#36.50 8/24/71

Memorandum 71-64

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

Background Material

Attached to this memorandum are the research study relating to benefits prepared for the Commission by our original consultants and two law review articles: Connor, Valuation of Partial Taking in Condemnation: A Need for Legislative Review, 2 Pac. L. J. 116 (1971); Haar & Hering, The Determination of Benefits in Land Acquisition, 51 Cal. L. Rev. 833 (1963). The staff is extremely reluctant to burden the Commissioners with excessive background materials. However, we believe that the decision regarding what the basic approach to valuation in partial taking cases should be is one of the most important decisions to be made in the area of compensation generally and that the attached materials each provide background valuable in making that decision. We accordingly urge you to read these materials with care.

Analysis

The basic issue. The issue here is what should be the approach to valuation of a condemnee's remaining property where a condemnor acquires not the condemnee's entire property, but only a portion (the take) thus leaving the condemnee with a part of his property (the remainder). The related question of what property or property interests constitutes the condemnee's "entire property" is discussed in Memorandum 71-63 dealing with the "larger parcel." Related problems involving the scope of recovery for business losses, moving expenses, and other consequential damages will only be touched upon here and deferred for more detailed treatment later.

The "rules." There are two basic tests for measuring compensation in partial taking cases. These are:

(1) The "before and after" test--compensation is determined by subtracting the value of the remainder after the condemnation from the value of the entire property before the condemnation; and

(2) The "value plus damages" method--compensation is determined by adding the value of the part taken to the damage to the remainder resulting from the taking.

In the absence of any benefits, in most situations both of these formulas should produce the same result. However, this is not always the case. An example where these formulas produce different results is noted in Connor, page 127. Assume that the utility of the property taken will be replaced on the part not taken, e.g., commercial frontage on a highway which is condemned, the frontage simply being moved to the rear. If, as in California, the take may be valued as an independent parcel, the condemnee will recover more under the value plus damages method than under the before and after test. The inequities and valuation difficulties that result are demonstrated in detail in Connor, pages 126-134.

Where "benefits" are present, the different formulas lend themselves to quite different results with even further variations occurring depending on what limitations, if any, are placed on the kind of benefits which may be considered. The staff agrees with the consultant that the distinction between general and special benefits is difficult, if not impossible, to define. See Study, pages 10-16. However, assuming that some meaningful distinction between the two types of benefits can be made, the insertion of benefits into the formulas noted above produces five basic approaches to partial taking valuation. See Study, pages 24-25. These are:

(1) Neither special nor general benefits may be offset against either damages to the remainder or against the value of the take.

(2) Special but not general benefits may be offset against damages to the remainder but not against the value of the take (present California rule).

(3) Both special and general benefits may be offset against the damages to the remainder but not against the value of the take.

(4) Special but not general benefits may be offset against both the damages to the remainder and the value of the take (probable federal rule and consultant's recommendation).

(5) Both special and general benefits may be offset against both the damages to the remainder and the value of the take (staff recommendation).

Offsetting benefits--pros and cons. Each of these approaches may be supported. The various limitations on the offset of benefits seem to have been based on a variety of factors: (1) Both the existence of benefits and their evaluation introduce elements of speculation; they are dependent upon the commitment of the condemnor to complete the planned improvement and, more importantly, on the projected effect upon the market of such improvement. (2) The owner of the property is often uncompensated for many items of damage; i.e., there are many items of damage (moving expense, litigation expense, business losses, and the like) which traditionally he has been unable even to make a claim for. Limiting the offset of benefits helps to mitigate the effect of these other rules. (3) The offsetting of benefits against damages tends to place the property owner in a worse position vis-a-vis his neighbor who receives such benefits without being damaged (the "island of equity" theory referred to in the Study). See generally Study, pages 26-42

The staff does not believe that these reasons for limiting the offset of benefits are persuasive or at least conclusive. (1) Concededly, "benefits" per se introduce elements of speculation. However, this seems to result from trying to isolate them and evaluate them separately. If the inquiry instead is directed towards ascertaining the value of the remainder in the after condition, it would seem that the automatic offset of all benefits which is achieved thereby actually is the simplest of all methods of dealing with them. Indeed, any other approach raises hypothetical questions which are totally unrelated to any that would be asked in the market place. See Connor, pages 134-141. There will, of course, be some speculation; however, where valuation is based on the total effect of the improvement as planned by the condemnor, it seems such speculation is reduced to a minimum. (2) It is true that property owners are not compensated for all elements of damage. However, the staff believes that each element of damage should be examined on its merits and dealt with accordingly. Certainly great steps have been made and are being made to provide recovery for moving expenses. The Commission has also examined the area of litigation expenses. "Business losses" is a topic for future consideration. In any event, it seems illogical to attempt to deal with these elements of damage through manipulation of the valuation formula in partial taking cases. (3) Finally, the "island of equity" theory has little appeal to the staff because it is totally dependent on the boundaries of the island, i.e., on the determination of which owners of property are to be included in the group receiving equal treatment. It would seem that most improvements produce varying effects on the value of nearby property. A rule which compensated for all damage but recouped all benefits might be the ideal (cf. Haar & Hering, pages 875-878); however, we are not optimistic of achieving this optimum.

In the absence of such a rule, we believe it is hopeless to attempt to achieve parity between property owners--some of whom are damaged and some of whome are benefited--through manipulation of the valuation formula. We believe it is a far more fruitful approach to attempt to provide indemnity for each owner of property vis-a-vis the condemnor and to then examine further ways of recouping benefits from owners of property not damaged in any way, recognizing that, whatever we do, all persons will not receive an absolutely equal share of the pie.

The staff recommendation. Existing California law permits only special benefits to be offset and only against damages to the remainder. This rule is criticized at length in both the Study and the Connor article. It would seem to be "beating a dead horse" to repeat that criticism here. Assuming then that some change is desirable, the background materials suggest two alternatives that might be recommended. The first is that benefits--but only "special" benefits--should be offset against both damages to the remainder and the value of the take. This is the recommendation of the consultant and is ably supported on pages 49-62 of the Study. The second alternative--favored by the staff--is that all benefits be offset against both the damages to the remainder and the value of the take. That is, where only part of a parcel is taken, the compensation for the property should equal the difference between the market value of the entire parcel as unaffected by the improvement and the market value of the remainder as affected by the improvement. (In addition, to achieve the fullest possible indemnification, the staff anticipates recommending recovery of certain "additives," most notably moving expenses.) Obviously, the point of difference between the consultant and the staff lies in the treatment of "general benefits." We do not believe that general and

special benefits can be distinguished satisfactorily. We believe that attempts to make such a distinction in the court room create a fantasyland totally unrelated to anything that occurs in the market place and introduces concepts that cannot help but confuse judges, lawyers, appraisers, and other expert witnesses, not to mention laymen jurors. Such confusion would seem to be a prolific source of error, both factual and legal. The consultant suggests that offsetting general benefits leads to injustice. We simply do not agree. We believe that "justice" lies in full indemnification and that this can be achieved under our approach. The argument that other owners may be damaged and not compensated to us is irrelevant. The argument that the condemnee will not be compensated for certain items of general damages, e.g., circuity of travel, is not accurate; our recommendation is truly a "before and after" test and would take into consideration all possible effects of the improvement, both harmful and beneficial. Obviously, both recommendations increase the ability of the condemnor to reduce the cost of improvements and decrease the potential for windfalls to the owners of property. The staff recommendation merely accentuates these advantages.

