thereof in such size or shape or condition as to require such condemnor to pay in compensation for the taking of such part an amount equal to the fair and reasonable value of the whole parcel, the resolution of the governing body of the city or county may provide for the taking of the whole of such parcel and upon the adoption of any such resolution it shall be deemed necessary for the public use, benefit, safety, economy, and general welfare that such condemning authority acquire the whole of such parcel.~~

Comment. Repealed Section 1266 is superseded by new Section 1266.1.

Code Civ. Proc. § 1266 (new). Voluntary acquisition of physical or financial remnants

Sec. 4. Section 1266 is added to the Code of Civil Procedure, to read:

1266. Whenever a part of a larger parcel of property is to be acquired by a public entity for public use and the remainder, or a portion of the remainder, will be left in such size, shape, or condition as to be of little value to its owner or to give rise to a claim for severance or other damages, the public entity may acquire the remainder, or portion of the remainder, by any means other than condemnation proceedings. Subject to any applicable limitations imposed by law, the public entity may sell, lease, exchange, or otherwise dispose of the property so acquired and credit the proceeds from such disposition to the fund or funds available for acquisition of the property being acquired for the public work or improvement.

Comment. Section 1266 provides a broad authorization for public entities to acquire, by voluntary transactions, physical or "financial" remnants, to dispose of them, and to credit the proceeds to the fund available for acquisition of the property being acquired for public use. Compare Section 1266.1 and the Comment to that section relating to the condemnation of remnants. The language of the section is similar to that contained in former Sections 104.1 and 943.1 of the Streets and Highways Code and Sections 254, 8590.1, 11575.2, and 43533 of the Water Code (all repealed in this recommendation). Inasmuch as exercise of the authority conferred by this section depends upon the consent and concurrence of the

property owner, the language of the section is broadly drawn to authorize acquisition whenever the remnant would have little value to its owner (rather than little market value or value to another owner) or would give rise to a "claim" for "damages" (rather than raise a "substantial risk" that the entity will be required to pay an amount substantially equivalent to the amount that would be required to be paid for the entire parcel). Compare Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App.2d 762, 304 P.2d 803 (1956). This section does not specify the procedure to be followed by the entity in disposing of the property so acquired, and that matter is left to be governed by other statutory provisions applicable to the particular entity. In particular, this section does not require that disposition be in accordance with the procedure specified by Government Code Sections 193-196 for the disposition of property acquired for "protective" purposes pursuant to Section 14 1/2 of Article I of the California Constitution and Sections 190-196 of the Government Code.

Code Civ. Proc. § 1266.1 (repealed)

Sec. 5. Section 1266.1 of the Code of Civil Procedure is repealed.

~~1266.1.--A-county-or-a-city-may-acquire-land-by-gift-or-purchase
from-the-owner-thereof-for-any-of-the-purposes-enumerated-in-Section
1266-of-this-code.~~

Comment. Repealed Section 1266.1 is superseded by new Section 1266.

§ 1266.1

Code Civ. Proc. § 1266.1 (new). Condemnation of physical or financial
remnants

Sec. 6. Section 1266.1 is added to the Code of Civil Procedure,
to read:

1266.1. (a) Whenever a part of a larger parcel of property is
to be taken by a public entity through condemnation proceedings
and the remainder, or a portion of the remainder, will be left in
such size, shape, or condition as to be of little market value or
to give rise to a substantial risk that the entity will be required
to pay in compensation an amount substantially equivalent to the
amount that would be required to be paid for the entire parcel, the
entity may take such remainder, or portion of the remainder, in
accordance with this section.

(b) The resolution, ordinance, or declaration authorizing the
taking of a remainder, or a portion of a remainder, under this sec-
tion shall specifically refer to this section. It shall be presumed
from the adoption of the resolution, ordinance, or declaration that
the taking of the remainder, or portion of the remainder, is justified
under this section. This presumption is a presumption affecting the
burden of producing evidence.

(c) If the condemnee desires to contest the taking under this
section, he shall specifically raise the issue in his answer and,
if he does not do so, he waives his right to contest the taking under
this section. The court may, and upon motion of either condemnor or
condemnee shall, determine whether the remainder, or portion of the
remainder, may be taken under this section before trial of the issue

§ 1266.1

of compensation. Upon trial of the issue of compensation, no reference shall be made to the resolution, ordinance, or declaration adopted to invoke this section. The contentions of the condemnee, and the evidence he presents in support of his contention, that the taking is not justified under this section are admissible against him as admissions in the trial on the issue of compensation.

(d) The court shall not permit a taking under this section if the condemnee proves that the public entity has a reasonable, practicable, and economically feasible means of avoiding or substantially reducing the damages that might cause the taking of the remainder, or portion of the remainder, to be justified under subdivision (a). If the court's determination is in favor of the condemnee, the remainder, or portion of the remainder, shall be deleted from the proceeding.

(e) Nothing in this section affects (1) the privilege of the entity to abandon the proceeding or abandon the proceeding as to particular property, or (2) the consequence of any such abandonment.

(f) Subject to any applicable limitations imposed by law, a public entity may sell, lease, exchange, or otherwise dispose of property taken under this section or acquired by purchase in lieu of proceedings under this section and may credit the proceeds to the fund or funds available for acquisition of the property being acquired for the public work or improvement.

