#36.40 6/19/69

Memorandum 69-77

Subject: Study 36.40 - Condemnation Law and Procedure (Excess Condemnation - Physical and Financial Remnants)

Attached to this memorandum is a draft statute (Exhibit I) that has been developed from discussions at the last two meetings. (You might want to re-refer to Memoranda 69-42 and 69-56 relating to this topic.) You have a copy of Mr. Matheson's study, "Excess Condemnation in California--Proposals for Statutory and Constitutional Change," and Mr. Capron's article, "Excess Condemnation in California--A Further Expansion of the Right to Take" (20 Hastings L.J. 571). Attached is an additional Note from the New York University Law Review criticizing the Rodoni decision (Exhibit II). Also attached (for convenience) as Exhibit III is a copy of the provisions of Code of Civil Procedure Section 1248 that dictate how, under existing law, value, severance damages, and benefits are determined in a partial-taking case.

"Physical solutions"

In previous meetings, the Commission has developed the idea that the preferred handling of these cases of enormous severance damages would be a "physical solution," if such a solution is available. The idea raises at least three problems: (1) whether such solution is available and feasible in the circumstances; (2) whether the public entity can be forced to provide such a solution; and (3) whether the property owner can be forced to accept such a solution. With respect to making such a solution legally available, this proposal merely defers, in the matter of street or highway access, to the Commission's outstanding tentative recommendation

on byroads and, with respect to problems other than access, to the closely related problem of substitute condemnation. This proposal does attempt to coerce the public entity into providing such a solution if the property owner raises the objection that such a solution is available. Under this draft, the taking of the "remnant" will be denied if the court determines that the public entity has a feasible means of avoiding or diminishing the excessive damages. See subdivisions (d) and (e) of Section 1266.1.

"The 50% solution"

The Commissioners have tended to eschew any unfettered discretion as to this problem on the part of either the public entity or the trial court or appellate courts. From the Rodoni decision (68 Cal.2d 206; copy attached to Memorandum 69-42), it is impossible to determine just how much the "remnant" must be damaged to permit a total taking. According to Chief Justice Traynor, total takings are not to be permitted simply to avoid litigation as to severance damages for this would "nullify the constitutional guarantee of just compensation . . . by permitting the state to threaten excess condemnation, not because it was economically sound, but to coerce condemnees into accepting whatever value the state offered for the property actually taken or waiving severance or consequential damages to avoid an excess taking." But, on the other hand, statutes authorizing "remnant-elimination" condemnation "may reasonably be interpreted to authorize only those excess condemnations that are for valid public uses; namely condemnation or remnants . . . or condemnations that avoid a substantial risk of excessive severance or consequential damages."

And further, "We need not decide in what specific cases other than those mentioned the statutes authorize excess condemnation. It should be emphasized, however, that the economic benefit to the state must be clear." All that is certain is that the permissibility of the remnant taking depends upon the ratio of the damages to value of the remnant in the "before condition."

In keeping with suggestions made at previous meetings, this draft postpones determination of the right to take the remnant until after the pertinent valuations have been made. The figure of 50% may be said to be wholly arbitrary, but the scheme has at least the virtue of eliminating the exercise of discretion or the making of predictive determinations on the part of either entities or courts. One can only guess whether a 55% damaging constitutionally justifies a total taking. However, that result would at least mean that, arithmetically speaking, the damages to the remnant loom larger than its remaining value. Perhaps a question more practicable than the constitutional one is whether this scheme would require the property owner to assume inconsistent positions in the valuation proceedings. In other words, to defeat the taking, the property owner would be disposed to show that severance damages do not exceed 50% of the value of the remainder. The thesis of this proposal, however, is that each party should "tell it like it is" and abide the event.

Relating the scheme to the valuation trial

As mentioned in previous memoranda, there are minor problems in relating this scheme to the trial of the issue of compensation. Under existing law (Code of Civil Procedure Section 1248; Exhibit III), the court or jury separately determines (1)

the value of the taking; (2) damages to the remainder; and (3) benefits to the remainder. Although subdivision (2) of Section 1248 does not explicitly require a determination of the "before" and "after" value of the remainder, that is the substantive rule and also the way the evidence is presented except in a "cost to cure" case (in which the condemnor undertakes to diminish the difference between the before and after values by showing an expedient that would diminish damages). Therefore, this scheme will jibe with existing procedure except for the need for a requirement that the court or jury specifically determine the "before" value of the remainder. See subdivision (f) of Section 1266.1.

If, however, California were to adopt the preferable "total parcel before and after rule" for the trial of partial-taking cases, there would be no determination or evidence as to the "before" value of the remainder. However, if this scheme is adopted, it can be readily adapted to the "total parcel before and after rule" by requiring the court or jury to determine the "before" value of the remainder. Necessary changes have been indicated in brackets in subdivision (f) of Section 1266.1.

Explanation of particular sections

Section 1225. This definition of "public entity" would be for convenience only and would not change any substantive taking powers. Specifically, it includes 215 agencies or types of entities. Thirteen state agencies have a stated condemnation power, but only five have active acquisition programs: Public Works (Highways); Water Resources; Reclamation Board; General Services (State Public Works Board); and Regents, U.C. Cities and counties, of course, have a broad warrant to condemn under a

prolix mass of legislation. The remaining 200 condemnors are types of local public entities ranging in importance from school districts, irrigation districts, and highway districts, down to such things as mosquito abatement districts. The principal exclusion effected by this definition would be the privately owned public utilities, but most of their takings are easement takings and therefore would not be within the ambit of this scheme in any event.

Section 1226. A definition of "larger parcel" would add precision to this scheme. In existing statutes, "larger parcel" is used and is important in determining severance damages, but the concept and its details are left to the case law. In our recodification of Title 7, we will probably have to define "larger parcel," but we would not want to form a definition for the limited purpose of this scheme. As used in this draft, of course, "larger parcel" has the same meaning as in Code of Civil Procedure Section 1248.

Section 1266. This section merely authorizes the voluntary acquisition and disposition of physical or financial remnants. With respect to disposition of the remnants, the staff has checked the property disposal powers of most public entities and finds that all entities have disposal powers, but the particular requirements (mostly competetive bidding) vary a great deal. The State Legislative Analyst has recently completed "A Survey of Land Acquisition and Disposal by State Agencies" and accurately observes (page 25):

> "The policies relating to land acquisition and disposal of the agencies studied are guided by the statutes and case laws requiring and defining just compensation. The policies do not differ greatly

between state agencies, except where authority for specific actions is not included in the enabling laws. There are some differences to be found in the disposal of surplus lands through exchange or sale without competitive bidding. The engineering-oriented agencies generally acquire surplus land in lieu of severance payment and rather freely exchange this surplus land for required lands as a matter of policy to minimize the costs of required rights of way. The sale of surplus land without competitive bidding is frequently desirable because of landlocking or other factors which limit the number of potential purchasers.

"In the site-oriented agencies surplus lands are generally disposed of through competitive bidding as a matter of policy. Basic policies for site-oriented agencies are partially stated in the State Administrative Manual.

Section 1266.1. This section undertakes to provide a formula and a procedure for dealing with such cases as Rodoni. "Excessive damages" are simply damages in excess of 50% of the "before" value of the remainder. It is necessary to say "remainder, or a portion of the remainder" because, e.g., a new highway may sever a large parcel and therefore involve a "take," great damages to one portion of the remainder, and little or no damage to the other portion of the remainder.

Subdivision (b) merely authorizes takings to avoid claims for excessive damages.

Subdivision (c) requires the public entity to expressly invoke this section and gives its resolution the effect of being presumptively well-founded. It seems necessary to provide this presumption because, if no right-to-take issue is raised, the court must include in its findings and judgment a determination that the taking is warranted.

Subdivision (d) permits the condemnee to contest the taking if he thinks that there is a "physical solution" or the damages will not be excessive.

Subdivision (e) permits the condemnee to attempt to make his case as to a physical solution, but it imposes the burden or proof upon him. To require the public entities to show the absence of a feasible physical solution would, in effect, require it to prove a negative. Even with the burden of proof, the condemnee would be in a better position than under existing law as at present he is stultified by the widespread "conclusive" resolutions of necessity and the limited review on the basis of "public use" as provided in the Rodoni decision.

Subdivision (f). This subdivision, of course, is the heart of the scheme. The issue of the right to take to avoid excessive severance damages is simply left to be determined by the determination of values, damages, and benefits in the proceeding. The subdivision would require, in effect, that the valuation case be presented as one of a partial taking, rather than a taking of an entire parcel, but this is relatively unimportant since, as a matter of substantive compensation law, the "take" and the remainder are to be valued as parts of the whole parcel. If the damages do exceed 50% of the "before" value of the remainder, the compensation is the assessed value of the "prime take" and the "before" value of the remainder; this, in effect, is the "before" value of the entire parcel. The property owner is permitted to remit the damages that exceed 50% and keep the remainder. This will guard the public entity, to the extent of 50%, against being required to provide a windfall to a property owner and at the same time give property owners a right to contest takings based on mere fears as to severance damages. In another sense, the scheme preserves the severance damage system, rather than a remnant elimination system, where remaining value exceeds damages.