Of course, there are many details that need to be considered in drafting a tentative statute along the lines recommended. These matters can be considered at subsequent meetings; for the present, we will feel we have made a significant step if a tentative decision can be reached on the basic approach.

Respectfully submitted,

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Assistant Executive Secretary

A STUDY PERTAINING TO BENEFITS IN EMINENT DOMAIN PROCEEDINGS*

*This study was made for the California Law Revision Commission by the law firm of Hill, Farrer & Burrill, Los Angeles. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

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A STUDY PERTAINING TO BENEFITS IN EMINENT DOMAIN PROCEEDINGS

INTRODUCTION

This study concerns itself with an analysis and interpretation of Section 1248(3) of the Code of Civil Procedure and Article I, Section 14 of the California Constitution as they pertain to the problem and treatment of benefits in arriving at just compensation in condemnation actions.

Section 1248(3) which has been on the statute books for almost ninety years, reads as follows:[1]

> "§1248. Hearing: items to be ascertained and assessed
>
> . . .
>
> . . .
>
> 3. Benefits. Separately, how much the portion 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; and 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; but 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; . . . "

At approximately the same time that the Legislature enacted Section 1248, the people of the State adopted the constitutional provision of Article I, Section 14, which includes an important dictate as to the treatment of benefits in certain condemnation actions. That constitutional provision, part of which was discussed in detail in a prior study in this series, reads as follows:[2]

> "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, and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, . . . "
>
> [Emphasis added]

In most instances the subject matter of this study and the question of benefits in general arise in partial taking or severance situations.[3] The problems and difficulties of ascertaining the proper measurement of just compensation when benefits are involved are, in reality, of the same nature as those involved in measuring just compensation when damages are present. In other words, the problems studied here are on the other side of the coin from those arising under Code of Civil Procedure §1248(2), pertaining to severance and consequential damages.

We have seen in prior studies that, despite the fact that the courts have often iterated that a condemnee should, insofar as possible and feasible, be left no worse off after the taking than he was before,[4] they have not rigidly adhered to this principle. Thus, to a great extent condemnees must bear, without remuneration, incidental losses, many consequential losses, and all types of general damages, to say nothing of acute hardships they must suffer when the interference with their property rights is designated as an exercise of the police power. But, by the same token, the courts do not always

abide by the principle of indemnity when dealing with the issue of benefits. As will be discussed at greater length in the course of this study, in the final analysis the courts are not only in disagreement among themselves as to the correct treatment of these factors but they are more often than not internally inconsistent in applying the rules of both damages and benefits.

As we have seen in prior studies dealing with various types of damages the condemnee suffers in the wake of modern public improvements, the entire concept of damages needs reappraisal since many of the precepts and rules which were formulated in the 19th Century are no longer applicable and are presently inequitable and unjust in modern society. Similarly, the concept of benefits, the importance of which was not recognized at the time of the formulation of condemnation procedure a century ago, may also be an outmoded one and incongruous with the modern scene. The tremendous acceleration in the tempo of takings today, moreover, has not only made it incumbent upon all concerned to re-evaluate the rules regarding damages, basically so as to protect the condemnee, but has likewise made it necessary to re-

examine the treatment of benefits so as to guard against the condemnor's being unduly burdened by excessive costs in condemnation actions.

Since World War II, probably more has been written about the topic of benefits than about any other single area of eminent domain.[5] And yet, there probably remains more controversy, a greater deal of inconsistency, and a wider variation in the treatment of this subject among the various jurisdictions in this country than exists in any other particular aspect of condemnation law.

One fairly exhaustive review of the treatment given the problem of benefits by the courts may be found in a 300-page annotation published in 145 A.L.R. 1-299 (1943).[6] Since that review as well as a number of other major articles have set forth a detailed account of the courts' treatment of the subject, this study will try to summarize the writings in the field, to focus upon the primary issues involved, and to resolve the conflict insofar as possible. No attempt will be made to embark upon a rehashing of the detailed research that has already been done on the general problem.

I. PRELIMINARY FACTORS IN THE TREATMENT OF BENEFITS

In order to appreciate the difficulties involved in resolving the plethora of problems connected with this subject, two factors must initially be noted. First, the different methods or formulas adopted by the courts for ascertaining just compensation in severance cases are an integral part of and are to some extent determinative of the extent and treatment of benefits. Second, the definition or definitions utilized for distinguishing between special and general benefits are of critical importance, particularly from a practical point of view.

A. The Various Formulas For Determining Just Compensation in Severance Cases

It appears that in practice the different formulas that are utilized for determining just compensation in the various jurisdictions do not demonstrably reflect a significant variation in the amount of the awards that each jurisdiction finally arrives at. The formulas, nonetheless, are of appreciable importance in any discussion of benefits. Indeed, in theory, when

benefits are involved, the different formulas should bring about appreciably divergent awards. The courts, however, apparently have not been governed by the strictures of the particular theory of compensation that they purportedly are adopting.[7] As a result, a logical approach to the problem is often lacking. But, in order properly to understand the possible alternative solutions available to the broad problem of benefits, it is first necessary to look to the formulas adopted, at least in theory, by the courts in determining just compensation in these instances.

Succinctly, there are three basic tests for measuring just compensation in severance cases. The third of these tests is an involved and complex one which has been adopted in the State of Louisiana but nowhere else;[8] and it will not be further discussed. The two major formulas utilized in the United States are:

(1) The value of the entire property before the condemnation less the value of the remainder after the condemnation measures just compensation; this test is generally referred to as the "before and after" test.

(2) The second formula, apparently adopted in the majority of the states, makes just compensation equal to the value of the part taken plus damages to the remainder. It may be referred to simply as the "value plus damages" method.

Theoretically, in the vast bulk of severance actions, assuming the complete absence of benefits, each of these three formulas should produce the same result. While the authorities seem to prefer the "before and after" test (because of its simplicity),[9] a proper application of any of these methods should not produce any divergent results -again, save for the consideration of benefits. The treatment of benefits, however, is radically affected by the adoption of one formula in lieu of another -at least from a theoretical standpoint.

The "before and after" test, logically applied, requires (both <u>special and general</u>)[10] benefits to the remainder to be deducted from the <u>award</u> -in other words, these benefits may diminish not only the amount of the damages to the part of the parcel that remains but may likewise diminish the amount of compensation

for the part taken, i.e., "value". As the West Virginia court in Guyandot Valley Ry. Co. v. Buskirk[11] stated:

> "Literally enforced, this rule would plainly charge the land owners with all benefits, general as well as special and peculiar . . . "

The "value plus damages" method, on the other hand, logically should bring about different results. Under this theory, the compensation for the part taken, being separately assessed, reasonably and inferentially may be immune to any deduction because of any benefit accruing to the remainder due to the improvement. Indeed, this latter method, in the absence of qualifying statutory language, may not even necessitate that benefits be set off from the damages to the remainder.

