#36.40 5/25/70

Memorandum 70-53

Subject: Study 36.40 - Condemnation (The Right to Take--Excess Condemnation)

One aspect of the "right to take" which should be covered in a comprehensive statute is the extent to which a condemnor may exercise the right of eminent domain to acquire property for purposes other than physical occupation by the improvement itself. The Commission has previously considered at some length the problems relating to remnant acquisitions and substantial progress has been made.

Attached to this memorandum is a revised tentative recommendation relating to this topic which incorporates the Commission's previous decisions. The staff believes that the recommendation is in good shape, and we hope the provisions contained therein can be tentatively approved at the June 1970 meeting for inclusion in the Comprehensive Statute and the recommendation itself can be approved for distribution for comment.

As indicated above, we do not anticipate, or at least suggest, that the Commission make any substantive changes in the recommendation. We do, however, believe that the most important policy decision reflected in the recommendation is the decision to limit remnant condemnation to those situations where there is "a substantial risk that the entity will be required to pay in compensation [i.e., damages] an amount substantially equivalent to the amount that would be required to be paid . . . [to acquire such remnant]." See subdivision (a) of Section 421 and Comment thereto. As indicated in the Comment, this is essentially the Rodoni test; although the language used there is "a substantial risk of excessive . . . damages." We expect that you will wish to discuss

this decision at the meeting, and we hope that you will all read or reread the Rodoni decision (Exhibit I--pink).

We have also attached a copy of an earlier staff-prepared background study, since published in the Southern California Law Review, which supplements the background contained in the recommendation.

Respectfully submitted,

Jack I. Horton
Associate Counsel

Memorandum 70-53

Exhibit I

[S. F. No. 22510. In Bank. Feb. 1, 1968.]

THE PEOPLE ex rel. DEPARTMENT OF PUBLIC WORKS, Petitioners, v. THE SUPERIOR COURT OF MERCED COUNTY, Respondent; ROY L. RODONI et al., Real Parties in Interest.

[On hearing after decision by the Court of Appeal, Fifth Appellate District, Civ. No. 723 (248 A.C.A. 30, 56 Cal.Rptr. 173) denying writ of mandate. Writ granted.]

[1a-1c] Eminent Domain—Uses—Excess Condemnation—To Avoid Excessive Damages; Mandamus.—Mandate must issue to compel the trial court to proceed with that part of the Department of Public Works' suit seeking to condemn, for purposes of public economy under Sts. & Hy. Code, § 104.1, 54 acres of a farmer's land that would be left landlocked by an associated condemnation, for highway purposes, of 0.65 acres of his land, where the record suggested that the entire parcel could probably be condemned for little more than the cost of taking the part needed for the highway and of paying damages for the remainder; but the excess condemnation

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[1] Right to condemn property in excess of needs for a particular public purpose, note, 6 A.L.R.3d 297. See also Cal.Jur.2d, Eminent Domain, §§ 8, 105; Am.Jur.2d, Eminent Domain, § 115.

McK. Dig. References: [1] Eminent Domain, §§ 31.5, 184; Streets, § 16; Highways, § 43; [2] Eminent Domain, § 14; [3] Eminent Domain, §§ 2, 31.1; [4] Eminent Domain, §§ 31.3, 31.5; Streets, § 15; Highways, § 44; [5] Eminent Domain, § 31.5; Streets, § 15; Highways, § 44; [6] Eminent Domain, § 31.1; Streets, § 15; Highways, § 44; [7] Eminent Domain, § 6; Constitutional Law, § 85; [8] Eminent Domain, § 27; Streets, § 15; Highways, § 44; [9] Eminent Domain, § 14; Streets, § 15; Highways, § 55.5; [10] Eminent Domain, § 31.7; Streets, § 16; Highways, § 49.

must be denied unless justified by the avoidance of excessive severance or consequential damages.

[2] **Id.—Uses—Province to Determine.**—It is for the Legislature to determine what shall be deemed a public use for the purposes of eminent domain, and its judgment is binding unless there is no possibility that the legislation may be for the welfare of the public.

[3] **Id.—Nature of Right: Excess Condemnation.**—Eminent domain being an inherent attribute of sovereignty, constitutional provisions relating thereto merely place limitations on its exercise. Thus, Cal. Const., art. I, § 14½, while expressly limiting excess condemnations for protective purposes, in no way limits the power of the Legislature to authorize excess condemnations for other than protective purposes.

[4] **Id.—Uses—Excess Condemnation—Remnants: To Avoid Excessive Damages.**—Despite its broad statutory language, Sts. & Hy Code, § 104.1, may reasonably be interpreted to authorize only those excess condemnations that are valid for public uses, namely, condemnation of remnants, or condemnations to avoid a substantial risk of excessive severance or consequential damages.

[5] **Id.—Uses—Excess Condemnation—To Avoid Excessive Damages.**—Cal. Const., art. I, § 14, precludes excess condemnations under Sts. & Hy. Code, § 104.1, unless the economic benefit to the state is clear, and the mere avoidance of the cost of litigating damages claimed by the condemnee is not sufficient; nor does the state authorize condemnations 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.

[6] **Id.—Uses—Excess Condemnation.**—Sts. & Hy. Code, § 104.1, providing for excess condemnation, is not an unconstitutional delegation of legislative power, since the statute contains adequate standards for the guidance of the agency, and the conditions in Sts. & Hy. Code, §§ 102, 103 and 104, themselves providing adequate standards governing the necessity of such condemnations, have first to be met.

[7] **Id.—Who May Exercise—Delegation.**—The power of eminent domain may be delegated by the Legislature to an administrative body as long as the delegating statute establishes an ascertainable standard to guide the administrative agents.

[8] **Id.—Uses—Province to Determine Necessity.**—Sts. & Hy. Code, § 103, by making conclusive the determination of the

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[3] See **Cal.Jur.2d**, Eminent Domain, § 9; **Am.Jur.2d**, Eminent Domain, §§ 2, 7.

Highway Commission on the necessity of taking particular land, thus taking such issue outside the scope of judicial review, does not infringe the constitutional rights of the condemnee.

[9] Id.—Uses—Province to Determine What Is a Public Use.—The issue of whether a taking of particular land under the Streets and Highways Code is for a public use is within the scope of judicial review.

[10] Id. — Uses — Excess Condemnation — Evidence.—To raise an issue of improper excess taking in eminent domain, the condemnees must show that the condemner is guilty of fraud, bad faith or abuse of discretion in the sense that the condemner does not actually intend to use the property as it resolved to use it, or that the contemplated use is not a public one.

PROCEEDING in mandamus to compel the Superior Court of Merced County to proceed with the condemnation of three instead of two parcels of real property owned by the real parties in interest. Writ granted.

Harry S. Fenton, Holloway Jones, Jack M. Howard, William C. DeMartini, Charles E. Spencer, Jr., and William R. Edgar for Petitioner.

Thomas C. Lynch, Attorney General, and Robert L. Bergman, Deputy Attorney General, as Amici Curiae on behalf of Petitioner.

Linneman, Burgess, Telles & Van Atta, L. M. Linneman and James E. Linneman for Real Parties in Interest.

Fadem & Kanner and Gideon Kanner as Amici Curiae on behalf of Real Parties in Interest.

TRAYNOR, C. J.—The Department of Public Works seeks to compel the trial court to proceed with the condemnation of three instead of two parcels of real property owned by the real parties in interest, Roy and Thelma Rodoni.

The department built a freeway across a farm owned by the Rodonis. The farm consists of a southern rectangular parcel and a northern triangular parcel. The northeast corner of the former touches the southwest corner of the latter. The freeway crosses the adjoining corners, taking a tip of each, which total .65 acres. As a result, the northern parcel of approximately 54 acres is landlocked.

In addition to the .65 acres the freeway occupies, the department seeks to condemn the remaining landlocked 54

acres pursuant to Streets and Highways Code section 104.1.[1] Its purpose is to protect the fisc by eliminating the risk that excessive severance damages to the landlocked parcel might be awarded for the taking of the corner that provided access to it. The department points out that if it is allowed to condemn the entire parcel the Rodonis will receive full value for their property, the risk of excessive severance damages will be eliminated, and ultimately it will be able to reduce the cost of the freeway by selling the part of the parcel not needed for freeway purposes.

The Rodonis challenge the excess condemnation on the ground that taking property for such a purely economic purpose violates article I, section 14 of the California Constitution[2] because such taking is not for a "public use." They contend that excess condemnation must be limited to parcels that may properly be deemed remnants with respect to which the public interest in avoiding fragmented ownership comes into play. In their view, 54 acres, even if landlocked and of little value, cannot be deemed a remnant of .65 acres. They insist that the state pay severance damages for the landlocked parcel and allow them to retain it, even though severance damages may be equal to its full original market value. They also assert that the excess condemnation is prohibited by section 14½ of article I of the California Constitution[3] because it is not limited to land lying within 200 feet of the freeway.

[1] "Whenever 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."

[2] California Constitution article I, section 14: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner. . . ."

[3] "The State, or any of its cities or counties, may acquire by gift, purchase or condemnation, lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred fifty feet from the closest boundary of such public works or improvements; provided, that when parcels which lie only partially within said limit of one hundred fifty feet only such portions may be acquired which do not exceed two hundred feet from said closest boundary, and after the establishment, laying out and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their

The trial court decided in favor of the Rodonis and ordered the complaint dismissed insofar as it seeks to condemn the landlocked parcel. It held that to allow the taking of any land not physically necessary for the freeway would be a taking for other than the public use and that if section 104.1 were construed to allow such a taking it would be unconstitutional. The department then petitioned for a writ of mandate ordering the Merced County Superior 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 order dismissing the complaint in part. (See *Tide Water Assoc. Oil Co.* v. *Superior Court* (1955) 43 Cal.2d 815 [279 P.2d 35]; *Financial Indem. Co.* v. *Superior Court* (1955) 45 Cal.2d 395, 399 [289 P.2d 233]; *People* ex rel. *Dept. Public Works* v. *Rodoni* (1966) 243 Cal.App.2d 771 [52 Cal.Rptr. 857].)

[1a] We hold that section 104.1 validly authorizes the trial court to proceed with the action to condemn the 54 acres. We also hold, however, that it 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.

[2] It is for the Legislature to determine what shall be deemed a public use for the purposes of eminent domain, and its judgment is binding unless there is no " 'possibility the legislation may be for the welfare of the public.' " (*Linggi* v. *Garovotti* (1955) 45 Cal.2d 20, 24 [286 P.2d 15], quoting *University of Southern Cal.* v. *Robbins* (1934) 1 Cal.App.2d 523, 525-526 [37 P.2d 163]; see also *Housing Authority* v. *Dockweiler* (1939) 14 Cal.2d 437, 449-450 [94 P.2d 794]; *Lux* v. *Haggin* (1886) 69 Cal. 255, 303-304 [4 P. 919, 10 P. 674]; *County of Los Angeles* v. *Anthony* (1964) 224 Cal.App.2d 103, 106 [36 Cal.Rptr. 308]; *Tuolumne Water Power Co.* v. *Frederick* (1910) 13 Cal.App. 498, 503 [110 P. 134].) "Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has

environs and to preserve the view, appearance, light, air and usefulness of such public works.

"The Legislature may, by statute, prescribe procedure."

proved impracticable in other fields. (*United States* ex rel. *T.V.A.* v. *Welch* (1946) 327 U.S. 546, 552 [90 L.Ed. 843, 848, 66 S.Ct. 715].)

