36.51

3/27/72

First Supplement to Memorandum 72-28

Subject: Study 36.51 - Condemnation (Larger Parcel)

Attached is supplementary information on the ITT case, discussed in the main memorandum. Exhibit I is a letter from the Commission's consultant, Mr. Kanner. Exhibit II is a copy of the ITT opinion as originally written and as modified, referred to by Mr. Kanner in his letter.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

First Supplement to
Memorandum 72-28

EXHIBIT I

LAW OFFICES
FADEM AND KANNER
A PROFESSIONAL CORPORATION
8383 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211

TELEPHONE
651-3372
AREA CODE 213

JERROLD A. FADEM
GIDEON KANNER
MICHAEL M. BERGER
WILLIAM STOCKER
ALBERT ROSEN
GREGORY STAMOS

March 23, 1972

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

Re: Memorandum 72-28

Dear Nat:

Your analysis of the unsoundness of the ITT opinion is a tribute to your learning. However, allow me to offer a comment or two, which may supplement your observations in Memorandum 72-28.

There was no question about proving that the agricultural parcel was intended to be used as a buffer. The evidence on this point was unequivocal and uncontradicted. The president of ITT-Jennings testified that ITT never had any intention of using the agricultural parcel for any plant uses; this parcel was bought to prevent it from being put to uses incompatible with the plant.

On the issue of larger parcel, the trial court found as follows:

> Defendant INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, a Delaware Corporation, sued herein as JENNINGS RADIO MANUFACTURING CORPORATION, a corporation, hereinafter sometimes referred to as ITT-JENNINGS, is the owner of an approximately 18 acre parcel of land out of which Parcels 1A, 1B, 1C and 1D, are being acquired herein. This 18 acre parcel was purchased by defendant ITT-JENNINGS in 1963 and is hereinafter called the "agricultural property." Defendant

> ITT-JENNINGS owns another approximately 20 acre parcel of land hereinafter called the "plant property" upon which is situated said defendant's electronic manufacturing plant. Said plant property is situated contiguous to and immediately south of the agricultural property. Defendant ITT-JENNINGS and its predecessor in interest have used the plant property for manufacturing purposes since 1942 and the agricultural property has been used for agricultural purposes up to the present time. The uses being made of the two properties are unrelated and markedly different. There is long-standing chain link fence separating the agricultural property from the plant property. The agricultural property is zoned for residential use and the plant property is zoned for industrial use. The agricultural property and the plant property have been and are delineated and treated as separate parcels by defendant ITT-JENNINGS and there has been no unity of use made of said parcels by defendant ITT-JENNINGS. The agricultural property was purchased by defendant ITT-JENNINGS with the knowledge that a portion of it was to be acquired by plaintiff herein for freeway use.

As you can see, disunity of use was the decision-making criterion.

I feel that it may be helpful to the Commission and staff to read the ITT opinion as originally written (Note that the opinion as published -- appearing as Exhibit II to Memorandum 72-28 -- is "as modified"). I have sent John a copy of the ITT petition for hearing which contained as an Appendix the opinion as originally written and as modified. If you haven't done so already, I suggest you read it in that form.

Sincerely,

GIDEON KANNER

GK:cl

EXHIBIT II

APPENDIX.

Opinion of the Court of Appeal as Modified.

NOTE: Because of the extensive modification of the original opinion, which involved numerous deletions and additions, the opinion which follows has been printed as modified. The material deleted from the January 13, 1972, opinion has been retained and appears as the crossed-out language. The material added by the January 20, 1972, Modification of Opinion, appears in italics.

In the Court of Appeal of the State of California, First Appellate District, Division Three.

The People of the State of California, acting by and through the Department of Public Works, Plaintiff and Respondent, vs. International Telephone & Telegraph Corporation, Defendant and Appellant. 1 Civil No. 28149, (Sup. Ct. No. 201460).

Filed: January 13, 1972. [Modified: January 20, 1972].

Respondent, Department of Public Works, filed a complaint in eminent domain against appellant ITT (also referred to in the pleadings as ITT-Jennings), seeking to condemn for a freeway a portion of land owned by ITT. TT filed an answer, requesting just compensation for the land taken, and for severance damages for the damage to be caused by the public improvement. Before commencement of the jury trial, the trial court ruled that evidence as to any severance damages would be limited to one of ITT's two parcels involved (the agricultural parcel), and that no evidence could be considered as to severance damages with regard to the other parcel (the plant parcel). The appeal is from the judgment.

Since 1942 defendant-appellant ITT-Jennings has owned and operated an electronics plant located on a 20-acre parcel in Santa Clara County. Adjacent to this parcel, on one side of the property, lies an 18-acre parcel which has been used for many years mostly for growing vegetables. This property was originally owned and farmed by one Reno Mazzanti.