But, as will be seen shortly, the courts have not literally followed the dictates of the theories they are purportedly propounding. And the rules are hardly even guideposts.

The California position regarding the two formulas -the value plus damages method, and the before

and after test- is now at least in theory fairly clear. Based upon CCP 1248, California adheres to the majority formula: value plus damages. Prior to the 1872 statute, however, California seemingly had adopted the "before and after" test.[12]

B. The "Distinction" Between Special and General Damages

While the differentiation between the jurisdictions regarding the method for determining compensation in severance cases is largely theoretical, the variation in treatment between special and general damages has very practical significance. Indeed, the manner in which a jurisdiction approaches this problem is quite often decisive of the primary question as to whether and to what extent benefits should be offset. Some jurisdictions so restrictively interpret special benefits that the rule they follow permitting only special benefits to be offset against damages has little meaning. Contrariwise, other jurisdictions broadly interpret special benefits, resulting consequently in the deduction from the award of what other courts would describe as general benefits.[13] Clearly,

therefore, the formulas for distinguishing between general and special benefits are crucial.

Unfortunately, acceptable statutory definitions of these terms defy human endeavor. Each particular taking is peculiar and unique and escapes a neat pigeonhole. Most authorities, therefore, resign themselves to loosely worded standards.[14] As Justice Holmes once stated:[15]

> "It may be that the line between special and general benefits is fixed by a somewhat rough estimate of differences. But all legal lines are more or less arbitrary as to the precise place of their incidence, although the distinctions of which they are the inevitable outcome are plain and undeniable."

But even the vague definitions adopted are often in conflict with each other, so much so that the broad question of benefits, already described as a "bewildering complexity",[16] is further aggravated.

Among the numerous definitions propounded by the courts and the authorities are the following:

NICHOLS states:[17]

> "General benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the

peculiar relation of the land in question to the public improvement."

ORGEL writes that:[18]

"The courts draw a distinction between special benefits and general benefits, placing in the former group those benefits that result in increases in value of particular properties directly affected by the taking and classifying under the latter heading, those benefits that accrue generally to the public at large."

The Alabama court expressed the distinction as follows:[19]

"There is a well-recognized distinction between general and special benefits. The former is that which is enjoyed by the general public of the community, through which the highway passes, whether it touches their property or not. An improved system of highways generally enhances all property which is fairly accessible to it. But that which borders it, or through which it extends, has benefits by reason of that circumstance which is not shared by those which are not so situated."

The authors of a recent law review Note add:[20]

"Special benefits are defined as those that accrue directly to the particular tract in question because of its peculiar relation to the public improvement. General benefits are termed as those that accrue to lands generally in the vicinity because of the improvement."

An Illinois court, however, refused to so limit special benefits. It stated:[21]

> "Special benefits do not become general benefits because the benefits are common to other property in the vicinity. The fact that other property in the vicinity of the proposed railroad will also be increased in value by reason of the construction and operation thereof furnishes no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged and, if it has, the depreciation in value."

The California courts, following Beveridge v. Lewis,[22] a 1902 case, appear (at least, until very recently) to have adopted a broader scope of general benefits. In that case, the California Supreme Court stated:

> "Benefits are said to be of two kinds, general and special. General benefits consist in an increase in the value of land common to the community generally, from advantages which will accrue to the community from the improvement. (Lewis on Eminent Domain, sec. 471). They are conjectural and incapable of estimation. They may never be realized, and in such case the property-owner has not been compensated save by the sanguine promise of the promoter.
>
> "Special benefits are such as result from the mere construction of the improvement, and are peculiar to the land in question . . . "

The above statements are but a few of the multitudinous definitions and distinctions adopted by the courts and authorities. They are sufficient to show, however, that the vagaries surrounding this problem cannot easily be ignored or rectified.

Upon further analysis, it seems that almost all courts hold that a public improvement which affects and is common to the entire community and which is enjoyed by the public at large may yield only a general benefit. Thus, a benefit which might attract and increase population or increase prosperity or which might improve business activity throughout the community is almost always designated as a general benefit.[23] This type of community benefit causes little difficulty. Furthermore, at the other end of the spectrum, all courts would agree that a benefit which is peculiar to the particular property owner or has a direct and unique effect upon the particular land is a special benefit.[24]

Again, however, numerous benefits resulting from public improvements may not be easily placed in either of these two categories. Thus, in addition to

the "community" and "peculiar" standards, many courts often resort to a third standard: Whether or not a particular benefit affects a neighborhood. And it is the latter test that causes the most difficulty. On the surface, this is a geographical measuring device and those courts that follow it usually label such neighborhood benefits as general benefits. However, numerous courts refuse to hold a neighborhood benefit as a general one, merely on that basis alone.[25]

And so, in the final analysis, the problem remains as nebulous as ever, even when it is broken down as the courts sometimes try to do. The myriad of situations that do not easily lend themselves to labels virtually requires that the interpretation of these vague standards be left to the courts to be delineated on a case-by-case basis. Statutory provisions can hardly provide relief in this particular aspect of the problem.

Thus, while an understanding of both the theoretical formulas for arriving at just compensation in severance cases and the elusive distinctions between general and special damages adopted by the

courts is vital in order to appreciate the overall problem of benefits, neither consideration is conducive to resolution of that problem. Consequently, we shall turn our attention to other factors involved, based upon the presumption that the courts will continue to follow the general pattern of distinguishing between special and general damages as they have in the past. We also assume that the theoretical formulas for ascertaining just compensation in severance cases, will also continue to have little effect one way or the other upon the proper treatment of the problem of offsetting benefits.

II. THE TREATMENT OF BENEFITS: AN HISTORICAL BACKGROUND

In prior studies we have seen how the law of condemnation was molded and shaped in the Nineteenth Century. It is now apparent that many of the doctrines and formulas propounded a century ago are today atavistic. Indeed, in some areas of condemnation law, for example, the denial of incidental losses,[26] the restrictions imposed can no longer be

rationally defended or at least cannot be supported by the rationale set forth at the time of their adoption. Similarly, it is clear that the treatment of benefits in arriving at compensation were evolved at the time that the railroad had a marked effect upon the economy in general, and upon the law of eminent domain in particular; and though the railroad is of less importance in today's economy, and has even less direct practical effect upon the modern condemnation scene, its imprinter remains as indelible as ever on the law of condemnation.

Early in this nation's history, takings were few and those which did occur generally involved unclaimed and unimproved property or land governmentally owned. Since the primary object of condemnation was the construction of roads, and since such roads were of considerable benefit to the landowner, usually no compensation was asked by him for the taking of his property for this purpose.[27] Until the latter part of the Nineteenth Century in the United States, as a result of these factors, the question of offsetting benefits hardly ever arose and its implications seldom

were realized.