Sections 104.1, 104.2, 104.3 and 104.6 of the Streets and Highways Code set forth the purposes for which the department may acquire or condemn property not immediately needed or property not physically needed for state highway purposes. In addition to the excess condemnation authorized by section 104.1, the department may condemn property for nonhighway public uses to be exchanged for property already devoted to such nonhighway uses when the department wishes to acquire the latter property for highway use. (§ 104.2)[4] It may condemn property adjacent to highways and other public works to be constructed by it and thereafter convey the adjacent property to private parties subject to restrictions protecting the highway or other public use. (§ 104.3.)[5] It may also acquire property for future needs and lease such property until it is needed. (§ 104.6.)[6] None of these sections limits the others, and each "is a distinct and separate authorization." (§ 104.7.)

[4] "Whenever property which is devoted to or held for some other public use for which the power of eminent domain might be exercised is to be taken for State highway purposes, the department may, with the consent of the person or agency in charge of such other public use, condemn, in the name of the people of the State of California, real property to be exchanged with such person or agency for the real property so to be taken for State highway purposes. This section does not limit the authorization to the department to acquire, other than by condemnation, property for such purposes."

[5] "The department may condemn real property or any interest therein for reservations in and about and along and leading to any State highway or other public work or improvement constructed or to be constructed by the department and may, after the establishment, laying out and completion of such improvement, convey out [sic] any such real property or interest therein thus acquired and not necessary for such improvement with reservations concerning the future use and occupation of such real property or interest therein, so as to protect such public work and improvement and its environs and to preserve the view, appearance, light, air and usefulness of such public work; provided, that land so condemned under authority of this section shall be limited to parcels lying wholly or in part within a distance of not to exceed one hundred fifty feet from the closest boundary of such public work or improvement; provided that when parcels which lie only partially within such limit of one hundred fifty feet are taken, only such portions may be condemned which do not exceed two hundred feet from said closest boundary."

[6] "The authority conferred by this code to acquire real property for state highway purposes includes authority to acquire for future needs. The department is authorized to lease any lands which are held for state highway purposes and are not presently needed therefor on such terms and conditions as the director may fix and to maintain and care for such property in order to secure rent therefrom. . . ."

Section 104.8 is patterned after section 14½ of article I of the California Constitution and, like that section, limits the property to be taken for protective purposes to property lying within 200 feet of the public work. It may be assumed without deciding that the constitutional provision compelled the statutory limitation; that the reference to streets in section 14½ includes state highways and that protective condemnations authorized by section 14½ are also limited by it. [3] Section 14½, however, does not limit the power of the Legislature to authorize excess condemnation for other than protective purposes. "Because eminent domain is an inherent attribute of sovereignty, constitutional provisions merely place limitations upon its exercise." (*People* ex rel. *Dept. of Public Works* v. *Chevalier* (1959) 52 Cal.2d 299, 304 [340 P.2d 598].)

Section 14½ was adopted in 1928 at a time when the validity of any excess condemnation was doubtful. It was not adopted to limit the power of eminent domain but to authorize condemnations that its sponsors believed would not be permitted under then current rules of constitutional law. (1928 Ballot Pamphlet, Argument for Proposed Senate Constitutional Amend. No. 16.) Although it includes limitations on the condemnations it authorizes and to that extent limits the state's inherent power of eminent domain, it in no way limits those condemnations that it does not authorize. Accordingly, since it only authorizes condemnations for protective purposes, it does not restrict condemnations for other purposes. (*People* ex rel. *Dept. of Public Works* v. *Garden Grove Farms* (1965) 231 Cal.App.2d 666, 668-673 [42 Cal.Rptr. 118]; see also *State* ex rel. *Highway Com.* v. *Curtis* (1949) 359 Mo. 402 [222 S.W.2d 64]; *State* ex rel. *Thomson* v. *Giessel* (1955) 271 Wis. 15, 51-54 [72 N.W.2d 577, 595-597]; *State* ex rel. *Evjue* v. *Seyberth* (1960) 9 Wis.2d 274, 279-281 [101 N.W.2d 118, 121-122].)

[4] In section 104.1 the Legislature has determined that excess condemnation is for a public use whenever remaining parcels are of little value or in such a condition as to give rise to claims or litigation concerning severance or other damages. Although the statutory language is broad, it may reasonably be interpreted to authorize only those excess condemnations that are for valid public uses; namely, condemnation of remnants (see e.g., *Kern County High School Dist.* v. *McDonald* (1919) 180 Cal. 7, 16 [179 P. 180]; *People* v. *Thomas* (1952)

108 Cal.App.2d 832, 836 [239 P.2d 914]; *In re Opinion of Justices* (1910) 204 Mass. 616, 619-620 [91 N.E. 578]; 2 Nichols, Eminent Domain (3d ed. 1963) § 7.5122 [1], p. 717) or condemnations that avoid a substantial risk of excessive severance or consequential damages. On the record before us, the taking in the present case is justified on the latter ground.

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. Remnant takings have long been considered proper. "The reasoning behind the 'remnant theory,' . . . is that by limiting the acquisition to only such parts of the property as are needed by the particular improvement, fragments of lots would remain of such shape and size as to render them separately valueless, with the result that the city would be required to pay for the whole, although it took only a part, and with the further result that because of the lack of such value, the city would thereafter be deprived of collecting taxes on these remnants." (Annot., 6 A.L.R.3d 297, 317 (1966); see also, 2 Nichols, Eminent Domain (3d ed. 1963) § 75122 [1] p. 718.) There is no reason to restrict this theory to the taking of parcels negligible in size and to refuse to apply it to parcels negligible in value.

[1b] 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. "The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of costs. [Citations.] And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public." (*United States* ex rel. *T.V.A.* v. *Welch*, *supra*, 327 U.S. 546, 554 [90 L.Ed. 843, 849]; see also *United States* v. *Agee* (6th Cir. 1963) 322 F.2d 139; *Boston* v. *Talbot* (1910) 206 Mass. 82, 89 [91 N.E. 1014]; *New Products Corp.* v. *State Highway Comr.* (1958) 352 Mich. 73, 86 [88 N.W.2d 528]; *Kern County High School Dist.* v. *McDonald*, *supra*, 180 Cal. 7, 16; *People* v. *Thomas*, *supra*, 108 Cal.App.2d 832, 836.)

[5] We need not decide in what specific cases other than

those mentioned the statute authorizes excess condemnation. It should be emphasized, however, that the economic benefit to the state must be clear. The economic benefit of avoiding the cost of litigating damages is not sufficient. The statute does not authorize excess condemnation anytime the condemnee claims severance or consequential damages. To allow such condemnation would nullify the constitutional guarantee of just compensation (Cal. Const., art. I, § 14) by permitting the state to threaten excess condemnation, not because it was economically sound, but to coerce condemnees into accepting whatever value the state offered for the property actually taken or waiving severance or consequential damages to avoid an excess taking.[7]

[6] As so construed section 104.1 is not an unconstitutional delegation of legislative power. Adequate standards appear in other provisions of the code. Section 102 of the Streets and Highways Code requires the Highway Commission, before authorizing condemnation by the department of any real estate for highway purposes, to make a determination that the "public interest and necessity require the acquisition" and that "the real property or interest therein described in such resolution is necessary for the improvement."[8] Section 103 makes the decision of the commission on the necessity of the improvement and of the taking of given property conclusive.[9] Section 104 provides a nonexclusive list

[7]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. (See Annot., 6 A.L.R.3d 297, 311-314.) 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.

[8]Streets and Highways Code section 102: "In the name of the people of the State of California, the department may condemn for State highway purposes, under the provisions of the Code of Civil Procedure relating to eminent domain, any real property or interest therein which it is authorized to acquire. The department shall not commence any such proceeding in eminent domain unless the commission first adopts a resolution declaring that public interest and necessity require the acquisition, construction or completion by the State, acting through the department, of the improvement for which the real property or interest therein is required and that the real property or interest therein described in such resolution is necessary for the improvement."

[9]Streets and Highways Code section 103: "The resolution of the commission shall be conclusive evidence: (a) Of the public necessity of such proposed public improvement. (b) That such real property or interest

of various purposes for which property is deemed necessary.[10] Only after these other conditions are met does section 104.1 come into play.

[7] The power of eminent domain may be delegated by the Legislature to administrative bodies. (*Holloway* v. *Purcell* (1950) 35 Cal.2d 220, 231 [217 P.2d 665].) Discretion cannot be absolute, but "if the delegating statute establishes an ascertainable standard to guide the administrative agents no objection can properly be made to it." (*Wotton* v. *Bush* (1953) 41 Cal.2d 460, 468 [261 P.2d 256].) In the *Holloway* case we held that standards found in Streets and Highways Code section 100.2 governing the discretion of the State Highway Commission in fixing the location of freeways were sufficiently definite. Section 100.2 authorizes the commission to approve the location of freeways whenever that location "in its opinion will best subserve the public interest." The standards found in section 104.1 are no less definite, and are similarly constitutional.

[8] The question remains of the scope of review of the department's decision to condemn excess property. Section 103 of the Streets and Highways Code makes the determination of the Highway Commission conclusive on the necessity of taking particular land. If the taking is for a public use and just compensation is paid, no constitutional rights of the condemnee are infringed by making the issue of necessity nonjusticiable. (*People* ex rel. *Dept. of Public Works* v. *Chevalier, supra,* 52 Cal.2d 299; see also *Rindge Co.* v. *County of Los Angeles* (1923) 262 U.S. 700, 708-710 [67 L.Ed. 1186, 1193-1194, 43 S.Ct. 689].)

[9] The issue of whether a taking is for a public use, however, is justiciable. (*People* ex rel. *Dept. of Public Works* v. *Chevalier, supra,* 52 Cal.2d 299.) The distinction between the scope of review of the questions of public use and necessity was properly recognized in *People* ex rel. *Dept. of Public*

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therein is necessary therefor. (c) That such proposed public improvement is planned or located in a manner which will be most compatible with the greatest public good and the least private injury."

[10]Streets and Highways Code section 104: "The department may acquire, either in fee or in any lesser estate or interest, any real property which it considers necessary for State highway purposes. Real property for such purposes includes, but is not limited to, real property considered necessary for any of the following purposes: [Herein are listed such purposes as rights of way, offices, parks adjoining the highway, landscaping, drainage, maintenance, etc.]"

Works v. *Lagiss* (1963) 223 Cal.App.2d 23, 39 [35 Cal.Rptr. 554]: "The necessity for the construction of a highway at the place designated and in the manner determined by the Commission, together with the amount of land required therefor, are matters which were conclusively established by the adoption of the resolution [of necessity]. The question as to whether the land was to be devoted to a public use, however, as distinguished from private purposes or to accomplish some purpose which is not public in character, became a proper issue for the judicial determination of the court." [10] To raise an issue of improper excess taking, condemnees must show that the condemner is guilty of "fraud, bad faith, or abuse of discretion in the sense that the condemner does not actually intend to use the property as it resolved to use it" (*People* ex rel. *Dept. of Public Works* v. *Chevalier*, *supra*, 52 Cal.2d 299, 304), or that the contemplated use is not a public one (see also *People* ex rel. *Dept. of Public Works* v. *Lagiss*, *supra*, 223 Cal.App.2d 23, 35-44; *Yeshiva Torath Emeth Academy* v. *University of Southern Cal.* (1962) 208 Cal.App. 2d 618, 619-620 [25 Cal.Rptr. 422]; *County of San Mateo* v. *Bartole* (1960) 184 Cal.App.2d 422, 430-434 [7 Cal.Rptr. 569]; *People* ex rel. *Dept. of Public Works* v. *Nahabedian* (1959) 171 Cal.App.2d 302, 306-309 [340 P.2d 1053]).