In the summer of 1962, the Department of Public Works announced plans for an extension of Interstate Route 280 near the location of the electronics plant; the proposed route was to pass mostly over the agricul-

tural property, and would have also required the taking of a small part of the ITT plant's parking area. After repeated urging by ITT, the Highway Commission moved the freeway route farther away from the plant. This new route would cross the northern half of the agricultural parcel, and would not require the taking of any of ITT's land.

ITT then proceeded to purchase the agricultural parcel over which it knew the freeway would pass. After the purchase, in April, 1963, ITT leased back the land to Mazzanti for his continued use for farming. The lease to Mazzanti was renewed annually, and at the time of the trial, Mazzanti was still farming the property under a one-year lease with options for three additional years. No part of the agricultural parcel has ever been used for any purpose connected with the ITT plant, and the parcels are separated by a high fence topped with barbed wire.

When the state brought its action to acquire the portion of the agricultural property required for the freeway, ITT claimed severance damages to its plant. It was claimed that the construction and operation of the freeway on the agricultural property would necessitate the installation of additional air filtration equipment at a cost of one million dollars over a five-year period.[1]

Prior to the jury trial on the issue of damages, the trial court ruled that because of the complete dissimilarity of the uses to which the plant and agricultural parcels had been put, the ITT plant parcel could not, as a matter of law, be included for the purposes of assessing severance damages.

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[1]This figure was stated in an offer of proof by ITT's attorney, and in appellant's reply brief; the answer to the complaint, however, only requested $600,000 severance damages.

The basic issue presented on appeal is whether the trial court was correct in ruling that appellant's plant parcel and the adjacent agricultural parcel did not constitute a single "larger parcel" for the purpose of assessing severance damages.

Code of Civil Procedure section 1248, subdivision 2, the statutory authority for awarding severance damages, provides in part as follows: "The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceeding, and thereupon must ascertain and assess: * * *

"2. *Severance Damages.* If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff." The words of this statute plainly indicate that in order to recover severance damages, the property sought to be condemned must constitute a part of a "larger parcel." The determination as to what constitutes a "larger parcel" under the terms of this statute is essentially a question of law for the determination of the trial court. (Oakland v. Pacific Coast Lumber etc. Co. (1915) 171 Cal. 392, 397; People ex rel. Dept. Pub. Wks. v. Nyrin (1967) 256 Cal.App. 2d 288, 294.)

The trial court determined as a matter of law that the plant property was not a part of the "larger parcel," and that the "larger parcel" included only the agricultural property for purposes of assessing severance damages. Consequently, the court limited the question of severance damages to the ~~plant~~ *agricultural* parcel.

The well established and consistently applied rule in California states that to recover severance damages there must be a unity of title, contiguity and unity of use. (City of Los Angeles v. Wolfe (1971) L.A. 29896, L.A. 29897; City of Menlo Park v. Artino, 151 Cal.App. 2d 261, 270; City of Stockton v. Marengo, 137 Cal.App. 760, 766; People ex rel. Dept. Public Works v. Dickinson, 230 Cal.App. 2d 932, 934.) There is no problem here as to the presence of the first two requirements. The controversy centers on the third requirement.

There was ample evidence to support the court's findings of fact with regard to the use of the property. In part, the court found: "Defendant ITT-Jennings and its predecessor in interest have used the plant property for manufacturing purposes since 1942 and the agricultural property has been used for agricultural purposes up to the present time. The uses being made of the two properties are unrelated and markedly different. There is [a] long-standing chain link fence separating the agricultural property from the plant property. The agricultural property is zoned for residential use and the plant property is zoned for industrial use."

Appellant relies heavily on *People v. Thompson*, 43 Cal. 2d 13. In *Thompson*, the court contrasted the facts of *Thompson* with those of the *City of Stockton v. Marengo, supra*. As the court stated, ". . . In the *Marengo* case the main tract was used by defendants for the purpose of farming, while the lot which was held not to be part of the tract for severance damage purposes was separated from the larger tract by a fence and was occupied by and used by a gas station. . . .

By contrast, there is in the present case (Thompson) no actual diversity or division of use, but simply a failure to use some of the property." The facts of *Marengo* are almost identical with the present case, substituting an electronics plant for the gas station.

Appellant contends that the use of the agricultural property is related to the use of the plant property, in that the agricultural parcel was purchased for the purpose of providing a buffer between the plant and the surrounding area, so as to insulate or isolate the plant from contaiminating influences of the surrounding area. The trial court properly found this was insufficient to constitute unity of use. Here there actually are two definite, separate, and independent uses of the parcels; one was used for an electronics plant, the other was used for growing vegetables.

