#36.51 3/21/72

Memorandum 72-28

Subject: Study 36.51 - Condemnation (Larger Parcel)

Summary

In connection with developing a scheme for compensating partial takings in eminent domain, it is advisable first to define what property is being partially taken. The Commission has previously considered this area of the law, noting dissatisfaction with some of the existing principles. Since that time, two additional cases further refining the existing principles have come down; these cases are attached as Exhibits I and II. This memorandum presents a brief recapitulation of existing law, notes the recent developments in the area, and compares this with the Commission's prior concerns. The object of the memorandum is to generate the basic policy decisions that will enable the staff to draft an adequate statutory definition of the larger parcel if such a definition appears to be necessary in the light of the recent developments.

Background

The problem in defining the "larger parcel" is basically the question of delineating those property interests that are so interrelated that, where the condemnor acts with regard to one, the effect of that action on the value of the others may be considered.

The traditional response to this problem has been to require three "unities." The property must be owned by the same person (unity of title), it must be physically contiguous (physical unity), and it must be devoted to an interrelated use (unity of use).

Each of these unities has proved to be somewhat inadequate in practice, and each has been the focus of efforts to expand the opportunity to recover damages to related property.

Unity of Title

The nature of the title that the defendant must have in the properties is not clear. Obviously, if the defendant owns a fee interest in two properties, he satisfies this qualification. See City of Menlo Park v. Artino, 151 Cal. App.2d 261, 311 P.2d 135 (1957). This is true even if one of the fee interests is subject to a lease. See People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967).

Beyond this, the California cases are too vague to support any adequate generalizations. Unity of title does not exist where the owner of the part taken has an option on physically contiguous land. East Bay Mun. Util. Dist. v. Kieffer, 99 Cal. App. 240, 278 P. 476 (1929). But where such an option has been exercised, there is unity of title since the defendant is the equitable owner of the land. County of Santa Clara v. Curtner, 245 Cal. App.2d 730, 54 Cal. Rptr. 257 (1966); East Bay Mun. Util. Dist. v. Kieffer, supra (dictum). Likewise, unity of title does not exist where the defendant shows no right or title to use adjoining land; but, if the defendant has a legal easement or leasehold, there may be unity of title. People v. Emerson, 13 Cal. App.2d 673, 57 P.2d 955 (1936)(dictum).

It has also been held that separately owned parcels operated as a unit under a partnership agreement satisfy the unity of title requirement. City of Stockton v. Ellingwood, 96 Cal. App. 708, 275 P. 228 (1929). It is doubtful that this decision would stand today since it is based in part upon the fact that California law at the time required individual ownership of partnership property.

Although the law is not clear, it appears likely that the unity of title test would be satisfied by equitable ownership or by a legal interest in the property. If this is so, it would satisfy the Commission's previously expressed desire that any ownership requirement be liberally drawn.

Contiguity

A review of the law governing the requirement that the property be physically contiguous may be found in City of Los Angeles v. Wolfe, 6 Cal.3d 326, P.2d , Cal. Rptr. (1971)(attached as Exhibit I). As the Supreme Court points out in that case, the law has been that contiguity is ordinarily essential, but there are limited exceptions to this rule. The exception was allowed in the Wolfe case because "there was unity of ownership, reasonably physical proximity of the parcels, strong unity of use with lawful means of access, special need, ..." 6 Cal.3d at 338, P.2d at , Cal. Rptr. at .

Thus, the Wolfe case provides a limited liberalization of the contiguity rule. At the time the Commission previously discussed the contiguity requirement, the general feeling was that it should be considerably relaxed although there was concern that total abolition of the requirement might allow too much room for speculation. Is the kind of limited holding of the Wolfe case satisfactory, or should the contiguity requirement be further relaxed or abolished?

Unity of Use

As with unity of title, the precise meaning of "unity of use" is not clear. Unity of use has been defined as

> a connection or relation of adaptation, convenience, and actual and permanent use [such] as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcels left, in the most advantageous and profitable manner in the business for which they are used. [City of Stockton v. Marengo, 137 Cal. App. 760, 766, 31 P.2d 467, (1934).]

It has been held under this test that land devoted partially to farming and partially to a service station does not constitute a larger parcel. City of Stockton v. Marengo, supra. On the other hand, land devoted partially to farming and partially unused may constitute a larger parcel. People v. Thompson, 43 Cal.2d 13, 271 P.2d 507 (1954). The rationale of these cases is that there may not be a larger parcel where there is a "diversity" of use, but that nonuse does not constitute such a diversity or "disunity" of use.

Just what amounts to a diversity or disunity of use depends on the particular facts of the case. Where property was being used for a hospital and a parking lot, the two uses, although "diverse," were sufficiently interdependent to create a unity of use. People v. Nyrin, supra. See also City of Los Angeles v. Wolfe, supra. However, the rule of interdependent uses appears to have been neglected in the recent case of People v. International Tel. & Tel. Corp., 22 Cal. App.3d 829, Cal. Rptr. (1972)(attached as Exhibit II). In that case, the property taken was devoted to agricultural use while the property damaged was devoted to industrial use. The defendant claimed that there was unity of use in that the agricultural property was owned as a buffer strip. The court held that the two parcels could not be valued together since there was a "disunity" of use. It is not clear whether this holding was based on a failure to adequately prove the buffer use or whether it was a determination that, regardless of the interrelation of the two, physically disparate uses could not be combined. If the holding was, in

fact, that a physical "disunity" precludes a finding of a larger parcel, this would mark a departure of the rule previously developed. It was the sense of the Commission at the time of its previous discussion that the fact of "integrated" use should be the crucial element rather than similarity or dissimilarity of use. The ITT case appears to violate this notion.