[1c] When, as in this case, the property is not needed for the physical construction of the public improvement, the question of public use turns on a determination of whether the taking is justified to avoid excessive severance or consequential damages. Accordingly, if the court determines that the excess condemnation is not so justified, it must find that it is not for a public use.

Let a writ of mandate issue ordering the trial court to proceed with the trial of the case under the original complaint in accordance with the views expressed herein.

McComb, J., Tobriner, J., Burke, J., and Sullivan, J., concurred.

MOSK, J.—I dissent.

Whenever an illustration of the voracious appetite of acquisitive government is desired, the action of the public agency here will serve well as Exhibit A.

To state the facts is to decide the case. Needing slightly more than a half acre for a public use (65/100 of an acre, to

be precise), this governmental department seeks to take 54.03 acres of private property which it does not need and cannot use. Its avowed purpose is to speculate on resale to a private purchaser.

No further discussion should be required to decide that the proposed condemnation is improper. Yet the agency advances a strange latter-day economics theory that taking more costs less, and cites as authority Streets and Highways Code section 104.1. If the section purports to grant any such power to the state, it is clearly in conflict with article I, section 14, of the California Constitution, which provides that "Private property shall not be taken or damaged for *public use* without just compensation having first been made to, or paid into court for, the owner. . . ." (Italics added.) Clearly no public use is involved in the taking of the 54 acres, for the land is admittedly more than 83 times in excess of that actually required for highway purposes.

Section 104.1, upon which the state relies, provides that "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."

A statute must be given a reasonable interpretation. (*People* v. *Muraia* (1960) 55 Cal.2d 1, 7 [9 Cal.Rptr. 601, 357 P.2d 833], and cases cited.) It seems clear that when the Legislature adopted the foregoing section referring to "the remainder" after a taking, it contemplated situations in which an insignificant remnant might remain. As a leading authority explains, it is "not an uncommon provision in the statutes relating to the laying out and widening of highways in force in the cities in which such conditions exist that, when part of a parcel of land is taken and the remainder is left in such condition or in such a shape as to be of little value to its owner, the city may take the whole and use or sell what it does not need for the highway, it being felt that it will be less expensive in the end for the city to take and pay for the whole of such lots and either to devote the remnants to municipal purposes, or, by consolidating contiguous remnants, sell them for a fair price, than to engage in protracted litigation over the question of damages to the remaining land with each

owner. If the owner consents or if the statute provides merely that he may surrender the whole tract if he chooses, no constitutional objections can arise, for such a proceeding doubtless tends to save the public money; but, if the owner insists upon keeping what is left of his land, *grave constitutional difficulties* would be encountered if it was attempted to compel him to part with it. Construing such a statute as *limited in its application to trifling and almost negligible remnants* which would be unsuitable for private use after the part actually needed for public use had been appropriated, it would probably be sustained in some jurisdictions at least as authorizing a taking for a purpose reasonably incidental to the laying out of public ways. However, if the proposed taking savored at all of a municipal land speculation, no court would hesitate to hold it unconstitutional." (Italics added; footnotes omitted.) (2 Nichols on Eminent Domain (3d ed. 1963) § 7.5122(1), pp. 718-719.)

Such a "trifling and almost negligible remnant" could result, for example, from a taking of 54 acres leaving an irregular half-acre residue; but to reverse that ratio, and deem 54 acres to be the remainder of a half acre, is truly a case of the tail wagging the dog.

The majority concede that the parcel of 54 acres here is not a physical remnant. That should end the lawsuit. But then they advance a novel theory, neither urged by the parties nor supported by authority, that "remnant" refers not only to geography but also to value.

If so, an inevitable query follows: "value to whom?" Section 104.1 makes it crystal clear that the criterion is not value to the state, as the majority erroneously assume; to justify taking, the remainder must be "of little value *to its owner*." By his resistance the owner here demonstrates that to him there is more than "little value" in the 54 acres. Even if the owner did not so contend, however, the court may take judicial notice that in the context of California's current population explosion, no 54-acre parcel in the state is without ascendant value. In the case at bench the purported "little value" of the 54 acres is attributed to the resultant landlocked condition of the property. Without deciding whether any property need remain totally inaccessible, property in a landlocked condition may readily become marketably valuable merely by acquisition of an easement for access, or by annexation of or to adjacent property.

The second clause of section 104.1 suggests that the excess

taking must provide a benefit to the state. Without pursuing the dubious constitutional aspect of that overly broad provision, in this instance its application is fallacious: so long as just compensation for the taking must be paid, by condemning over 83 times more property than it needs, *a fortiori* the state is paying more than it must necessarily pay.

The theory of the agency is that by taking the land not required for public use, assertedly of little value, it will recoup by resale.[1] But there is no repeal of the basic laws of the marketplace when the state becomes a vendor. If the land is truly of little value, the state will obtain little return by way of sale. Thus, there is no significant benefit to the state, as required by the statute, in depriving the owner of his property.

Nevertheless, the majority insist that "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," and again later, the majority stress "that the economic benefit to the state must be clear." While as indicated above, I doubt there is clear economic benefit to the state from this excessive taking, fundamentally I find the concept of economy, rather than public use or public purpose,[2] to be a unique and unsupportable rationalization to justify the seizure of an individual's private property.[3] The state relies heavily on *United States* ex

[1]The recoupment theory has been roundly condemned in Nichols (2 Nichols on Eminent Domain (3d ed. 1963) § 7.5122(3), p. 720): "although sanctioned in countries in which the power of the legislature is not restricted by a written constitution," recoupment, which "involves the taking of the property of one person and the sale of it to another for his own private use," has not been approved in American jurisdictions. (See also *In re Opinion of Justices* (1910) 204 Mass. 607 [91 N.E. 405, 27 L.R.A. N.S. 483]; *Atwood* v. *Willacy County Nav. Dist.* (Tex. Civ. App. 1954) 271 S.W.2d 137, 141.)

[2]As indicated in *Redevelopment Agency* v. *Hayes* (1954) 122 Cal. App.2d 777, 789 [266 P.2d 105], "the more modern courts have enlarged the traditional definition of public use to include 'public purpose.'" Thus slum clearance was deemed a public purpose, even though after the taking and demolition of the slums, redevelopment was to be undertaken by private industry."

[3]In *Cincinnati* v. *Vester* (6th Cir. 1929) 33 F.2d 242, 245, an Ohio statute authorizing excess condemnation was criticized: "If it means . . . that the property may be taken for the purpose of selling it at a profit and paying for the improvement, it is clearly invalid. . . . [I]t violates the due process clause of the Constitution." (Aff'd. in 281 U.S. 439, with the United States Supreme Court refraining from an opinion on any subject other than compliance with the statute.)

rel. *T.V.A.* v. *Welch* (1945) 327 U.S. 546 [90 L.Ed. 843, 66 S.Ct. 715] in which 6,000 acres beyond that needed for dam purposes were taken, and the court there referred to "a common sense adjustment." Factually, however, the case offers no guidance to us, for the excess land was not resold but was adapted to public recreational purposes, authority for which was specifically provided in the T.V.A. act.

What constitutes a public use is basically a question of fact. In *Linggi* v. *Garovotti* (1955) 45 Cal.2d 20, 24 [286 P.2d 15], this court approved the rule: "whether, in any individual case, the use is a public use must be determined by the judiciary from the facts and circumstances of that case." Here the trial court, after hearing evidence and reviewing the facts, found that the proposed acquisition was not related to any public use and was therefore constitutionally impermissible. The state does not complain of an abuse of discretion, or, indeed, of erroneous conclusions by the trial court; it merely maintains that no court has the power to review its reliance on section 104.1. To the contrary, however, this court held in *People* v. *Chevalier* (1959) 52 Cal.2d 299, 304 [340 P.2d 598], that the issue of public use is justiciable in eminent domain proceedings.

Section 104.1, as interpreted by the state, would lack any definitive standards and thus clearly do violence to the constitutional requirement of due process. The trial court noted in its memorandum opinion that the state's right-of-way agent, as a witness, gave as his opinion under the provisions of section 104.1 "the state would have a right to take as much as one thousand acres of private property, even though it was not for a public use." If a thousand acres, why not 6,000 acres as in *Welch*, or 10,000 or 100,000 acres? If there is any limitation whatever on the amount of land the state may take, without intent to devote it to a public use, neither section 104.1 nor the majority opinion suggests the boundaries. Government's cavalier treatment of private property rights, abjectly approved by the majority, evokes apprehension that Big Brother may have taken over 16 years before 1984.

Amici curiae have complained that the power of the Department of Public Works to condemn any excess property without limitation becomes a potent weapon to be used against prospective condemnees who refuse to sell at the price offered by the department. Right-of-way agents, it is indicated, demand acquiescence in sale of the desired part of the land at

the proffered price with a threat of a punitive taking of all the owner's property. This could be disregarded as a fanciful fear were it not for the state agency's petition for writ of mandate, which candidly admits that denial of the right of excess condemnation "will also have important and substantial side effects upon the heretofore successful policy of petitioner in negotiating the settlement of land acquisitions." We cannot be oblivious to the "tremendous power in government" and the need for "a growing sensitivity to the protection of the individual in his relation with government," as Justice Tobriner has written. (Tobriner, Individual Rights in an Industrialized Society (1968) 54 A.B.A.J. 21, 22.)

The majority finally propose this doctrine: "the question of public use turns on a determination of whether the taking is justified to avoid excessive severance or consequential damages." This concept is completely wrong. It ignores the key word: *use*.

Condemnation is not a necessary antidote for excessive damages, since the law has always been clear that excessive damages are indefensible in any case and under all circumstances, and a ready remedy by trial and appellate courts is available. (Code Civ. Proc., § 657, subds. 5 and 6; *Koyer* v. *McComber* (1938) 12 Cal.2d 175, 182 [82 P.2d 941] [new trial granted]; *Barrett* v. *Southern Pac. Co.* (1929) 207 Cal. 154, 166 [277 P. 481] [reversal on appeal]; *Maedo* v. *Oakland High School Dist.* (1931) 212 Cal. 419, 425 [298 P. 987] [reduction on appeal]; 2 Witkin, Summary of Cal. Law (7th ed. 1960) Torts, § 443, pp. 1636-1637.) Indeed, that the trial judge was well aware of his responsibility is indicated by his written memorandum, noting that if excessive severance damages were awarded, the court would "be remiss in its duty if it did not reduce whatever amount was excessive." Once the word "excessive" is eliminated from the majority's rule, we come to the nub of the problem: the state agency proposes no use of the property whatever, but merely seeks to avoid paying any severance or consequential damages even though the law recognizes such damages as being assessable in appropriate cases. (Code Civ. Proc., § 1248, subd. 2; 3 Witkin, Summary Cal. Law (7th ed. 1960) Constitutional Law, § 236, p. 2046.)

I would substitute for the majority's rule the following: *the question of public use or purpose turns on a factual deter-*

mination of what the public agency proposes to do with the property after acquisition.