As stated in *City of Stockton v. Marengo, supra*, 137 Cal.App. 760, 766, "To constitute a unity of property between two or more contiguous but *prima facie* distinct parcels of land, there must be such a connection or relation of adaptation, convenience, and actual and permanent use as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcels left. . . ."

It cannot be said that there was any actual use made of the agricultural parcel that was reasonably and substantially necessary for the operation of an electronics plant. Appellant's claim that the agricultural parcel was purchased for the purpose of providing a buffer is to some extent defeated by testimony that the agricultural use of the land created dust and caused the plant trouble. In addition, the two parcels of land were zoned differently and the agricultural parcel could

not be used for industry. Also, the president of ITT, in effect, testified that to the best of his knowledge, ITT never used any part of the agricultural parcel for its own activities. Appellant's only connection with the agricultural parcel was the mere fact that it held record title to the land; it made no active use of the land whatsoever and leased back the land to the seller, who continued to use it for farming purposes. Thus, the trial court's finding of fact that the two parcels were used for different purposes must be upheld, as must the conclusion of law that the two parcels did not constitute a single larger parcel within the meaning of Civil Procedure, section 1248(2). As stated in *City of Menlo Park v. Artino, supra,* 151 Cal.App. 2d 261, 270, 271, ". . . On appeal we are bound to indulge in every intendment which supports the judgment of the lower court. (Hind v. Oriental Products Co., Inc., 195 Cal. 655 [235 P. 438].) When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (Hartzell v. Myall, 115 Cal. App. 2d 670 [252 P.2d 676].)"

Appellant's contention that the trial court held as a matter of law that ITT was not entitled to compensation for the cost of curing air contamination caused by the freeway on the land taken is incorrect. The trial court excluded evidence of damage to the plant parcel on the grounds that it was not part of a "larger parcel," not on the grounds that air pollution is a non-compensable injury. Thus the cases cited are not in point.

~~In its briefs, appellant relies on cases decided in the area of inverse condemnation. (E.g., Pierpont Inn, Inc. v. State of California (1969) 70 Cal.2d 282; Breidert v. Southern Pac. Co. (1964) 61 Cal.2d 659.)~~

~~Although, generally speaking, the principles which affect the parties' rights in inverse condemnation are the same as those in an eminent domain action (Breidert v. Southern Pac. Co., *supra* 663, n. 1), when proceeding on an inverse condemnation theory plaintiffs need only prove that their property has been proximately taken or damaged for public use. (Olson v. County of Shasta (1970) 5 Cal.App. 3d 336, 340.)~~

~~But the present case was tried in the court below with appellant alleging that it was entitled to severance damages by reason of the taking of the agricultural land, and not that it was entitled to damages under the theory of inverse condemnation. Because appellant did not rely on the theory of inverse condemnation at the trial and did not plead facts putting inverse condemnation into issue, we may not consider its contentions that the principles of inverse condemnation should apply here. (People ex rel. Dept. Pub. Wks. v. Romano (1971) 17 Cal.App. 3d 479, 489, and cases cited therein.)~~

Appellant further contends that the issue is not severance damages in the customary sense, i.e., a diminution in value caused by severing the part taken from the remainder. Appellant contends that what we have here is damage occurring to the plant property which has rendered it less valuable by reason of the construction and operation of the freeway, citing *People v. O'Connor*, 31 Cal.App. 2d 157, 159; *City of Fresno v. Hedstrom*, 103 Cal.App. 2d 453, 456; *Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Assn.*, 188 Cal.App. 2d 850; *Albers v. County of Los Angeles*, 62 Cal.2d 250 and *Cox v. State of California*, 3 Cal.App. 3d 301.

The first three cases cited by appellant, are to use appellant's words, "severance damage cases in their customary sense—in the sense which gave birth to the larger parcel rule." They do not hold, however, that damage to property rendered less valuable by reason of construction and operation of a freeway under the present circumstances is compensable. The *Alberts* and *Cox* cases are inverse condemnation cases, and as stated in *Cox* at pages 308, 309, "The long established rule is that an owner whose land is being condemned in part may not recover damages *in a condemnation action* to the remainder of his land caused by the manner in which the works are to be constructed or operated *on the land of others.* The owner may recover compensation only for the detriment that will result from the public improvement or operation of works *upon his land alone.* . . . After his remaining property is damaged by such extrinsic causes, the owner may recover compensation for that damage in an inverse condemnation action. . . ."