The Commission also felt that the integrated use should not have to be a present or existing use of the property in order to constitute a larger parcel. Any property that is capable of an integrated use as its highest and best use should be valued together in a partial taking. This notion contravenes the case of City of Menlo Park v. Artino, 151 Cal. App.2d 261, 311 P.2d 135 (1957), which held that property being used for adjacent independent dwellings did not constitute a larger parcel even though it was capable of consolidation for commercial purposes.

One more problem related to unity of use requires consideration at this time. Suppose there is one large tract that is susceptible of different uses in different portions as its highest and best uses. For example, a person may own a very large block of land of varied terrain best suited for commercial development in some areas and residential development in other areas. A development of the land would involve developing each portion for its highest and best use. Should severance damages be awarded when a portion of the tract is taken and the damages are to the areas that would be developed for a "different use"? Present law allows them to be, provided there is no present disunity of use, e.g., if all the land is undeveloped. The concept of the "larger parcel"--that land not taken be compensated if its value is necessarily affected by its severance--seems to demand that only interrelated property be considered as a larger parcel and unrelated property not be included despite the accident of contiguity.

If such an approach is adopted by the Commission, there will be problems in determining whether certain uses are integrated. Suppose the defendant owns a large tract of land that is best developed as a "planned community," with residences on one portion and recreation, service, and commercial facilities on other portions serving the residences. Is this such an integration of use that the taking of one portion permits the consideration of its consequences for the other portions? Under existing law, apparently it would be. Under the test suggested above, the answer is more doubtful but probably yes.

Conclusion

Present law and recent cases do not appear to fully measure up to the Commission's feelings concerning the definition of the larger parcel. The Wolfe case, while easing the contiguity requirement, does not appear to go as far as the Commission had wished. The ITT case appears to retrench on the unity of use concept rather to expand it to prospective integration of uses (or compatible uses) as the Commission had discussed. And while the law relating to ownership appears to be in line with the Commission's desire of a fairly loose test of legal interest in property, the cases are far from clear.

The staff suggests that the law relating to the larger parcel requires codification in the interest of certainty, if nothing else, and a determination by the Commission as to those areas that are presently overrestricted and how much the law should be liberalized in those areas.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

[L.A. Nos. 29896, 29897. In Bank. Dec. 16, 1971.]

CITY OF LOS ANGELES, Plaintiff and Respondent, v. ROBERT LEE WOLFE et al., Defendants and Appellants.

SUMMARY

Defendants owned a business building which failed to satisfy parking requirements of an ordinance enacted after construction. The building enjoyed a nonconforming use status, but, in order to acquire a conforming use status, defendants, as authorized by ordinance, acquired land near, but not physically contiguous with, the building property for use as a parking facility. The parking facility property was condemned and defendants sought severance damages, but the trial court held against them under the view that strict physical contiguity was a requirement for an award of such damages. (Superior Court of Ventura County, No. 938376, Roy A. Gustafson, Judge.)

The Supreme Court reversed and remanded for further proceedings on the issue of severance damages, recognizing the general rule requiring physical contiguity, but holding that the facts of the particular case did not present an "ordinary" situation. The Court pointed out that physical contiguity was not an absolute requirement under all conditions and that the facts in the instant case made a showing of constructive contiguity, interdependent use, and unity of ownership, such as might justify an award of severance damages. (Opinion by McComb, J., expressing the unanimous view of the Court.)

HEADNOTES

Classified to McKinney's Digest

(1) **Eminent Domain § 71—Compensation—Estimation of Damages—Damages to "Contiguous" Land—"What Constitutes a Parcel" as a Constitutional Question.**—The question of what constitutes a "parcel" within the meaning of Code Civ. Proc., § 1248, relating to value

determinations in proceedings in eminent domain, is a matter of statutory interpretation, and, since the section is part of the statutory scheme to carry out the constitutional mandate that just compensation be given for the taking of private property for public use, the question is also a matter of constitutional import.

(2) **Eminent Domain § 92—Compensation—Evidence as to Damages—Damages to "Contiguous" Land—Unity of Property.**—To show, on the issue of severance damages, that property taken by condemnation is part of a larger parcel, unity of the property must be shown.

(3) **Eminent Domain § 92—Compensation—Evidence as to Damages—Damages to "Contiguous" Land—Unity of Title.**—To constitute unity of property, with respect to a claim for severance damages, there must be present unity of title, ordinarily contiguity, and unity of use.

[See **Cal.Jur.2d, Rev.**, Eminent Domain, § 147.]

(4) **Eminent Domain § 72—Compensation—Estimation of Damages—Damages to "Contiguous" Land—Necessity That There Be Contiguity.**—Ordinarily, physical contiguity is a requirement of the unity of property that must be shown to establish that property taken by condemnation is part of a larger parcel.

(5) **Eminent Domain § 92—Compensation—Evidence as to Damages—Damages to "Contiguous" Land—Unity of Property.**—Each relevant fact must be analyzed and all of the facts considered in order to determine the question of unity of property in a condemnee's claim for severance damages.