Prior to any significant condemnation activity in the United States, England began to witness a necessity for extensive takings, ushered in by railroad development. Since "compulsory acquisition" in that country was used primarily for the benefit of profit making railroads, both the courts and the public became sympathetic in their view of the treatment to be afforded the condemnee.[28] Not only did the condemnation law in that country grant liberal compensation allowance to the condemnee,[29] but it also made a significant distinction in the amount of compensation available to the condemnee depending upon the nature of the condemning entity. For example, the law at that time in England prohibited the special adaptability of the condemned property to be taken into consideration in arriving at compensation if the taking was for a purpose which could be accomplished only by resort to statutory powers. This restriction on compensation, however, only applied to condemnations by governmental agencies; privately owned corporations with the power of condemnation had to pay

for this "special value".[30]

When railroad development was at its height in the United States in the latter part of the last century, many courts refused to set off general benefits and, in some instances, both general and special benefits, from the compensation award, "influenced by the circumstances that the condemning corporations were usually privately owned enterprises."[31] The great bulk of takings at that time, it appears, were made by railroads. A North Carolina court summed up the differentiation accorded between private and public condemnors thus:[32]

> "The distinction seems to be that where the improvement is for private emolument, as a railroad or water power, or the like, being only a quasi-public corporation, the condemnation is more a matter of grace than of right, and hence either no deductions for benefits are usually allowed, or only those which are of special benefit to the owner, but where the property is taken solely for a public purpose to pay only the actual damages, after deducting all benefits, either special or general."

Concurrently with the position taken by the courts in discriminating as between private and public condemnors, many state legislatures adopted statutes

and many other states adopted constitutional provisions prohibiting the offsetting of benefits when property was being condemned by other than governmental units.[33] During this period, which reached its height in the 1870's, California also enacted a constitutional provision, similar to that being adopted in other states, which stated that private condemnors had to pay full compensation "irrespective of any benefits from any improvement proposed by such corporation".[34] The reason for this constitutional provision was enunciated by the court in the Beveridge case. There, the court said it was:[35]

> "satisfied that in a proceeding to condemn a right of way, at least by a corporation other than municipal or by a natural person, such benefits cannot be set off against damages to lands not taken under our present constitution. Prior to the adoption of the present constitution the supreme court had decided, in a case where it was found that there were no special benefits, but only general benefits, as I have defined them, that such benefits could be set off against damages and that by this rule the owner was fully compensated. (California Pac. R. R. Co. v. Armstrong, 46 Cal. 85.) By section 14, involved here, I believe the people intended to overrule this case and other like decisions, so far as applicable to private railroad corporations."

During the same time, many states, including those that were adopting constitutional provisions, also enacted statutory provisions regarding benefits; and influenced by the fact that the great bulk of takings were by railroads, most of these statutory enactments sought to limit the power of the condemnor to offset benefits.[36] From out of this welter of constitutional and statutory "reform" the law of benefits was propounded. Oftentimes, the primary purpose of the enactment of this legislation -to restrict private condemnors- was ignored. In other instances, both the statutory and constitutional provisions were given little, if any, effect.

We shall examine more closely the evolution of these statutory and constitutional provisions in California. But before turning to both that aspect of the problem, as well as the divergent positions taken by the various jurisdictions, it is important to conclude this section of the discussion by noting that regardless whether the law of benefits resulted from court made law, from constitutional enactment or from statutory revision, from all quarters almost everyone

seemed to be influenced by the fact that most takings were for the benefit of railroads and other private condemnors.

III. THE PRESENT TREATMENT OF BENEFITS THROUGHOUT THE UNITED STATES AND THE STATED POLICY JUSTIFICATIONS FOR THE DIVERSE COURSES

A. "The Law" In The Various Jurisdictions

A number of commentators and studies have sought to classify the various jurisdictions in the United States as falling under one or another of the many categories that exist regarding the offset of benefits.[37] Repeatedly, however, such classifications have proven misleading and inaccurate. Part of the reason for these failings has been that quite often the courts themselves are far from clear as to the rule in their own jurisdictions and their opinions are hardly edifying. Still another reason is that statutory provisions are often interpreted quite differently than one would imagine from a careful reading. Lastly, many of the prior decisions and original

statutes are no longer given much effect and, indeed, are even today being altered.

For example, the State of Wisconsin has been classified by some recent commentators[38] as falling within that class of jurisdictions that permits the offsetting of both general and special benefits not only from the remainder but from the part taken as well. Whether that determination was ever accurate or not, a 1960 Wisconsin statute clearly states that only special benefits are to be offset, and then only as against the remainder.[39] In West Virginia, the statute states that all benefits may be deducted from the amount of the damages to the remainder;[40] yet, the courts in that State appear to have permitted only special benefits to be offset against damages.[41] And another illustration of the inherent difficulty of categorizing in this area of condemnation law is the fact that both recent and older authorities have indicated the State of Alabama permits the offsetting of both general and special benefits against both value and damages.[42] The courts in that State have pointed out that that classification was incorrect.[43]

Based on the foregoing, it is understandable why still another authority has indicated that it is impossible to classify almost one-half the States of the country in regard to their positions on this question.[44]

It is, therefore, with reservation that we present even a rough classification of the position of the States regarding the offsetting of benefits. The reader should recognize that the following categories and the number of States that belong under each are somewhat indefinite.

In general, it may be said that there are five notable but different routes followed by the various jurisdictions in the country in the matter of offsetting benefits:

1. Benefits -both special and general- cannot be offset either against damages to the remainder or against the value of the part taken.

Only a few states appear to follow this rule, Mississippi being the chief among these.[45]

2. Special but not general benefits may be offset against damages to the remaining part but

not against the value of the part taken.

Approximately one-half the states appear to abide by this formula, including California.

3. Both special and general benefits may be offset against damages to the remainder but may not be offset against the value of the part taken.

This procedure appears to be followed in the State of New York alone.[46] West Virginia seemingly adopted it in a 1933 statute but the courts of that State have limited its application.[47]

4. Special but not general benefits may be offset against both damages to the remainder and against the value of the part taken.

Some authorities have indicated that this is the majority position but, upon close analysis, approximately 14 jurisdictions, including the Federal Government, adhere to it.[48]

5. Both general and special benefits may be offset against both damages to the remaining part and the part taken.

It is doubtful that more than two or three states adhere to this rule.[49] Like its counterpart

--the policy of prohibiting any offset of benefits--on the opposite side of the spectrum, few courts are prone to enforce it.

The above, as indicated, are the major classifications; a few other states have adopted hybrid rules depending on the nature of condemnor, or upon whether the damage is of a severance or consequential type.[50]

B. The Conflict In Policy Between The Divergent Rules

In the final analysis, despite the variegated paths followed by each of the states, the conflict between them may be summed up as follows: Should benefits be offset? And, if so, to what extent? And what kind, if any, benefits should be so offset?