Following the trial court's determination that the plant property was not part of the larger parcel, appellant limited its presentation of evidence to the damage occurring to the agricultural parcel. No evidence was offered relative to damage to the plant property from air contamination proximately caused by the construction or operation of the freeway. The court did not restrict the introduction of evidence as to damage to the plant property other than to prohibit its use as evidence of severance damages to the remainder of the larger parcel. Appellant argues, in its brief, that evidence of damage from dust, fumes, and other air contaminants is admissible even though no part of the property damaged is taken for the public improve-

ment. This theory was not presented in the trial court nor was any evidence offered (or excluded by the court) to prove such damage. The theory is raised for the first time on appeal, with no facts in the record to support it.

Appellant in his [sic] brief relies on cases decided in the area of inverse condemnation. (e.g., Pierpont Inn, Inc. v. State of California (1969) 70 Cal.2d 282; Breidert v. Southern Pac. Co. (1964) 61 Cal.2d 659.) As stated in Breidert v. Southern Pac. Co., supra, 663, n. 1, "An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemner. The principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action. (See Rose v. State, supra, 19 Cal.2d 713; Bacich v. Board of Control, supra, 23 Cal.2d 343.)" It is immaterial, with certain exceptions not pertinent here,[2] whether the claim of damage is asserted in a pending condemnation suit or by way of an action in inverse condemnation. However, as stated above, the appellant did not assert such damage under either form of action. The burden of proving damage to the plant property was upon the appellant and obviously without offering evidence on the subject, it did not fulfill the burden of proof.

~~In the present case~~ *A*ppellant *also* maintains that part of the damage-causing activity is conducted on the

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[2]*See People v. Ricciardi, 23 Cal. 2d 390, 400.)*

land taken from ITT and the right to be compensated follows *a fortiori*, citing *People ex rel. Dept. Pub. Wks. v. Ramos*, 1 Cal.3d 261. *Ramos* involved the taking of a portion of a single parcel (see n. page 262), and is thus distinguishable from the present case. *Furthermore, as discussed above, no proof of damage to the plant property was offered.*

It is true that a part of ITT land was taken, but it was a taking from a separate parcel, not the one upon which the damage is claimed. The fact that part of one parcel has been taken for the freeway does not entitle the owner to recover in an eminent domain action for alleged damage to other separate parcels due to the construction and operation of a freeway. (See Cox v. State of California, *supra*, 3 Cal.App. 3d 301, 308; City of Menlo Park v. Artino, *supra*, 151 Cal.App. 2d 261, 269, 270.) Whether ITT may have a cause of action in inverse condemnation is an issue we need not determine in this appeal.

Appellant cites the case of *Pierpont Inn, Inc. v. State of California*, 70 Cal.2d 282, as being indistinguishable from the present case. *Pierpont* is distinguishable on its facts. First, *Pierpont* was an inverse condemnation case, not a direct eminent domain case. Second, *Pierpont* involved a single parcel, owned by Pierpont Inn, and described by the court as a parcel divided by San Jon Road. Apparently, there was no dispute raised in the case concerning "single parcel" and the court does not, in its opinion, discuss the facts or law upon which the determination of single

~~parcel was made. Thus, *Pierpont* is of no help to us here.~~

Appellant, by letter, has called the court's attention to the recent case of *People v. Volunteers of America,* 21 Cal. App. 3d 111 and specifically the statement on page 118: "Under such circumstances, where there is a special detriment to the private land involved, it should be immaterial whether the works which caused the damage were wholly, or partially, or in no way upon some land which was taken from the private owner." The court, however, recognized that though perhaps desirable, this is not the law. The court further discussed the problem at pages 127-128 and then stated the rule: "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. . . . It is also obvious that the adjacent property is damaged to the same degree by the detrimental factors of a freeway whether no property is taken, whether a mere narrow strip is taken, or whether a substantial portion of the property is taken for the construction of the improvement. (See Van Alstyne, op. cit., 16 U.C.L.A. L.Rev., at pp. 503-505.) Until such time as provision is made for compensation of those who are merely adjacent (see *id.*, at pp. 517-518; and Andrews v. Cox (1942) 129 Conn. 475, 478 [29 A.2d 587, 588-589]), they presumably may not recover proximity damages. Two wrongs do not make a right. Though illogical, the taking of the strip warrants the allowance of consequential damages under existing precedents. . . . If there is . . . warrant for the compensation of such an owner, *because a portion of his property has been taken,* it should be granted if established by proper proof." (Emphasis added.)

In the present case no portion of the plant parcel was taken and the language relied upon by appellant on page 118, as the court pointed out, is not the law in California. Thus, *People v. Volunteers of America, supra,* is of no help to appellant.

Judgment is affirmed.

CERTIFIED FOR PUBLICATION.

Caldecott, *J.*

We concur:

Draper, *P. J.*

Brown (H. C.), *J.*