Employing that test, the trial court found as a fact that the property was not being taken for a public use. Since land speculation is clearly not a public use, the trial court was correct. I would therefore affirm the order.

Peters, J., concurred.

EXCESS CONDEMNATION IN CALIFORNIA: PROPOSALS FOR STATUTORY AND CONSTITUTIONAL CHANGE

MICHAEL JOHN MATHESON*

Condemnors often find it necessary or useful, in taking land for public projects, to condemn property for purposes other than physical occupation by the proposed improvement. For example, a highway authority may wish to take land adjoining the right of way for resale to private interests on condition that no use be made of the property which will interfere with the safety, utility or beauty of the highway.[1] Or, where only a portion of a parcel is needed for the highway, the condemnor may want to take the entire parcel to avoid leaving remnants of such size, shape, or condition as to be essentially useless for private purposes, or to avoid the payment of severance damages.[2] Finally, the highway authority may simply wish to condemn adjacent property for resale at a profit to reduce the cost of the highway project to the public.[3]

The powers of various public authorities in California to engage in such "excess condemnation" have accumulated over the years in piece-

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[1] *See, e.g.*, CAL. STS. & H'WAYS CODE § 104.3 (West 1956).

[2] *See, e.g.*, CAL. STS. & H'WAYS CODE § 104.1 (West 1956). *See also* statutes of other states cited in Petitioner's Petition for Hearing, Appendix C, People *ex rel.* Department of Public Works v. Superior Court, 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

[3] *See, e.g.*, City of Cincinnati v. Vester, 33 F.2d 242 (6th Cir. 1929), *aff'd on other grounds*, 281 U.S. 439 (1930) (the lower court declared such a purpose invalid and the Supreme Court ducked the issue).

meal fashion. The area lacks overall uniformity and includes some powers that may be inconsistent with the holdings of the California courts on constitutional questions. While the problem of excess condemnation has received extensive theoretical treatment by a number of commentators,[4] specific proposals are needed to make the statutes and constitutional provisions governing excess condemnation more uniform and rational. This Article outlines a variety of measures designed to accomplish this purpose.

I. General Limitations on Excess Condemnation

A. *The Scope of Excess Condemnation*

It is not easy to define with precision what the California courts include within the term "excess condemnation." The term has most often been used by commentators to refer generally to the taking of property not "physically necessary" for a public improvement.[5] However, California courts are prohibited by statute from inquiring into the necessity of the manner or extent of improvements undertaken by most of the major public authorities with eminent domain powers.[6] In *People ex rel. Department of Public Works v. Lagiss*,[7] for example, the Court of Appeal refused to consider an owner's contention that one of these condemnors had taken more land than was actually necessary for the construction of a state highway, holding that this question of necessity was "not justiciable"[8] for any purpose and that the only permissible inquiry was "whether such property was acquired by the condemnor with the intent

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[4] *See, e.g.*, R. Cushman, Excess Condemnation (1917); 2 P. Nichols, Eminent Domain § 7.5122 (3d ed. 1964) [hereinafter cited as Nichols]; Capron, *Excess Condemnation in California—A Further Expansion of the Right to Take*, 20 Hastings L.J. 571 (1969); Comment, *Excess Condemnation*, 18 Calif. L. Rev. 284 (1930).

[5] *See, e.g.*, Comment, *Eminent Domain; Excess Condemnation*, 43 N.Y.U.L. Rev. 795 (1968); Note, *An Expanded Use of Excess Condemnation*, 21 U. Pitt. L. Rev. 60, 61 (1959).

[6] *See, e.g.*, Cal. Civ. Pro. Code § 1241(2) (West Supp. 1968) (irrigation, sanitary, water, transit, school, and public utility districts, but only where the taking is within the territorial limits of such district); Cal. Educ. Code § 23152 (West 1960) (University of California); Cal. Gov't. Code § 15855 (West 1963) (State Public Works Board); Cal. Health & Safety Code § 34878 (West 1955) (Limited Dividend Housing Corp.); Cal. Pub. Res. Code § 6808 (West 1956) (State Lands Commission); Cal. Sts. & H'ways Code § 103 (West 1956) (Department of Public Works); *id.* at § 30404 (West 1956) (Toll Bridge Authority); Cal. Water Code § 251 (West Supp. 1968) (Department of Water Resources), *id.* at § 8595 (West 1956) (State Government and Reclamation Board).

[7] 223 Cal. App. 2d 23, 35 Cal. Rptr. 554 (1963).

[8] *Id.* at 41, 35 Cal. Rptr. at 565.

of not putting it to a public use."[9]

It would appear, therefore, that the term "excess condemnation" is generally used by California courts to refer only to the taking of land which the condemnor intends to use for purposes other than physical occupation by the improvement.[10] In this sense, excess condemnation does not include takings for future public use[11] or the resale of property originally taken for the physical use of the improvement but later found to be unnecessary for that purpose.[12]

At least one California commentator has defined excess condemnation in a more limited and precise sense to refer only to the taking of property for the purpose of resale to private persons, with or without restrictions as to its subsequent use.[13] This distinction has analytical merit since it sets out an objective and relatively precise means of identifying the cases of greatest public concern, where the condemnor is most tempted to take large unneeded parcels purely for speculative purposes. Nonetheless, for the sake of convenience, this Article uses the term in the more general and descriptive sense employed by the California courts.

Courts and commentators have generally recognized three types of excess condemnation authority, depending upon the situation of the land and the purpose of the condemnor: (1) protective, (2) remnant, and (3) recoupment. In protective condemnation, the condemnor acts to protect the utility, safety, and beauty of an improvement by taking adjacent land, often for resale to private persons on condition that future owners refrain from injurious uses of the property.[14] In remnant condemnation, the condemnor needs only a portion of a parcel for an improvement, but takes the entire parcel to avoid leaving a useless remnant or the payment of severance damages.[15] In recoupment con-

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[9] *Id.* at 41, 35 Cal. Rptr. at 565-66. *See also* People *ex rel.* Department of Pub. Works v. Chevalier, 52 Cal. 2d 299, 307, 340 P.2d 598, 603 (1959); Reid v. State, 193 Cal. App. 2d 799, 805, 14 Cal. Rptr. 597, 601 (1961).

[10] *See, e.g.*, Flood Control & Water Conservation Dist. v. Hughes, 201 Cal. App. 2d 197, 214-15, 20 Cal. Rptr. 252, 262-63 (1962). *Cf.* 2 NICHOLS at § 7.223[2] (discussing taking for future needs).

[11] CAL. STS. & H'WAYS CODE § 104.6 (West 1956) (authorizing taking for future public use).

[12] *See, e.g.*, 2 NICHOLS at § 7.223.

[13] Comment, *supra* note 4, at 285. *See also* R. CUSHMAN, *supra* note 4, at 2.

[14] 2 NICHOLS at § 7.5122[2]; Capron, *supra* note 4, at 588-91; Note, *supra* note 5 at 62-64.

[15] 2 NICHOLS at § 7.5122[1]; Capron, *supra* note 4, at 582-88; Note, *supra* note 5, at 62.

demnation, the condemnor takes land benefited by the proposed improvement to recoup the value of such benefits through resale to private persons.[16]

Legislation authorizing the first two types of excess condemnation is common in this country, but independent recoupment condemnation powers are seldom authorized by statute or permitted by the courts.[17] California follows this general trend, authorizing various condemnors to exercise certain types of protective[18] and remnant[19] condemnation but not independent recoupment.[20] These California provisions will be analyzed in detail after a brief consideration of the general limitations on the exercise of excess condemnation power.

B. *Authority for Excess Condemnation*

The power of eminent domain is generally said to be inherent in the sovereignty of the states, and no express authorization in the federal or state constitution is necessary to empower a state legislature to invest state agencies with such powers of condemnation as it sees fit.[21] Accordingly, language in the California constitution authorizing one type of excess condemnation does not prohibit or restrict the exercise of any other type by public condemnors.[22]

It has often been stated that proper statutory authorization is necessary for the exercise of eminent domain powers by public authorities, and that substantive due process is violated by public takings in the absence of such authority.[23] It is not clear whether condemnors with general eminent domain powers may engage in excess takings for public purposes without specific statutory authority, but in practice, condemnors with any substantial need for excess condemnation authority

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[16] 2 NICHOLS at § 7.5122[3]; Capron, *supra* note 4, at 591-95.

[17] The laws and decisions of other states are summarized in Anno., 6 A.L.R. 3d 297 (1966) and 2 NICHOLS at § 7.5122.

[18] *See* text accompanying notes 41-45 *infra*.

[19] *See* text accompanying notes 52-57 *infra*.

[20] *See* text accompanying notes 106-09 *infra*.

[21] Albert Hanson Lumber Co. Ltd. v. United States, 261 U.S. 581, 587 (1923) (conditioned only by just compensation clause of the fifth amendment); People *ex rel.* Department of Public Works v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959) (limited by "public use" and "just compensation"); Eden Memorial Park Ass'n v. Superior Court, 189 Cal. App. 2d 421, 425, 11 Cal. Rptr. 189, 192 (1961).

[22] People *ex rel.* Department of Public Works v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959); People *ex rel.* Department of Public Works v. Garden Grove Farms, 231 Cal. App. 2d 666, 671-72, 42 Cal. Rptr. 118, 121-22 (1965).

[23] *See e.g.*, People v. Superior Court, 10 Cal. 2d 288, 295-96, 73 P.2d 1221, 1225 (1937); 1 NICHOLS at § 4.9.

are governed and limited by statute.[24] Furthermore, where the validity of an excess taking is challenged, the condemnor's position is much stronger where the legislature has explicitly declared that the excess taking is for a legitimate public purpose.[25] In such cases, the courts are usually reluctant to dispute the legislature's findings, and ordinarily confine themselves to determining whether the particular project of the condemnor serves the purpose which the legislature intended. It is prudent, therefore, to make separate statutory provision in all cases for the excess condemnation authority of agencies with eminent domain power.

C. *The "Public Use" Requirement*

Both the federal[26] and the California[27] constitutions implicitly restrict the power of eminent domain to the taking or damaging of property for a "public use." Early decisions interpreting such provisions took a highly restrictive view of the eminent domain power, and held that no taking could be for a public use unless the property condemned was actually to be used by some significant portion of the public.[28] However, as the need for governmental involvement in private activities began to expand, many courts began to accept as "public" any use which substantially contributed to the general utility and facilitated the achievement of public purposes, even though private interests might incidentally benefit from the process.[29]

In California, where public construction and development has been of particular importance in the exploitation of natural resources and the growth of urban centers, the courts have adhered to this broader view,[30]

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[24] *See* text accompanying notes 41-45, 52-57, 106-09 *infra*.

[25] *See* People *ex rel.* Department of Public Works v. Superior Court, 68 Cal. 2d 206, 210, 436 P.2d 342, 345, 65 Cal. Rptr. 342, 345 (1968):

> It is for the Legislature to determine what shall be deemed a public use for the purposes of eminent domain, and its judgment is binding unless there is no "possibility the legislation may be for the welfare of the public."

Lingg v. Garovotti, 45 Cal. 2d 20, 24, 286 P.2d 15, 18 (1955) quoting University of So. Calif. v. Robbins, 1 Cal. App. 2d 523, 525-26, 37 P.2d 163 (1934), *cert. denied*, 295 U.S. 738 (1935).