Subdivision (g). This subdivision makes it clear that this scheme does not change the condemnor's existing privilege (under Code of Civil Procedure Section 1255a) to abandon, or partially abandon, the proceeding and to pay specified costs and fees on such abandonment. The practical effect of the subdivision is to adopt the view of the Nyrin decision (256 Cal. App.2d 288) that, if the remnant proves unduly expensive, the public entity may not merely renounce its resolution to take that remnant, but must abandon the proceeding as to that remnant and pay appropriate costs and fees.

Subdivision (h). This subdivision authorizes the public entity to dispose of the remnant and to credit the proceeds to the property acquisition fund. It seems impracticable to attempt to draft a blanket procedural statute for such disposition that would cover all entities and agencies. All of them now have some sort of disposition procedure, and this subdivision merely leaves them to resort to such procedures.

Respectfully submitted,

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Assistant Executive Secretary

Memorandum 69-77 6/19/69

EXHIBIT I

DRAFT STATUTE - PHYSICAL AND FINANCIAL REMNANTS

The following sections would be added to the Code of Civil Procedure:

GENERAL DEFINITIONS

§ 1225. "Public entity" defined

1225. As used in this title, "public entity" includes the state, the Regents of the University of California, a county, city, district, public authority, public agency, or any other political subdivision or entity in the state.

Comment. For a comparable definition of "public entity," see Section 811.2 of the Government Code. The definition in this section is provided for convenience in distinguishing governmental from non-governmental condemnors; it does not enlarge or diminish the power of condemnation of any condemnor.

§ 1226. "Larger parcel" defined

(To be drafted later.)

[Comment. As used in Sections 1266 and 1266.1, "larger parcel" has the same meaning as those words in Section 1248 and the decisional law construing that term. See People v. Ocean Shore R.R., 32 Cal.2d 406, 196 P.2d 570, 6 A.L.R.2d 1179 (1948); People v. Nyrin, 265 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967).]

ACQUISITION OF PHYSICAL
AND FINANCIAL REMNANTS

§ 1266. Acquisition other than by condemnation

1266. Whenever a part of a larger parcel of property is to be acquired by a public entity for public use and the remainder, or a portion of the remainder, will be left in such size, shape, or condition as to be of little value to the owner or to give rise to claims for severance or other damages, the public entity may:

(a) Acquire the remainder, or portion of the remainder, by any means other than condemnation proceedings; and

(b) Sell, lease, exchange, or otherwise dispose of property so acquired and credit the proceeds from such disposition to the fund or funds available for acquisition of the property to be acquired for the public use.

Comment. Section 1266 is added to authorize any public entity to acquire, by a voluntary transaction, physical or "financial" remnants, to dispose of them, and to credit the proceeds to the fund available for acquisition of the property being acquired for public use. As to "financial" remnants, see Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App.2d 762, 304 P.2d 803 (1956). The language of the section is similar to that contained in former Sections 1266 of the Code of Civil Procedure, 104.1 and 943.1 of the Streets and Highways Code, and Sections 254, 8590.1, 11575.2, and 43533 of the Water Code (all repealed in this recommendation). This section does not provide the procedures to be followed by the entity in disposing of the property so acquired, and that matter is left to be governed by other statutory provisions applicable to the particular entity.

§ 1266.1. Acquisition by condemnation

1266.1. (a) As used in this section, "excessive damages" means damages to the remainder, or a portion of the remainder, of a larger parcel of property by reason of its severance from the part taken for public use and from construction of the public improvement in the manner proposed by the public entity, after being diminished by any benefits, that exceed fifty percent (50%) of the value of such remainder, or portion of the remainder, immediately before condemnation and as unaffected thereby.

(b) Whenever a part of a larger parcel of property is to be taken for public use by a public entity by condemnation proceedings and the remainder, or a portion of the remainder, will be left in such size, shape, or condition as to give rise to claims for excessive damages, the public entity may take such remainder, or portion of the remainder, in accordance with this section and not otherwise.

(c) The resolution, ordinance, or declaration authorizing the taking of a remainder, or a portion of the remainder, under this section shall specifically refer to this section and shall recite a determination by the officer or body adopting the resolution, ordinance, or declaration that the remainder, or a portion of the remainder, sought to be taken will be left in such size, shape, or condition as to give rise to claims for excessive damages. The determination and recital required by this subdivision shall not be referred to in the trial of the issue of compensation. It shall be presumed from the adoption of the resolution, ordinance, or declaration that the taking of the remainder, or portion of the remainder, is justified under this section.

(d) The condemnee may contest a taking under this section upon either or both of the following grounds:

(1) That the public entity has a reasonable, practicable, and financially feasible means of avoiding excessive damages or diminishing them to such an extent that they will not be excessive.

(2) That the remainder, or portion of the remainder, will not suffer excessive damages.

(e) If the condemnee contests the taking on the ground listed in paragraph (1) of subdivision (d), the court shall determine the issue and the burden of proof is on the condemnee. If the determination is in favor of the condemnee, the remainder, or portion of the remainder, shall be deleted from the proceeding.

(f) If the taking is contested upon the ground that the remainder, or portion of the remainder, will not suffer excessive damages, the court shall postpone determination of the issue until the court, jury, or referee has determined values, damages, and benefits respecting the parcel. In addition to the other determinations to be made under [Section 1248 (value of part taken, severance damages, and benefits) or any successor to that section], the court, jury or referee shall determine specifically the value of the remainder, or portion of the remainder, before condemnation and as unaffected thereby. If such determinations do not result in excessive damages, as defined in subdivision (a), the remainder, or portion of the remainder, shall be deleted from the proceeding and compensation shall be adjudged as in a partial taking. [No change necessary if Section 1248 is modified to adopt the "total parcel before-and-after rule."] If excessive damages do result, the remainder, or portion of the remainder, shall be included in the judgment, and compensation shall be adjudged by adding

the value of the part taken for the public improvement and the value of the remainder, or portion of the remainder, before condemnation and as unaffected thereby. [If Section 1248 is changed, say "adjudged as in a taking of the entire parcel."] However, if within ten days from the determination of values, damages and benefits, the property owner files in the proceeding a remission of all excessive damages, as defined in subdivision (a), the remainder, or portion of the remainder, shall not be included in the judgment, and compensation shall be adjudged by adding the value of the part taken for the public improvement to the damages that are not remitted. [If Section 1248 is changed, this language would have to be changed accordingly.]

(g) Nothing in this section affects (1) the privilege of the entity to abandon the proceeding or abandon the proceeding as to particular property, or (2) the consequence of any such abandonment.

(h) A public entity may sell, lease, exchange, or otherwise dispose of property taken under this section or acquired by purchase in lieu of proceedings under this section and may credit the proceeds to the fund or funds available for acquisition of the property to be acquired for the public use.

Comment. Section 1266.1 is added to provide a uniform procedure, applicable to all public entities, for determining whether damages to a remainder of property will be excessive and for avoiding the payment of excessive damages. As to the concept of "excessive severance damages," see Dep't of Public Works, v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967); La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App.2d 762, 304 P.2d 803 (1956). See, generally, Recommendation Relating to Condemnation Law and Procedure: Number ___, Excess Condemnation, __ Cal. L. Revision Comm'n Reports 000 (19). The section supersedes Sections 1266 of the Code of Civil Procedure, 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 sections of special district laws.

Subdivision (a). "Excessive damages" are defined to mean damages, after offsetting benefits, that result to a remainder and that exceed 50 percent of the value of such remainder in the "before condition." For the purposes of this section, only the portion of the damages that exceed 50 percent are "excessive." "Value," "damages," and "benefits" have the same meaning as in Section 1248 (or any successor to that section). The phrase "remainder, or portion of the remainder" contemplates a case in which one portion of the remainder is damaged more severely than another portion. For example, if a highway severs a large, single parcel, the portion remaining on one side of the highway may be substantially damaged, while the portion on the other side is damaged only slightly or not at all.

Subdivision (b). This subdivision authorizes the taking of physical or financial remnants, but requires the taking to be in accordance with this subdivision. The language of the section is similar to that contained in former Sections 1266 of the Code of Civil Procedure, 104.1 and 943.1 of the Streets and Highways Code, and Sections 254, 8590.1, 11575.2, and 43533 of the Water Code (all repealed in this recommendation).

Subdivision (c). To invoke this section, the resolution to condemn must refer to it and must recite a determination that the taking will "give rise to claims for excessive damages"; the resolution is not a determination or concession that damages will exceed 50 percent of the value of the remainder. The subdivision forbids reference to the determination or recital in the valuation trial. For an analogous provision, see Section 1243.5(e) (amount deposited to take immediate possession). The resolution (or ordinance or declaration) is given the effect of raising a presumption that the taking is justified under this section. In the absence of a contest of

that issue, therefore, the subdivision permits a finding and judgment that the remainder be taken.

Subdivisions (d) and (e). These subdivisions permit the condemnee to contest a taking under this section upon the grounds that a "physical solution" could be provided by the condemnor. or that the damages, as assessed, will not prove excessive. In at least a few cases, the condemnee may be able to demonstrate that, given construction of the public improvement in the manner proposed, the entity is able to provide substitute access or take other steps that would be economically feasible under the circumstances of the particular case and would preclude excessive damages. If he can do so, subdivision (e) prevents acquisition of the remainder.