(6) **Eminent Domain § 92—Compensation—Evidence as to Damages—Damages to "Contiguous" Land—Unity of Property.**—In determining the question of unity of property in a condemnee's claim for severance damages with respect to properties not physically contiguous, unity of use is relevant.

(7) **Eminent Domain § 92—Compensation—Evidence as to Damages—Damages to "Contiguous" Land—Unity of Property.**—To find unity of property on the issue of severance damages with respect to parcels that are physically distinct, 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, in the most advantageous and profitable manner in the business for which they are used.

(8) **Eminent Domain § 73—Compensation—Estimation of Damages—Damages to "Contiguous" Land—What Constitutes Contiguity—Separation of Tracts by Highway.**—Generally, where there is actual and existing unity of use and purpose, the separation of tracts by highways is without legal consequence on the issue of unity of property with respect to a claim for severance damages, so long as there is an actually lawfully used means of access between the tracts.

(9) **Evidence § 18—Judicial Notice—Applicability of Principles to Particular Matters—Need For Parking Facilities.**—The Supreme Court may take judicial notice that availability of parking facilities is essential to commercial enterprises in highly developed areas.

(10) **Eminent Domain § 73—Compensation—Estimation of Damages—Damages to "Contiguous" Land—What Constitutes Contiguity—Constructive Contiguity.**—What is a reasonable distance between parcels in order to have constructive contiguity, in determining whether condemned property is part of a larger parcel, is to be determined by the facts in each particular case.

(11) **Zoning § 6(2)—Operation, Effect and Interpretation of Zoning Laws—Extension of Nonconforming Uses—Policy of Law.**—The policy of the law is for elimination of nonconforming uses, and, generally, there can be no resumption of a nonconforming use which has been relinquished.

(12) **Eminent Domain § 92—Compensation—Evidence as to Damages—Damages to "Contiguous" Land—Right to Trial of Issue of Constructive Contiguity.**—Notwithstanding physical absence of contiguity between defendants' property on which their business building stood and their other property used as a parking facility for the building, they were entitled to a full trial on the issue of severance damages on condemnation of the parking facility property, where there was unity of ownership, reasonably physical proximity, strong unity of use with lawful access, special need for private parking facilities, non-availability of physically contiguous land, zoning requiring parking facilities but permitting them within a certain distance from physical contiguity, acquisition of noncontiguous land to obtain a

conforming use status, and loss of that status and needed parking facilities through condemnation.

COUNSEL.

Chester A. Price, Jr., for Defendants and Appellants.

Roger Arnebergh, City Attorney, Charles W. Sullivan, James A. Doherty, Assistant City Attorneys, and Lambert M. Javelera, Deputy City Attorney, for Plaintiff and Respondent.

OPINION

McCOMB, J.—The city commenced this action in 1968 to condemn the fee in five adjacent parcels of real property in the Westwood area of Los Angeles for public off-street parking. Parcel 3 thereof is owned by defendants. They also own another piece of real property (herein 3-A) which the city did not seek to condemn and which is not physically contiguous to parcel 3. However, defendants claimed a right to severance damages to parcel 3-A, pursuant to section 1248 of the Code of Civil Procedure,[1] by reason of the taking of parcel 3 under the special circumstances of this case.

The pretrial conference order states that the parties demanded a jury trial on the issues of value but agreed to an interim trial by the court on the issues raised as to the validity of the ordinance authorizing the condemnation, whether the taking was for a public purpose, and whether the property being sought by the city was an entire taking or the taking of a parcel from a larger parcel. At the interim hearing held on September 3, 1969, defendants waived the first two issues. Very little evidence was presented on the remaining issue. The court held that there was a single taking, thus denying defendants' claim for severance damages, and set dates for further pretrial conference and jury trial. It granted defendants'

[1]Section 1248 provides that the court or jury must hear such legal testimony as may be offered by any of the parties to the eminent domain proceedings, and thereupon must ascertain and assess "2. 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."

motion to file amended answer and cross-complaint in inverse condemnation but held that the issues raised by those pleadings had already been resolved by the court. Minute order of October 23, 1969, shows that the parties agreed to the sum of $131,000 as the fair market value of parcel 3; that defendants reserved their right to a possible appeal on any claim for just compensation other than fair market value; and that defendants' motion to cite "section 12.21A IVm of the zoning code as further authority and reconsideration of the issues" was denied.

Defendants appealed from the interlocutory order of September 3rd and from the judgment entered December 6th pursuant to the order of October 23, 1969. The order of September 3rd is non-appealable and the purported appeal therefrom is hereby dismissed.

(1) The question of what constitutes a "parcel" within the meaning of section 1248 of the Code of Civil Procedure is a matter of statutory interpretation. And since this section is part of the statutory scheme to carry out the constitutional mandate that just compensation be given for the taking of private property for public use (art. I, § 14, Cal. Const.; 14th Amend., U.S. Const.; *Chicago, Burlington etc. R'd* v. *Chicago* (1896) 166 U.S. 226, 233-241 [41 L.Ed. 979, 983-986, 17 S.Ct. 581]), it is also a matter of constitutional import.

Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings (*United States* v. *Miller* (1943) 317 U.S. 369, 375-376 [87 L.Ed. 336, 343-344, 63 S.Ct. 276, 147 A.L.R. 55]). (See 4 Nichols, Consequential Damages, § 14.31, p. 715; 27 Am.Jur. Eminent Domain, § 310, p. 124; 29a C.J.S. Eminent Domain, § 140, p. 589; 17 Cal.Jur., 2d Rev. Eminent Domain, § 145, p. 818; Anno. 6 A.L.R.2d 1199; 3 Witkin Sum. of Cal. Law (1960) Severance Damages, § 236, p. 2046; Cont. Ed. Bar (1960) California Condemnation Practice, Severance Damages, § C, pp. 66-75.) **(2)** In order to show that a part taken is part of a larger parcel unity of the property must be shown. **(3)** "Three elements must be present to constitute unity of property, namely, *unity of title* (*San Benito County* v. *Copper Mtn. Min. Co.* [1935] 7 Cal.App.2d 82 [425 P.2d 428]; *City of Stockton* v. *Ellingwood* [1929] 96 Cal.App. 708 [275 P. 228]); *ordinarily, contiguity* (*People* v. *Ocean Shore Railroad, Inc.* [1948] 32 Cal.2d 406, 424 [196 P.2d 570, 6 A.L.R.2d 1179]); and *unity of use* (*City of Menlo Park* v. *Artino* [1957] 151 Cal.App. 2d 261, 270 [311 P.2d 135]; *City of Stockton* v. *Marengo* [1934] 137 Cal. App. 760, 766 [31 P.2d 467].)" (*People* ex rel. *Dept. Public Works* v. *Dickinson* (1964) 230 Cal.App.2d 932, 934 [41 Cal.Rptr. 427].) (Italics added.)

(4) The legal issues raised on this appeal are whether physical con-

tiguity is *always* necessary and, if not, whether this case comes within one of the exceptions. The first issue is easily answered by the many decisions in which the appellate courts of this state have announced the general rule to be that "ordinarily" physical contiguity is required and in which they have determined that a particular set of facts did or did not bring particular parcels of land within the exception. These decisions, hereinafter briefly referred to, indicate that the resolution depended upon the facts of the case and upon the sound discretion of the courts in analyzing those facts, which sometimes were susceptible of more than one interpretation.

In 1951 defendants, owners of parcel 3-A, constructed thereon a building containing ground floor stores and three stories for medical offices. This lot fronted on Weyburn Avenue and had parking spaces for eight or nine cars. There was at that time a parking lot directly behind the medical office building, but it was not then, and it is not now, available to defendants' tenants and employees for monthly parking. It is now a validating lot for transient parking. Monthly parking has always been required by defendants' tenants. It is provided to them, without separate charge, under the lease agreements. Defendants have always provided parking, even when they had to go out and find additional parking, to carry out their leases and meet their tenants' needs.

After the building was erected the city enacted a more restrictive zoning ordinance.[2] It required that parking be provided within 750 feet of a com-

[2]Ordinance No. 111,049, amending Municipal Code of the City of Los Angeles, "Zoning." The zoning provisions were not pleaded or admitted into evidence but the parties referred to them in oral argument and in their briefs. The court may take judicial notice of their content, pursuant to Evidence Code sections 452, subdivision (b), 455, subdivision (a), 459, subdivisions (a) and (c). (See also *Jordan* v. *County of Los Angeles* (1968) 267 Cal.App.2d 794, 798 [73 Cal.Rptr. 516].)

Section 12.21 A-4 provided: "*Off-Street Automobile Parking Requirements.* A garage or an off-street automobile parking area shall be provided in connection with and at the time of the erection of each of the buildings or structures hereinafter specified, or, at the time such buildings or structures are altered, enlarged, commenced or increased in capacity by the addition of dwelling units, guest rooms, floor area or seating capacity. The parking space capacity required in said garage or parking area shall be determined by the amount of dwelling units, guest rooms, floor area, or seats so provided, and said garage or parking area shall be maintained thereafter in connection with such buildings or structures."

Section 12.21 A-4 (g) provided: "*Location of Parking Area.* The automobile parking spaces . . . shall be provided either on the same lot as the use for which they are intended to serve or not more than 750 feet distant therefrom; said distance is to be measured horizontally along the streets between the two lots, except that where the parking area is located adjacent to an alley, public walk or private easement which is easily useable for pedestrian travel between the parking area and the use it is to serve, the 750 foot distance may be measured along said alley, walk or easement."

Section 12.21 A-4 (m) provided in part: "*For Existing Buildings.* Off-street auto-

mercial building measured along streets, walks, alleys or private easements as long as the building was maintained. Where automobile parking space being maintained in connection with a pre-existing building was insufficient to meet the new requirements, the building could continue to operate as a "non-conforming" building. If parking spaces were not provided the building could not be altered or enlarged.[3] Defendant's building became a "non-conforming building" for lack of parking spaces.

In order to remedy this situation and to provide parking facilities for building tenants and employees defendants in 1959 purchased parcel 3. The distance between the two parcels is well within the 750 feet required by the ordinance. It is 250 feet if one walks through a public alley, across a public parking lot and over a public street, or 550 feet if one walks only along public streets. Parcel 3 is bounded on the west by a public alley and on the south by Broxton Avenue, which intersects with Weyburn Avenue within one block of each parcel. Defendants have lawful access over public roads between their parcels. They do not own the fee underlying the public roads, the alley, or the private property which separates their parcels. Availability of the public parking lot which extends between Weyburn Avenue and the alley is not referred to by the parties.

Defendants did not consult the city prior to purchasing parcel 3 to determine the exact parking requirements under the ordinance. They did read the ordinance and satisfied themselves that they had to comply. Parcel 3 was closest property which it was feasible for them to purchase at the time. There are no comparable facilities at the present time for rent or for lease.