[26] U.S. CONST. amend. V, § 7(a) has been held applicable to the states via the fourteenth amendment. See, *e.g.*, Chicago, B. & Q. R.R. v Chicago, 166 U.S. 226 (1897); City of Cincinnati v. Vester, 33 F.2d 242 (6th Cir. 1929), *aff'd*, 281 U.S. 439 (1930).

[27] CAL. CONST. art. I, § 14 (explicit "public use" requirement).

[28] *See, e.g.*, 2 NICHOLS at § 7.2[1]; Comment, *supra* note 4, at 287.

[29] *See, e.g.*, 2 NICHOLS at § 7.2[2]; Annot., 6 A.L.R.3d 297 (1966).

[30] *See, e.g.*, Bauer v. County of Ventura, 45 Cal. 2d 276, 284, 289 P.2d 1, 6 (1955); Water Dist. v. Bennett, 156 Cal. App. 2d 745, 748, 320 P.2d 536, 538 (1958);

and have come to include as a "public use" any utilization of the property "that concerns the whole community or promotes the general interest in its relation to any legitimate object of government."[31] Therefore, California condemnors may take property to facilitate its use by private persons in a manner more conducive to the general welfare, so long as private gain is only incidental to the main public purpose, and the public is protected by controls or restrictions on private use.[32] For example, land may be taken to provide services to the public even though private interests are to use the land and benefit thereby.[33] Furthermore, the condemnor may realize income from unrelated private uses where they are consistent with the intended public use or where the land is not immediately to be used by the public.[34]

Some courts have gone even further in broadening the scope of permissible takings where the condemnation of a particular piece of property is "incidental to" and "necessary for" the completion of an improvement, and where the condemnor has no reasonable alternative means of achieving its legitimate purposes, even though the property itself is not literally to be "used" for any but private benefit. This doctrine has frequently been employed in "substitute condemnation" cases —where property is taken for transfer as compensation to other landowners whose property is needed for the condemnor's improvement.[35] Although California courts have not yet dealt with the validity of such substitute-condemnation statutes,[36] the Court of Appeal implicitly approved this rationale in *Redevelopment Agency v. Hayes*,[37] holding valid the taking of property in an urban renewal project for clearance and return to private owners, subject to restrictions protecting the public. There, the court appeared to accept the proposition that the beneficial effect of the taking rather than the actual use of the property after

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Redevelopment Agency v. Hayes, 122 Cal. App. 2d 777, 803, 266 P.2d 105, 122, *cert. denied*, 348 U.S. 897 (1954).

[31] Frostuck v. City of Fairfax, 212 Cal. App. 2d 345, 358, 28 Cal. Rptr. 357, 365 (1963).

[32] *See, e.g.*, Los Angeles v. Anthony, 224 Cal. App. 2d 103, 36 Cal. Rptr. 308, *cert. denied*, 376 U.S. 963 (1964); Redevelopment Agency v. Hayes, 122 Cal. App. 2d 777, 226 P.2d 105, *cert. denied*, 348 U.S. 897 (1954).

[33] *See, e.g.*, Los Angeles v. Anthony, 224 Cal. App. 2d 103, 36 Cal. Rptr. 308, *cert. denied*, 376 U.S. 963 (1964).

[34] *See, e.g.*, People *ex rel.* Department of Public Works v. Nahabedian, 171 Cal. App. 2d 302, 307-09, 340 P.2d 1053, 1055-57 (1959).

[35] *See* Comment, *Substitute Condemnation*, 54 CALIF. L. REV. 1097 (1966).

[36] *Id.* at 1113.

[37] 122 Cal. App. 2d 777, 226 P.2d 105, *cert. denied*, 348 U.S. 897 (1954).

the taking might justify condemnation.[38] It would seem, therefore, that the public-use requirement will be held satisfied in California where a taking is itself substantially necessary for the accomplishment of the public objectives served by a project, given a lack of reasonable alternatives available to the condemnor.[39]

In excess condemnation, the condemnor often intends that private persons will use the property after it is taken and is aware that these persons normally will benefit from that use. As in the case of other takings, however, this does not by itself render the condemnor's actions invalid. Rather, in accordance with the present thinking of California courts on the general problem of public use, it would seem that excess condemnation is valid where the public will derive such a benefit from the contemplated private use, or from the taking itself, that any private benefit can be regarded as "merely incidental."[40]

With this general background, the three individual types of excess condemnation can now be examined and the possible changes in the California law governing each type can be discussed.

II. PROTECTIVE CONDEMNATION

Governmental agencies wishing to protect the safety, utility and beauty of their improvements from deleterious conditions and uses of surrounding property often take the adjoining land, sometimes to develop it or to correct any harmful conditions, and resell it to private persons on condition that future owners refrain from injurious uses. Several con-

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[38] *Id.* at 790. See also the urban renewal decisions of other jurisdictions *noted in* Note, *supra* note 5, at 64 n.4.

[39] One important practical difference between this rationale and previous theories of public use should be stressed. In California, the condemnation resolutions of most of the major condemnors are conclusive on the issue of the "necessity" for the taking proposed. *See* note 6 *supra*. Therefore, once the courts have determined that such a taking is for a public use, they are precluded from further inquiry into the necessity for the improvement, the extent of the taking, or the manner of its design and construction. However, to the extent that this expanded theory of public use depends upon some evaluation of the relative necessity of the taking as a means of accomplishing the condemnor's objectives, there may be greater scope for judicial scrutiny into the propriety of the condemnor's decision to take.

[40] One commentator in another jurisdiction has proposed the following similar test for the validity of excess takings:

> [T]he test is that the excess condemnation should be part of a *single, inseparable plan* for the accomplishment of a public purpose. The excess property must be taken at the *same time* as the land physically necessary for the public improvement, the excess property must be that which is *specially affected* by the improvement, and the taking of the excess property must *benefit the public* in some specific and definable way . . . .

Note, *supra* note 5, at 70 (emphasis in original).

stitutional and statutory provisions authorize California condemnors to engage in excess condemnation of this type. Some set no limit on the amount of property that the condemnor may take. Typical of this variety are provisions for condemnation to protect the scenic value of certain highways[41] and the safety of aircraft entering or leaving airports.[42] Others restrict takings to land within a certain distance of the improvement. Section 14½ of Article I of the California Constitution imposes a 200-foot limit on protective condemnation for memorial grounds, streets, squares, and parkways.[43] This limitation is followed in statutes implementing Section 14½.[44] Similarly, protective condemnation for state dams and water facilities is limited to lands within 600 feet.[45]

It seems fairly clear that excess takings for the primary purpose of protecting the safety, utility or beauty of a public improvement would be treated as being for a "public use" by the California courts. Such takings have uniformly been upheld where consistent with any specific constitutional or statutory limitations.[46] The reason for this uniform acceptance is apparent: the public derives a clear and immediate benefit from the use of the land by the condemnor itself or by private persons in accordance with the restrictions imposed by the condemnor.

Section 14½ of Article I of the California Constitution, the source of most of the statutory limitations on the amount of excess land that may be taken for protective purposes, was adopted in 1928, apparently in the belief that no excess condemnation powers could be granted without specific constitutional authority.[47] That view has since been expressly rejected by the California courts on several occasions.[48] There is, therefore, no need for constitutional authorizations like Section 14½ which

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[41] CAL. GOV'T. CODE §§ 7000-01 (West 1963).

[42] CAL. CIV. PRO. CODE § 1239.4 (West 1955).

[43] Part of each parcel taken must be within 150 feet of the improvement and all of the land taken must be within 200 feet of it. CAL. CONST. art. I § 14½.

[44] *See* CAL. GOV'T. CODE §§ 190-96 (West 1955); CAL. STS. & H'WAYS CODE § 104.3 (West 1956).

[45] CAL. WATER CODE § 256 (West Supp. 1968).

[46] *See, e.g.*, People *ex rel.* Department of Public Works v. Lagiss, 223 Cal. App. 2d 23, 35 Cal. Rptr. 554 (1963); Flood Control and Water Conservation Dist. v. Hughes, 201 Cal. App. 2d 197, 20 Cal. Rptr. 252 (1962).

[47] People *ex rel.* Department of Public Works v. Superior Court, 68 Cal. 2d 206, 212, 436 P.2d 342, 346, 65 Cal. Rptr. 342, 345 (1968) (citing 1928 BALLOT PAMPHLET, ARGUMENT FOR PROPOSED SENATE CONST'L AMEND. No. 16).

[48] *See, e.g.*, People *ex rel.* Department of Pub. Works v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959); People *ex rel.* Department of Pub. Works v. Garden Grove Farms, 231 Cal. App. 2d 666, 671-72, 42 Cal. Rptr. 118, 122 (1965).

impose excessive rigidity on the Legislature in its ordering of the powers of condemnors. Accordingly, Section 14½ can and should be repealed.

Furthermore, present statutory authorizations for protective condemnation should be replaced by a single uniform provision explicitly granting each agency with eminent domain powers the authority to take land to protect the agency's improvements and their environs and to preserve their view, appearance, light, air, and usefulness. Where the condemnor intends to retain the excess land, the financial burden of condemning and paying for large stretches of land without expectation of resale should sufficiently restrict ambitious condemnors.

However, there may be a real need to restrict the discretion of the major condemnors, whose resolutions of condemnation are conclusive on the issue of necessity, in the protective taking of excess land for the purpose of resale. In many cases, for example, such condemnors may be tempted to take large amounts of land in the neighborhood of highways for scenic protection, or in the general vicinity of water and flood control projects for physical protection, where there is in fact little need for extensive condemnation, where public purposes might readily be served by less drastic measures,[49] and where the condemnor's primary interest in taking the land may be to enrich the public treasury by resale at a profit. Absent further statutory restrictions, the courts would probably be unable to exercise any effective control over such protective excess takings.[50]

Nevertheless, absolute limitations on the amount of land that a condemnor may take are unnecessarily arbitrary and restrictive. There may be many instances, for example, in which a highway or flood control authority would legitimately need to protect its projects from uses and conditions on land lying beyond any reasonable uniform distance limitation, and yet find uneconomical the taking and retention of all such property. In such cases, the condemnor should be able to condemn the land for resale, subject to appropriate protective conditions.

In place of fixed distance limitations, therefore, it would be preferable to allow judicial inquiry into the necessity for all protective takings for the purpose of resale.[51] This would enable landowners to place in

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[49] *See* R. CUSHMAN, *supra* note 4, at 87-96.

[50] *See* People *ex rel.* Department of Public Works v. Lagiss, 223 Cal. App. 2d 23, 35 Cal. Rptr. 554 (1963).

[51] The condemnor would, of course, not be required to demonstrate the absolute necessity of the proposed protective taking to the construction and operation

issue the need for excess protective condemnation in the manner and extent proposed, and the adequacy of less drastic and costly alternative means of accomplishing the same public purpose, including the taking of protective easements rather than the entire fee. However, the condemnor's resolution should stand as prima facie evidence of necessity in each of these aspects, and objecting landowners should bear the burden of pleading and proving the existence of less onerous alternatives. Alternatively, excess condemnation within a fixed distance of the improvement could retain the conclusive presumption of necessity, and only takings in excess of such limits be subjected to judicial examinations of necessity. In either case, once the courts are empowered to examine the necessity of excess protective takings for resale, a single uniform provision for all agencies becomes practical: all can operate and be supervised by the courts under the same basic standard of necessity. A multitude of individual limitations on the protective powers of each condemnor would no longer be needed.