Subdivision (f). If the condemnee contests a taking under this section, subdivision (f) requires the court to postpone determination of the issue until the valuation phase of the proceeding has been completed. The question whether the remainder may be taken is made to turn simply upon the results of the assessment of value, damages, and benefits. The court or jury must specifically assess the value of the remainder in the "before condition" to permit comparison of that figure with the assessed damages-less-benefits. If damages-less-benefits exceed 50 percent of the "before value," the remainder may be taken, but if not, the remainder may not be taken and the matter is resolved as any other partial taking. However, the condemnee is permitted to remit any damages in excess of 50 percent and retain the remainder. As to procedure before enactment of this section, see Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436, P.2d 342, 65 Cal. Rptr. 342 (1968).

Subdivision (g). Subdivision (g) makes clear that the procedure provided by this section has no bearing upon the privilege to abandon or the

consequences of abandonment. The subdivision makes no change in existing law. See Section 1255a and People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967).

Subdivision (h). This subdivision authorizes the entity to dispose of property acquired under this section or acquired in lieu of such proceedings. However, it does not specify or provide the procedure to be followed. Accordingly, such procedure is left to be governed by statutory provisions applicable to the particular entity or agency.

The following sections, relating to this matter, would be repealed:

Sec. 3. Section 1266 of the Code of Civil Procedure is repealed.

~~1266.--Whenever-land-is-to-be-condemned-by-a-county-or-city-for the-establishment-of-any-street-or-highway,-including-express highways-and-freeways,-and-the-taking-of-a-part-of-a-parcel-of-land by-such-condemning-authority-would-leave-the-remainder-thereof-in such-size-or-shape-or-condition-as-to-require-such-condemnor-to-pay in-compensation-for-the-taking-of-such-part--an-amount-equal-to-the fair-and-reasonable-value-of-the-whole-parcel,-the-resolution-of-the governing-body-of-the-city-or-county-may-provide-for-the-taking-of the-whole-of-such-parcel-and-upon-the-adoption-of-any-such-resolution it-shall-be-deemed-necessary-for-the-public-use,-benefit,-safety, economy,-and-general-welfare-that-such-condemning-authority-acquire the-whole-of-such-parcel.~~

Sec. 4. Section 104.1 of the Streets and Highways Code is repealed.

~~104.1.--Wherever-a-part-of-a-parcel-of-land-is-to-be-taken-for state-highway-purposes-and-the-remainder-is-to-be-left-in-such-shape or-condition-as-to-be-of-little-value-to-its-owner,-or-to-give-rise to-claims-or-litigation-concerning-severance-or-other-damage,-the department-may-acquire-the-whole-parcel-and-may-sell-the-remainder or-may-exchange-the-same-for-other-property-needed-for-state-highway purposes.~~

§ 943.1

Sec. 5. Section 943.1 of the Streets and Highways Code is repealed.

~~943.1.--Whenever a part of a parcel of land is to be taken for county highway purposes and the remainder of such parcel is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damages, the county may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for county highway purposes.~~

Sec. 6. Section 254 of the Water Code is repealed.

~~254.--Whenever a part of a parcel of land is to be taken for state dam or water purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for state dam or water purposes.~~

Sec. 7. Section 8590.1 of the Water Code is repealed.

~~8590.1.--Wherever a part of a parcel of land is to be taken for purposes as set forth in Section 8590 of this code and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the board may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for purposes as set forth in Section 8590 of this code.~~

Sec. 8. Section 11575.2 of the Water Code is repealed.

~~11575.2.--Whenever-a-part-of-a-parcel-of-land-is-to-be-taken for-state-water-development-purposes-and-the-remainder-is-to-be left-in-such-shape-or-condition-as-to-be-of-little-value-to-its owner,-or-to-give-rise-to-claims-or-litigation-concerning-severance-or-other-damage,-the-department-may-acquire-the-whole-parcel-and-shall-sell-the-remainder-or-shall-exchange-the-same-for other-property-needed-for-state-water-development-purposes.~~

Sec. 9. Section 43533 of the Water Code is repealed.

~~43533. Whenever a part of a parcel of land is to be acquired pursuant to this article and any portion of the remainder is to be left in such shape or condition as to be of little value to its owner, the board may acquire and sell such portion or may exchange the same for other property needed to carry out the powers conferred on said board.~~

Sec. 10. Water Code Appendix Section 28-16-5/8 is repealed:

~~Sec.-16-5/8.--Whenever-a-part-only-of-a-larger-parcel-of-land-is required-by-the-district-for-the-control-or-conservation-of-flood, storm,-or-other-waste-waters,-and-the-taking-thereof,-and-the-construction-of-the-proposed-public-improvement-thereon-will-interfere with-reasonable-access-to-the-remainder,-or-will-otherwise-cause substantial-damage-to-the-remainder,-the-district-may-condemn, purchase,-or-otherwise-acquire-the-whole-parcel-of-land-of-which the-area-required-for-public-use-is-a-part.--Or,-in-lieu-of-such acquisition,-the-district-may-condemn,-purchase,-or-otherwise acquire-an-easement-for-ingress-to-and-egress-from-the-said-remainder for-use-by-the-public,-including-the-owner-of-the-land.~~

Sec. 11. Water Code Appendix Section 28-16 3/4 is repealed.

~~Sec. 16-3/4.--Whenever a part only of a house or other structure must be taken or removed in order to use the land on which such structure is situated for flood control or water conservation purposes and the severance of such portion of the structure from the whole structure would cause a substantial damage to the structure, the Board of Supervisors of the Los Angeles Flood Control District may condemn or otherwise acquire the entire house or structure and thereafter sell or otherwise cause the said structure to be removed from the portion of the land so required for a public use.~~

Sec. 12. Water Code Appendix Section 36-16.1 is repealed.

~~Sec. 16.1.--Whenever a part only of a parcel of land is required by the district for the control or conservation of flood, storm, or other waste waters, and the taking thereof, and the construction of the proposed public improvement thereon, will interfere with reasonable access to the remainder, or will otherwise cause substantial damage to the remainder, the district may condemn, purchase, or otherwise acquire the whole parcel of land and may sell the remainder or exchange the same for other property required for district purposes. Or, in lieu of such acquisition of the remainder, the district may condemn, purchase, or otherwise acquire an easement for ingress to and egress from the remainder for use by the public, including the owner of the land.~~

§ 48-9.2

Sec. 12.1. Water Code Appendix Section 48-9.2 is repealed.

~~48-9.2.---Whenever-a-part-only-of-a-parcel-of-land-is-required by-the-district-for-any-purpose-authorized-by-this-act-and-the-taking thereof,-and-the-construction-of-the-proposed-public-improvement thereon,-will-interfere-with-reasonable-access-to-the-remainder,-or will-otherwise-cause-substantial-damage-to-the-remainder,-the-district may-purchase,-condemn,-or-otherwise-acquire-the-whole-parcel-of-land and-may-sell-the-remainder-or-exchange-the-same-for-other-property required-for-district-purposes.--In-lieu-of-such-acquisition-of-the remainder,-the-district-may-purchase,-condemn-or-otherwise-acquire-a right-of-way-or-real-property-for-ingress-to-and-egress-from-the remainder-for-use-by-the-public,-including-the-owner-of-the-land.~~

Sec. 12.2. Water Code Appendix Section 49-6.1 is amended to read:

49-6.1. ~~Whenever-a-part-only-of-a-parcel-of-land-is-required by-the-district-for-the-control-or-conservation-of-flood,-storm,-or other-waste-waters,-and-the-taking-thereof,-and-the-construction-of the-proposed-public-improvement-thereon,-will-interfere-with-reasonable-access-to-the-remainder,-or-will-otherwise-cause-substantial damage-to-the-remainder,-the-district-may-condemn,-purchase,-or otherwise-acquire-the-whole-parcel-of--land-and-may-sell-the-remainder or-exchange-the-same-for-other-property-required-for-district-purposes. Or,-in-lieu-of-such-acquisition-of-the-remainder,-the-district-may condemn,-purchase,-or-otherwise-acquire-an-easement-for-ingress-to and-egress-from-the-remainder-for-use-by-the-public,-including-the owner-of-the-land.~~ No authority is ~~hereby~~ granted to the district by Section 1266 or 1266.1 of the Code of Civil Procedure to acquire riding and hiking trails by condemnation.

Sec. 12.3. Water Code Appendix Section 51.3.4 is amended to read:

51-3.4 The agency shall have the power of eminent domain to acquire within or outside the agency by condemnation in the manner and to the extent prescribed in Article 1, Section 14 of the Constitution and Title 7, Part 3 of the Code of Civil Procedure, as now existing or hereafter amended, all property or interests therein necessary or convenient for carrying out the powers and purposes of the agency except that the agency shall not have power to acquire by condemnation publicly owned property held or used for the development, storage or distribution of water for public use; and it is hereby declared that the use of the property which may be condemned, taken or appropriated under the provisions of this act, is a public use, subject to regulation and control of the state in the manner prescribed by law. The district in exercising such power shall in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal or relocation of any structure, railways, mains, pipes, conduits, wires, cable, poles, or any public utility which is required to be moved to a new location, and provided further that notwithstanding any other provision of this act or any other law, no property shall be taken unless it is taken upon a finding by a court of competent jurisdiction that the taking is for a more necessary public use than that to which it has already been appropriated.

