

## Second Supplement to Memorandum 71-64

Study 36.50 - Condemnation (Compensation in Case of Partial Take: The Volunteers of America Case)

Summary

Attached to this memorandum as Exhibit I is the recent Court of Appeal decision in People v. Volunteers of America, 21 Cal. App.3d 111, Cal. Rptr. (1971). This memorandum presents an analysis of the case because it is an important development in the area of compensation for a partial take and because the case presents a good discussion of some of the relevant legal principles and social policies involved in compensating partial takes.

Facts in the Case

The salient facts in Volunteers of America are comparatively simple. The Department of Public Works planned to construct an elevated freeway that would run near, but not over, the property of the defendant. As part of the freeway right of way, the department condemned a small strip of the defendant's property, of relatively minor value, on which to place a fence.

The key issue in the case was whether the defendant could recover for noise damage the freeway would cause to the remainder of its property. The defendant offered to prove that the remaining property would be unusable for its existing purpose as a dormitory site due to the noise and that its value would be halved from \$3.00 per square foot to \$1.50 per square foot.

The trial court refused to admit evidence of the damage to the remainder due to noise, and the defendant appealed. The court of appeal reversed, stating that the defendant should be given the opportunity to prove and recover for damage caused by noise.

### Relevant Legal Principles

In case of a partial taking of property, such as occurred in Volunteers of America, the property owner is entitled to recover damage to the remainder that will result from:

its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff. [Code Civ. Proc. § 1248(2).]

Thus there are two elements involved in the determination of damage to the remainder--damage caused by the fact of severance (e.g., leaving a lot under the minimum zoned size) and damage caused by the operation of the project for which the property was taken (e.g., noise, dust, and fumes).

It is the second of these elements--consequential damage to property caused by the project--that has caused the most difficulty in partial take cases, and it was this element that was the subject of controversy in Volunteers of America. Through this continuing controversy, two basic court-made rules limiting consequential damages have evolved. A defendant, a portion of whose property has been taken for public use, may recover for consequential damages to the remainder of the property if (1) the project causing the damage is located on the portion of the property that was taken and (2) the damages are peculiar to the remainder of the property rather than general to the whole community.

The court in Volunteers of America was called upon to apply both these principles to the facts. Its response, as shall be seen, was to liberalize recovery for property owners by narrowing the limitations on recovery for consequential damages.

### Reasoning of the Court

Project causing damage must be located on property taken. The first condition for recovery of consequential damages, that they may be awarded only if caused by an improvement located on the part of the defendant's property that was taken, the court dealt with in Part I of its opinion. The plaintiff had argued that, since the defendant's property was only being taken for a fence whereas the noise would be caused by a freeway not located on any property taken from the defendant, the defendant was not entitled to consequential damages.

The court disposed of this point rather summarily, pointing out that the Supreme Court has held that, even though a defendant's property is not taken for the paved portion of a freeway, consequential damages may be allowed if the property is taken for the right of way generally. See People v. Ramos, 1 Cal.3d 261, 460 P.2d 992, 81 Cal. Rptr. 792 (1969). This rule, which arose from a case involving loss of access to property, applies equally well to a case involving noise damage to property.

Only special and not general damages are recoverable. Having disposed of the preliminary issue whether the damage was caused by a project located on the property that was taken, the court next faced, in Part II of its opinion, the issue whether damage caused by noise is the type of "special damage" to property that is compensable. Arvo Van Alstyne states flatly in his study prepared for the Commission that noise damage is recoverable. On the other hand, although dicta in some cases indicate that noise damage is compensable, the court was confronted by at least two California cases that held noise damage not compensable because the damage suffered was not unique to the defendant, but was shared with the rest of the public.

The court resolved this problem of general-special damage by referring to the basic policy conflict that underlies the problem. On the one hand, the primary purpose of the just compensation clause of the Constitution is to distribute throughout the community the loss inflicted upon individuals by the making of public improvements. On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements due to the greatly increased cost.

The court is persuaded by the argument that a disproportionate share of the public project is being borne by the individual defendant. The public has chosen the system of automobile transportation and should not disguise the true economic burden of this choice by providing freeways for itself while requiring adjacent owners to contribute more than their proper share to the public undertaking.

The court thus goes on to hold that the property owner, on a proper showing, is entitled to recover for the diminution of the value of the remainder caused by noise that would render the premises, as then improved, uninhabitable and unusable, would reduce the highest and best use of the property from multiple housing to low grade residential or commercial, and would depreciate its value from \$3.00 to \$1.50 per square foot.

#### Evaluation of the Case

The holding of the Volunteers of America case, and the reasoning that supports the holding, may prove instructive to the Commission in its deliberations on compensation in the partial take area.

The holding of the court in Volunteers of America that noise damage is a proper element to consider in computing severance was carefully circumscribed and limited to the facts involved.

(1) There was a recognized right of recovery involved. In wrestling with the competing policy considerations of harm to the individual versus cost to the public, the court took notice of the concern that creation of new rights of recovery might cause the cost of public projects to become prohibitive. The court pointed out, however, that compensation for noise damage, "although not clearly established, is not a new right." 21 Cal. App.3d at 128.