Finally, a condemnor taking land for protective purposes might be required, before disposing of the excess to third parties, to offer the same property to the condemnee on the same terms and subject to the same conditions under which the condemnor proposes to sell the parcel. While such a limitation might restrict the condemnor's ability to secure the most favorable and profitable disposition of the property, it would also protect the condemnee's special interests in retaining his own land. In addition it would minimize the possibility of coercive use by a condemnor of protective condemnation powers to secure a more favorable deal with the condemnee on the acquisition of other property.

III. Remnant Condemnation

The construction of a public improvement often requires the condemnation of only part of the parcels along the perimeter of the project. This is particularly true where the location and physical extent of the improvements are determined by engineering and functional considerations, as in the case of highways, water projects, and the like. In some cases, the condemnation of only the parts actually required would leave fragments of such small size, irregular shape, impaired condition, or inaccessibility as to be virtually useless to private interests and of little

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of the improvement, but only reasonable or practical necessity given the alternatives open to him. *See, e.g.*, People *ex rel.* Department of Nat. Res. v. O'Connell Bros., 204 Cal. App. 2d 34, 40, 21 Cal. Rptr. 890, 894 (1962); Flood Control & Water Conservation Dist. v. Hughes, 201 Cal. App. 2d 197, 213, 20 Cal. Rptr. 252, 262 (1962).

or no value to their owners. In these cases, it may be perfectly sensible for the condemnor to take such remnants and, where possible, to consolidate or develop them so that they may be resold to private persons in useable condition.

In California, a number of statutes authorize the taking of an entire parcel where only part is needed for an improvement. Typically, these statutes vary from agency to agency, often with little or no apparent reason for the differences.[52] Two basic types of statutory provisions are discernible, however: (1) those depending upon the quantum of damage to the remainder and (2) those depending on the actual or potential liability of the condemnor to pay compensation to the owner. Provisions of the first type, for example, allow the taking of the entire parcel where any remant is "to be left in such shape or condition as to be of little value to its owner"[53] or where "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 . . . ."[54] Typical of the second type are provisions permitting the taking of the entire parcel where the taking of part "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,"[55] or where

[52] For example, the remnant-condemnation authority of adjoining flood control and water districts often varies without apparent justification. *Compare*, San Diego County [CAL. WATER CODE § 105-6(12) (APP.) (West 1968)] *and* Orange County [CAL. WATER CODE § 36-16.1 (APP.) (West 1956)] *with* Alameda County [CAL. WATER CODE § 55-28(a) (APP.) (West 1956)] *and* Santa Clara County [CAL. WATER CODE § 60-6 (APP.) (West 1956)].

[53] CAL. STS. & H'WAYS CODE § 104.1 (West 1956) (Department of Public Works); *id.* at § 943.1 (West Supp. 1968)(county highway authorities); CAL. WATER CODE § 254 (West Supp. 1968) (Department of Water Resources); *id.* at § 8590.1 (Reclamation Board); *id.* at § 11575.2 (Department of Water Resources); *id.* at § 43533 (West 1966) (water districts).

[54] CAL. WATER CODE § 28-16¾ (APP.) (West 1968) (Los Angeles County Flood Control District); *id.* at § 36-16.1 (Orange County Flood Control District); *id.* at § 48-9.2 (Riverside County Flood Control and Water Conservation District); *id.* at § 49-6.1 (San Luis Obispo County Flood Control and Water Conservation District); *id.* at § 51-3.4(d) (Santa Barbara County Water Agency); *id.* at § 60-6.1 (Santa Clara County Flood Control and Water Conservation District); *id.* at § 74-5 (12.1) (Santa Barbara County Flood Control and Water Conservation District); *see also id.* at § 28-16¾ (Los Angeles County Flood Control District).

[55] CAL. CIV. PRO. CODE § 1266 (West 1955) (city and county highway authorities); CAL. WATER CODE § 105-6(12) (APP.) (West 1968) (San Diego County Flood Control District); *see also* CAL. PUB. UTIL. CODE § 1504 (West Supp. 1968) which permits the condemnation of all of the property of a private utility in an operating water service system where the condemnor would otherwise be required to pay compensation equal to the value of all such property for a taking of part.

the partial taking would "give rise to claims or litigation concerning severance or other damage . . . ."[56] Often, the statutory authority of particular condemnors will consist of a combination of more than one of these provisions.[57]

These two types of provisions are, of course, closely related since the measure of compensation to the owner is roughly designed to correspond to the damage to his parcel: for example, an owner who is left with a remainder so heavily damaged as to be of no value in its severed condition must be compensated by the condemnor for the market value of the entire parcel.[58] There may, however, be important differences since some elements of actual damage to property are noncompensable,[59] and some benefits rendered by the improvement are not legally cognizable.[60]

Remnant takings have been upheld by the courts in some circumstances as valid takings for a public use.[61] Basically, the courts have relied on two rationales: first, that the condemnation is necessary to return the property to productive private use, and second, that the condemnation is necessary to minimize the cost of the improvement to the condemnor.

A. *Restoring the Remnant to Productive Use*

The result of a series of partial takings along a highway improvement would often be a string of unsightly and useless strips and wedges. These might lie unused and unproductive for long periods of time. In some cases, the only feasible method of restoring these fragments to productive use is through condemnation and consolidation by the condemnor. The obvious need for such takings in the development of

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[56] CAL. STS. & H'WAYS CODE § 104.1 (West 1956) (Department of Public Works); *id.* at § 943.1 (West Supp. 1968) (county highway authorities); CAL. WATER CODE § 254 (West Supp. 1968) (Department of Water Resources); *id.* at § 8590.1 (Reclamation Board); *id.* at § 11575.2 (Department of Water Resources); *id.* at § 43533 (West 1966) (water districts).

[57] *See, e.g.*, CAL. WATER CODE § 254 (West Supp. 1968) (Department of Water Resources); CAL. STS. & H'WAYS CODE § 104.1 (West 1956) (Department of Public Works).

[58] *See generally*, on compensation for partial takings, CAL. CONT. EDUC. B., CALIFORNIA CONDEMNATION PRACTICE §§ 4.1-.22 (1960) [hereinafter cited as CONDEMNATION PRACTICE]; 4 NICHOLS at §§ 12.2.22[2]; L. ORGEL, VALUATION UNDER EMINENT DOMAIN §§ 47-65 (2d ed. 1953) [hereinafter cited as ORGEL].

[59] *See, e.g.*, CONDEMNATION PRACTICE §§ 4.11-.13.

[60] *See, e.g., id.* at §§ 4.16-.17.

[61] *See, e.g.*, 2 NICHOLS at § 7.5122[1]; Annot., 6 A.L.R.3d 297 (1966).

streets in congested areas caused the courts in California[62] and elsewhere[63] to hold them valid from an early date. The courts held that the use of the remnants taken would be sufficiently "public" because of the benefit to the community from the removal of unsightly fragments along the public improvement,[64] the facilitation of business growth and expansion along the route which the improvement was often primarily designed to encourage,[65] and the generation of tax revenues by the productive use of the fragments after consolidation.[66] Since the actual use of the parcels after condemnation has therefore been held sufficiently public, there would be no need to justify the taking of such remnants as a necessary incident to some other valid taking.[67]

The condemnation of excess remnants of little or no value in their severed condition is clearly authorized by each of the provisions found in the California statutes noted above, whether of the damage-to-the remainder type[68] or the amount-of-compensation type.[69] Takings of this sort rarely cause the courts much difficulty. However, none of the California remnant-condemnation statutes are limited to parcels of small size. All apply, in addition, to partial takings that cause the requisite quantum of damage or necessitate the requisite amount of compensation even though the remainder is of appreciable size. This situation usually arises where large remainders are cut off from reasonable access by highway or water projects and rendered economically useless in their landlocked or waterlocked state. The problem has been of particular importance in the last two decades in California with the massive construction of limited-access freeways.[70]

Traditionally, the courts have been reluctant to allow the excess

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[62] *See, e.g.*, Union High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919); People v. Botiller, 108 Cal. App. 2d 832, 239 P.2d 914 (1952).

[63] *See* cases cited in Annot., 6 A.L.R. 3d 297 (1966); 2 NICHOLS at § 7.5122[1].

[64] *E.g.*, People *ex rel.* Department of Public Works v. Lagiss, 223 Cal. App. 2d 23, 35 Cal. Rptr. 554 (1963); People v. Thomas, 108 Cal. App. 2d 832, 239 P.2d 914 (1952).

[65] *See* 2 NICHOLS at § 7.5122.

[66] *Id.*

[67] *See* text accompanying notes 35-39 *supra*.

[68] *See* text accompanying notes 53-54 *supra*.

[69] *See* text accompanying notes 55-56 *supra*.

[70] As of February 28, 1967, the Department of Public Works had 190 parcels of land under condemnation proceedings, 77 of which were landlocked by partial takings in freeway construction and 72 of which were otherwise damaged by such construction. Petitioner's Petition for Hearing 5, and Appendix B, People *ex rel.* Department of Public Works v. Superior Court, 62 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

taking of large remnants.[71] Even some judges[72] and commentators[73] today appear to regard minute size as a necessary prerequisite to a valid remnant condemnation. However, if the taking of the entire parcel by the condemnor were necessary to return landlocked remainders to productive private use, there would seem to be no real reason to distinguish between remainders solely on the basis of size. Indeed, the return of large remainders to productive use would be of much greater benefit to the public in terms of the revenue generated, the economic benefit to the community, and the elimination of unsightly parcels along the right of way.

However, condemnation for resale should not be necessary to remedy such deprivations of access. In cases in other jurisdictions, private persons have been allowed to acquire property of adjoining landowners for the construction of access roads to landlocked parcels.[74] Although California courts apparently have not yet recognized this as a general right of property owners,[75] the doctrine might be developed in this area. In any event, it would appear that 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,[76] and proposals have been made to make California statutory authority for such takings explicit and uniform.[77] So clarified, this power of a condemnor to remedy deprivations of access caused by its own improvements would eliminate any justification for the taking of large remnants solely as a means of returning the property to productive private use. Where the condemnor deems the construction of new access to a landlocked parcel impractical or uneconomical, its decision is tantamount to a conclusion

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[71] *See, e.g.*, 2 NICHOLS at § 7.5122[1].

[72] *See, e.g.*, People *ex rel.* Department of Public Works v. Superior Court, 68 Cal. 2d 206, 217-18, 436 P.2d 342, 349-50, 65 Cal. Rptr. 342 349-50 (1968) (dissenting opinion).

[73] *See* Comment, *supra* note 5, at 799-800.

[74] *See, e.g.*, State *ex rel.* Huntoon v. Superior Court, 145 Wash. 307, 260 P. 527 (1927); Komposh v. Powers, 75 Mont. 493, 244 P. 298 (1926); Derryberry v. Beck, 153 Tenn. 220, 280 S.W. 1014 (1926).

[75] *Compare* General Pet. Corp. v. Hobson, 23 F.2d 349 (S.D. Cal. 1927) *and* Sierra Madre v. Superior Ct., 191 Cal. App. 2d 587, 12 Cal. Rptr. 836 (1961) *with* Lingg v. Garovotti, 45 Cal. 2d 20, 286 P.2d 15 (1955) *and* CAL. CIV. CODE § 1001 (West 1954). *See also* Note, Eminent Domain: Right of Exercise by a Private Person, 44 CALIF. L. REV. 785 (1956).