The few jurisdictions that by statute or court decision refuse to allow any offsetting of any benefits do so primarily based upon their interpretation of the Constitutional mandates in those states that just compensation be made, coupled with the lack of any constitutional directive to deduct for benefits.[51] At times, they appear to buttress this posi-

tion by asserting that the various constitutions must be interpreted so as to compensate the condemnee in money; that benefits may not be utilized in lieu of money. This argument was advanced almost one hundred years ago in the Minnesota case, where one dissenting justice stated:[52]

> "If the legislature has the right under our Constitution to say that a party may be compensated for his land taken for public use, in 'benefits', it may also say that he may be compensated in oxen, sheep, provisions, or tobacco, or in any other useful or useless thing. Either they have no power, or unlimited power, to designate the currency or commodity in which payment may be made. To my mind it seems clear that the Constitution properly interpreted gives them no power in the premises. When the public or a corporation takes the property of an individual, it becomes indebted to him for its value, and should pay that debt in that which by the law of the land would be deemed a lawful tender in payment of any other debt."

And as the Chief Justice of the Supreme Court of Michigan, a little later, stated:[53]

> "I cannot believe that the framers of our Constitutions, either state or national, which provide that private property shall not be taken for public use without just compensation therefor, and that 'private property shall not be taken for public improvements in

> cities and villages . . . unless the compensation therefor shall first be paid,' ever anticipated that such compensation could be made up of benefits to the owner entirely speculative in character, the value of which should be estimated by persons whose pecuniary interests would induce them to place the lowest possible value upon the property to be taken, and the highest appraisal on the benefits claimed. The compensation intended by these provisions of our Constitutions is the fair cash market value of the property to be taken, and the payment intended is required to be in the legal currency of the country, and it should make no difference what incidental benefits the owner may be thought to derive."

As will be pointed out later, whatever merit there is in this argument is really only applicable to offsetting benefits against the value of the land taken; it would not appear to have any proper application to offsetting benefits as against damages insofar as it is difficult, if not impossible, to ascertain the value of the remainder without assessing benefits.

More cogent, however, is the general argument sustaining the position of these jurisdictions: A condemnee is not to be put in the position after the taking any worse off than his neighbor who has

sustained no injury. Under this latter line of thinking, the offsetting of any benefits, whether general or special, would relegate the condemnee to a less desirable position than his neighbor, for if the condemnee must "pay" for benefits and his neighbor is able to receive those benefits for free, the condemnee is put in a worse position. Quite frequently, neighboring land owners are able to receive special as well as general benefits for a public improvement and yet these benefited land owners need not pay any special assessment and need only contribute to the benefit as general taxpayers.

The crux of the above rationale is that a condemnee should be accorded compensation in relation to the benefit attained and injury sustained by his neighbor. Thus is created what has been termed an "island of equity".[54] It can be seen upon reflection that this principle, while not necessarily in conflict, is somewhat inconsistent with the principle of indemnity which heretofore has been considered the goal of just compensation. The principle of indemnity connotes that the condemnee, after the taking, shall be put in the

position pecuniarily as good as he would have been had there been no taking at all. The "island of equity" theory, however, broadens the indemnity principle by superimposing upon it not only that the condemnee will be left in no worse position than he otherwise would have been but for the taking but, also, that he will be left in a position no worse than his neighbors.

We shall later return to a further examination of this dichotomy but before doing so it is well to point out what one writer, critical of this addendum to the indemnity principle states:[55]

> "Our system of justice embodies the idea that when one unit, whether it be human, corporate, or political, is in litigation with another, the tribunal can do no more than create justice between the parties to the proceeding; where the condemnee has received, he should pay his benefactor (in the form of a deduction), and should not be heard to complain that some third person received but was not required to pay."

Similarly, in 1855, Georgia court stated:[56]

> "What matters it if others have been benefited? They are taking no issue with those who construct the public work. But he whose land has been taken is making such issue, and the duty has been devolved

> on his fellow citizens of ascertaining whether or not he has been injured, and if so, how much. And can they say he has been injured and is justly entitled to compensation, if they find he has been benefited?"

The main battlefield in the war of offsetting benefits is between those jurisdictions that permit or prohibit benefits to be offset against the value of the land taken. In this instance, of course, the reasoning of the minority courts that refuse to offset <u>any</u> benefits is somewhat more applicable. Indeed, while few jurisdictions accept this rationale insofar as it applies to prohibiting the offsetting of benefits against damages, apparently a majority of the states are willing to adopt such reasoning in regard to offsetting benefits against the value of the land taken. The conclusion of most courts in such instance is, as expressed by an Alabama court:[57]

> "The party whose land is taken should certainly be paid in full for the land actually taken, without regard to any benefits accruing to the remaining lands; but, when the party seeks to recover for the injury or damage to the remaining lands, it is difficult to see how it can be said that any damage has been suffered by reason of the change

> of grade and making of the sidewalk, if the net result of that work has been that the land has been benefited, and not deteriorated, in value."

But a number of jurisdictions, both adhering to a strict indemnity concept and recognizing a purported theoretical inconsistency between allowing an offset against the remainder but not against the value of the part taken, permit benefits, of one sort or another, to be offset against the entire award.[58] The leading case permitting the offset of special benefits against the entire award is Bauman v. Ross,[59] decided by the United States Supreme Court. This case, enunciating the federal rule, states:

> "'The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.
>
> Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the

> owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened. * * * The constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied; and it is therefore within the authority of congress, in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken or for any injury to the rest, shall take into consideration by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken.'"

In answer to the argument that offsetting benefits against the part taken would put the condemnee in a worse position than his neighbors, a later Federal court, in Aronson v. United States,[60] pointed out that a failure to offset such benefits

would destroy the balance and equality of the rule that the owner is entitled to receive the value of what he has lost but no more. "It is not easy," said the Aronson court, "to perceive any other mode of arriving at a just compensation than by considering all the consequences of the act complained-of; whether they enhance or mitigate the injury." Still another court in a more summary fashion dismissed the "island of equity" principle. In a very early Indiana decision the court stated:[61]

> " . . . if others, whose property the public exigency does not injure are equally benefited, it must be set down as one of those chances by which fortune distributes her favors -a distribution which no legislature or other earthly power can render equal among men."

Thus, the federal courts and an appreciable minority of states adhere to an indemnity principle which takes into consideration only the equities that exist as between the condemnor and condemnee. The relative position that the condemnee may have vis-a-vis his neighbor is apparently dehors the scope of consideration. Yet, upon even closer analysis, the

federal government and most of the states in this category do not fully adhere to their interpretation of the indemnity principle. For most of these jurisdictions do take into consideration the status of the condemnee in relation to his neighbors insofar as general benefits are concerned. The great bulk of these states prohibit the offsetting of general benefits from either the part taken or the remainder.