[Whenever real property which is devoted to or held for some other public or quasi-public use is required by the agency for any purpose authorized by this act, the agency may condemn real property adjacent thereto or in the immediate vicinity thereof to be exchanged for the real property so required by the agency.]

The power of eminent domain vested in the agency shall include the power to condemn in the name of the agency either the fee simple or any lesser estate or interest in any property which the board of directors by resolution shall determine is necessary for carrying out the purposes of the agency. Such resolution, adopted by a two-thirds vote of all its members, shall be conclusive evidence of all of the following:

(a) The public necessity for the proposed public improvement.

(b) The property or property interest being acquired is necessary for the proposed public use.

(c) Such proposed public improvement is planned or located in the manner which will be compatible with the greatest public good and the least private injury.

Whenever-a-part-only-of-a-parcel-is-required-by-the-agency for-any-purpose-authorized-by-this-act,-and-the-taking-thereof, and-the-construction-of-the-proposed-public-improvement-thereon,-will-interfere-with-reasonable-access-to-the-remainder,-or will-otherwise-cause-substantial-damage-to-the-remainder,-the agency-may-condemn,-purchase,-or-otherwise-acquire-the-whole parcel-of-land-and-may-sell-the-remainder-or-exchange-the-same for-other-property-required-for-agency-purposes.--Or,-in-lieu-of such-acquisition-of-the-remainder,-the-agency-may-condemn,-purchase,-or-otherwise-acquire-an-easement-for-ingress-to-and-egress from-the-remainder-for-use-by-the-public,-including-the-owner-of the-land.

Sec. 13. Water Code Appendix Section 55-28.1 is repealed.

~~Sec.-28.1.--Whenever-land-is-to-be-condemned-by-the-district for-any-of-the-uses-and-purposes-permitted-by-law,-and-the-taking of-a-part-of-a-parcel-of-land-would-leave-the-remainder-thereof in-such-size-or-shape-or-condition-as-to-require-the-district-to pay-in-compensation-for-the-taking-of-such-part-an-amount-equal to-the-fair-and-reasonable-value-of-the-whole-parcel,-the-resolution-of-the-board-may-provide-for-the-taking-of-the-whole-of-such parcel-and-upon-the-adoption-of-any-such-resolution-it-shall-be deemed-necessary-for-the-public-use,-benefit,-safety,-economy, and general-welfare-that-the-district-acquire-the-whole-of-such-parcel.~~

Sec. 14. Water Code Appendix Section 60-6.1 is repealed.

~~Sec. 6.1. Whenever a part only of a parcel of land is required by the district, and the taking thereof, and the construction of the proposed public improvement thereon, will interfere with reasonable access to the remainder of a portion thereof, or will otherwise cause substantial damage to the remainder, the district may condemn, purchase, or otherwise acquire the whole parcel of land or such portion of the remainder to which access is impaired and may sell the remainder or exchange the same for other property required for district purposes. Or, in lieu of such acquisition of the remainder, the district may condemn, purchase, or otherwise acquire an easement for ingress to and egress from the remainder for use by the public, including the owner of the land.~~

Sec. 14.1. Water Code Appendix Section 74-5 is amended to read:

74-5. The district is hereby declared to be a body corporate and politic and as such shall have, in addition to the other powers vested in it by this act, the following powers:

1. To have perpetual succession.

2. To sue and be sued in the name of said district.

3. To adopt a seal.

4. To acquire by grant, purchase, lease, gift, devise, contract, condemnation, construction, or otherwise, and to hold, use, enjoy, sell, let, and dispose of real and personal property of every kind, including: lands, structures, buildings, rights-of-way, easements, and privileges, and to construct, maintain, alter and operate any and all works or improvements, within or without the district, necessary or proper to carry out any of the objects or purposes of this act and convenient to the full exercise of its powers, and to complete, extend, add to, alter, remove, repair or otherwise improve any works, or improvements, or property acquired by it as authorized by this act.

5. To control the flood and storm waters of said district and the flood and storm waters of streams that have their sources outside of said district, but which streams and the floodwaters thereof flow into said district, and to conserve such waters for beneficial and useful purposes of said district by spreading, storing, retaining and causing to percolate into the soil within or without said district, or to save or conserve in any manner all or any of such waters and protect from damage from such flood or storm waters the watercourses, watersheds, harbors, public highways, life and property in said district, and the watercourses outside of the district of streams flowing into the district, and to prevent waste of water or diminution of the water supply in, or exportation of water from said district, and to obtain, retain and reclaim drainage, storm, flood and other waters for beneficial use in said district; provided, that nothing in this act contained shall authorize the carrying out of any plan of improvement, the purpose of which is, or the effect of which will be, to take water which flows in any watershed in said district and transport or sell same for use anywhere outside of the district when the water level of any gravel beds within the district is below the normal level and such water could reasonably be used to replenish the water level of said gravel beds; provided further, that none of the provisions of this act shall preclude the exercise by any other political subdivision that may now or hereafter exist, wholly or in part, within the district from exercising its powers, although such powers may be of the same nature as the powers of said district. Any such other political subdivision may, by written agreement with the district, provide for the use, or joint use, of property or facilities in which any such other political subdivision has an interest, or for the use, or joint use, of property or facilities in which said district has an interest.

6. To cooperate and to act in conjunction with the State of California, or any of its engineers, officers, boards, commissions, departments or agencies, or with the government of the United States, or any of its engineers, officers, boards, commissions, departments or agencies, or with any public or private corporation, or with the County of Santa Barbara, in the construction of any work for the controlling of flood or storm waters of or flowing into said district, or for the protection of life or property therein, or for the purpose of conserving said waters for beneficial use within said district, or in any other works, acts, or purposes provided for herein, and to adopt and carry out any definite plan or system of work for any such purpose.

7. To carry on technical and other investigations of all kinds, make measurements, collect data and make analyses, studies, and inspections pertaining to water supply, water rights, control of storm waters and floods and use of water, both within and without said district, and for such purposes said district shall have the right of access through its authorized representatives to all properties within said district. The district, through its authorized representatives, may enter upon such lands and make examinations, surveys, and maps thereof.

8. To enter upon any land, to make surveys and locate the necessary works of improvement and the lines for channels, conduits, canals, pipelines, roadways and other rights-of-way; to acquire by purchase, lease, contract, condemnation, gift, devise, or other legal means all lands and water and water rights and other property necessary or convenient for the construction, use, supply, maintenance, repair and improvement of said works, including works constructed and being constructed by private owners, lands for reservoirs for storage of necessary water, and all necessary appurtenances; to enter into contracts and agreements with, and do any acts necessary or proper for the performance of any such contracts and agreements with the United States, or any state, county, district of any kind, public or private or municipal corporation, association, firm, or individual, or any number of them, for the joint acquisition, construction, leasing, ownership, disposition, use, management, maintenance, repair or operation of any rights, works or other property of a kind which might be lawfully acquired or owned by the district; to acquire the right to store water in any reservoirs, or to carry water through any canal, ditch or conduit not owned or controlled by the district; to grant to any owner or lessee the right to the use of any water or right to store such water in any reservoir of the district, or to carry such water through any tunnels, canal, ditch, or conduit of the district; to enter into and do any acts necessary or proper for the performance of any agreement with any district of any kind, public or private corporation, association, firm or individual, or any number of them for the transfer or delivery to any such district, corporation, association, firm or individual of any water right or water pumped, stored, appropriated or otherwise acquired or secured, for the use of the district or for the purpose of exchanging the same for other water, water right or water supply in exchange for water, water or water supply to be delivered to said district by the other party to said agreement.

9. To incur indebtedness and to issue bonds in the manner herein provided.

10. To cause taxes or assessments to be levied and collected for the purpose of paying any obligation of the district, and to carry out any of the purposes of this act, in the manner hereinafter provided.

11. To make contracts, and to employ labor, and to do all acts necessary for the full exercise of all powers vested in said district or any of the officers thereof by this act.

12. To exercise the right of eminent domain, either within or without said district, and in the manner provided by law for the condemnation of private property for public use, to take any property necessary to carry out any of the objects or purposes of this act, whether such property be already devoted to any public use by any district or other public corporation, or agency, or otherwise; provided, however, that the district in exercising such power shall in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, wires, cable, poles, of any public utility which is required to be moved to a new location; and provided further, that notwithstanding any other provision of this act or any other law, no property shall be taken unless it is taken upon a finding by a court of competent jurisdiction that the taking is for a more necessary public use than that to which it has already been appropriated; and provided further, that no right shall exist in said district to take by proceedings in eminent domain any property, including water rights, appropriated to public use by any existing city and county or municipal utility district. The district shall also have and may exercise the right to condemn any existing works or improvements in said district or along streams flowing into said district now or hereafter used to control flood or storm waters, or to conserve such flood or storm waters or to protect any property in said district or along streams flowing into said district from damage from such flood or storm waters, and it is hereby declared that the use of the property, lands, rights-of-way, easements, or materials which may be condemned, taken or appropriated under the provisions of this act is a public use subject to the regulation and control of the state in the manner prescribed by law; provided, however, that nothing in this act contained shall be deemed to authorize said district, or any person or persons to divert the waters of any river, creek, stream, irrigation system, canal or ditch, or the waters thereof or therein unless compensation therefor be first provided in the manner prescribed by law.

