

## First Supplement to Memorandum 71-64

Subject: Study 36.50 - Condemnation (Compensation in Case of Partial Take)

At the October and November 1971 meetings, the Commission directed the staff to prepare for consideration draft provisions which would effectuate a strict "before and after" rule as the basic measure of damages for an eminent domain taking. At the November meeting, the Commission also suggested that the background materials previously furnished be supplemented by sample statutes of other jurisdictions which deal with the basic measure of compensation issue. We expect, at the December 1971 meeting, to review this issue generally and have accordingly redistributed Memorandum 71-64 and the attached background materials. We urge you to review these materials carefully. Attached to this memorandum are draft proposals which would implement a strict "before and after" rule (Exhibit I--pink; Section 601). Presented below are examples of statutes from other states.

As indicated in the background materials attached to Memorandum 71-64, a substantial number of states follow a rule similar to that stated in Code of Civil Procedure Section 1248: i.e., that the basic measure of compensation in a partial taking case is the value of the take plus the amount, if any, by which the damage to the remainder exceeds the benefits to the remainder. However, this approach to compensation seems to be uniformly criticized, and the Commission has expressed no desire to retain such a rule. Accordingly, we will not further consider this approach.

The consultant suggests that a modified version of the "before and after" rule be adopted: i.e., that special, but not general, benefits be offset against both damages to the remainder and value of the take. Such a rule has been adopted relatively recently by statute in both Pennsylvania and Wisconsin. The Wisconsin statute provides:

Wisconsin Statutes Annotated, Section 32.09

32.09. Rules governing determination of just compensation. In all matters involving the determination of just compensation in eminent domain proceedings, the following rules shall be followed:

(1) The compensation so determined and the status of the property under condemnation for the purpose of determining whether severance damages exist shall be as of the date of evaluation . . . .

\* \* \* \* \*

(3) Special benefits accruing to the property and affecting its market value because of the planned public improvement shall be considered and used to offset the value of property taken or damages under sub. (6), but in no event shall such benefits be allowed in excess of damages described under sub. (6).

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(5) In the case of a total taking the condemnor shall pay the fair market value of the property taken and shall be liable for the items in s. 32.19 if shown to exist. [incidental damages]

(6) In the case of a partial taking, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

(a) Loss of land including improvements and fixtures actually taken.

(b) Deprivation or restriction of existing right of access to highway from abutting land, provided that nothing herein shall operate to restrict the power of the state or any of its subdivisions or any municipality to deprive or restrict such access without compensation under any duly authorized exercise of the police power.

(c) Loss of air rights.

(d) Loss of a legal nonconforming use.

(e) Damages resulting from actual severance of land including damages resulting from severance of improvements or fixtures and proximity damage to improvements remaining on condemnee's land.

(f) Damages to property abutting on a highway right of way due to change of grade where accompanied by a taking of land.

(g) Cost of fencing reasonably necessary to separate land taken from remainder of condemnee's land, less the amount allowed for fencing taken under par. (a), but no such damage shall be allowed where the public improvement includes fencing of right of way without cost to abutting lands.

(7) In addition to the amount of compensation paid pursuant to sub. (6), the owner shall be paid for the items provided for in s. 32.19, if shown to exist . . . .

Section 32.09 was enacted in 1961, based upon recommendations of an Eminent Domain Committee appointed by the governor and charged with the responsibility of revising Wisconsin's laws relating to eminent domain. You will note that subdivision (6) lists a number of items of loss or damage which may be given effect in determining the "after" value. The Wisconsin committee also proposed a list of items which should not be given effect. The legislature did not follow this latter recommendation, but we list these factors below for your information:

Items of damage which are not compensable. Without restriction because of enumeration the following items of damage are not compensable: loss of business during construction of the improvement; temporary impairment of access during construction; inconvenience to condemnee during construction; loss of value of a business over and above value of real estate as a result of the taking; loss of future profits; expenditures to secure a new location or to prevent loss of trade; diversion of surface water; damage caused by the manner of improvement on the land of others; personal annoyance or discomfort; restriction of access but leaving a remaining access which is reasonable under all the circumstances; reasonable traffic regulations; diversion of traffic; circuitry of travel; right of access on a controlled access highway in new location.

The pertinent sections of the Pennsylvania Eminent Domain Code are Sections 602 and 606. They provide in part:

Section 602. (Measure of Damages.) Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property interest remaining immediately after such condemnation and as affected thereby, and such other damages as are provided in this article.

\* \* \* \* \*

Section 606. (Effect of Condemnation Use on After Value.) In determining the fair market value of the remaining property after a partial taking, consideration shall be given to the use to which the property condemned is to be put and the damages or benefits specially affecting the remaining property due to its proximity to the improvement for which the property was taken. Future damages and general benefits which will affect the entire community beyond the properties directly abutting the property taken shall not be considered in arriving at the after value. Special benefits to the remaining property shall in no event exceed the total damages except in such cases where the condemnor is authorized under existing law, to make special assessments for benefits.