That most of those states that profess to adhere to the indemnity or restitution principle by permitting benefits to be offset against the part taken are inconsistent in their rationale is exemplified by their refusal to follow this theory in regard to offsetting general benefits. For example, one court has set forth a hypothetical case justifying its position for refusing to deduct for general benefits. The court stated:[62]

> "Perhaps a simple illustration will serve to show why only special benefits peculiar to that property should be deducted from the damage caused, and not those benefits which are common to all properties similarly situated. Suppose a series of lots abutting on a common street, only one of which is injured by the grading and paving of that

> street. The one lot has suffered damage to the extent of $500, but has been specially benefited to the extent of $100 by the removal of a deep and malodorous mudhold immediately in front of it, while every lot abutting on that highway, including plaintiff's has been enhanced in value $250 by reason of the better grading and paving. Clearly the city has the right to deduct the $100 special benefit from the total claim, leaving $400 as the amount necessary to restore plaintiff's lot to the same relative value it bore to other lots on that street before the improvement. But what of the $250 benefit common to every lot due to a general enhancement of values because of the improvement? Should it also be deducted? Clearly not. For if it is, plaintiff is the only property owner on the street to lose the general enhancement of values common to all properties, and to which he is entitled as taxpayer. Every other owner retains his additional $250, and so should plaintiff, for the $400 restores his lot to the same relative value it possessed immediately before the improvement, thus placing it on a plane of equality with the other lots similarly situated, and ready to share with them in the general enhancement of values."

While there is undoubtedly considerable merit in that position, and indeed we are in concurrence with it, it must be recognized that it is not consistent with the same court's position of offsetting special benefits against the remainder.

Indeed, approximately 90% of the jurisdictions adhere to the principle as set forth by a Utah court:[63]

> "If such benefits are not excluded, then the property injured is not placed on an equality with property on the same street affected by the same public improvements but not injured thereby. If compensation for injuries is to be reduced by general benefits, then property not injured gains by whatever such benefits add to the property, while injured property is taxed with them in the very attempt of making compensation. To deduct these general benefits, therefore, would result in not making full compensation at all, because something would be withheld from the injured property which would be enjoyed by property not injured."

The minority position on this point, permitting the deduction of general benefits, is likewise similar to the rationale set forth by those cases that allow special benefits to be offset against the part taken. These cases assert that the property owner is not damaged merely because his neighbor may be benefited to a greater extent, or that the owner cannot demand a premium but only just compensation or, lastly, that if there is a hardship, it is for the legislature to rectify the situation. As an early Kentucky court put it:[64]

> "The advantages which the owner may derive from the construction of the road are not in the least diminished by the fact that they will be enjoyed by others, nor does it furnish any reason why they should be excluded from the estimate in comparing the advantages and disadvantages that will result to him from the establishment of the road. Other persons, it is true, may enjoy the same advantages, without being subjected to the same inconvenience, but this results from the nature of the improvement itself, and does not in any degree detract from the value of these advantages to the owner of the land through which the road passes."

This minority position, permitting general benefits to be offset, is in effect a strict "before and after" test. Most courts, at least insofar as general benefits are concerned, believe that a greater injustice results by applying this principle strictly and, therefore, in this context adopt the position which compares one property owner with another as the proper approach, rather than the approach which would put the property owner on one side and the taxpayer on the other.

In the final analysis, what the courts appear to be doing is trying to create a balance as between the property owner and the taxpayer. In doing so, they have, at least from a theoretical position, run into internal inconsistencies in reasoning. A considerable

proportion of the states have achieved this balance by adhering to the indemnity approach in permitting special benefits to be offset against both the part taken and the remainder while following an "island of equity" approach in prohibiting general benefits to be offset. Those states that permit special (but not general) benefits to be offset only against the remainder also fail to follow either principle completely. Only the two extreme categories are consistent: That which prohibits any offsetting of benefits ("island of equity" theory), and that which permits all benefits to be offset from the award (the indemnity theory).[65]

Those that advocate a complete indemnity position, i.e., call for both general and special benefits to be offset against both the part taken and the remainder, or the "before and after" test, frequently assert that the benefits -including general benefits- that a condemnee receives as a result of a public improvement should be treated in the same manner as damages; and that it is only proper to offset such benefits. Adhering to this line of

reasoning, two attorneys for public bodies have written:[66]

> "For example, a farmer on an unpaved county or private road may be served with an improved farm-to-market road for distributing his products following taking of a small part of his land. A retail businessman may see the number of cars passing his establishment every hour increase from 10 to 100. A home owner may have travel time from his residence to the center of town reduced one-half. The owner of former 'swamp land' may be favored and enhanced by the location of service roads and an interchange to a new limited-access highway in close proximity to or through his property where only a portion is taken. A landlocked timber or agricultural area may be enhanced following construction of a limited-access highway. Upon reflection, everyone will agree that a retail establishment may have a warehouse full of salable goods, but that merchandise will not move until the inventory is displayed for customer inspection. Land is largely influenced by the same rules of human behavior and experience. Following construction of a limited-access highway, previously landlocked timber and agricultural land will be opened, displayed and put on the market to thousands of people who otherwise would never have seen or been familiar with the particular areas involved, and the travel time between that property and the urban areas will be reduced to save many thousands of man hours. Prior to the construction of a new land service or limited-access highway, rural property may have been served

> only by a narrow, inadequate county road. The property likely will become adaptable for a higher or better use -residential or subdivision- and frequently, such property will enjoy frontage on a highly desirable road. These and many other factual situations suggest and present the issue and extent of enhancement. The test of benefit is the same as the test of damage -the effect of the project on the subject property in the opinion of the valuation expert and the factual situation reflecting benefits or damage.
>
> "Just compensation requires a full indemnity, but nothing more. It means a balancing of things against each other -a balancing of benefits against loss and damages. When a condemnor acquires a part of a parcel of property for a use that carries into the remaining tract a value equal to or in excess of the part acquired, then the owner has lost nothing, and he has received just compensation. The application of any contrary rule obviously would be unjust to the public."

There is, however, a serious and vital inconsistency in the foregoing logic. For in most of the examples given in the above-quoted statement, there appears to be a general benefit. Yet, as we have seen in prior studies, when the situation is reversed and because of the public improvement, the condemnee is injured by diversion of traffic from his land or by being forced to travel a more circuitous route to

reach it or by the similar exercise of police power, he is not awarded damages for such "inconveniences". In other words, his home may be further away from the main flow of traffic or all traffic may be diverted from his premises and yet he would, according to universal application of the law, not be recompensed for such a loss. It is damnum absque injuria. Thus, since the indemnification theory does not hold in instances where a condemnee may suffer general damages, it does not follow that general benefits should be offset.

IV. THE CALIFORNIA POSITION AND ITS EVOLUTION

The law of benefits in California, while not entirely clear (despite the fact there has been no significant statutory or Constitutional change in almost ninety years), appears to amount to the following: In actions instituted by public condemnors, this state follows the large bulk of jurisdictions that permit special benefits to be offset against damages to the remainder; benefits usually may not be offset against the value of the part taken. The refusal to

offset benefits against the part taken is justified based upon the language of §1248(3). It has been reaffirmed on a number of occasions by the California courts.[67] General benefits at least in right of way and reservoir takings may not be offset against either the value of the part taken nor damages to the remainder.[68] This latter position has been in California, as in almost all of the jurisdictions, judicially engrafted on the statute.

When a private corporation or individual is the condemnor, the rule is probably different and, indeed, less clear cut. It seems that private condemnors do not have the advantage of offsetting either general or special benefits under any circumstances. This prohibition, though not specific in case law, is supported by the interpretation of Article I, §14, of the California Constitution as enacted in 1879. In light of various court decisions, however, the effect of the rule is in doubt.