The power of eminent domain vested in the district shall include the power to condemn in the name of the district either the fee simple or any lesser estate, easement, or interest in any real property which the board of directors of the district by resolution shall determine is necessary for carrying out the purposes of this act. Such resolution, adopted by a two-thirds vote of all its members, shall be conclusive evidence of all of the following:

(a) The public necessity for the proposed public improvement.

(b) The property or property interest being acquired is necessary for the proposed public use.

(c) Such proposed public improvement is planned or located in the manner which will be compatible with the greatest public good and the least private injury.

(Whenever real property which is devoted to or held for some other public or quasi-public use is required by the district for any purpose authorized by this act, the district may condemn real property adjacent thereto or in the immediate vicinity thereof to be exchanged for the real property so required by the district.)

Nothing in this act contained shall be construed as in any way affecting the plenary power of any existing city and county or municipal utility district or other district or public agency to provide for a water supply for such city and county or municipal utility district, or as affecting the absolute control of any properties of such city and county or municipal utility district necessary for such water supply and nothing herein contained shall be construed as vesting any power of control over such properties in such Santa Barbara County Flood Control and Water Conservation District or in any officer thereof, or in any person referred to in this act.

12.1.--Whenever-a-part-only-of-a-parcel-is-required-by-the district-for-any-purpose-authorized-by-this-act,-and-the-taking thereof,-and-the-construction-of-the-proposed-public-improvement thereon,-will-interfere-with-reasonable-access-to-the-remainder, or-will-otherwise-cause-substantial-damage-to-the-remainder,-the district-may-condemn,-purchase,-or-otherwise-acquire-the-whole parcel-of-land-and-may-sell-the-remainder-or-exchange-the-same for-other-property-required-for-district-purposes.--Or,-in-lieu of-such-acquisition-of-the-remainder,-the-district-may-condemn, purchase,-or-otherwise-acquire-an-easement-for-ingress-to-and egress-from-the-remainder-for-use-by-the-public,-including-the owner-of-the-land.

13. To make contracts with the County of Santa Barbara and with municipalities and public agencies, and to employ labor for the purpose of doing flood control work and for inspecting and passing upon the adequacy of drainage plans provided for each proposed new subdivision in the County of Santa Barbara.

Sec. 15. Water Code Appendix Section 105-6 is amended to read:

Sec. 6. The district is hereby declared to be a body corporate and politic and as such shall have, in addition to the other powers vested in it by this act, the following powers:

1. To have perpetual existence.
2. To sue and be sued in the name of the district.
3. To adopt a seal and alter it at pleasure.
4. To acquire by grant, purchase, lease, gift, devise, contract, condemnation or otherwise, and to hold, use, enjoy, sell, let, and dispose of real and personal property of every kind, including lands, structures, buildings, rights of way, easements, and privileges, excepting water rights owned by a public corporation or agency without the consent of such public corporation or agency, and to construct, maintain, alter and operate any and all projects or works of improvement, within or without the district, necessary or proper to carry out any of the objects or purposes of this act, or convenient to the full exercise of its powers, and to construct, complete, extend, add to, alter, remove, reconstruct, repair or otherwise improve any projects or works of improvement, or property acquired by it as authorized by this act.
5. To control the flood and storm waters of the district, and the flood and storm waters of streams that have their source outside of the district, but which streams and the flood waters thereof flow into the district, and to conserve such waters for beneficial and useful purposes within the district by retarding, spreading, storing, retaining and causing the same to percolate into the soil within or without the district, or to save and conserve in any manner all or any of such waters and protect from damage from such flood or storm waters the watercourses, watersheds, public highways, life and property in said district; provided, that water rights now existing, public or private, be not thereby taken or damaged without compensation; provided further, that none of the provisions of this act shall in any manner limit or preclude the full exercise by any county, city, district, public or municipal authority, agency or corporation, or any political subdivision that may now or hereafter exist, wholly or in part, within the district from exercising any of its powers, although such be of the same nature as the powers of the district. Any such other public entity may, by written agreement with the district, provide for the use, or joint use, of property or facilities in which any such other public entity has an interest, or for the use, or joint use, of property or facilities in which the district has an interest.
6. To cooperate and to act in conjunction with or contribute funds to, the United States or the State of California, or any of their engineers, officers, boards, commissions, departments or agencies, or with any public or private corporation, or with the County of San Diego, or with any public agency or district, in the construction of any projects or works of improvement for the controlling of flood or storm waters of or flowing into the district, or for the protection of life or property therein, or for the purposes of conserving said waters for beneficial use within said district, or for the protection of beaches and shorelines from erosion, or for the restoration of beaches and shorelines, or in any other works, acts or purposes provided for herein, and to adopt and carry out any definite plan or system of projects or works of improvement for any such purpose; and to enter into, and to do any and all acts necessary or proper for the performance of, any agreement with, or necessary to comply with any act of authorization of, the United States, or any state, county or district of any kind, or necessary and proper for the performance of any agreement with any public or private corporation, association, firm or individual, or any number of them, for the joint financing, acquisition, construction, leasing, ownership, disposition, use, management, maintenance, repair or operation of any rights, projects or works of improvement, or other property of any kind which might be lawfully acquired or owned by the district.
7. To acquire the right to store water in any reservoirs, or to carry water through any canal, ditch or conduit not owned by the district, and to grant to any person the right to carry any water owned by such person through any tunnel, canal, ditch or conduit of the district; provided, that the district shall not acquire any such rights from a municipality or public water agency or district other than with the consent of such municipality or public water agency or district.
8. To carry on technical and other investigations of all kinds, make measurements, collect data, and to make analyses, studies, and inspections pertaining to water supply, water rights, ocean currents, tides, erosion, control of floods, and use

of water, and to make surveys, studies, and maps and plats relative to the location of necessary projects and works of improvement including but not limited to dams, levies, channels, conduits, canals, pipelines, roadways and other rights-of-way, and relative to the acquisition of lands, or interests therein, and other property; provided, that the foregoing powers may be exercised by the district to the extent necessary to accomplish the purposes of this act; and further provided, that the district has the right of access, and may enter upon any lands within or without the district, irrespective of the ownership of such lands, with or without the permission of the owner of such lands, in order to accomplish the acts authorized by this section, or any of them, and such entry by the district or by its authorized representative shall not constitute, nor give rise to, any cause of action in favor of the owner or owners of such land except for injuries resulting from negligence, wantonness, or malice.

Whenever a project or work of improvement is contemplated due consideration shall be given to the location of existing sewage lines and to the possible locations of future sewage lines, and the district shall solicit the recommendations of public sewage disposal agencies in order that district facilities may be located equitably in light of such sewage lines.

9. To incur indebtedness and to issue bonds in the manner hereinafter provided.

10. To cause taxes or assessments to be levied and collected for the purpose of paying any obligation of the district, and to carry out any of the purposes of this act, in the manner hereinafter provided.

11. To make contracts, to employ labor, to employ expert appraisers, consultants and technical advisors and assistants, and to do all acts necessary for the full exercise of all powers vested by this act in said district or in any of the officers thereof.

12. The district has and may exercise the right of eminent domain within the County of San Diego, either within or without the district, and in the manner provided by law for the condemnation of private property for public use, to take any property necessary to carry out any of the objects or purposes of this act, whether such property be already devoted to any public use by any district or public corporation or agency, or otherwise; provided, however, that the district in exercising such power shall in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction or relocation of any structure, railways, mains, pipes, conduits, wires, cable, poles or other property of any public utility or public corporation or district which is required to be moved to a new location; and provided further, that notwithstanding any provision of this act or any other law, no property shall be taken unless it is taken upon a finding by a court of competent jurisdiction that the taking is for a more necessary public use than that to which it has already been appropriated; and provided further, that no right shall exist in the district to take by proceedings in eminent domain any water rights appropriated to public use by any existing municipal corporation, water district, or other public agency. The district shall also have the right to and may condemn, within the County of San Diego, any existing works or improvements in the district or along streams flowing into the district now or hereafter used to control flood or storm waters, or to conserve such flood or storm waters or to protect any property in the district or along streams flowing into the district from damage from such flood or storm waters, or to protect beaches or shorelines from erosion or to restore such beaches or shorelines, and it is hereby declared that the use of the property, lands, rights-of-way, easements or materials which may be condemned, taken or appropriated under the provisions of this act is a public use subject to the regulation and control of the State of California in the manner prescribed by law; provided, however, that nothing in this act contained shall be deemed to authorize the district or any person to divert the waters of any river, creek, stream, irrigation system, canal or ditch or the waters thereof or therein unless compensation therefor be first provided in the manner prescribed by law.

The power of eminent domain vested in the district shall include the power to condemn in the name of the district either the fee simple or any lesser estate, easement or interest in any real property which the board by resolution shall determine is necessary for carrying out the purposes of this act.

Before property can be taken it must appear:

1. That the use to which it is to be applied is a use authorized by this act; and

2. That the taking is necessary to such use; provided, when the board, by resolution adopted by vote of two-thirds of all its members, has found and determined that the public interest and necessity require the acquisition, construction or completion by the district of some project or work of improvement, and that the property described in such resolution is necessary therefor, such resolution shall be conclusive evidence:

(a) of the public necessity for such proposed project or work of improvement;

(b) that such property is necessary therefor, and

(c) that such proposed project or work of improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury; provided, however, that said resolution shall not be such conclusive evidence in the case of the taking by the district of property located outside of the territorial limits thereof.