The city was unaware of the common use of these parcels until after it condemned parcel 3. The city attorney stated at the hearing below that the city had never investigated the exact requirements for parking spaces for building 3-A,—that defendants were free to use parcel 3 as they wished; that the city would not hold them to the common use or require that the parcels be sold together; and that the city was not seeking any title or interest in parcel 3-A. The city also urged that defendants were not entitled to damages to parcel 3-A merely because it was subject to more

mobile parking space being maintained in connection with any existing main building or structure shall be maintained so long as said main building or structure remains. . . ."

[3]Section 12.23 C2 provided in part: "Where the automobile parking space being maintained on a lot in connection with a building . . . at the time this article became effective is insufficient to meet the requirements of Sec. 12.21-A or where no parking space has been provided, said building or structure may not be altered or enlarged . . . unless additional automobile parking space is supplied and maintained to meet the requirements of Sec. 12.21-A. . . ."

restrictive zoning. However, the trial court correctly pointed out that defendants were not seeking damages because of the enactment of the ordinance but were seeking severance damages for taking away the use of parcel 3-A.

The court held that the unitized use of these parcels could be considered in evaluating the damages for the taking of parcel 3, but that there was no taking as to parcel 3-A, the city seeking no interest therein. It did not consider the question whether the unitized use was sufficient to bring this case within an exception to the rule requiring physical contiguity.

Unity of Title: There were several owners, all joined as defendants herein. No issues of fact or law are raised with regard to unity of title.

Contiguity: The general rule in this state is that contiguity is "ordinarily essential." (*People* v. *Ocean Shore Railroad, supra,* 32 Cal.2d 406, 423; *People* v. *Thompson* (1954) 43 Cal.2d 13, 18 [271 P.2d 507]; *People* ex rel. *Dept. Public Works* v. *Dickinson, supra,* 230 Cal.App.2d 932, 934.)

Oakland v. *Pacific Coast Lumber etc. Co.* (1915) 171 Cal. 392 [153 P. 705] has frequently been cited as requiring physical contiguity.[4] The factual situation was somewhat comparable to this one. There a condemnee sought severance damages to its planing mill and mill business by reason of the condemnation of a tidelands leasehold upon which it conducted a wharf and lumber yard. The two parcels were some 300 to 400 feet apart, the condemnee did not own the intervening fee, and there was convenient access by public streets between the parcels. The opinion points out that the condemnee did not seriously argue that the parcels were physically contiguous. It stresses the fact that the damages sought were for noncompensable injury to business (pp. 398-399).

People v. *Ocean Shore Railroad, supra,* 32 Cal.2d 406, involved two pieces of property, formerly used for railroad purposes, separated by a public park over which their tracks formerly ran. Many years before the condemnation proceedings the railroad service had been discontinued, the tracks taken up, but the railroad retained no easement or right of access across the intervening park. The issue was whether a prospective use constituted an integrated unitary use of the separate parcels and it was held that it did not. This court stated that the "primary test for severance

[4]See 4 Nichols, Eminent Domain, *supra,* p. 715; 6 A.L.R.2d, *supra,* p. 1207; 3 Witkin, Summary, *supra,* p. 2046; *East Bay Mun. Utility Dist.* v. *Kieffer* (1929) 99 Cal.App. 240, 248 [278 P. 476, 279 P. 178]; *People* ex rel. *Dept. Public Works* v. *Fair* (1964) 229 Cal.App.2d 801, 804 [40 Cal.Rptr. 644].

damages is contiguity, and while an existing unity of use may warrant an award, none can be allowed where, as here, the property is not contiguous and there is merely a possible or prospective and not a presently existing, unity of use." (P. 424) Lest there be any misunderstanding as to this holding this court also stated (p. 423) "Under section 1248 of the Code of Civil Procedure, however, *contiguity is ordinarily essential* and the owner is not entitled to severance damages for injury to other separate and independent parcels. [Citations.] There may be a right to an award of severance damages in some cases where the property, *though not physically contiguous*, is being devoted to an existing unity of use. [Citations.] But such damages are *ordinarily limited to contiguous property*, and the mere fact that there is a possible or prospective use of separate properties as a unit, or that they are susceptible to a common use, will not justify the allowance of severance damages." (Italics added.)

In *People* v. *Thompson, supra*, 43 Cal.2d 13, an exception to the general rule was found. There parcels of land under common ownership were bisected by a public highway in which defendants owned the underlying fee and over which they had unlimited access prior to condemnation of a strip of one parcel and prior to the construction by the state of a highway fence. Even under a weak showing of unified use and lack of physical contiguity, the parcels were found to be one, and the award of severance damages upheld.

In 1964 exceptions to the general rule were considered in *People* ex rel. *Dept. Public Works* v. *Dickinson, supra*, 230 Cal.App.2d 932; *People* ex rel. *Dept. Public Works* v. *Fair, supra*, 229 Cal.App.2d 801; *People* v. *Bowers*, 226 Cal.App.2d 463 [38 Cal.Rptr. 238]. In *Dickinson*, defendants owned noncontiguous parcels which they used for an automobile salvage and wrecking business. They claimed severance damages for the taking of one parcel, urging that their easement of access over the 500 foot intervening property owned by others was sufficient to make their parcels contiguous under section 1248. The court held that it did not but pointed out that the nature of the easement was in doubt. It stated that it made no determination whether conjunction would have been effected had the easement been shown to be appurtenant. In *Fair*, defendants owned orchard farms on either side of a public highway. The state owned the underlying fee in the highway. Defendants had no prior direct access to the intervening highway but only to a road which intercepted the highway. The parcels were held to be separate. In *Bowers*, defendants owned grazing land on either side of a strip which was owned by other persons, over which they had no access rights, and which was completely fenced off from their properties and was used for other purposes.