The history of the interpretation and treatment given to benefits in California is not only interesting in and of itself but also is helpful in

understanding the present rules. To begin with, prior to both the enactment of §1248(3) and the adoption of the Constitutional provision pertaining to benefits, the courts of this state had seemingly adopted a strict "before and after" test. In 1866, California Supreme Court in San Francisco, A&S R. Co. v. Caldwell[69] was presented with the question as to whether or not benefits may be offset against the value of the land taken. The California Supreme Court held that there could be such an offsetting. In so doing, it touched upon each of the numerous arguments usually presented by each side on this question. It stated:

> "But in ascertaining what is just compensation the question is presented, in the case before us, as to the power of the Legislature to declare and determine that benefits which may result to him whose property shall be taken, by the enhancement of the value of his remaining property, which is of the parcel of that taken, by reason of the construction of the railroad, shall be estimated and set off in satisfaction or in part satisfaction of the compensation to which he may be entitled for the particular property taken from him for the use of the public. The opinions or jurists on this subject are found,

on examination, to be widely diverse from each other. On the one side it has been maintained that compensation to the extent of the value of the land taken must be made in all cases, without any deduction on account of any benefit or advantage which may accrue to other property of the owner, by reason of the public improvement for which the property is taken . . .

"In support of this view it is argued that the enhancement of the value of other property of the owner of the land proposed to be condemned to public use, which may be of the parcel of that taken, is merely the measure of such owner's share in the general good produced by the public improvement; and why, it is asked, is not the owner in such case justly entitled to the increase in the value of the property thus fortuitously occasioned, without paying for it? His share in the benefits resulting may be larger than falls to the lot of others owning property in the same vicinity, and it may not be so large, and yet he alone is made to contribute to the improvement by a deduction from the compensation which is awarded him by sovereign behest as a pure matter of right, though others whose property may adjoin the public work are equally with himself benefited by it. On the other side it is maintained that the public is only dealing with those whose property is necessarily taken for public use, and that if the property of such persons immediately connected with that taken, but which remains unappropriated, is enhanced in value by reason of the improvement, then, thereby the owners receive a

just compensation for the lands taken to the extent of such enhancement, and if thereby fully compensated they cannot in justice ask for anything more . . .

"The weight of authority appears to be in favor of allowing benefits and advantages to be considered in ascertaining what is a just compensation to be awarded in such cases, and it seems to us that the reasons in support of this view of the subject are unanswerable.

"Just compensation requires a full indemnity and nothing more. When the value of the benefit is ascertained there can be no valid reason assigned against estimating it as a part of the compensation rendered for the particular property taken, as all the Constitution secures in such cases is a just compensation, which is all that the owner of property taken for public use can justly demand. The Constitution does not require the compensation in such cases to be rendered in money, though in the estimation of benefits their value must be measured by the money standard . . .

"Their duty [the Commissioners] is to ascertain what is a just compensation to the owner, and when the land of which he is deprived is a part only of a tract, such compensation may be ascertained by determining the value of the whole tract without the improvement and the portion remaining after the work is constructed. The difference is the true compensation to which the party is entitled."

"Corrective" action was not long in coming.

In 1872, as part of the enactment of the Code on Emi-

nent Domain, the Legislature adopted §1248(3) of the CCP. This provision discarded the strict "before and after" test and prohibited the court from offsetting benefits from the value of the part taken. It seems probable that the Legislature primarily had in mind the holding of the Caldwell case; and it should be noted, once again, that the condemnor in that action was a railroad. Thus, to a large extent, it appears that §1248(3) was motivated by a feeling that private condemnors should not be allowed this liberal offset advantage.[70]

Thereafter, in 1879, the Constitution provision was enacted. This provision in Article 1, §14, included a number of considerations. First, as indicated in a prior study,[71] the citizenry appeared to be primarily concerned with remuneration for consequential damages that often accompanied railroad takings and were, theretofore, noncompensable. Secondly, the section also concerned the guaranty of a jury trial coupled with a further protection to the condemnee that the property would not be taken without first insuring and granting just compensation. More-

over, the clause preventing the offsetting of benefits exempted municipal (and later almost all public) agencies. Once again, the discrimination against private condemnors, particularly railroads, was evident.[72]

There has been little difficulty in interpreting §1248(3). No condemnor, it seems, may offset benefits against the part taken. Moreover, only special benefits may be offset against the remainder. Probably special benefits may be offset only in favor of public condemnors.[73]

The Constitution provision clearly denies private condemnors this liberal exemption; however, it should be noted that the cases are still a bit ambiguous and not entirely settled to the effect that private condemnors are not afforded this privilege.[74] The Beveridge case, supra, discusses the question of special and general benefits and the distinction between them. If the case decided that private condemnors may not offset any benefits (as the Constitution reads), then there appears to be no reason why the court would have been concerned with

the distinction between general and special benefits. Indeed, there is language in that case which suggests that it is possible that special benefits may be offset against the remainder even though the condemnor be a private agency.[75]

V. CONCLUSIONS AND RECOMMENDATIONS

In the final analysis, we are confronted with two questions:

(1) Should benefits be offset against both the part taken and the remainder, against only the remainder, or not at all?

(2) If benefits may be offset to some extent, should this include general or only special benefits?

In an effort to arrive at a "balance" and to bring about just compensation which is just both to the condemnor and the condemnee, we are immediately concerned with the basic policy consideration. Shall we abide by a strict concept of indemnity (or restitution) theory or does just compensation connote

that a condemnee shall be left after the taking in as good a position as his neighbors; that is to say, shall we adhere rather to an "island of equity" theory. A resolution of this conflict is most difficult, primarily because each approach has considerable merit and neither approach is wholly satisfactory. It is, indeed, apparent that it is just because of this dilemma that most courts throughout the country have fashioned a combination of rules that negates either a full acceptance or a full rejection of either of these approaches.

To begin with, we find it unreasonable to accept either of the extremes. To allow no benefits to be offset under any conditions certainly would allow property owners to benefit at the direct expense of a public agency. A condemnee would be able to receive damages to his remainder, and yet at the same time profit by a benefit which could easily mitigate the entire measure of damages and would in reality frequently put him in a position not only superior to that that he would have had in the absence of condemnation but superior to that of his

neighbors. On the other hand, to allow all type benefits to be offset would certainly and clearly put him in a worse condition than his neighbor; but more crucial, as will be seen, it will not afford him a reasonable opportunity to be put in as good a pecuniary position after the taking as he was before. Thus, in the final analysis, the question is which of the two theories - the indemnity (restitution) or the "island of equity" - is to be given greater importance.

Should special benefits be offset against the value of the land taken? A strict interpretation of the indemnity principle would necessitate that this question be answered in the affirmative. While we may find some merit in the contravailing policy, there seems no sufficient justifiable reason why a condemnee should, as a result of a taking, be placed in a position after the taking more beneficial than that which he would have had if there had been no taking at all, at least insofar as special benefits are concerned. A simple example will underscore this conclusion. If a strip of land, but a

small proportion of the condemnee's property, is taken and has a value, say, of $10,000.00, but because of the improvement in the manner proposed the remainder is specially benefitted to the extent of $100,000.00, to allow the condemnee to be given $10,000.00 as "just" compensation for the part taken, while he retains the entire benefit, does not strike us as equitable. The argument that the condemnee must be paid in money for the part taken should not prohibit a liberal offsetting policy. It is to be noted that such argument loses some of its force when it is recognized that special benefits may be offset against damages to the remainder - thus not all damages are paid for in money.