Comment. Section 1266.1 provides a uniform standard and a uniform procedure for determining whether property may be taken to eliminate

§ 1266.1

physical and financial "remnants." With respect to physical remnants, see Kern County High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919); People v. Thomas, 108 Cal. App.2d 832, 239 P.2d 914 (1915). As to the concept of "financial remnants," see Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); People v. Jarvis, 274 Adv. Cal. App. 243, Cal. Rptr. (1969); People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967); La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App.2d 762, 304 P.2d 803 (1956). See generally Recommendation Relating to Condemnation Law and Procedure: Number 00, Excess Condemnation--Physical and Financial Remnants, Cal. L. Revision Comm'n Reports 000 (19); 2 Nichols, Eminent Domain § 7.5122 (3d ed. 1963); Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L. J. 571 (1969); Matheson, Excess Condemnation in California: Proposals for Statutory and Constitutional Change, So. Cal. L. Rev. (1969). This section supersedes Section 1266 of the Code of Civil Procedure, Sections 104.1 and 943.1 of the Streets and Highways Code, Sections 254, 8590.1, 11575.2, and 43533 of the Water Code, and various sections of special district laws. It does not supersede or affect various provisions made for "protective" condemnation, including Section 14 1/2 of Article I of the California Constitution and Sections 190-196 of the Government Code.

Subdivision (a). Definitions of "public entity" and "larger parcel" are provided by Sections 1225 and 1226 (added in this recommendation), respectively. The term "portion of the remainder" is used in various subdivisions of this section to allow for the case in which a taking

affecting a parcel leaves more than one remnant (e.g., the complete severance of a ranch by a highway). In certain cases, the taking of only one remnant (i.e., "a portion of the remainder") might be justified. The term does not mean or refer to artificially contrived "zones" of damage or benefit sometimes used in appraisers' analyses.

Subdivision (a) undertakes to provide a common sense rule to be applied by the court in determining whether physical remnants (those of "little market value") or financial remnants (those raising a "substantial risk" that assessed damages will be "substantially equivalent" to value) may be taken. The test is essentially that stated as a matter of constitutional law in Dep't of Public Works v. Superior Court, supra, except that the confusing concept of "excessive" damages is not used and "sound economy" alone, or an estimate as to "sound economy" on the part of the condemnor, is not made a basis for total-parcel takings. As the Supreme Court made clear in that decision, such takings are not justified (1) to avoid the cost and inconvenience of litigating damages; (2) to preclude the payment of damages, including damages substantial in amount in appropriate cases; (3) to guard against the mere possibility that the determination of values, damages, and benefits will "miscarry"; or (4) to afford the condemnor an opportunity to "recoup" damages or unrecognized benefits by speculating as to the future market for the property not actually devoted to the public work or improvement. In general, a usable and generally salable piece of property is neither a physical nor financial remnant even though its "highest and best use" has been downgraded by its severance or a serious controversy exists as to its best use or value after severance. See, e.g., La Mesa v. Tweed & Gambrell Planting Mill, supra; State Highway Commission v. Chapman, 446 P.2d 709 (Mont. 1968). However, if

§ 1266.1

it is totally "landlocked," reduced beneath minimum zoning size, rendered unusable for any of its plausible applications, or made to be of significant value to only one or a few persons (e.g., adjoining landowners), it is a "remnant" irrespective of its size. See, e.g., Dept. of Public Works v. Superior Court, supra; State v. Buck, 226 A.2d 840 (N.J., 1968). The test provided by subdivision (a) is the objective one of marketability and market value generally of the remainder, rather than "value to its owner" as specified in Section 1266 (which authorizes the purchase of remnants) and certain superseded provisions such as former Section 104.1 of the Streets and Highways Code. See State Highway Commission v. Chapman, supra. The term "substantial risk" and the concept of "substantial" equivalence of damages and value are taken directly from Dep't of Public Works v. Superior Court, supra. Obviously, those general terms are only guides to the exercise of judgment on the part of the court. They are intended to serve as such, rather than to indicate with precision the requisite range of probability or the closeness of arithmetical amounts.

Subdivision (b). Although this subdivision requires a specific reference to Section 1266.1 as the statutory basis for the proposed taking, it does not require either the recitation or the pleading of the facts that may bring the case within the purview of the section. See People v. Jarvis, supra. The resolution (or ordinance or declaration) is given the effect of raising a presumption that the taking is justified under this section. Thus, in the absence of a contest of that issue, the subdivision permits a finding and judgment that the remainder be taken. However, the presumption is specified to be one affecting the

burden of producing evidence (see Evidence Code Sections 603, 604), rather than one affecting the burden of proof (see Evidence Code Sections 605, 606). Accordingly, the burden of proving the facts that bring the case within the section is left with the plaintiff (i.e., the condemnor). See People v. Van Garden, 226 Cal. App.2d 634, 38 Cal. Rptr. 265 (1964); People v. O'Connell Bros., 204 Cal. App. 34, 21 Cal. Rptr. 890 (1962).

In this respect, the subdivision eliminates any greater effect that might be attributed to the resolution (compare People v. Chevalier, 52 Cal.2d 299, 340 P.2d 603 (1959)) or that might be drawn from a legislative (see Los Angeles County v. Anthony, 224 Cal. App.2d 103, 36 Cal. Rptr. 308 (1964)) or administrative (see San Mateo County v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960)) determination or declaration as to "public use."