The parcels were held to be separate. In *People* v. *Chastain* (1960) 180 Cal.App.2d 805 [4 Cal.Rptr. 785], defendants owned farming property on either side of a highway. Their degree of access was reduced after the state made the highway into a limited access freeway. The parcels were held to constitute one for severance purposes. In the above cases where lands were physically separated by highways and private land the courts took into consideration the degree of access before and after the taking, whether the state or the other persons owned the underlying fee, and the unified use (or lack of diversity of use) of the separted parcels. **(5)** Each relevant fact must be analyzed and all of the facts considered in order to determine unity in a condemnee's claim for severance damages.

The question is raised as to what is the controlling factor. *Oakland* v. *Pacific Coast Lumber etc. Co., supra,* 171 Cal. 392, 398,[5] resisted a claim that unity of use should be regarded as the controlling and determinative factor in determining "contiguity" whenever the question arises. **(6)** Unity of use if not the controlling factor is relevant, however, and may be considered where the properties are not physically contiguous. In *People* v. *Thompson, supra,* 43 Cal.2d 13, 23, this court quoted with approval from 18 American Jurisprudence 910-911, "[T]he general rule is stated: 'In determining what constitutes a separate and independent parcel of land, when the property is actually used and occupied, unity of use is the principal test and . . . it is not considered a separate and independent parcel merely because . . . the two tracts are separated by a highway . . . .'" It also quoted, in the same context, from 29 Corpus Juris Secundum, page 1008, section 152, "'Each case must be governed by its own circumstances.'"

(7) Where parcels are physically distinct 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, in the most advantageous and profitable manner in the business for which they are used.'"

[5]"[I]f unity of use is the controlling consideration, it can matter not how far in fact the pieces of land are separated. A factory may be in one county, its warehouse in another, its principal sales agency in a third; any interference with any of the three properties would of necessity be an interference with the unity of use of them all, and if appellant's position is sound, damages to the other two may be recovered for the taking of or an injury to the third. . . . It is quite within the power of the legislature to declare that a damage to that form of property known as business or the goodwill of a business shall be compensated for, but unless the constitution or the legislature has so declared, it is the universal rule of construction that an injury or inconvenience to a business is *damnum absque injuria,* and does not form an element of the compensating damages to be awarded."

(*City of Stockton* v. *Marengo* (1934) 137 Cal.App. 760, 766 [31 P.2d 467]; see also *City of Stockton* v. *Miles and Sons, Inc.* (1958) 165 F.Supp. 554, 564.) **(8)** "The law, generally speaking, is that where there is actual and existing unity of use and purpose, the separation of the tracts in question by . . . highways . . . is without legal consequence so long as there is an actually lawfully used means of access between the tracts."

Question: One. *Do the facts stated suffice to bring this case within an exception to the requirement of physical contiguity?*

Yes. The facts show constructive or legal contiguity, although not actual physical contiguity, a strong showing of interdependent present use, and unity of ownership.

The congested nature of Westwood can be inferred from the testimony of Richard C. Wolfe,* from the zoning requirements, and from the fact that the "public necessity" for which parcel 3 was condemned was for use as public off-street parking. **(9)** This court may take judicial notice of the fact of life that availability of parking facilities is essential to commercial enterprises in highly developed areas.

The effect of the zoning ordinance was to require defendants to obtain additional parking if they wished to avoid the status and economic restriction of having a nonconforming building. In enacting the ordinance the city took into effect the practicalities of obtaining and providing parking facilities, and allowed parking to be provided within 750 feet as measured along streets, walks, alleys or private easements. Defendants acquired and provided parking well within the limits set. The city should not now be heard to require physical contiguity when it condemns the parking facilities so acquired. Equity requires a finding that there was constructive contiguity for both purposes.

Nonownership of the fee underlying the private property is not a determinative factor here because of the strength of other factors. Non-

*Wolfe testified that defendants acquired the parking lot in 1959 to supply additional parking spaces for building 3-A, that this brought building 3-A within the zoning ordinance, that without parcel 3 there are not sufficient parking spaces, that the loss of this parking will be a total obstacle to renting the office spaces in the building, and that it will become obsolete entirely except for the ground floor. No additional charge is made to the tenants, it is included in the printed rental schedule. The only questions asked on cross-examination were whether he believed that by the purchase he had complied with the zoning (answer yes), had he consulted first with the city (answer no), was the parking lot adjacent to parcel 3-A then improved or unimproved (answer, it was improved but not available to the tenants), and whether it is now a presently validating lot (answer yes).

ownership of the fee underlying the public street, alley, or public parking lot over which there was a public easement, is likewise immaterial under the circumstances. Nor are we here concerned with damage to access rights of abutting property owners. The street is not here considered as an extension of defendant's land merely because it provides lawful access (see *People* ex rel. *Dept. Public Works* v. *Dickinson*, *supra*, 230 Cal. App.2d 932; 6 A.L.R.2d, *supra*, 1201). But access measured by public streets, alleys and easements is relevant to showing compliance with the zoning ordinance, proximity, and the interdependent use of these parcels.