[76] *See, e.g.*, Los Angeles v. Leavis, 119 Cal. 164 (1897); Sherman v. Buick, 32 Cal. 241 (1867).

[77] *See* California Law Revision Commission, Tentative Recommendation Relating to Condemnation Law and Procedure: The Right to Take (Byroads), 1968 (unpublished memorandum).

that return to productive private use is not worth the allocation of resources. Therefore, although the taking of large remnants has been upheld on other grounds,[78] apparently no California court has done so under this theory.

B. *Minimizing the Cost of the Improvement to the Condemnor*

Traditionally, California courts have been reluctant to permit the taking of remnants of appreciable size, however worthless, under any theory.[79] However, in the recent case of *People ex rel. Department of Public Works v. Superior Court*,[80] commonly known as the *Rodoni* case,[81] the California Supreme Court held such a taking valid solely as a means of reducing the cost of the improvement to the condemnor. The Department of Public Works condemned 0.65 acres of a 54 acre parcel 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, rending 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 of Chief Justice Traynor:

> 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

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[78] People *ex rel.* Department of Pub. Works v. Superior Ct., 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

[79] In Union High School Dist. v. McDonald, 180 Cal. 7, 16, 179 P. 180, 185 (1919), where the condemnor was permitted to take the final 20 feet of a 100-foot parcel, the court noted the worthlessness of the remainder, but apparently did not treat it as a "non-physical" remnant.

[80] 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

[81] 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 *ex rel.* Department of Public Works 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 *ex rel.* Department of Public Works v. Superior Court, 68 Cal. 2d 206, 210, 436 P.2d 342, 345, 65 Cal. Rptr. 342, 345 (1968).

> 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.
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> 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.[82]

Evidently neither the court nor the Department of Public Works sought to justify the taking of the remainder as a "public use" on the theory that the actual use of the remnant intended by the condemnor would be of substantial benefit to the public. Rather, it was the beneficial effect of the taking itself, as a means of reducing the condemnor's ultimate costs for the project, that justified condemnation and rendered any private benefit from the use of the land "merely incidental." The court's decision is, therefore, essentially another application of the modern view of public use found in urban renewal and substitute condemnation cases. There, takings substantially necessary for the accomplishment of the public objectives served by a project are held valid even though the property itself is not literally to be used for a public purpose.[83]

Justice Mosk in dissent[84] and at least one commentator[85] have objected strenuously that such excess takings cannot legitimately minimize the condemnor's ultimate costs within the limits of the public use requirement. This objection requires consideration of the theoretical measure of compensation in partial-taking cases, and the actual relationship between jury verdicts in these cases and the trend of market values of such remainders.

According to Section 1248 of the California Code of Civil Procedure, the trier of fact in partial-taking cases must separately assess: (1) the value of the portion of the parcel to be condemned, (2) the damages accruing to the remainder by reason of its severance and the construction of the proposed improvement, and (3) the benefit to the remainder occasioned by the construction of the improvement. The condemnee

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[82] *Id.* at 212-13, 436 P.2d at 346-47, 65 Cal. Rptr. at 346-47.

[83] *See* text accompanying notes 35-39 *supra*.

[84] People *ex rel.* Department of Public Works v. Superior Court, 68 Cal. 2d 206, 216, 436 P.2d 342, 349, 65 Cal. Rptr. 342, 349 (1968). *See also* Brief for Roy and Thelma Rodoni, real parties in interest as Amici Curiae at 6-12.

[85] Comment, *supra* note 5, at 798-99.

is entitled to the value of the portion taken plus any excess of severance damages to the remainder over benefits conferred.[86] On the other hand, should the condemnor take the entire parcel, the condemnee would be entitled to the fair market value of the entire parcel at the time of condemnation.[87] The condemnor may prefer in practice to take the entire parcel for a number of reasons.

First, the process of appraising, negotiating, and, if necessary, litigating the elements of damage in partial-taking cases will normally prove considerably more difficult and costly than the simpler matter of determining and paying the fair market value of the entire parcel. However, the court in *Rodoni*[88] explicitly denied that this saving of cost and trouble could by itself justify the taking of the remainder. This would, according to Chief Justice Traynor,[89]

> [n]ullify the constitutional guarantee of just compensation . . . by permitting the state to threaten excess condemnation, not because it was economically sound, but to coerce condemnees into accepting whatever value the state offered for the property actually taken or waiving severance or consequential damages to avoid an excess taking.

Furthermore, the condemnor would have virtually unlimited remnant condemnation power under such a rule, regardless of the value or size of the remainder, since it is always more difficult and costly to determine compensation in partial-taking cases.

However, the condemnor may also find it economically advantageous to take an entire parcel where the remainder will be benefited as well as damaged by the proposed improvement. "General benefits," benefits accruing to a large number of similarly situated owners in the vicinity, may not be offset against damages in determining compensation; only "special benefits" peculiar to the condemnee may be considered.[90] Furthermore, even special benefits may be offset only against damages to the remainder; compensation for the value of the parcel taken may never be reduced.[91] As a result, the owner may realize a significant windfall and yet retain the remainder, while the condemnor may be

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[86] CAL. CIV. PRO. CODE § 1248(3) (West Supp. 1968).

[87] CAL. CIV. PRO. CODE § 1248(1) (West Supp. 1968).

[88] People *ex rel.* Department of Public Works v. Superior Court, 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

[89] *Id.* at 213-14, 436 P.2d at 347, 65 Cal. Rptr. at 347.

[90] *See, e.g.*, Los Angeles v. Marblehead Land Co., 95 Cal. App. 602, 273 P. 131 (1928); CONDEMNATION PRACTICE §§ 4.16-.17.

[91] CAL. CIV. PRO. CODE § 1248(3) (West Supp. 1968).

required to pay up to the full market value of the entire parcel while retaining only part.

The majority in *Rodoni* carefully disclaimed the proposition that a condemnor might take a remainder solely to recoup benefits generated by the improvement.[92] However, the California rules on compensation for partial takings may not only prevent the condemnor from recovering benefits rendered, but may also require the condemnor to pay substantial sums to an owner who has, in fact, been enriched by the construction of the improvement or retains property whose value has already been paid by the condemnor. The court carefully distinguished the avoidance of such windfall payments from pure recoupment, and found such avoidance a valid basis for remnant condemnation.[93]

Finally, as a number of commentators have noted, the California method of determining compensation for partial takings can be quite confusing to a trier of fact, and may require bare intuitive speculation as to the use and value of the individual parts of the owner's parcel with little objective basis for the result.[94] In some cases, the courts themselves have doubted the feasibility of complying with these rules in an objective and consistent manner.[95] As a result, condemnors have often complained that juries tend to reach verdicts unnecessarily generous to owners in partial-taking cases, and substantially out of line with the real economic detriment suffered by condemnees.[96] Recent studies in freeway construction projects seem generally to confirm that owners of remainders along the right of way tend to profit from these improvements on a scale inconsistent with the amounts of compensation they receive at the time of condemnation.[97]

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[92] People *ex rel.* Department of Public Works v. Superior Court, 68 Cal. 2d 206, 214, 436 P.2d 342, 347, 65 Cal. Rptr. 342, 347 (1968), (at note 7). A fortiori, a condemnor could not justifiably take a remainder for the sole purpose of speculation, unrelated to the needs of the project or benefits generated thereby.

[93] *Id.*

[94] *See, e.g.*, ORGEL § 52; Note, *Eminent Domain: Compensation for Partial Taking of Farmland in Constructing Limited Access Highways*, 42 MINN. L. REV. 106, 116-17 (1957).

[95] *See, e.g.*, People *ex rel.* Department of Public Works v. Anderson, 236 Cal. App. 2d 683, 696, 46 Cal. Rptr. 377, 386 (1965).

[96] *See* Reply of Petitioner to Memorandum in Opposition of Real Parties in Interest and Amicus Curiae Brief at 2, 3a, People *ex rel.* Department of Public Works v. Superior Court, 56 Cal. Rptr. 173 (1967).

[97] *See* G. SCHMUTZ, CONDEMNATION APPRAISAL HANDBOOK 112-29 (1963).

C. *Statutory Changes to Conform to* Rodoni

It is clear that the *Rodoni* opinion will necessitate substantial revision of California's remnant-condemnation statutes. Certain of these provisions appear clearly to violate the *Rodoni* standards, as where authority to take depends only on a mere assertion of severance damage claims[98] or a mere showing of "substantial" damage to the remainder.[99] Others appear to fall within the *Rodoni* criteria, as where the condemnor may take only remainders of little or no value to the owner[100] or in such damaged condition as to require payment of compensation equal to the value of the entire parcel,[101] 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.[102]

All present remnant-condemnation provisions could be replaced by a single statute permitting all condemnors to take remainders under the circumstances of the *Rodoni* case, where the remainder left by severance would be of such size, shape, or condition as to raise a substantial risk that the condemnor may be required to pay severance damages equal or substantially equal to the value of the remainder at the time of condemnation. Such a provision would permit remnant takings where there is clear economic benefit to the condemnor, and where the greatest possibility of windfall recovery by the condemnee is otherwise threatened. The provision would authorize the taking of physical remnants, as traditionally allowed, and "financial" remnants as defined in *Rodoni*.

However, such a provision would limit condemnors to a fairly small class of remainders,[103] and the *Rodoni* opinion clearly indicated that the full scope of constitutionally permissible remnant takings was not exhausted by the *Rodoni* circumstances. According to the court:

> [The language of the statute in question] may reasonably be interpreted to authorize only those excess condemnations that are for valid

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98 *See* note 56 *supra*.

99 *See* note 54 *supra*.

100 *See* note 53 *supra*.

101 *See* note 55 *supra*.

102 *See* note 52 *supra*.

103 *See, e.g.*, La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 2d 762, 304 P.2d 803 (1956), where damages totalling 83% of the value of a parcel were held not "equal" or even "substantially equal" to the value of the parcel for the purposes of § 1266 of the Code of Civil Procedure.

> public uses; namely, condemnation of remnants . . . or condemnations that avoid a substantial risk of excessive severance or consequential damages. . . .
>
> We need not decide in what specific cases other than those mentioned the statute authorizes excess condemnation. It should be emphasized, however, that the economic benefit to the state must be clear. . . .[104]

It is difficult to determine what the court might have meant to include within the phrase "excessive severance or consequential damages" or the requirement that the proposed taking be of "clear" economic benefit to the state. Conceivably, these criteria would permit remnant takings wherever there is a substantial danger of windfall payments to the condemnee, whether a product of the realization of noncognizable benefits or of the tendency of juries to give speculative and excessive awards in partial-taking cases.

The legislature might choose to force the courts themselves to define and interpret the meaning of the *Rodoni* language by incorporating the key phrases from the opinion into the provisions authorizing remnant takings. Thus, for example, all condemnors might be authorized to take an entire parcel whenever severance would leave a remainder in such size, shape, or condition as to raise a substantial risk that the condemnor may be required to pay excessive severance or consequential damages. In the long run, such a formulation should lead to the pragmatic development of workable limits on the remnant-taking powers of all condemnors, although there would be a likelihood of short-run uncertainty and confusion among condemnors and lower courts before comprehensive standards were developed, and perhaps a need for legislative revision to refine or correct the results of such a judicial development.