(2) The damage in this case was substantial. The court stressed throughout that the issue involved was not whether noise damage generally was compensable, but whether "the property owner can recover severance damages when the alleged diminution in the value of its remaining property is caused by noise emanating from the use of the freeway which would render the premises, as then improved, uninhabitable and unusable." 21 Cal. App.3d at 114. Thus, the damage alleged was (a) substantial and (b) actual damage to property value as opposed to a "mere infringement" of personal enjoyment and convenience.

(3) The project causing the damage was a freeway project. The court indicated that a freeway is in a special category of damage-causing projects in that it is not designed to benefit the local area in which the property is situated. The court distinguished cases that had denied noise damage on the ground that they involved projects that simply enlarged an existing public use:

The property owner properly may be charged with knowledge that traffic patterns may be upset by traffic regulations and the establishment of ordinary thoroughfares which control the local flow of traffic. In such a case he may have to anticipate growth and increased use of existing facilities which necessitate their improvement, or the substitution of new thoroughfares. It is quite another thing to say that he should suffer comparable, but probably more inconvenience and loss in property value, because the public elects to put a non-accessible freeway over or next to his property to accommodate the flow of traffic from community to community, or from one center of population or trade to another, without any regard for the needs of his neighborhood. [21 Cal. App.3d at 127.]

The freeway, like railroads and airports, belongs to a special group of projects for which similar broad principles of compensation should apply.

(4) There was an actual taking of property. The court pointed out that this case was strictly a severance damage case and distinguished another case holding that noise damage was not a compensable property right on the ground that there was no actual taking of property in that case.

While the holding in Volunteers of America is carefully limited in the ways indicated above, the reasoning of the court should be of interest to the Commission in its attempt to resolve more general aspects of compensating partial takes. Two of the major problems the court struggled with and that have confronted the Commission in the past are: (1) Is it fair to compensate only one of two neighbors who suffer identical damage simply on the basis that the one has had some property taken while the other has not? (2) What should be the measure of consequential damage in a partial take case?

(1) Property must be taken before compensation allowed. Although the court in Volunteers of America took pains to make the point that it was allowing compensation for noise damage only where some property was taken (see limitation #4 above), it was obviously disturbed by this limitation:

It has already been pointed out that the test of whether the property taken is used for the portion of the project giving rise to the detrimental conditions is an arbitrary one (see Part I above). It is also obvious that adjacent property is damaged to the same degree by the detrimental factors of a freeway whether no property is taken, [footnote] whether a mere narrow strip is taken, or whether a substantial portion of the property is taken for the construction of the improvement. [21 Cal. App.3d at 127-128.]

Despite this inequity, the court made no effort to remedy the law in other areas. It had before it only a partial take case and undertook to remedy an abuse in the law in that area only:

Two wrongs do not make a right. Though illogical, the taking of the strip warrants the allowance of consequential damages under existing precedents. [21 Cal. App.3d at 128.]

This type of approach--to deal with only one problem at a time--is comparable to the decision the Commission has previously made in this area. The Commission has previously determined to work only on the problems involved in compensating partial takes at this time, with the view to recommending a comprehensive eminent domain law within the foreseeable future. Any inequities in other areas of the law, such as inverse condemnation, can be looked into separately at a later time. The staff believes this is a sound decision.

(2) Measure of damage in partial take case. The Commission is faced with the problem of what damages are compensable in a partial take case. The existing measure of compensable damage is whether the damage is "special" to the property involved or "general" to the community. The staff has proposed to replace this general-special test with a basic before-and-after test of value, not distinguishing among the various factors that may enter into value.

The court, in Volunteers of America, was forced to struggle with the general-special distinction in order to award damages caused by noise. The court found this distinction basically unsatisfactory, for the use of such a label disguises the policy considerations that underlie the label. The court reduced the general-special damage label to its policy components--whether the individual or the community is to bear the loss imposed by the public project. The court, in this case, concluded that, where there is substantial noise damage imposed by a freeway project, the public which has chosen the automobile and freeway as its mode of transportation must bear the economic burden of its choice.

Thus, in Volunteers of America, the court, like the Commission's staff, finds fault with a test of "special" versus "general" damages and in its place seeks a more rational solution to the problem of compensating partial takes.

The court specifically rejects, however, a before-and-after test like that proposed by the staff, citing with approval an earlier case holding that some types of damage are not compensable:

That the value of the remainder before and after the construction of the improvement in the manner proposed is not a conclusive test is demonstrated by People v. Gianni (1933) 130 Cal. App. 584 [20 P.2d 87]. [21 Cal. App.3d at 122.]

The court did not concern itself with precisely what types of damage are and are not compensable under its compensation policy test, but directed itself to the limited question of substantial property damage caused by freeway noise. However, from the case cited and from other language in the opinion, it is apparent that the court believed that damages such as business losses or decreases in property value due to a diversion or rerouting of traffic should not be compensable.

Respectfully submitted,

Nathaniel Sterling  
Legal Counsel