Subdivision (c). Remnant-elimination condemnation inevitably raises the problem of requiring both condemnor and condemnee to assume one position as to the right-to-take issue and an opposing position in the valuation trial. Thus, to defeat the taking, the property owner logically contends that the remainder is usable and valuable, but to obtain maximum severance damages, his contention is the converse. To sustain the taking, the condemnor emphasizes the severity of the damage to the remainder, but if the right-to-take issue is lost, its position in the partial-taking valuation trial is reversed. Under decisional law, the right-to-take issue as to remnants has been disposed of at various stages. See, e.g., Dep't of Public Works v. Superior Court, supra (mandamus as to preliminary adverse decision by trial court); People v. Nyrin, supra (appeal from condemnation judgment as to post-verdict motion to delete remnant);

§ 1266.1

People v. Jarvis, supra (appeal from condemnation judgment as to belated pre-trial motion to add remnant); La Mesa v. Tweed & Gambrell Planing Mill, supra (appeal from condemnation judgment following a valuation trial apparently based on an alternative of partial or total taking). To obviate this procedural confusion and jousting, subdivision (c) makes clear that either party is entitled to demand determination of the right-to-take issue before the valuation trial and permits the court to employ that procedure whether or not it is demanded. The subdivision makes no change in existing law as to the appellate remedies (appeal from final judgment of condemnation, prohibition, mandamus) that may be available as to the trial court's determination. However, the subdivision does not contemplate that results of the valuation trial as to values, damages, or benefits may be invoked either in post-verdict proceedings in the trial court or on appeal to disparage a determination of the right-to-take issue made before the valuation trial. Such a determination is necessarily based on matters made to appear at the time it is made and it should be judged accordingly. The subdivision also forbids reference in the valuation trial to the resolution to take under this section. For a somewhat analogous provision, see Section 1243.5(e)(amount deposited or withdrawn in immediate possession cases).

Subdivision (d). This subdivision permits the condemnee to contest a taking under this section upon the grounds that a "physical solution" could be provided by the condemnor as an alternative to either a total taking or a partial taking that would leave an unusable or unmarketable

§ 1266.1

remainder. In at least a few cases, the condemnee may be able to demonstrate that, given construction of the public improvement in the manner proposed, the public entity is able to provide substitute access or take other steps that would be feasible under the circumstances of the particular case. If he can do so, subdivision (d) prevents acquisition of the remainder.

Subdivision (e). Subdivision (e) makes clear that the procedure provided by this section has no bearing upon the privilege to abandon or the consequences of abandonment. The subdivision makes no change in existing law. See Section 1255a and People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967).

Subdivision (f). This subdivision authorizes the entity to dispose of property acquired under this section or acquired in lieu of such proceedings. However, it does not specify or provide the procedure to be followed. Accordingly, such procedure is left to be governed by statutory provisions applicable to the particular entity or agency.

§ 104.1

Sec. 7. Section 104.1 of the Streets and Highways Code is repealed.

~~104.1. --Wherever a part of a parcel of land is to be taken for state highway purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for state highway purposes.~~

§ 943.1

Sec. 8. Section 943.1 of the Streets and Highways Code is repealed.

~~943.1.--Whenever a part of a parcel of land is to be taken for county-highway purposes and the remainder of such parcel is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damages, the county may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for county-highway purposes.~~

§ 254

Sec. 9. Section 254 of the Water Code is repealed.

~~254.--Whenever-a-part-of-a-parcel-of-land-is-to-be-taken-for
state-dam-or-water-purposes-and-the-remainder-is-to-be-left-in-such
shape-or-condition-as-to-be-of-little-value-to-its-owner,-or-to
give-rise-to-claims-or-litigation-concerning-severance-or-ether
damage,-the-department-may-acquire-the-whole-parcel-and-may-sell
the-remainder-or-may-exchange-the-same-for-ether-property-needed
for-state-dam-or-water-purposes.~~

Sec. 10. Section 8590.1 of the Water Code is repealed.

~~8590.1.--Wherever a part of a parcel of land is to be taken for purposes as set forth in Section 8590 of this code and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the board may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for purposes as set forth in Section 8590 of this code.~~

Sec. 11. Section 11575.2 of the Water Code is repealed.

~~11575.2.--Whenever a part of a parcel of land is to be taken for state water development purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and shall sell the remainder or shall exchange the same for other property needed for state water development purposes.~~

Sec.12. Section 43533 of the Water Code is repealed.

~~43533---Whenever-a-part-of-a-parcel-of-land-is-to-be-acquired
pursuant-to-this-article-and-any-portion-of-the-remainder-is-to-be
left-in-such-shape-or-condition-as-to-be-of-little-value-to-its
owner,-the-board-may-acquire-and-sell-such-portion-or-may-exchange
the-same-for-other-property-needed-to-carry-out-the-powers-conferred
on-said-board.~~

Sec. 13. Water Code Appendix Section 28-16 5/8 is repealed:

~~Sec. 16-5/8.--Whenever a part only of a larger parcel of land is required by the district for the control or conservation of flood, storm, or other waste waters, and the taking thereof, and the construction of the proposed public improvement thereon will interfere with reasonable access to the remainder, or will otherwise cause substantial damage to the remainder, the district may condemn, purchase, or otherwise acquire the whole parcel of land of which the area required for public use is a part.--Or, in lieu of such acquisition, the district may condemn, purchase, or otherwise acquire an easement for ingress to and egress from the said remainder for use by the public, including the owner of the land.~~

Sec. 14. Water Code Appendix Section 28-16 3/4 is repealed.