Alternatively, condemnors could be granted the power to take the entire parcel whenever there is a substantial risk that severance damages may exceed a fixed proportion of the value of the entire parcel, or of the remainder at the time of condemnation. However, such an arbitrary fixed standard, unless set very high, would not identify with much precision the cases of windfall to the condemnee and benefit to the condemnor that alone justify remnant takings. Courts and condemnors might therefore have to fall back upon the vague standards of *Rodoni* in every case regardless of the proportion fixed.

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[104] People *ex rel.* Department of Public Works v. Superior Court, 68 Cal. 2d 206, 212-13, 436 P.2d 342, 346-47, 65 Cal. Rptr. 342, 346-47 (1968).

Each of these alternatives would presumably require a preliminary determination by the trial court of the probable amount of severance or consequential damages and of the value of the parcels involved before the condemnor's initial right to take the remainder could be resolved. It would be more rational and expeditious to reserve all such questions of valuation and damages to the trier of fact and to require a verdict in the normal course of proceedings setting forth both the amount of compensation appropriate for the taking of only part and the amount appropriate for the taking of the entire parcel. At that point, if the statutory and constitutional standards for the taking of the remnant had been met, the condemnor could elect to take the entire parcel if it deems such a course of action to be in the public interest. Similarly, the condemnee should be given the right to elect to waive such damages as the trial court finds excessive and thereby avoid the taking of the remnant.

Finally, as in the case of protective takings for the purpose of resale,[105] the necessity of remnant takings by all condemnors for the purpose of resale should be subjected to judicial examination. Condemnees might thereby 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. As in the case of protective takings, however, the condemnor's resolution of condemnation should stand as a prima facie indication of necessity in all aspects, and objecting landowners should bear the burden of pleading and proving the existence of less onerous alternatives.

IV. Recoupment Condemnation

The construction of public improvements is often of great benefit to owners of land in the immediate vicinity, particularly where the improvement remedies undesirable natural or artificial conditions or opens up new means of access to the area. Condemnors may seek to tap this pool of external economies by taking benefitted parcels and reselling them at a profit to private persons. American courts have generally invalidated such takings as not being for a public use;[106] the actual use of the parcels taken would be of primary benefit to the private purchasers alone under the traditional view of the public use doctrine. Furthermore, the taking itself could not be regarded as a necessary incident to the construction of the improvement, since the value of the

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[105] *See* text accompanying note 51 *supra*.

[106] *See, e.g.*, 2 Nichols at § 7.5122[3]; Annot., 6 A.L.R.3d 297 (1966).

benefits could be recouped by less drastic measures such as special assessments, and since the former owners could equally well have exploited for the general welfare the added economic potential generated by the improvement.

As noted earlier, the California courts seem to have rejected condemnation for the sole purpose of recoupment,[107] and California statutes apparently do not authorize independent recoupment condemnation.[108] No change in this regard is warranted.[109] However, it should be emphasized that a condemnor is not prohibited from recouping benefits generated by its project where excess land is taken as a valid exercise of protective or remnant condemnation powers.[110] In such cases, the resulting private benefit can be regarded as merely incidental to the public purposes which justified the action as a protective or remnant taking.

V. CONCLUSION

The changes suggested in this Article can be accomplished by the repeal of all present California statutory and constitutional provisions dealing with protective[111] and remnant[112] takings, and the enactment of single uniform provisions, in Title 7 of Part 3 of the Code of Civil Procedure (Section 1237 *et seq.*) or some other appropriate place,[113] to govern excess condemnation for protective and remnant purposes. The protective section should provide for: (1) protective-taking authority for

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107 See People *ex rel.* Department of Public Works v. Superior Court, 68 Cal. 2d 206, 214, 436 P.2d 342, 347, 65 Cal. Rptr. 342, 347 at note 7 (1968); Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co., 72 Cal. App. 2d 638, 654, 165 P.2d 741, 750 (1946).

108 California Government Code § 192 seems literally to authorize unlimited takings of excess land in conjunction with the construction or improvement of memorial grounds, streets, squares, parkways, or other public places. However, it would seem clear from §§ 191 and 193 of the Government Code and the preamble to the enacting statute, Cal. Stats. 48th Sess., ch. 795 (1929) [repealed Cal. Stats. 1953 Reg. Sess., ch. 170, § 231], that this section was intended to be limited to protective takings authorized by § 14½ of article I of the California Constitution. One commentator has argued, however, that Government Code § 192 might still be interpreted to authorize recoupment takings. Capron, *supra* note 4, at 591-92. Any such ambiguity should be removed by the repeal of these sections.

109 For discussion of the possible merits and disadvantages of recoupment condemnation, *see, e.g.*, Capron, *supra* note 4, at 591-95; Note, *supra* note 5, at 64-69.

110 *See* Redevelopment Agency v. Hayes, 122 Cal. App. 2d 777, 804, 266 P.2d 105, 122-23, *cert. denied*, 348 U.S. 897 (1954).

111 *See* notes 41-45 *supra*.

112 *See* notes 52-57 *supra*.

113 Such provisions might be located in the Government Code in place of the present California Government Code §§ 190-96.

all condemnors without distance limitation, (2) judicial power to inquire into the necessity of all protective takings for the purpose of resale, and (3) a right of first refusal by the condemnee on dispositions of excess land by the condemnor. The remnant section should provide for: (1) remnant-taking authority for all condemnors for physical and "financial" remnants, and in all other cases where "excessive" severance or consequential damages are threatened, (2) a post-verdict election for condemnors between the taking of the entire parcel or only the part needed, (3) a post-verdict election for condemnees to avoid the taking of the entire parcel through the waiver of any "excessive" damages, and (4) judicial power to inquire into the necessity of all remnant takings for the purpose of resale.

The result of these changes should be to provide condemnors with an adequate choice of measures to accomplish their legitimate purposes, and, at the same time, to protect landowners from excessive and arbitrary condemnations that serve no public need.

#36.40 Revised 5/25/70

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

EXCESS CONDEMNATION--PHYSICAL AND FINANCIAL REMNANTS

PRELIMINARY STAFF DRAFT

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

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.

36.40 Revised 5/25/70

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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* The Constitution Revision Commission has recommended the repeal of Section 14 1/2 as unnecessary.

or legislatures.[1]

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,[5] 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:[6]

> 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 remnant-condemnation statutes.[7] 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 on a mere assertion of severance damage claims[8] or a mere showing of damage to the remainder.[9] Other provisions appear to fall within the Rodoni criteria, as where the condemnor may take only remainders that are of little or no value to the owner[10] or are in such damaged condition as to require payment of compensation equal to the value of the entire parcel,[11] 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 both physical and financial remnants by voluntary transactions, to dispose of the 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 valueless.[12] 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.

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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 of the Law Revision Commission Relating to Condemnation Law and Procedure: The Right to Take (Byroads).

PROPOSED LEGISLATION

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

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* The Commission is presently engaged in the task of preparing a comprehensive statute relating to eminent domain. For convenience, the legislation proposed here is numbered with reference to that statute. It should also be noted that the repealed sections do not include the many uncodified sections dealing with special districts. The latter sections will be dealt with at a future time.

Division 4. The Right to Take

Chapter 7. Excess Condemnation

§ 420. Voluntary acquisition of physical or financial remnants

420. 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 expressly consented to by the owner.

Comment. Section 420 provides a broad authorization for public entities to acquire physical or "financial" remnants of property by voluntary transactions, including condemnation proceedings initiated with the consent of the owner. Compare Section 421 and the Comment to that section relating to the condemnation of remnants. The language of this 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 to be repealed]. 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. That matter is provided for by Section 422. See Section 422 and Comment thereto.

The Right to Take

§ 421. Condemnation of physical or financial remnants

421. (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 section 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. Upon trial of the issue of compensation no reference shall be made to the resolution, ordinance, or declaration adopted to invoke this section.

(c) If the condemnee desires to contest the taking under this section, he shall specifically raise the issue in his answer. Upon motion of either the condemnor or the condemnee, made not later than 20 days prior to the day set for trial of the issue of compensation, the court shall determine whether the remainder, or portion of the remainder, may be taken under this section. If the condemnee does not specifically raise the issue in his answer, or if a motion to have this issue heard is not timely made, the right to contest the taking under this section shall be deemed waived.

(d) The determination whether the remainder, or portion of the remainder, may be taken under this section, shall be made before trial of the issue of compensation. 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) 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).

(f) 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.

Comment. Section 421 provides a uniform standard and a uniform procedure for determining whether property may be taken to eliminate 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 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, 42 So. Cal. L. Rev. 421 (1969). This section supersedes Section 1266 of the Code of Civil Procedure, Section 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). It should be noted preliminarily that the terms "larger parcel" and "entire parcel" are not synonymous. "Larger parcel" refers to the original, contiguous, unified parcel held by the condemnee. See Code of Civil Procedure Section 1248(2); People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967). "Entire parcel" refers to the entire parcel sought to be acquired by the condemnor; this includes the part taken for the improvement itself and the remainder, or portion of the remainder sought to be acquired under this section. 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 Planing Mill, supra; State Highway Commission v. Chapman, 446 P.2d 709 (Mont. 1968). However, if it is totally "landlocked" and no physical solution is practical, or reduced beneath minimum zoning size and there is no reasonable probability of a zoning change, or 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., Dep't 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 420 (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 421 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."

The subdivision also forbids reference in the valuation trial to the resolution to take under this section. For a somewhat analogous provision, see Code of Civil Procedure Section 1243.5(e) (amount deposited or withdrawn in immediate possession cases).

Subdivisions (c) and (d). 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); 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. Moreover, failure to make such demand shall be deemed a waiver of this issue. Subdivisions (c) and (d) make 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, these subdivisions do 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 preliminary hearing will be concluded and a determination reached prior to the trial of issue of compensation. The extent to which evidence introduced at a preliminary hearing can be introduced at the valuation trial should be determined under the provisions of the Evidence Code.

Subdivision (e). 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

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 (e) prevents acquisition of the remainder.

Subdivision (f). Subdivision (f) 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).

The Right to Take

§ 422. Disposal of acquired physical or financial remnants

§ 422. Subject to any applicable limitations imposed by law, a public entity may sell, lease, exchange, or otherwise dispose of property taken under Section 420 or Section 421 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 422 authorizes the entity to dispose of property acquired under Sections 420 and 421. 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. 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 OF CIVIL PROCEDURE § 1266

Staff recommendation

Sec. . 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 condemner 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. Section 1266 is superseded by Section 421 of the Comprehensive Statute.

CODE OF CIVIL PROCEDURE § 1266.1

Staff recommendation

Sec. . 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. Section 1266.1 is superseded by Section 420 of the Comprehensive Statute.

Sec. . 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.~~

Comment. Section 104.1 is superseded by Sections 420 through 422 of the Comprehensive Statute.

Sec. . 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.~~

Comment. Section 943.1 is superseded by Sections 420 through 422 of the Comprehensive Statute.

Sec. . 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 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 dam or water purposes.~~

Comment. Section 254 is superseded by Sections 420 through 422 of the Comprehensive Statute.

Sec. . 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.~~

Comment. Section 8590.1 is superseded by Sections 420 through 422 of the Comprehensive Statute.

WATER CODE § 11575.2

Staff recommendation

Sec. . 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.~~

Comment. Section 11575.2 is superseded by Sections 420 through 422 of the Comprehensive Statute.

Sec. . 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.~~

Comment. Section 43533 is superseded by Sections 420 through 422 of the Comprehensive Statute.