(10) What is a reasonable distance between parcels in order to have constructive contiguity is a matter to be determined by the facts in each particular case. Here it is reasonable to consider the limits imposed by the zoning ordinance as being within permissible limits of contiguity.

No findings were made with regard to the applicability of the zoning ordinance nor the effect of the taking upon parcel 3-A. It may briefly be observed here that by complying with the zoning ordinance, defendants relinquished the status of a nonconforming building for building 3-A. **(11)** The policy of the law is for elimination of nonconforming uses, and generally there can be no resumption of a nonconforming use which has been relinquished. (8a McQuillin, Municipal Corporations (3d ed.) §§ 25.189-25.199, pp. 36-52.) Enforced relinquishment is inequitable where no comparable facilities are available to meet zoning or tenant-occupancy requirements, as seems to be the case here.

The real difficulty in determining when to make an exception to the general rules laid down by the courts for determining unity of property in eminent domain proceedings, is, (see 6 A.L.R.2d 1226-1227) in resisting two related tendencies: 1, to make the test of integrity the interrelation of the parts regardless of location, as where a factory is in the suburbs and a warehouse is in the city; and 2, to give damages for injury to business as such, that is, for future loss of profits, which are excluded by general principles under the prevailing rule that the question is one of market value of the property before and after the taking.

The relief here sought is not damages for future loss of profits but damages for a direct and substantial diminution in the value of the medical building on lot 3-A in conjunction with which lot 3 was being used, and for the impairment of a property right to continue the conforming use status of the medical building.

The trial court ruled that strict physical contiguity was necessary for defendants to recover severance damages. Unquestionably this accounted

for the failure of defendants to present further evidence on this issue. Exceptions have been recognized, as above noted, to the rule of strict physical contiguity were the factual situation was found to warrant such an exception. A full trial should have been held on this issue.

(12) Here there was unity of ownership, reasonably physical proximity of the parcels, strong unity of use with lawful means of access, special need for private parking facilities in a congested city area, nonavailability of physically contiguous land, zoning which required that parking be provided but allowed 750 feet as being sufficiently contiguous to comply with such requirement, acquisition of noncontiguous land to provide parking and to obtain a conforming use status, and the loss of such status and loss of needed private parking by the condemnation of lot 3. An "ordinary" situation within the rule requiring strict contiguity was not presented.

Judgment is reversed and the case remanded for further proceedings on the issue of severance damages.

Wright, C. J., Peters, J., Tobriner, J., Mosk, J., Burke, J., and Sullivan, J., concurred.

Memorandum 72-28

EXHIBIT II

[Civ. No. 28149. First Dist., Div. Three. Jan. 13, 1972.]

[As modified Jan. 20, 1972.]

THE PEOPLE ex rel. DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent, v. INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, Defendant and Appellant.

SUMMARY

Before commencement of a jury trial in an action by the state to condemn real property for a freeway, the trial court ruled that evidence as to severance damages would be limited to an agricultural parcel owned by defendant across which the freeway was to pass, and that no such evidence would be considered with regard to defendant's adjacent electronics plant property. Defendant had purchased the agricultural property after announcement of the freeway plans and after it had persuaded the highway commission to move the freeway route so that it would not cross the plant property. The agricultural parcel had been used by its former owner for many years for raising vegetables. After the purchase it was leased back to him and he continued the agricultural activity. (Superior Court of Santa Clara County, No. 201460, John E. Longinotti, Judge.)

The Court of Appeal affirmed the judgment of the trial court, upholding its finding of fact that the two parcels were used for different purposes and its conclusion of law that the two parcels did not constitute a single larger parcel so as to permit the allowance of severance damages to the plant parcel under Code Civ. Proc., § 1248, subd. 2, authorizing such damages. The court noted among other matters that the parcels had been used for many years for unrelated and markedly different purposes, that a long-standing chain link fence separated the properties, and that the agricultural property was zoned residential and the plant property industrial. In rejecting a contention that evidence of damage to property from dust, fumes, and other air contaminates was admissible even though no part of the property damages was taken for the public improvement,

the court pointed out that such theory was raised for the first time on appeal with no facts in the record to support it. (Opinion by Caldecott, J., with Draper, P. J., and Brown (H. C.), J., concurring.)

HEADNOTES

Classified to McKinney's Digest

(1a-1c) **Eminent Domain § 73—Compensation—Estimation of Damages—Damages to Contiguous Land—What Constitutes Contiguity.**—In an action to condemn a portion of agricultural property owned by a corporation for freeway purposes, the trial court properly concluded that the agricultural parcel and defendant's adjacent electronics plant property did not constitute a single larger parcel so as to permit assessment of alleged severance damages to the plant parcel under Code Civ. Proc., § 1248, subd. 2, where the plant parcel had been used for manufacturing for over 20 years before defendant purchased the agricultural parcel, which had been continuously used for agricultural purposes up to the time of trial, where there was a long-standing chain link fence separating the two parcels, where the agricultural property was zoned for residential use and the plant property for industrial use, where, though defendant claimed the agricultural property was purchased to insulate the plant from surrounding contaminating influences, there was testimony that the agricultural use of the land created dust and caused the plant trouble, and where the agricultural parcel had been leased back to its original owner and defendant's president testified that to the best of his knowledge, defendant never used any part of the agricultural parcel for its own activities.

