

#36.50

1/3/72

Third Supplement to Memorandum 71-64

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

Attached are some further comments on the Volunteers of America case received from the Commission's consultant, Mr. Kanner.

The case is not yet final as of the time of this writing the staff has been informed, for the plaintiff in the case has petitioned the Supreme Court for a hearing.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

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Third Supplement to
Memorandum 71-64

EXHIBIT I

LAW OFFICES

FADEM AND KANNER

A PROFESSIONAL CORPORATION

8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211

TELEPHONE
681-3372
AREA CODE 313

HEROLD A. FADEM
SIDOR KANNER
MICHAEL M. BERGER
WILLIAM STOCKER
ALBERT ROSEN

OF COUNSEL
ROBERT S. FINCK

December 31, 1971

Nathaniel Sterling, Esq.
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Second Supplement to Memorandum 71-64

Dear Nat:

I would like to make three observations on your memorandum on the Volunteers of America case.

First: I believe that the language at 21 Cal App 3d 119[2] is enormously significant, and you should note it. That expression should convey an unmistakable warning to condemnors that they cannot just plop their project wherever the draftsman happens to place the precise boundary, and then come crying to court about the damages they have to pay (on the spoken or unspoken but usually all too familiar risk-to-the-fisc theory: "We can't afford to be just. Urban civilization will come to an end if we aren't permitted to dump a disproportionate part of the cost on the condemnee.")*/

It seems to me that the court articulated the principle that it is no more than simple justice (and sound economics) to require society to consider all costs that flow from the creation of public projects, and to weigh them against the benefits (see 21 Cal App 3d at 128). The

*/ See you-know-who, 6 Cal Western L.Rev. at 76-85, particularly footnote 96.

Nathaniel Sterling, Esq.
December 31, 1971

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commentators have been saying that for some time, */and judicial recognition of that principle is commendable, if slightly overdue.

Second: I don't think it is fair to characterize the Court's disposition of the condemnor's argument that the taking was only for a fence, as "summary" (see p. 3 of your memo). The condemnor relied in the trial court on the Elsmore case, which was later expressly disapproved in Ramos. My reading of 21 Cal App 3d 117-120[1][2], indicates that the Court gave condemnor's argument (that Ramos should be restricted to its facts, i.e. impairment of access) extended consideration, and reasoned its way to the conclusion reached.

The Court's conclusion was sound; what the condemnor asked for was the creation of an arbitrary subrule of a rule which itself is arbitrary (see 21 Cal App 3d at 120). I don't think that the Court's refusal to thus arbitrarily limit the rationale of Ramos can be characterized as summary.

Third: I am unable to find in the opinion any indication as to what the court believed with regard to what should be the rule of compensation in cases involving business losses or diversion of traffic. I must confess, however, that in light of the quality of the Volunteers of America opinion I would certainly like to see that court deal with those subjects. You know how I feel about business losses, so I won't bother you with repetition, but wouldn't it be fun to see the touch of Justice Sims' pen on such problems as the "rule" that when you divert traffic toward an owner's parcel it's a special benefit which the owner can be compelled to accept in lieu of money (see People v. Giumarra Farms, Cal App 3d _____ (3d Civ. 13102, Filed Dec. 17, 1971), but when you divert traffic away from his parcel, it's non-compensable.

*/ Prof. Michelman's admonition is exemplary: ". . .What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose costs, including costs which remain 'unsocialized' exceed their benefits. Thus, it would appear that any measure which society cannot afford or, putting it in another way, is unwilling to finance under conditions of full compensation, society cannot afford at all." 80 Harv.L.Rev. at 1181.

Nathaniel Sterling, Esq.

December 31, 1971

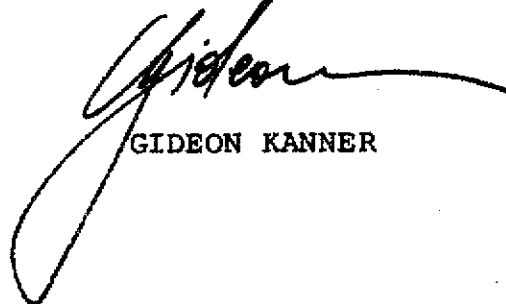
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If the Commission is going to go into the problem of proximity damages in the near future, I wish you would dig out and re-read "Just How Just Is Just Compensation?"

I will be unable to attend the January Commission meeting, because I am appearing in the PLI condemnation seminar in New York on the 14th and 15th. However, Mike Berger should be able to attend. He just got through briefing the anomalies of Symons in the Santa Monica Airport case and is up on the subject of proximity damages (By the way, oral argument in that case will take place in Los Angeles on January 7).

If I can be of any assistance before the next meeting please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Gideon", with a long, sweeping underline that extends to the right and then loops back down and left.

GIDEON KANNER

GK:gc