~~Sec. 16-3/4.--Whenever a part only of a house or other structure must be taken or removed in order to use the land on which such structure is situated for flood control or water conservation purposes and the severance of such portion of the structure from the whole structure would cause a substantial damage to the structure, the Board of Supervisors of the Los Angeles Flood Control District may condemn or otherwise acquire the entire house or structure and thereafter sell or otherwise cause the said structure to be removed from the portion of the land so required for a public use.~~

Sec. 15. Water Code Appendix Section 36-16.1 is repealed.

~~Sec. 16.1. --Whenever a part only of a parcel of land is required by the district for the control or conservation of flood, storm, or other waste waters, and the taking thereof, and the construction of the proposed public improvement thereon, will interfere with reasonable access to the remainder, or will otherwise cause substantial damage to the remainder, the district may condemn, purchase, or otherwise acquire the whole parcel of land and may sell the remainder or exchange the same for other property required for district purposes. Or, in lieu of such acquisition of the remainder, the district may condemn, purchase, or otherwise acquire an easement for ingress to and egress from the remainder for use by the public, including the owner of the land.~~

§ 48-9.2

Sec. 16. Water Code Appendix Section 48-9.2 is repealed.

~~48-9.2.---Whenever a part only of a parcel of land is required by the district for any purpose authorized by this act and the taking thereof, and the construction of the proposed public improvement thereon, will interfere with reasonable access to the remainder, or will otherwise cause substantial damage to the remainder, the district may purchase, condemn, or otherwise acquire the whole parcel of land and may sell the remainder or exchange the same for other property required for district purposes.---In lieu of such acquisition of the remainder, the district may purchase, condemn or otherwise acquire a right of way or real property for ingress to and egress from the remainder for use by the public, including the owner of the land.~~

§ 49-6.1

Sec. 17. Water Code Appendix Section 49-6.1 is amended to read:

49-6.1. Whenever a part only of a parcel of land is required by the district for the control or conservation of flood, storm, or other waste waters, and the taking thereof, and the construction of the proposed public improvement thereon, will interfere with reasonable access to the remainder, or will otherwise cause substantial damage to the remainder, the district may condemn, purchase, or otherwise acquire the whole parcel of land and may sell the remainder or exchange the same for other property required for district purposes. Or, in lieu of such acquisition of the remainder, the district may condemn, purchase, or otherwise acquire an easement for ingress to and egress from the remainder for use by the public, including the owner of the land. No authority is hereby granted to the district by Section 1266 or 1266.1 of the Code of Civil Procedure to acquire riding and hiking trails by condemnation.

Sec. 18. Water Code Appendix Section 51.3.4 is amended

to read:

51.3.4. The agency shall have the power of eminent domain to acquire within or outside the agency by condemnation in the manner and to the extent prescribed in Article 1, Section 14 of the Constitution and Title 7, Part 3 of the Code of Civil Procedure, as now existing or hereafter amended, all property or interests therein necessary or convenient for carrying out the powers and purposes of the agency except that the agency shall not have power to acquire by condemnation publicly owned property held or used for the development, storage or distribution of water for public use; and it is hereby declared that the use of the property which may be condemned, taken or appropriated under the provisions of this act, is a public use, subject to regulation and control of the state in the manner prescribed by law. The district in exercising such power shall in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal or relocation of any structure, railways, mains, pipes, conduits, wires, cable, poles, of any public utility which is required to be moved to a new location, and provided further that notwithstanding any other provision of this act or any other law, no property shall be taken unless it is taken upon a finding by a court of competent jurisdiction that the taking is for a more necessary public use than that to which it has already been appropriated.

Whenever real property which is devoted to or held for some other public or quasi-public use is required by the agency for any purpose authorized by this act, the agency may condemn real property adjacent thereto or in the immediate vicinity thereof to be exchanged for the real property so required by the agency.

The power of eminent domain vested in the agency shall include the power to condemn in the name of the agency either the fee simple or any lesser estate or interest in any property which the board of directors by resolution shall determine is necessary for carrying out the purposes of the agency. Such resolution, adopted by a two-thirds vote of all its members, shall be conclusive evidence of all of the following:

- (a) The public necessity for the proposed public improvement.
- (b) The property or property interest being acquired is necessary for the proposed public use.
- (c) Such proposed public improvement is planned or located in the manner which will be compatible with the greatest public good and the least private injury.

~~When a part only of a parcel is required by the agency~~
~~for any purpose authorized by this act, and the taking thereof,~~
~~and the construction of the proposed public improvement there-~~
~~on, will interfere with reasonable access to the remainder, or~~
~~will otherwise cause substantial damage to the remainder, the~~
~~agency may condemn, purchase, or otherwise acquire the whole~~
~~parcel of land and may sell the remainder or exchange the same~~
~~for other property required for agency purposes. Or, in lieu of~~
~~such acquisition of the remainder, the agency may condemn, pur-~~
~~chase, or otherwise acquire an easement for ingress to and egress~~
~~from the remainder for use by the public, including the owner of~~
~~the land.~~

Sec. 19. Water Code Appendix Section 55-28.1 is repealed.

~~Sec.-28.1.--Whenever-land-is-to-be-condemned-by-the-district
for-any-of-the-uses-and-purposes-permitted-by-law,-and-the-taking
of-a-part-of-a-parcel-of-land-would-leave-the-remainder-thereof
in-such-size-or-shape-or-condition-as-to-require-the-district-to
pay-in-compensation-for-the-taking-of-such-part-an-amount-equal
to-the-fair-and-reasonable-value-of-the-whole-parcel,-the-resolu-
tion-of-the-board-may-provide-for-the-taking-of-the-whole-of-such
parcel-and-upon-the-adoption-of-any-such-resolution-it-shall-be
deemed-necessary-for-the-public-use,-benefit,-safety,-economy, and
general-welfare-that-the-district-acquire-the-whole-of-such-parcel.~~

§ 60-6.1

Sec. 20. Water Code Appendix Section 60-6.1 is repealed.