The comment to Section 606 explains its effect as follows:

Comment:

The provisions of this section are meant to emphasize that the value of the remaining property after a partial taking, as affected by the condemnation, would be that which a prudent buyer would pay, recognizing the damages and benefits accruing to the remaining property as they can be interpreted and evaluated at that time. While the ultimate benefits to be derived from improvements within the part taken may be great, the owner of the remaining property may not enjoy them in some cases for several years. In determining the fair market value of the remaining property, consideration should be given to the necessary time discount, inconvenience and other effects of the construction period, which might materially affect the price which the condemnee would receive if he were to sell the remaining property to a third party immediately after the day of condemnation, but before completion of the improvement.

It is also the purpose of this section to provide, in accordance with existing law, that general benefits and damages which accrue to the community as a whole are not to be considered in arriving at the after value. Only special, particular and direct benefits and damages to the remaining property may be considered in arriving at the after value. The special benefits may not exceed the amount of damages to which the condemnee is entitled; in other words, the condemnor cannot obtain a judgment against the condemnee on the basis that the special benefits exceed the damages.

This act is not intended to supersede or otherwise affect those statutes which authorize the assessment of benefits covering the cost of public improvements, such as sewers, or the method of assessing them, except where a condemnation cognizable under this act accompanies the installation of the assessable improvement, in which case the entire proceeding is intended to be under this act and such benefits may be assessed as provided in the last sentence of this section.

The principal drawback to these provisions is that attempt to distinguish between "special" and "general" benefits. As indicated in Memorandum 71-64, the staff believes that a strict "before and after" test is the best measure of compensation. Such a test would simply require valuation of the remainder in its after condition as it stands-- without distinction between special and general benefits or special and general damages. This is the test which seems to have been adopted by New Mexico in 1968 and by Kansas in 1963. The respective provisions are as follows:

New Mexico Statutes Annotated, Section 22-9-9.1

22-9-9.1. Measure of damage to remainder in partial condemnation. --In any condemnation proceeding in which there is a partial taking of property, the measure of compensation and damages resulting from the taking shall be the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking. In determining such difference, all elements which would enhance or diminish the fair market value before and after the taking shall be considered even though some of the damages sustained by the remaining property in themselves, might otherwise be deemed noncompensable.

Kansas Statutes Annotated, Section 26-513

26-513. (a) . . . . Private property shall not be taken or damaged for public use without just compensation.

(b) Taking entire tract. If the entire tract of land or interest therein is taken, the measure of compensation is the value of the property or interest at the time of the taking.

(c) Partial taking. If only a part of a tract of land or interest is taken, the compensation and measure of damages are the difference between the value of the entire property or interest immediately before the taking, and the value of that portion of the tract or interest remaining immediately after the taking.

(d) Factors to be considered. In ascertaining the amount of compensation and damages as above defined, the following factors, without restriction because of enumeration, shall be given consideration if shown to exist but they are not to be considered as separate items of damages, but are to be considered only as they affect the total compensation and damages under the provisions of subsections (b) and (c) of this section:

1. The most advantageous use to which the property is reasonably adaptable.
2. Access to the property remaining.
3. Appearance of the property remaining, if appearance is an element of value in connection with any use for which the property is reasonably adaptable.
4. Productivity, convenience, use to be made of the property taken, or use of the property remaining.
5. View, ventilation and light, to the extent that they are beneficial attributes to the use of which the remaining property is devoted or to which it is reasonably adaptable.
6. Severance or division of a tract, whether the severance is initial or is in aggravation of a previous severance; changes of grade and loss or impairment of access by means of underpass or overpass incidental to changing the character or design of an existing improvement being considered as in aggravation of a previous severance, if in connection with the taking of additional land and needed to make the change in the improvement.
7. Loss of trees and shrubbery to the extent that they affect the value of the land taken, and to the extent that their loss impairs the value of the land remaining.
8. Cost of new fences or loss of fences and the cost of replacing them with fences of like quality, to the extent that such loss affects the value of the property remaining.

9. Destruction of a legal nonconforming use.
10. Damage to property abutting on a right-of-way due to change of grade where accompanied by a taking of land.
11. Proximity of new improvement to improvements remaining on condemnee's land.
12. Loss of or damage to growing crops.
13. That the property could be or had been adapted to a use which was profitably carried on.
14. Cost of new drains or loss of drains and the cost of replacing them with drains of like quality, to the extent that such loss affects the value of the property remaining.
15. Cost of new private roads or passageways or loss of private roads or passageways and the cost of replacing them with private roads or passageways of like quality, to the extent that such loss affects the value of the property remaining.

The Kansas statute was reviewed shortly after enactment by a Kansas judge in Beatty, The Eminent Domain Procedure Act, 32 J.B. Ass'n Kansas 125 (1963). He had this to say about the basic measure of compensation.