Whenever land is to be condemned by the district for any of the uses and purposes permitted by law, and the taking of a part of a parcel of land would leave the remainder thereof in such size or shape or condition as to require the district to pay in compensation for the taking of such part an amount equal to the fair and reasonable value of the whole parcel, the resolution of the board may provide for the taking of the whole of such parcel and upon the adoption of any such resolution it shall be deemed necessary for the public use, benefit, safety, economy, and general welfare that the district acquire the whole of such parcel.

Whenever real property which is devoted to or held for some other public or quasi-public use is required by the district for any purpose authorized by this act, the district may condemn real property adjacent thereto or in the immediate vicinity thereof to be exchanged for the real property so required by the district.

Nothing in this act contained shall be construed as in any way affecting the plenary power of any existing municipal corporation, water district or other public agency providing water to the public or as affecting the absolute control of any properties of such municipal corporation, water district or public agency necessary for such water supply, and nothing herein contained shall be construed as vesting any power of control over such properties in the district or any officer thereof, or in any person referred to in this act, except to the extent consented thereto by such municipal corporation, water district or public agency.

13. To plan, improve, operate, maintain, and keep in a sanitary condition a system of public parks, playgrounds, beaches, swimming areas, and other facilities for public recreation, for the use and enjoyment of all the inhabitants of the district, as an incident to the carrying out of the projects and works of improvement of the district and on land acquired or used for the flood control, drainage, beach or shoreline erosion control, or water conservation purposes of this act; to construct, maintain, and operate any other amusement or recreational facilities on such lands, including picnic grounds and equipment incidental thereto, bathhouses, golf courses, tennis courts and other special amusements and forms of recreation; to fix and collect reasonable fees for the use by the public of any such special facilities, services or equipment; and to adopt such rules and regulations as in the discretion of the board are necessary to the orderly operation and control of the use by the public of such lands and facilities for recreational purposes; provided, however, that the district shall not, for the purposes specified in this subsection, interfere with the control or operation of any existing public park, playground, beach, swimming area, parkway, recreational ground, or other public property, owned or controlled by any other district, county or municipal corporation, except with the consent of the governing body of such district, county or municipal corporation, and upon such terms as may be mutually agreed upon between the board and such governing body; and further provided, that no such recreational facility shall be established in any city or in the unincorporated territory of a county without the consent of the governing body of such city or county, and further provided, that if any such recreational facility is located within the unincorporated territory of a county then that county, or if any such recreational facility is located within the corporate limits of any city then that city, by resolution duly passed by the governing body of such county or city, may assume the management and control of such recreational facility, in which event such county or city shall establish and collect nondiscriminatory fees and charges for the use of such recreational facility and may establish rules and regulations pertaining to such recreational facility, and the county or city annually shall deduct from such fees and charges an amount sufficient to reimburse the county or city for the costs and expenses incurred in such management and control of such recreational facility, and shall pay over to the district, for use for general district purposes, all money collected in excess of the amount necessary for such reimbursement.

14. The powers herein granted shall include the design, construction, or maintenance of any levees, seawalls, groins, breakwaters, jetties, outlets, channels, harbors, basins, or other projects or works of improvement pertaining thereto for the protection of shoreline or beaches.

15. To lease, sell or dispose of any property or interest therein whenever, in the judgment of the board, said property or said interests therein or part thereof is no longer required for the purposes of the district, or may be leased for any purpose without interfering with the use of such property for the purposes of the district, and to pay any compensation received therefor into the general fund of the district and use the same for the purposes of this act; provided, however, that nothing herein contained shall authorize the board or any officer of said district to sell, lease or otherwise dispose of any water, water right, reservoir space or storage capacity or any interest or space therein, except to public agencies for recreational purposes or except as heretofore provided in subsection 6 of this section, or except, in the discretion of the board, as is necessarily incidental to the accomplishment of the purposes of this act or to the public welfare; provided, however, that the district may grant and convey to the United States, or to any federal agency authorized to accept and pay for such land or interests in land, all lands and interests in land, now owned or hereafter acquired, lying within any channel, dam, or reservoir site, or shoreline or beach, improved and constructed, in whole or in part, with federal funds, upon payment to the district of sums equivalent to actual expenditures made by it in acquiring the lands and interests in land so conveyed, and in improving such lands and interests in land, deemed reasonable in the discretion of the board.

16. To grant or otherwise convey to counties, cities and counties, cities, the State of California or the United States easements for street and highway purposes over, along, upon, in, through, across or under any real property owned by the district.

17. To remove, carry away and dispose of any rubbish, trash, debris, or other inconvenient matter that may be dislodged, transported, conveyed, or carried by means of, through, in or along the works and structures operated or maintained hereunder and deposited upon the property of the district or elsewhere.

18. Notwithstanding any provision of this act, the district shall not have the power to compete with water selling or distribution agencies, either public or private, by selling or distributing water to consumers for domestic, agricultural or industrial use; provided, however, that the district shall have the power to sell to water agencies, either public or private, such surplus water as it may accumulate. (Stats.1966, 1st Ex.Sess., c. 55, p. —, § 6.)

The following section, relating to this matter, would not be amended or repealed:

§ 1504. Compensation; ascertainment; acquisition of property when compensation equal to value of property of utility

Just compensation for the property so taken for public purposes shall be as may be mutually agreed by the political subdivision and the private utility or as ascertained and fixed by a court of competent jurisdiction pursuant to the laws of this state relating to eminent domain, including consideration of the useful value to the political subdivision of the property so taken.

Whenever the compensation by a political subdivision under this section is an amount equal to the just compensation value of all the property of the private utility in the operating system that the private utility employs in providing water service to the service area, the political subdivision may, by resolution, provide for the acquisition of all such property.

A political subdivision engaged in activities set forth in Section 1503 shall pay just compensation for the property so taken for public purposes. (Added Stats. 1965, c. 1732, p. 3925, § 1.)

Memorandum 69-77

EXHIBIT II

EMINENT DOMAIN—EXCESS CONDEMNATION—AVOIDANCE OF EXCESSIVE SEVERANCE DAMAGES HELD A VALID PUBLIC USE.*

Among the inherent powers of both federal and state government is eminent domain: the power to take private property.[1] While this power is not expressly granted by the Constitution,[2] the fifth amendment recognizes but restricts its use; private property cannot be taken except for a "public use" and upon payment of "just compensation."[3] Not only are governments permitted to condemn that property which is physically necessary for proposed public improvements, but, in accordance with due process, they may condemn additional land when such excess taking can also be said to be for a public use.[4]

Excess condemnation has traditionally been justified on three theories of public use: remnant, protective, and recoupment.[5] The remnant theory permits an excess taking only when the property that remains after a necessary taking is of such shape or size as to be of no practical value to its owner;[6] the protective theory sanctions the taking of additional land that is deemed necessary to preserve and protect a public improvement or to secure the desirable development of its surroundings;[7] and, recoupment allows the state to condemn additional property to be sold in order to diminish the overall cost to a particular public improvement.[8] While the first two theories have been accepted

* People ex rel. Dep't of Pub. Works v. Superior Court, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

[1] James v. Dravo Contracting Co., 302 U.S. 134 (1937); United States v. Kansas City, Kansas, 159 F.2d 125 (10th Cir. 1946); County of San Mateo v. Coburn, 130 Cal. 631, 634, 63 P. 78, 79 (1900).

[2] Eminent domain is an implied power. E.g., Valentine v. Lamont, 13 N.J. 569, 575, 100 A.2d 668, 670 (1953), cert. denied, 347 U.S. 966 (1954).

[3] U.S. Const. amend. V, § 7(a). While the fifth amendment does not apply directly to action by the states, similar restrictions upon the states' exercise of the power of eminent domain exist in every state, e.g., Cal. Const. art. I, § 14; N.Y. Const. art. I, § 7a, except New Hampshire and North Carolina. Moreover, it has been held that the fourteenth amendment's due process clause extends the fifth amendment limitations upon eminent domain to the states. Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

[4] E.g., City of Cincinnati v. Vester, 33 F.2d 242 (6th Cir. 1929), aff'd, 281 U.S. 439 (1930); see also City of Carlsbad v. Ballard, 71 N.M. 397, 378 P.2d 814 (1963); 2 P. Nichols, Eminent Domain § 7.5122 (3d ed. 1963). But see United States v. 15.38 Acres of Land, 61 F. Supp. 937, 939 (D. Del. 1945).

[5] It should be noted that on whatever grounds an excess condemnation is justified, the condemnee must always be justly compensated for the additional property taken.

[6] See, e.g., Opinion of the Justices, 204 Mass. 616, 91 N.E. 578 (1910). See also 2 P. Nichols, supra note 4, § 7.5122[1].

[7] E.g., United States v. 91.69 Acres of Land, 334 F.2d 229 (4th Cir. 1964); Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959). See also 2 P. Nichols, supra note 4, § 7.5122[2].