~~Sec. 6.1.--Whenever a part only of a parcel of land is required by the district, and the taking thereof, and the construction of the proposed public improvement thereon, will interfere with reasonable access to the remainder of a portion thereof, or will otherwise cause substantial damage to the remainder, the district may condemn, purchase, or otherwise acquire the whole parcel of land or such portion of the remainder to which access is impaired and may sell the remainder or exchange the same for other property required for district purposes.--Or, in lieu of such acquisition of the remainder, the district may condemn, purchase, or otherwise acquire an easement for ingress to and egress from the remainder for use by the public, including the owner of the land.~~

Sec. 21. Water Code Appendix Section 74-5 is amended

to read:

74-5. The district is hereby declared to be a body corporate and politic and as such shall have, in addition to the other powers vested in it by this act, the following powers:

1. To have perpetual succession.
2. To sue and be sued in the name of said district.
3. To adopt a seal.
4. To acquire by grant, purchase, lease, gift, devise, contract, condemnation, construction, or otherwise, and to hold, use, enjoy, sell, let, and dispose of real and personal property of every kind, including lands, structures, buildings, rights-of-way, easements, and privileges, and to construct, maintain, alter and operate any and all works or improvements, within or without the district, necessary or proper to carry out any of the objects or purposes of this act and convenient to the full exercise of its powers, and to complete, extend, add to, alter, remove, repair or otherwise improve any works, or improvements, or property required by it as authorized by this act.
5. To control the flood and storm waters of said district and the flood and storm waters of streams that have their sources outside of said district, but which streams and the floodwaters thereof flow into said district, and to conserve such waters for beneficial and useful purposes of said district by spreading, storing, retaining and causing to percolate into the soil within or without said district, or to save or conserve in any manner all or any of such waters and protect from damage from such flood or storm waters the watercourses, watersheds, harbors, public highways, life and property in said district, and the watercourses outside of the district of streams flowing into the district, and to prevent waste of water or diminution of the water supply by, or exportation of water from said district, and to obtain, retain and reclaim drainage, storm, flood and other waters for beneficial use in said district; provided, that nothing in this act contained shall authorize the carrying out of any plan of improvement, the purpose of which is, or the effect of which will be, to take water which flows in any watershed in said district and transport or sell same for use anywhere outside of the district when the water level of any gravel beds within the district is below the normal level and such water could reasonably be used to replenish the water level of said gravel beds; provided further, that none of the provisions of this act shall preclude the exercise by any other political subdivision that may now or hereafter exist, wholly or in part, within the district from exercising its powers, although such powers may be of the same nature as the powers of said district. Any such other political subdivision may, by written agreement with the district, provide for the use, or joint use, of property or facilities in which any such other political subdivision has an interest, or for the use, or joint use, of property or facilities in which said district has an interest.
6. To cooperate and to act in conjunction with the State of California, or any of its engineers, officers, boards, commissions, departments or agencies, or with the government of the United States, or any of its engineers, officers, boards, commissions, departments or agencies, or with any public or private corporation, or with the County of Santa Barbara, in the construction of any work for the controlling of flood or storm waters or for flowing into said district, or for the protection of life or property therein, or for the purpose of conserving said waters for beneficial use within said district, or in any other works, acts, or purposes provided for herein, and to adopt and carry out any definite plan or system of work for any such purpose.
7. To carry on technical and other investigations of all kinds, make measurements, collect data and make analyses, studies, and inspections pertaining to water supply, water rights, control of storm waters and flood and use of water, both within and without said district, and for such purposes said district shall have the right of access through its authorized representatives to all properties within said district. The district, through its authorized representatives, may enter upon such lands and make examinations, surveys, and maps thereof.

8. To enter upon any land, to make surveys and locate the necessary works of improvement and the lines for channels, conduits, canals, pipelines, roadways and other rights-of-way; to acquire by purchase, lease, contract, condemnation, gift, devise, or other legal means all lands and water and water rights and other property necessary or convenient for the construction, use, supply, maintenance, repair and improvement of said works, including works constructed and being constructed by private owners, lands for reservoirs for storage of necessary water, and all necessary appurtenances; to enter into contracts and agreements with, and do any acts necessary or proper for the performance of any such contracts and agreements with the United States, or any state, county, district of any kind, public or private or municipal corporation, association, firm, or individual, or any number of them, for the joint acquisition, construction, leasing, ownership, disposition, use, management, maintenance, repair or operation of any rights, works or other property of a kind which might be lawfully acquired or owned by the district; to acquire the right to store water in any reservoir, or to carry water through any canal, ditch or conduit not owned or controlled by the district; to grant to any owner or lessee the right to the use of any water or right to store such water in any reservoir of the district, or to carry such water through any tunnels, canal, ditch, or conduit of the district; to enter into and do any acts necessary or proper for the performance of any agreement with any district of any kind, public or private corporation, association, firm or individual, or any number of them for the transfer or delivery to any such district, corporation, association, firm or individual of any water right or water pumped, stored, appropriated or otherwise acquired or secured, for the use of the district or for the purpose of exchanging the same for other water, water right or water supply in exchange for water, water or water supply to be delivered to said district by the other party to said agreement.