Where all of a property owner's tract is taken, the measure of damages will be the value of the property or interest at the time of the taking . . . . Where only a part of it is taken, we have a new formula. We have adapted the . . . rule, the difference between the value of the entire property or interest before the taking, and the value of that portion of the tract or interest remaining immediately after taking. . . . Of course, we will still be concerned about the remainder being damaged and how, but we will focus attention on the real issue, namely, how all this affects market value.

\* \* \* \* \*

Both formulas, the old [similar to Code Civ. Proc. § 1248] and the new, usually produce the same result, but the new formula does it quicker and easier, and with less fiction and fiddle faddle.

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[U]nder the new statute . . . the emphasis is on value and we stop going around Robin Hood's barn to reach it. Under the old law we have been operating like the statistician for the Department of Agriculture. He was sent into the state to count the cows. The method he was using was to count the "tits" and tails and divide by five. Under the new law, we will count the cows.

The old statute . . . spoke in terms of damages to the remainder, not market value of the remainder before and after. We were supposed to ascertain damages to the remainder, only damages, not benefits, and give the property owner all his damages. We were not supposed to consider general benefits . . . . And we sometimes tried to make a difficult and unrealistic differentiation between special and general benefits. . . . I believe the new formula, in seeking market value before and after, has a built-in device, an automatic device for ascertaining damages and offsetting benefits, all benefits, that sometimes flow from condemnation.

The staff concedes that the "before and after" rule is not the panacea for all our compensation problems. Many difficult problems will remain even though this rule is adopted. We do, however, believe that we will have made the best start towards solving these problems by adopting a strict "before and after" rule. Attached is a draft section (Section 601) which would implement such a choice.

Respectfully submitted,

Jack I. Horton  
Assistant Executive Secretary



First Supplement to Memorandum 71-64

EXHIBIT I

EMINENT DOMAIN CODE § 600

Staff draft November 1971

Compensation

DIVISION 5. JUST COMPENSATION AND MEASURE OF DAMAGES

Chapter 1. General Provisions

§ 600. Right to just compensation

600. The condemnee is entitled to just compensation for the taking or damaging of his property, determined as set forth in this code.

Comment. Section 600 effectuates the requirement of Article I, Section 14, of the California Constitution that "private property" not be "taken or damaged for public use" without "just compensation" to the owner. Although the Constitution refers to "private property," Section 600 makes clear that every condemnee--private and public--is entitled to just compensation for the taking of his property. See People v. City of Los Angeles, 220 Cal. App.2d 345, 33 Cal. Rptr. 797 (1963). Section 14 of Article I establishes minimum requirements of just compensation. See [citation] . Subject to these minimum requirements, Section 600 provides that just compensation is to be determined as set forth in this code. The basic measure of just compensation is stated in Section 601. Supplementary provisions are set forth in Sections .

§ 601. Measure of just compensation

601. Just compensation shall consist of the difference between the fair market value of the condemnee's entire property on the date of valuation and as unaffected by the condemnation and the fair market value of his property remaining after such condemnation and as affected thereby, and such other damages as are provided in this article. In determining such difference, all factors which would enhance or diminish the fair market value after such condemnation shall be considered.

Comment. Section 601 states the basic measure of just compensation payable to a property owner for a taking under this code. Simply stated, it provides a "before and after" rule supplemented by additional damages in appropriate circumstances. [Reference to moving expenses and other "additives."] Adoption of the "before and after" rule in the partial taking case constitutes a significant departure from prior law. Under former Code of Civil Procedure Section 1248, California used the "value plus damages" method of determining just compensation. That is, compensation was determined by adding the value of the part of the owner's property taken to the damage to the remainder resulting from the taking. Moreover, the "take" could be valued as an independent parcel, and the landowner was entitled to recover the value of the take without regard to the value of the remainder after the taking-- even though this value was enhanced by the project for which the property

EMINENT DOMAIN CODE § 601

Staff draft November 1971

taken was used. See, e.g., People v. Corporation etc. of Latter-Day Saints, 13 Cal. App.3d 371, 19 Cal. Rptr. 532 (1970). This method of determining compensation was further complicated by the distinction made between general and special benefits and the treatment accorded benefits. The inequities and valuation difficulties that resulted were criticized repeatedly. See, e.g., Connor, Valuation of Partial Taking in Condemnation: A Need for Legislative Review, 2 Pac. L.J. 116 (1971).; Haar and Hering, The Determination of Benefits in Land Acquisition, 51 Cal. L. Rev. 833 (1963). Section 601 eliminates these difficulties by focusing simply on the value of what the property owner possessed before the taking and what he possesses after the taking. The difference between these two amounts furnishes the basic measure of just compensation. Value refers to "fair market value." See Section 602. No distinction is made between general and special benefits or general and special damages.