[8] 2 P. Nichols, supra note 4, § 7.5122[3]. Recoupment is to be distinguished from the situation where the property originally taken is thought to be physically necessary for the public purpose but, proving not to be so, is sold. See City of Boston v. Talbot, 206 Mass. 82, 91 N.E. 1014 (1910); Bond v. Mayor & City Council of Baltimore, 116 Md. 683, 82 A. 978 (1911).

in the United States, American courts have uniformly rejected recoupment, holding that when land is taken and sold solely to meet the costs of public improvements the financial benefit derived is not a public use.[9] In *People ex rel. Department of Public Works v. Superior Court*,[10] the California Supreme Court accepted a fourth justification for excess condemnation: avoidance of excessive severance damages.[11] In so doing, the court distinguished recoupment, while extending the remnant concept.

The condemnees owned two parcels of land, one a rectangular parcel of sixty-five acres and the other a triangular parcel of approximately fifty-four acres. The northeast corner of the former touched the southwest corner of the latter. The only access to either was a country road running north along the easternmost boundary of the rectangular parcel and ending at the base of the triangular parcel. The Department of Public Works condemned 0.65 acres of the condemnees' land to build a freeway over the adjoining corners.[12] As a result, the freeway eliminated the only access to the remainder of the northern parcel, leaving it landlocked. Subsequently, the department sued to condemn the remaining 54 acres pursuant to section 104.1 of the California Streets and Highways Code,[13] claiming that such an excess taking would protect the fisc by eliminating the risk of excess severance damages to the landlocked parcel.[14] The condemnees resisted, arguing that such an excess taking for purely economic purposes violated the California Constitution[15] because it was not for a public use.[16]

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[9] E.g., City of Cincinnati v. Vester, 33 F.2d 242, 245 (6th Cir. 1929), aff'd, 281 U.S. 489 (1930). See City of Richmond v. Carneal, 129 Va. 383, 106 S.E. 403 (1921).

[10] 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

[11] It should be noted that severance damages and consequential damages, although often confused, are not the same. They are similar to the extent that severance damages may be considered one type of consequential damage. Severance damage may arise only where a part of the parcel is taken, leaving a portion untouched. Consequential damages may arise when the property taken is not a part of the damaged parcel. The difference between the two lies largely in their compensability, as severance damages are always compensible while some consequential damages are not. This varies from one jurisdiction to another and depends on the relevant statutory provisions. See 4 P. Nichols, supra note 4, § 14.1.

[12] Cal. Const. art. I, § 14½ expressly grants the power of eminent domain.

[13] Cal. Sts. & H'ways Code § 104.1 (West 1956) reads: "Wherever a part of a parcel of land is to be taken for state highway purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for state highway purposes." Other states have similar statutes, e.g., Ohio Rev. Code Ann. § 5501.111 (Page 1967); Wash. Rev. Code Ann. § 47.12.160 (1962).

[14] 436 P.2d at 334-35, 65 Cal. Rptr. at 344-45.

[15] "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner . . . ." Cal. Const. art. I, § 14.

[16] This case was heard at trial. The Department of Public Works took an

Chief Justice Traynor, writing for the majority, reasoned that although the words of the statute authorized excess condemnation whenever a partial taking[17] might give rise to claims or litigation concerning severance damages, the statutory purpose was to permit such takings only to avoid *excessive* severance damages. In the instant case, since the parcel which remained after the necessary taking was landlocked, the court believed it was possible that the cost of taking the part needed for the freeway plus the payment of severance damages for the remainder would equal the original market value of the entire parcel.[18] Consequently, not only was it "sound economy for the state to take the entire parcel to minimize ultimate costs,"[19] but the taking was constitutional since the cost of public projects was a relevant factor in determining what is a valid public use.[20]

The court's conclusion is based on three questionable assumptions: first, that when severance damages to a remainder are equal or almost equal to the original market value of the entire parcel they are excessive and must be avoided by condemning the entire parcel; second, that the condemnees would be unjustly enriched if the state paid severance damages for the landlocked parcel in addition to allowing them to retain it;[21] and third, that a substantial loss to the state results when severance damages to the parcel are equal to its original value.[22]

Severance damages can arise only where there is a taking of a part of a larger parcel.[23] In valuating severance damages most jurisdictions recognize the before-and-after rule: the difference in market value between the entire parcel before the taking and the market value of the

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interlocutory appeal from a decision of the trial court questioning the validity of the taking. The appellate court held that the taking would not be for a public use and ordered that the appeal be dismissed, People ex rel. Dep't of Pub. Works v. Rodoni, 243 Cal. App. 2d 771, 52 Cal. Rptr. 857 (1966). The Department then sought a writ of mandamus to vacate the judgment of dismissal and to prohibit the trial court from enforcing its order. The Court of Appeal for the Fifth District affirmed, holding that Cal. Sts. & H'ways Code § 104.1 was unconstitutional, insofar as its application to eminent domain was concerned, for lack of standards, People ex rel. Dep't of Pub. Works v. Superior Court, 56 Cal. Rptr. 173 (1967). It was from this decision that the Department took this appeal to the State Supreme Court.

[17] A partial taking occurs when the state condemns only a portion of the entire parcel.

[18] 436 P.2d at 346, 65 Cal. Rptr. at 346.

[19] Id. at 347, 65 Cal. Rptr. at 347. The court qualifies this to the extent "that the economic benefit to the state must be clear." Id.

[20] Id. The court cites United States ex rel. Tennessee Valley Authority v. Welch, 327 U.S. 546 (1946), for this proposition. However, *Welch* may be distinguished from the instant case. In *Welch* the excess was not taken merely to fulfill the economic motive, but was used for a public recreation area—a recognized public use. United States v. Cooper, 20 D.C. (9 Mackey) 104, 133 (1891), aff'd sub nom. Shoemaker v. United States, 147 U.S. 282 (1893).

[21] 436 P.2d at 347 n.7, 65 Cal. Rptr. at 347 n.7.

[22] Id.

[23] See Baetjer v. United States, 143 F.2d 391 (1st Cir.), cert. denied, 323 U.S. 772 (1944). See note 11 supra.

remainder after the taking.[24] However, this valuation includes not only the decrease in market value of the remaining parcel, but also the value of the parcel which is taken. Consequently, severance damages, as such, are never awarded separately[25] but are simply one aspect of a condemnee's just compensation for a partial taking.[26]

If severance damages are an integral part of just compensation, then to claim that a condemnee may receive excessive severance damages is a fortiori to claim that he may be overcompensated. Yet could this be true in the instant case? Assume the original triangular parcel is worth $10,000. If the remaining landlocked parcel is indeed valueless, then in order to be justly compensated the condemnees should receive $10,000, comprising the value of the 0.65 acre parcel taken plus the damage to the remainder. It is hard to conceive in what way this compensation is excessive. Furthermore, although the condemnees retain the 54 acre parcel, it will have been adjudged valueless. Hence, unless the valuation is incorrect and the parcel has market value, rather than being unjustly enriched by the payment of $10,000, the condemnees are being justly compensated.[27] Finally, it seems unrealistic for the state to claim that it has suffered a "substantial loss" to the fisc which must be remedied by excess condemnation, when it merely fulfills its constitutional duty to justly compensate those whose property has been taken for a public use.

The court reasons that because the statute's purpose is to prevent a windfall to the condemnees and a substantial loss to the state, the statute in no way authorizes excess condemnation for recoupment purposes.[28] This conclusion assumes that the avoidance of excessive severance damages is a valid public use. But as pointed out, if the landlocked parcel is indeed valueless, there can be no windfall to the condemnees or loss to the state by the payment of severance damages. This is true even if the value of the parcel taken plus damages to the remainder may equal the original market value of the entire parcel. Consequently, there being no real threat of excessive severance damages, an excess taking

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[24] Rogers, Partial Taking, in American Institute of Real Estate Appraisers, Condemnation Appraisal Practice 72 (1961).

[25] A minority of jurisdictions, however, although not making separate awards of damages, do valuate separately the part which is taken. This is added to the value of the remainder after the taking and the total is subtracted from the original market value of the entire parcel. The result is the amount of severance damages. See Matter of City of New York (Cross-Bronx Expressway), 195 Misc. 842, 848-49, 82 N.Y.S.2d 55, 63-64 (Sup. Ct. 1948).

[26] Thus, the Supreme Court has recognized that severance damages are a part of just compensation. United States v. Miller, 317 U.S. 369, 376 (1943).

[27] But see Kern County Union High School Dist. v. McDonald, 180 Cal. 7, 16, 179 P. 180, 185 (1919), where the court found that where the state in condemning 80 feet of land would have to pay "practically the value of the entire one hundred feet of land belonging to the [condemnee]" the state could amend its complaint to condemn the entire 100 feet. Any other result would be "manifestly unjust." Id.

[28] 436 P.2d at 347 n.7, 65 Cal. Rptr. at 347 n.7.

is unauthorized by the statute. Rather, as the dissent points out,[29] the sole consequence of an excess taking in the instant case is to allow the state to diminish its costs by recoupment. Indeed, the majority seems to imply this when it reasons that the state can minimize its ultimate costs by taking the entire parcel. Certainly the excess taking alone does not reduce its expenses since the state must still pay the original market value of the entire parcel to justly compensate the condemnees. Consequently, the only effective way the state can minimize its costs is to hold the land until it is marketable and then sell it, as the statute permits, recouping its enhanced value and offsetting this gain against its ultimate costs.