[See **Cal.Jur.2d, Rev.,** Eminent Domain, §§ 146, 147; **Am.Jur.2d,** Eminent Domain, § 315.]

(2) **Eminent Domain § 73—Compensation—Estimation of Damages—Damages to Contiguous Land—What Constitutes Contiguity.**—The language of Code Civ. Proc., § 1248, subd. 2, authorizing the award of severance damages in eminent domain proceedings plainly indicates that an order to permit recovery of such 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 the statute is essentially a question of law for the determination of the trial court.

(3) **Eminent Domain § 73—Compensation—Estimation of Damages—Damages to Contiguous Land — What Constitutes Contiguity.** — In order to permit recovery of severance damages in an eminent domain proceeding, there must be a unity of title, contiguity, and unity of use between the portion of the property sought to be condemned and the portion not sought.

(4) **Eminent Domain § 73—Compensation—Estimation of Damages—Damages to Contiguous Land—What Constitutes Contiguity.**—To constitute a unity of property between two or more contiguous but prima facie different parcels of land for the purpose of allowance of severance damages in an eminent domain proceeding, 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.

(5) **Appeal § 1244(2)—Review—Questions of Law and Fact—Insufficiency of Evidence—Presumptions and Inferences Indulged—Power of Appellate Court.**—A reviewing court is bound to indulge in every intendment which supports the judgment of the trial court. 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.

(6) **Eminent Domain § 71—Compensation—Estimation of Damages—Damages to Contiguous Land.**—On appeal from a judgment in a condemnation action wherein the trial court refused to consider evidence of severance damages to certain property owned by defendant adjacent to the property taken, defendant could not successfully argue that evidence of damage to property from dust, fumes, and other air contaminates is admissible even though no part of the property damaged is taken for the public improvement, where such theory was not presented in the trial court and no evidence was offered to prove such damage.

(7) **Eminent Domain § 204—Remedies for Unlawful Taking—Inverse Condemnation — Principles Applicable.** — An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemnor. The principles affecting the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action.

COUNSEL

Fadem & Kanner and Gideon Kanner for Defendant and Appellant.

Harry S. Fenton, John P. Horgan, Lee Tyler, William J. Turner, William R. Edgar and Robert R. Buell for Plaintiff and Respondent.

OPINION

CALDECOTT, J. — 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. ITT 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 agricultural 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 purpose of assessing severance damages.

(1a) 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.

(2) 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. 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 [153 P. 705; *People* ex rel. *Dept. Pub. Wks.* v. *Nyrin* (1967) 256 Cal. App.2d 288, 294 [63 Cal.Rptr. 905].)

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

[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 agricultural property for purposes of assessing severance damages. Consequently, the court limited the question of severance damages to the agricultural parcel.

(3) 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) 6 Cal.3d 326 [—— Cal.Rptr. ——, —— P.2d ——]; *City of Menlo Park* v. *Artino*, 151 Cal.App.2d 261, 270 [311 P.2d 135]; *City of Stockton* v. *Marengo*, 137 Cal.App. 760, 766 [31 P.2d 467]; *People* ex rel. *Dept. Public Works* v. *Dickinson*, 230 Cal.App.2d 932, 934 [41 Cal.Rptr. 427].) **(1b)** 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 [271 P.2d 507]. 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 contaminating 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.

(4) 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. . . ."

(1c) 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 Code of Civil Procedure, section 1248, subd. 2. (5) 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 very 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.

(6) 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 [87 P.2d 702]; *City of Fresno* v. *Hedstrom*, 103 Cal.App.2d 453, 456 [229 P.2d 809]; *Los Angeles County Flood Control Dist.* v. *Southern Cal. Bldg. & Loan Assn.*, 188 Cal.App.2d 850 [10 Cal.Rptr. 811]; *Albers* v. *County of Los Angeles*, 62 Cal.2d 250 [42 Cal.Rptr. 89, 398 P.2d 129] and *Cox* v. *State of California*, 3 Cal.App.3d 301 [82 Cal.Rptr. 896].

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 improvement. 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 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 [74 Cal.Rptr. 521, 449 P.2d 737]; *Breidert* v. *Southern Pac. Co.* (1964) 61 Cal.2d 659 [39 Cal.Rptr. 903, 394 P.2d 719].) (7) As stated in *Breidert* v. *Southern Pac. Co.*, *supra*, page 663, footnote 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 [123 P.2d 505]; *Bacich* v. *Board of Control*, *supra*, 23 Cal.2d 343 [144 P.2d 818].)" 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.

Appellant also maintains that part of the damage-causing activitiy is

[2]See *People* v. *Ricciardi*, 23 Cal.2d 390, 400 [144 P.2d 799].

conducted on the 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 [81 Cal.Rptr. 792, 460 P.2d 992]. Furthermore, as discussed above, no proof of damage to the plant property was offered. *Ramos* involved the taking of a portion of a single parcel (see fn. 1, p. 262), and is thus distinguishable from the present case.

Appellant, by letter, has called the court's attention to the recent case of *People* ex rel. *Dept. Pub. Wks.* v. *Volunteers of America*, 21 Cal.App.3d 111 [98 Cal.Rptr. 423] 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 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." (Italics 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* ex rel. *Dept. Pub. Wks.* v. *Volunteers of America*, *supra*, is of no help to appellant.

Judgment is affirmed.

Draper, P. J., and Brown (H. C.), J., concurred.