

#36.40

12/12/72

Memorandum 73-7

Subject: Study 36.40 - Condemnation (Excess Condemnation)

At the December meeting, the Commission considered a redraft of the excess condemnation article which was designed to deal with the problem of condemnation of an entire structure located partly on property to be taken and partly on the remainder.

Attached as Exhibit I is a revised excess condemnation article. Section 1240.420, which has been redrafted in light of the comments at the last meeting, deals with condemnation of the remainder of a structure. The text of Section 1240.410 and the Comment to that section have been revised in accord with the instructions given the staff at the December meeting.

The Commission has previously approved sending the entire chapter on the right to take to the printer to have it set in type. We have held up sending this chapter pending approval of the excess condemnation article. Accordingly, we are hopeful that the excess condemnation article can be approved for sending to the printer after the January meeting.

Respectfully submitted,

John H. DeMouly
Executive Secretary

EXHIBIT I

Article 5. Excess Condemnation

§ 1240.410. Condemnation of remnants

1240.410. (a) As used in this section, "remnant" means a remainder or portion thereof that will be left in such size, shape, or condition as to be of little market value.

(b) Whenever the acquisition by a public entity by eminent domain of part of a larger parcel of property will leave a remnant, the public entity may exercise the power of eminent domain to acquire the remnant in accordance with this article.

(c) Property may not be acquired under this section if the defendant proves that the public entity has a reasonable, practicable, and economically sound means to avoid or substantially reduce the damages that cause the property to be a remnant.

Comment. Section 1240.410 states the test to be applied by the court in determining whether a remainder or portion thereof is a remnant that may be taken by eminent domain. 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).

The test is essentially that stated in Dep't of Public Works v. Superior Court, supra, except that the confusing concept of "excessive" damages is not

used. The remainder or a portion thereof may be taken if it would be left in "such size, shape, or condition as to be of little market value." The "of little market value" concept is a flexible one; whether the excess property may be taken is to be determined in light of the circumstances of the particular case. Thus, the project may result in the excess property having relatively little market value in situations such as, for example, where (1) it will be totally "landlocked" and no physical solution will be practical, (2) it will be reduced beneath minimum zoning size, and it is not reasonably probable that there will be a zoning change, (3) it will be of significant value to only one or few persons (such as adjoining landowners), or (4) it will be landlocked and have primarily a speculative value dependent upon access being provided when adjacent land is developed and the time when the adjacent land will be developed is a matter of speculation. See, e.g., Dep't of Public Works v. Superior Court, supra; State v. Buck, 226 A.2d 840 (N.J. 1968). The test is the objective one of marketability and market value generally of the excess property. Compare Section 1240.150 (purchase of remnants). Cf. Govt. Code § 7267.7 ("If the acquisition of only a portion of a property would leave the remaining portion in such a shape or condition as to constitute an uneconomic remnant, the public entity shall offer to and may acquire the entire property if the owner so desires.").

On the other hand, 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 and value after severance. See, e.g., La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 762, 304 P.2d 803 (1956); State Highway Comm'n v. Chapman, 446 P.2d 709 (Mont. 1968). Likewise, Section 1240.410 does

not authorize a taking of excess property (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 coerce the condemnee to accept whatever value the condemnor offers for the property actually needed for the public project, 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 project. See Dep't of Public Works v. Superior Court, supra.

A remnant may be a portion of a remainder where the taking affecting a parcel leaves more than one piece (e.g., the severance of a ranch by a highway so as to leave pieces on both sides of the highway). In certain cases, only one piece might be a remnant. Artificially contrived "zones" of damage or benefit sometimes used in appraisers' analyses are not to be deemed separate pieces for remnant elimination purposes.