9. To incur indebtedness and to issue bonds in the manner herein provided.

10. To cause taxes or assessments to be levied and collected for the purpose of paying any obligation of the district, and to carry out any of the purposes of this act, in the manner hereinafter provided.

11. To make contracts, and to employ labor, and to do all acts necessary for the full exercise of all powers vested in said district or any of the officers thereof by this act.

12. To exercise the right of eminent domain, either within or without said district, and in the manner provided by law for the condemnation of private property for public use, to take any property necessary to carry out any of the objects or purposes of this act, whether such property be already devoted to any public use by any district or other public corporation, or agency, or otherwise; provided, however, that the district in exercising such power shall in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction, or relocation of any structure, railways, mallet, pipes, conduits, wires, cable, poles, of any public utility which is required to be moved to a new location; and provided further, that notwithstanding any other provision of this act or any other law, no property shall be taken unless it is taken upon a finding by a court of competent jurisdiction that the taking is for a more necessary public use than that to which it has already been appropriated; and provided further, that no right shall exist in said district to take by proceedings in eminent domain any property, including water rights, appropriated to public use by any existing city and county or municipal utility district. The district shall also have and may exercise the right to condemn any existing works or improvements in said district or along streams flowing into said district now or hereafter used to control flood or storm waters, or to conserve such flood or storm waters or to protect any property in said district or along streams flowing into said district from damage from such flood or storm waters, and it is hereby declared that the use of the property, lands, rights-of-way, easements, or materials which may be condemned, taken or appropriated under the provisions of this act is a public use subject to the regulation and control of the state in the manner prescribed by law; provided, however, that nothing in this act contained shall be deemed to authorize said district, or any person or persons to divert the waters of any river, creek, stream, irrigation system, canal or ditch, or the waters thereof or therein unless compensation therefor be first provided in the manner prescribed by law.

The power of eminent domain vested in the district shall include the power to condemn in the name of the district either the fee simple or any lesser estate, easement, or interest in any real property which the board of directors of the district by resolution shall determine is necessary for carrying out the purposes of this act. Such resolution, adopted by a two-thirds vote of all its members, shall be conclusive evidence of all of the following:

(a) The public necessity for the proposed public improvement.

(b) The property or property interest being acquired is necessary for the proposed public use.

(c) Such proposed public improvement is planned or located in the manner which will be compatible with the greatest public good and the least private injury.

(Whenever real property which is devoted to or held for some other public or quasi-public use is required by the district for any purpose authorized by this act, the district may condemn real property adjacent thereto or in the immediate vicinity thereof to be exchanged for the real property so required by the district. '

Nothing in this act contained shall be construed as in any way affecting the plenary power of any existing city and county or municipal utility district or other district or public agency to provide for a water supply for such city and county or municipal utility district, or as affecting the absolute control of any properties of such city and county or municipal utility district necessary for such water supply and nothing herein contained shall be construed as vesting any power of control over such properties in such Santa Barbara County Flood Control and Water Conservation District or in any officer thereof, or in any person referred to in this act.

~~12.1. Whenever a part only of a parcel is required by the district for any purpose authorized by this act, and the taking thereof, and the construction of the proposed public improvement thereon, will interfere with reasonable access to the remainder, or will otherwise cause substantial damage to the remainder, the district may condemn, purchase, or otherwise acquire the whole parcel of land and may sell the remainder or exchange the same for other property required for district purposes. Or, in lieu of such acquisition of the remainder, the district may condemn, purchase, or otherwise acquire an easement for ingress to and egress from the remainder for use by the public, including the owner of the land.~~

13. To make contracts with the County of Santa Barbara and with municipalities and public agencies, and to employ labor for the purpose of doing flood control work and for inspecting and passing upon the adequacy of drainage plans provided for each proposed new subdivision in the County of Santa Barbara.

Sec. 22. Water Code Appendix Section 105-6 is amended to read:

Sec. 6. The district is hereby declared to be a body corporate and politic and as such shall have, in addition to the other powers vested in it by this act, the following powers:

1. To have perpetual existence.
2. To sue and be sued in the name of the district.
3. To adopt a seal and alter it at pleasure.
4. To acquire by grant, purchase, lease, gift, devise, contract, condemnation or otherwise, and to hold, use, enjoy, sell, let, and dispose of real and personal property of every kind, including lands, structures, buildings, rights of way, easements, and privileges, excepting water rights owned by a public corporation or agency without the consent of such public corporation or agency, and to construct, maintain, alter and operate any and all projects or works of improvement, within or without the district, necessary or proper to carry out any of the objects or purposes of this act, or convenient to the full exercise of its powers, and to construct, complete, extend, add to, alter, remove, reconstruct, repair or otherwise improve any projects or works of improvement, or property acquired by it as authorized by this act.
5. To control the flood and storm waters of the district, and the flood and storm waters of streams that have their source outside of the district, but which streams and the flood waters thereof flow into the district, and to conserve such waters for beneficial and useful purposes within the district by retarding, spreading, storing, retaining and causing the same to percolate into the soil within or without the district, or to save and conserve in any manner all or any of such waters and protect from damage from such flood or storm waters the water-courses, watersheds, public highways, life and property in said district; provided, that water rights now existing, public or private, be not thereby taken or damaged without compensation; provided further, that none of the provisions of this act shall in any manner limit or preclude the full exercise by any county, city, district, public or municipal authority, agency or corporation, or any political subdivision that may now or hereafter exist, wholly or in part, within the district from exercising any of its powers, although such be of the same nature as the powers of the district. Any such other public entity may, by written agreement with the district, provide for the use, or joint use, of property or facilities in which any such other public entity has an interest, or for the use, or joint use, of property or facilities in which the district has an interest.
6. To cooperate and to act in conjunction with or contribute funds to, the United States or the State of California, or any of their engineers, officers, boards, commissions, departments or agencies, or with any public or private corporation, or with the County of San Diego, or with any public agency or district, in the construction of any projects or works of improvement for the controlling of flood or storm waters of or flowing into the district, or for the protection of life or property therein, or for the purposes of conserving said waters for beneficial use within said district, or for the protection of beaches and shorelines from erosion, or for the restoration of beaches and shorelines, or in any other works, acts or purposes provided for herein, and to adopt and carry out any definite plan or system of projects or works of improvement for any such purpose; and to enter into, and to do any and all acts necessary or proper for the performance of, any agreement with, or necessary to comply with any act of authorization of, the United States, or any state, county or district of any kind, or necessary and proper for the performance of any agreement with any public or private corporation, association, firm or individual, or any number of them, for the joint financing, acquisition, construction, leasing, ownership, disposition, use, management, maintenance, repair or operation of any rights, projects or works of improvement, or other property of any kind which might be lawfully acquired or owned by the district.
7. To acquire the right to store water in any reservoirs, or to carry water through any canal, ditch or conduit not owned by the district, and to grant to any person the right to carry any water owned by such person through any tunnel, canal, ditch or conduit of the district; provided, that the district shall not acquire any such rights from a municipality or public water agency or district other than with the consent of such municipality or public water agency or district.
8. To carry on technical and other investigations of all kinds, make measurements, collect data, and to make analyses, studies, and inspections pertaining to water supply, water rights, ocean currents, tides, erosion, control of floods, and use

of water, and to make surveys, studies, and maps and plats relative to the location of necessary projects and works of improvement including but not limited to dams, levees, channels, conduits, canals, pipelines, roadways and other rights-of-way, and relative to the acquisition of lands, or interests therein, and other property; provided, that the foregoing powers may be exercised by the district to the extent necessary to accomplish the purposes of this act; and further provided, that the district has the right of access, and may enter upon any lands within or without the district, irrespective of the ownership of such lands, with or without the permission of the owner of such lands, in order to accomplish the acts authorized by this section, or any of them, and such entry by the district or by its authorized representative shall not constitute, nor give rise to, any cause of action in favor of the owner or owners of such land except for injuries resulting from negligence, wantonness, or malice.

Whenever a project or work of improvement is contemplated due consideration shall be given to the location of existing sewage lines and to the possible locations of future sewage lines, and the district shall solicit the recommendations of public sewage disposal agencies in order that district facilities may be located expeditiously in light of such sewage lines.

9. To incur indebtedness and to issue bonds in the manner hereinafter provided.

10. To cause taxes or assessments to be levied and collected for the purpose of paying any obligation of the district, and to carry out any of the purposes of this act, in the manner hereinafter provided.

11. To make contracts, to employ labor, to employ expert appraisers, consultants and technical advisors and assistants, and to do all acts necessary for the full exercise of all powers vested by this act in said district or in any of the officers thereof.

12. The district has and may exercise the right of eminent domain within the County of San Diego, either within or without the district, and in the manner provided by law for the condemnation of private property for public use, to take any property necessary to carry out any of the objects or purposes of this act, whether such property be already devoted to any public use by any district or public corporation or agency, or otherwise; provided, however, that the district in exercising such power shall in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction or relocation of any structure, railways, mains, pipes, conduits, wires, cable, poles or other property of any public utility or public corporation or district which is required to be moved to a new location; and provided further, that notwithstanding any provision of this act or any other law, no property shall be taken unless it is taken upon a finding by a court of competent jurisdiction that the taking is for a more necessary public use than that to which it has already been appropriated; and provided further, that no right shall exist in the district to take by proceedings in eminent domain any water rights appropriated to public use by any existing municipal corporation, water district, or other public agency. The district shall also have the right to and may condemn, within the County of San Diego, any existing works or improvements in the district or along streams flowing into the district now or hereafter used to control flood or storm waters, or to conserve such flood or storm waters or to protect any property in the district or along streams flowing into the district from damage from such flood or storm waters, or to protect beaches or shorelines from erosion or to restore such beaches or shorelines, and it is hereby declared that the use of the property, lands, rights-of-way, easements or materials which may be condemned, taken or appropriated under the provisions of this act is a public use subject to the regulation and control of the State of California in the manner prescribed by law; provided, however, that nothing in this act contained shall be deemed to authorize the district or any person to divert the waters of any river, creek, stream, irrigation system, canal or ditch or the waters thereof or therein unless compensation therefor be first provided in the manner prescribed by law.

The power of eminent domain vested in the district shall include the power to condemn in the name of the district either the fee simple or any lesser estate, easement or interest in any real property which the board by resolution shall determine is necessary for carrying out the purposes of this act.