The court seeks to justify the excess taking in the instant case by analogizing it to the excess condemnation of a physical remnant. Since physical remnants have been traditionally defined as very small or ill-shaped remainders,[30] the court could not logically describe the 54 acre parcel as a physical remnant. However, the court reasons that since the physical remnant theory permits excess condemnation because the parcels which remain after a partial taking are valueless to the owner, the state also should be allowed to take an apparently valueless 54 acre parcel while justly compensating the condemnees for the taking. Calling the landlocked remainder a "financial remnant," the court concludes that there is no reason to restrict the remnant theory to parcels that are negligible in size and refuse to apply it to parcels that are negligible in value.[31]

The reason advanced for the taking of physical remnants is that, because of their size and shape, the owners cannot build on them, cannot readily convert them to some practical use and, hence, cannot in any way enhance their market value.[32] Furthermore, physical remnants have no potential tax value to the state.[33] Consequently, the state is permitted to condemn physical remnants, consolidate them, and sell the resulting parcels, thus restoring their collective value not only to the state for tax purposes, but to the new owners. Basically, the excess taking prevents the property from being completely wasted. However, the financial remnant in the instant case can be put to practical use. It is not physically impossible to build on a 54 acre parcel, and the mere acquisition of an easement would make the land accessible thus not only enhancing its market value but also its value to the state as revenue producing property.[34] Hence, while excess taking may be the only way

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[29] Id. at 352, 65 Cal. Rptr. at 352.

[30] See text accompanying note 6 supra.

[31] 436 P.2d at 346, 65 Cal. Rptr. at 346.

[32] See Opinion of the Justices, 204 Mass. 616, 91 N.E. 578 (1910).

[33] Annot., 6 A.L.R.3d 297, 317 (1966).

[34] See People ex rel. Dep't of Pub. Works v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959), where the City of Los Angeles was permitted to condemn an easement across adjoining land to provide access to a parcel landlocked by the building of a freeway.

to preserve the productive value of physical remnants, this is not the case with financial remnants.[35]

Indeed, it may be the court's real but unarticulated concern that the parcel will have some market value in the foreseeable future. As Justice Mosk indicates in his dissent "no 54-acre parcel in . . . [California] is without ascendant value."[36] After the completion of the freeway, the remainder might be put to a commercial use. It is possible that the parcel will have some market value as a spot for advertising or an establishment such as a motel or restaurant after the freeway has been completed.[37] Moreover, the fact that the property is landlocked should not substantially impair this value, since a buyer might readily acquire an easement of access.[38] Consequently, the state may be faced with the prospect of paying the condemnees the original value of the entire parcel, while they retain a 54 acre remainder which will soon be quite valuable. To the extent that this is true, it might be argued that the condemnees are being overcompensated.

However this dilemma stems from a method of valuation which takes into account only the value of the remainder at the time of the taking.[39] If, in fact, the court is concerned with permitting the condemnees to retain a potentially valuable parcel, perhaps the remainder's possible future uses should be considered in valuating severance damages.[40] For example, assuming that the landlocked remainder will have an ascertainable market value in the near future,[41] this value, and not

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[35] See id. In State v. Buck, 94 N.J. Super. 84, 226 A.2d 840 (1967), the court permitted an excess taking under a statute similar to California's. The statute authorized such a taking when the remainder was so situated that the cost to the state of part of a parcel is practically equivalent to the total value of the entire parcel. N.J. Rev. Stat. § 27:7A-4.1 (Supp. 1952). However, *Buck* is distinguishable from the present case. In *Buck*, the remaining parcel was merely 1.078 acres in size and had frontage of 80 feet, neither dimension being sufficient to satisfy the relevant zoning requirement. Therefore, not only was the remnant too small to be of any practical use to the owner, but it could not be converted to such use. Consequently, in contrast to the principal case, the remainder fell within the physical remnant theory.

[36] 436 P.2d at 350, 65 Cal. Rptr. at 350 (Mosk, J., dissenting).

[37] See Rogers, supra note 24, at 70-71. It must be noted that this is a limited-access highway, and the importance of this theory will depend on the actual layout of the highway and the proximity of exits.

[38] 436 P.2d at 350, 65 Cal. Rptr. at 350 (Mosk, J., dissenting). Cf. Porrata v. United States, 158 F.2d 788 (1st Cir. 1947); People ex rel. Dep't of Pub. Works v. Chevalier, 52 Cal. 2d 299, 340 P.2d 598 (1959).

[39] See text accompanying note 25 supra.

[40] See Kalish, Potential Use and Market Value, in American Institute of Real Estate Appraisers, Condemnation Appraisal Practice 38 (1961).

[41] This method of valuation is not novel. It has long been established that in valuating a condemnee's just compensation for the taking of an entire parcel the market value of the property is determined not only by the use to which it is devoted at the time of the taking, but also by any use which it may readily be converted to in the foreseeable future. E.g., United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266, 275 (1943); Porrata v. United States, 158 F.2d 788, 790 (1st Cir. 1947).

zero, should be subtracted from the original market value of the entire parcel in order to compute severance damages. Furthermore, if the landlocked parcel is specially enhanced[42] by the freeway, the court has the power to instruct the jury to offset this value against the damage to the remaining parcel and thus avoid possible overcompensation.[43] Consequently, in the present case an equitable result may be reached without resort to the drastic remedy of excess condemnation.

Yet, even assuming severance damages are excessive, the state's proper remedy is not excess condemnation. The question of just compensation has always been one for the courts.[44] If a court believes that a condemnee has been overcompensated for a partial taking by receiving excessive damages, its duty lies in reducing the damages by whatever amount is found to be excessive.[45] Moreover, if its purpose is solely to avoid severance damages, the state may have a further alternative to excess condemnation. If the alleged damage to the parcel can be "cured"[46] by the acquisition of an easement, the state might reimburse the condemnees for the expense of obtaining such an easement thus avoiding the payment of severance damages.[47]

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[42] Enhanced value to a remainder due to a proposed public improvement is a "benefit." In order for such value to be offset against the value of the part taken or the damages to the remainder, it must be deemed a "special benefit," i.e., the enhanced value must attach with regard to the land's specific location and with reference to the specific improvement. Foster v. State, 33 Misc. 2d. 725, 227 N.Y.S.2d 220 (Ct. Cl. 1961).

[43] In California, special benefits may be offset against damages to the residue. By statute, the jury assesses damages and special benefits separately and then offsets. Cal. Civ. Pro. Code §§ 1248, 1249 (West Supp. 1967). See People ex rel. Dep't of Pub. Works v. Schultz Co., 123 Cal. App. 2d 925, 268 P.2d 117 (1954).

[44] Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893); American-Hawaiian S.S. Co. v. United States, 124 F. Supp. 378 (Ct. Cl. 1954), cert. denied, 350 U.S. 863 (1955); Dore v. United States, 97 F. Supp. 239 (Ct. Cl. 1951); United States v. 60,000 Square Feet of Land, 53 F. Supp. 767 (N.D. Cal. 1943).

[45] 436 P.2d at 352, 65 Cal. Rptr. at 352 (Mosk, J., dissenting). E.g., Maede v. Oakland High School Dist., 212 Cal. 419, 425, 298 P. 987, 990 (1931).

[46] In In re Old Riverhead Rd., 48 Misc. 2d 39, 264 N.Y.S.2d 162 (Sup. Ct. 1965), the court did not award severance damages to the remainder because the damages could be "cured." In that case, the condemnor was responsible for the condemnee's violation of a zoning ordinance as a result of the taking of a part of his property. Because of this, the court thought that there was a reasonable likelihood that the condemnor would grant a variance. It, therefore, ruled that the condemnee should not be awarded severance damages in the amount it would cost to move his building to comply with the existing zoning ordinance, but that he should be reimbursed for the expenses of obtaining a variance, including reasonable counsel fees.

[47] Use of these less restrictive alternatives may be mandated by the due process clause. See generally Struve, The Less-Restrictive-Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967).

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EXHIBIT III

§ 1248. Hearing; items to be ascertained and assessed

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:

1 Value.

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

2 Severance damages.

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;

3 Benefits.

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiffs. * * * If the benefit shall be equal to the damages assessed under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken. * * * If the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value. If the benefit shall be greater than the damages so assessed, the owner of the parcel shall be allowed no compensation except the value of the portion taken, but the benefit shall in no event be deducted from the value of the portion taken;

4 Water; benefits.

4. If the property sought to be condemned be water or the use of water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property;

5 Railroads.

5. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences, along the line of such railroad, and the cost of cattle guards, where fences may cross the line of such railroad; and such court, jury or referee shall also determine the necessity for and designate the number, place and manner of making such farm or private crossings as are reasonably necessary or proper to connect the parcels of land severed by the easement condemned, or for ingress to or egress from the lands remaining after the taking of the part thereof sought to be condemned, and shall ascertain and assess the cost of the construction and maintenance of such crossings;

6 Structures.

6. If the removal, alteration or relocation of structures or improvements is sought, the cost of such removal, alteration or relocation and the damages, if any, which will accrue by reason thereof;

7 Separate assessment.

7. As far as practicable, compensation must be assessed for each source of damages separately.

8 Encumbrances.

8. When the property sought to be taken is encumbered by a mortgage or other lien, and the indebtedness secured thereby is not due at the time of the entry of the judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment, and the lien of the mortgage or other lien shall be continued until such indebtedness is paid; except that the amount for which, as between the plaintiff and the defendant, the plaintiff is liable under Section 1252.1

[Balance of section omitted.]