Subdivision (c) permits the condemnee to contest a taking under Section 1240.410 upon the ground 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. 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 equitable under the circumstances of the particular case. If he can do so, subdivision (c) prevents acquisition of the excess property. In most cases, some physical solution would be possible; but subdivision (c) requires that the solution also be "reasonable, practicable, and economically sound." To be "economically sound," the proposed solution must, at a minimum, reduce the overall cost to the condemnor

of the taking. Thus, the total of the cost of the solution, the compensation paid for the part taken, and the damages to the remainder must be less than the amount that would be required to be paid if the entire parcel were taken. The court should, moreover, consider questions of maintenance, hardship to third persons, potential dangers, risk of tort liability, and similar matters in determining whether the solution is also "reasonable and practicable."

If the court determines that a taking is not permitted under Section 1240.410 because a physical solution is "reasonable, practicable, and economically sound," the damages to the remainder must be computed taking into account the extent to which any physical solution that will be provided avoids or reduces such damages. See Section 1245.000 and the Comment thereto.

Section 1240.410 supersedes Section 1255 of the Code of Civil Procedure, Sections 100130.5 and 102241 of the Public Utilities Code, Sections 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 provisions of uncodified special district acts.

§ 1240.420. Condemnation of remainder of structure

1240.420. Where a public entity is authorized to acquire by eminent domain property that is part of a larger parcel and a structure is located partly on the property to be taken and partly on the remainder, the public entity may exercise the power of eminent domain to acquire the entire structure and the temporary use of the remainder for the purpose of demolishing or relocating the structure if the removal of the entire structure would leave the remainder with a higher market value than it would have with the partial structure located on it.

Comment. Section 1240.420 states the test to be applied by the court in determining whether an entire structure may be taken by eminent domain even though a portion of the structure is located on land not needed for public use. Section 1240.420 is similar to Section 1240.410 (condemnation of remnants) but, under Section 1240.420, the public entity acquires the structure only and the land not needed for public use is not acquired. The authority granted by Section 1240.420 is restricted to the case where demolition or removal of the structure will reduce the damages to the remainder. In other words, the section applies only where the removal of the structure from the remainder will increase the market value of the remainder. Section 1240.420 supersedes Section 16-3/4 of the Los Angeles County Flood Control Act.

§ 1240.430. Resolution of necessity and complaint

1240.430. When property is sought to be acquired pursuant to Section 1240.410 or 1240.420, the resolution of necessity and the complaint filed pursuant to such resolution shall specifically refer to such section. It shall be presumed from the adoption of the resolution that the taking of the property is authorized under the section to which reference is made. This presumption is a presumption affecting the burden of producing evidence.

Comment. Section 1240.430 requires a specific reference in both the resolution and the complaint to the section that is 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, 274 Cal. App.2d 217, 79 Cal. Rptr. 175 (1969). A resolution that refers to Section 1240.410 or 1240.420 gives rise to a presumption that the taking is authorized under that section. Thus, in the absence of a contest of that issue, Section 1240.430 permits a finding and judgment that the "excess" property may be taken. However, the presumption is specified to be one affecting the burden of producing evidence (See Evid. Code §§ 603, 604) rather than one affecting the burden of proof (see Evid. Code §§ 605, 606). Accordingly, the burden of proving the facts that bring the case within Section 1240.410 or 1240.430 is left with the plaintiff (i.e., the condemnor). See People v. Van Garden, 226 Cal. App.2d 634, 38 Cal. Rptr.

§ 1240.430

265 (1964); People v. O'Connell Bros., 204, Cal. App. 34, 21 Cal. Rptr. 890 (1962). In this respect, Section 1240.430 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 County of Los Angeles v. Anthony, 224 Cal. App.2d 103, 36 Cal. Rptr. 308 (1964)) or administrative (see County of San Mateo v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960)) determination or declaration as to "public use."

As to the time and manner of raising the issue whether a taking is authorized under Section 1240.410 or 1240.420, see Section 1260.000.

§ 1240.440. Disposal of acquired remnants

1240.440. A public entity may sell, lease, exchange, or otherwise dispose of property taken under this article and may credit the proceeds to the fund or funds available for acquisition of the property being acquired for the public work or improvement. Nothing in this section relieves a public entity from complying with any applicable statutory procedures governing the disposition of property.

Comment. Section 1240.440 authorizes the entity to dispose of property acquired under Sections 1240.410 and 1240.420.