Before property can be taken it must appear:

1. That the use to which it is to be applied is a use authorized by this act; and
2. That the taking is necessary to such use; provided, when the board, by resolution adopted by vote of two-thirds of all its members, has found and determined that the public interest and necessity require the acquisition, construction or completion by the district of some project or work of improvement, and that the property described in such resolution is necessary therefor, such resolution shall be conclusive evidence:

(a) of the public necessity for such proposed project or work of improvement;

(b) that such property is necessary therefor, and

(c) that such proposed project or work of improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury; provided, however, that said resolution shall not be such conclusive evidence in the case of the taking by the district of property located outside of the territorial limits thereof.

~~Whenever land is to be condemned by the district for any of the uses and purposes permitted by law, and the taking of a part of a parcel of land would leave the remainder thereof in such size or shape or condition as to require the district to pay in compensation for the taking of such part an amount equal to the fair and reasonable value of the whole parcel, the resolution of the board may provide for the taking of the whole of such parcel and upon the adoption of any such resolution it shall be deemed necessary for the public use, benefit, safety, economy, and general welfare that the district acquire the whole of such parcel.~~

Whenever real property which is devoted to or held for some other public or quasi-public use is required by the district for any purpose authorized by this act, the district may condemn real property adjacent thereto or in the immediate vicinity thereof to be exchanged for the real property so required by the district.

Nothing in this act contained shall be construed as in any way affecting the plenary power of any existing municipal corporation, water district or other public agency providing water to the public or as affecting the absolute control of any properties of such municipal corporation, water district or public agency necessary for such water supply, and nothing herein contained shall be construed as vesting any power of control over such properties in the district or any officer thereof, or in any person referred to in this act, except to the extent consented thereto by such municipal corporation, water district or public agency.

13. To plan, improve, operate, maintain, and keep in a sanitary condition a system of public parks, playgrounds, beaches, swimming areas, and other facilities for public recreation, for the use and enjoyment of all the inhabitants of the district, as an incident to the carrying out of the projects and works of improvement of the district and on land acquired or used for the flood control, drainage, beach or shoreline erosion control, or water conservation purposes of this act; to construct, maintain, and operate any other amusement or recreational facilities on such lands, including picnic grounds and equipment incidental thereto, bathhouses, golf courses, tennis courts and other special amusements and forms of recreation; to fix and collect reasonable fees for the use by the public of any such special facilities, services or equipment; and to adopt such rules and regulations as in the discretion of the board are necessary to the orderly operation and control of the use by the public of such lands and facilities for recreational purposes; provided, however, that the district shall not, for the purposes specified in this subsection, interfere with the control or operation of any existing public park, playground, beach, swimming area, parkway, recreational ground, or other public property, owned or controlled by any other district, county or municipal corporation, except with the consent of the governing body of such district, county or municipal corporation, and upon such terms as may be mutually agreed upon between the board and such governing body; and further provided, that no such recreational facility shall be established in any city or in the unincorporated territory of a county without the consent of the governing body of such city or county, and further provided, that if any such recreational facility is located within the unincorporated territory of a county then that county, or if any such recreational facility is located within the corporate limits of any city then that city, by resolution duly passed by the governing body of such county or city, may assume the management and control of such recreational facility, in which event such county or city shall establish and collect nondiscriminatory fees and charges for the use of such recreational facility and may establish rules and regulations pertaining to such recreational facility, and the county or city annually shall deduct from such fees and charges an amount sufficient to reimburse the county or city for the costs and expenses incurred in such management and control of such recreational facility, and shall pay over to the district, for use for general district purposes, all money collected in excess of the amount necessary for such reimbursement.

14. The powers herein granted shall include the design, construction, or maintenance of any levees, seawalls, groins, breakwaters, jetties, outlets, channels, harbors, basins, or other projects or works of improvement pertaining thereto for the protection of shoreline or beaches.

15. To lease, sell or dispose of any property or interest therein whenever, in the judgment of the board, said property or said interests therein or part thereof is no longer required for the purposes of the district, or may be leased for any purpose without interfering with the use of such property for the purposes of the district, and to pay any compensation received therefor into the general fund of the district and use the same for the purposes of this act; provided, however, that nothing herein contained shall authorize the board or any officer of said district to sell, lease or otherwise dispose of any water, water right, ~~reservoir~~ space or storage capacity or any interest or space therein, except to public agencies for recreational purposes or except as heretofore provided in subsection 6 of this section, or except, in the discretion of the board, as is necessarily incidental to the accomplishment of the purposes of this act or to the public welfare; provided, however, that the district may grant and convey to the United States, or to any federal agency authorized to accept and pay for such land or interests in land, all lands and interests in land, now owned or hereafter acquired, lying within any channel, dam, or reservoir site, or shoreline or beach, improved and constructed, in whole or in part, with federal funds, upon payment to the district of sums equivalent to actual expenditures made by it in acquiring the lands and interests in land so conveyed, and in improving such lands and interests in land, deemed reasonable in the discretion of the board.

16. To grant or otherwise convey to counties, cities and counties, cities, the State of California or the United States easements for street and highway purposes over, along, upon, in, through, across or under any real property owned by the district.

17. To remove, carry away and dispose of any rubbish, trash, debris, or other inconvenient matter that may be dislodged, transported, conveyed, or carried by means of, through, in or along the works and structures operated or maintained hereunder and deposited upon the property of the district or elsewhere.

18. Notwithstanding any provision of this act, the district shall not have the power to compete with water selling or distribution agencies, either public or private, by selling or distributing water to consumers for domestic, agricultural or industrial use; provided, however, that the district shall have the power to sell to water agencies, either public or private, such surplus water as it may accumulate. (Stats.1906, 1st Ex.Sess., c. 55, p. —, § 6.)