Of course, it may be that in certain instances an acceptance of the indemnity principle in this context may put a condemnee in a position somewhat inferior to that of his neighbors who also may have been specially benefitted but who are usually not taxed and assessed for their gain. But as indicated before:[76]

> ". . . . if others, whose property the public exigency does not injure are equally benefitted, it must be set down as one of those chances by which fortune distributes its favors - a distribution which no legislature or other earthly power can render equal among men."

Moreover, the adoption of the "island of equity" principle in regard to offsetting special benefits against the part taken leads to very impractical results. For example, some neighbors may be specially benefitted more than others. Some neighbors may be benefitted to a greater or lesser degree than the condemnee. With whom shall the condemnee be compared? And shall he receive, offset-free, the amount of special benefits of a neighbor on his left or a neighbor on his right? And are we to open up to the courts the question of ascertaining the amount and extent and the differences of benefits realized throughout the neighborhood? These questions have not been broached by any court, to our knowledge, but a strict adherence to the "island of equity" concept would certainly make them relevant. As a result of these inequities we

would consider that the better rule in these circumstances would be that adopted in the federal jurisdictions and throughout a number of states to the effect that special benefits may be offset against the award, and not just the remainder. It is a rule which is more practical and certainly not less equitable to all concerned. It is also in harmony with previous recommendations made in other studies in this series.

Thus, we are brought to the second main consideration: should the indemnity principle be strictly interpreted so as to offset general as well as special benefits. As indicated above, this is essentially an extreme position, taken by no more than three jurisdictions in the country. We, too, must emphatically reject it. To begin with, there is some merit in the "island of equity" concept and the adoption of this extreme position would completely disregard that principle. In People v. Thompson,[77] a 1954 case, the California Supreme Court approved the trial court instruction, which stated:

> "You are instructed that the chance that land will increase in value as population increases and new facilites for transportation and new markets are created is an element of value quite generally taken into consideration in the purchase of land in estimating its present market value. If a part of one's property is taken for the construction of a highway, he stands in reference to the other property not taken like similar property owners in the neighborhood. His neighbors are not required to surrender this prospective enhancement in value in order to secure the increased facilities which the highway will afford. If he is compelled to contribute all that he could possibly gain by the improvement while others in all respects similarly affected by it are not required to do so he does not receive the equal protection of the law. The work is not being done for his benefit. The law will not imply a promise on his part to pay anything toward it.
>
> "To compel him to give up or pay full value for his share of the common or general benefit while others are allowed to retain it is to deny him equal protection of the law."

But if this factor, in light of what has been said before, cannot itself support the position that general benefits should not be offset, certainly two other factors necessitate such a conclusion. First, general benefits are of a nebulous and uncertain nature, so much so that to offset them would be

to diminish a condemnee's award based upon enhancements which are, by their very nature, speculative and conjectural. The California Supreme Court recognized this in the Beveridge case, supra. There the court stated:

> "In the first place, such benefits are uncertain, incapable of estimation, and future. Compensation must be made in money and in advance. The property-owner, therefore, cannot be compelled to receive his compensation in such vague speculations as to future advantages, in which a jury may be induced to indulge."

Such an elusive concept, inherently vague, would not be a proper instrument for reducing a condemnee's award; it could easily tend to deny just compensation.

And, lastly, connected with the above reasoning, is the fact that allowing these general benefits to be offset would be entirely inconsistent with the established policy and rule that a condemnee is not to be afforded general damages. Since a condemnee may not receive compensation for injury suffered in common with his neighbors in the community resulting from such things as diversion of

traffic or circuity of travel, because they are general, it would be exceedingly improper to penalize him for an improved travel pattern or other similar general benefit.

It should be additionally noted that this position regarding the prohibition against offsetting general benefits is one that is not entirely settled in this state. The Beveridge opinion seemed to establish that, under no circumstances, can general benefits be offset. However, a subsequent District Court of Appeals case, Crum v. Mt. Shasta Power,[78] cast some doubt as to whether or not this rule applies in all cases. For the court in the Crum case enigmatically stated:

> "The rule in California is well established in eminent domain cases, other than those which involve rights of way, to the effect that both general and special benefits which accrue to either the portion of property which is taken or that which remains, may be considered and set off against the damages which are assessed."

Accordingly, it is recommended that statutory language be adopted indicating that in all cases special benefits may be deducted from the entire

award and that in no instance may general benefits be deducted from any part of the award.

The above statutory "reform" may be brought about by the legislature. In all cases concerning public condemnors (municipalities, counties or the state) this policy may be "corrected" by simple statute, but because of the clear prohibition in the Constitution, it would take a Constitutional amendment to afford this liberal offset policy to private condemnors. As indicated throughout this study, much of the confusion and a good deal of the present distinctions regarding benefits may be traced to the fact that rules were propounded at the time when most of the takings were brought about by railroads and other private condemnors. And, as indicated, the legislature and the people considered that a discrimination was in order, particularly insofar as these private condemnors were exercising an extraordinary power and were gaining an advantage which was of dubious validity at best.

On closer analysis, we find it difficult

to sustain this discrimination today. If railroads or other private condemnors take private property under the eminent domain code, a discrimination against them will not necessarily redound to the public's advantage, as was formerly thought.[79] For a private corporation that has to pay an increased award will undoubtedly pass that additional cost on to the general public through rate increases.[80] The public, therefore, does not gain by such discrimination. Moreover, it does not appear to be logical to cause a differentiation as to the amount the condemnee will receive depending upon the nature of the condemnor, at least in that area of the law where the private condemnor is given no undue advantage. Accordingly, therefore, there seems no reason or grounds for sustaining this anachronism and the Constitution should eliminate this discrimination.

Before concluding, it may be recalled that in prior pages of this study we indicated that the California courts, generally, have adopted and adhered to a fairly sound definition and interpretation of general and special benefits. While recog-

nizing that a fine differentiation between these types of benefits is a difficult one, by and large the California courts have followed the majority position in most difficult fact situations and have, accordingly, adopted reasonable and just guide lines. However, in a very recent case, City of Haywood v. Unger,[81] an August 1961 District Court of Appeals decision, the California court appears to have veered in a dubious direction. In the Unger case the Court held that an improvement to an existing city street which resulted in an increase in traffic in the neighborhood was a special rather than a general benefit. Not only is such a holding contrary to the great weight of authority,[82] but it is also unreasonable and unfair; for it is quite clear, in California and elsewhere, that a change in traffic pattern on an existing street or highway is a general not a special damage. Thus, the consultants believe that the Unger court was in error and, though there does not appear to be a feasible way in which meaningful statutory language can be devised to insure against such rulings, it is hoped

that the Unger case does not mark a beginning of a trend in this direction.

It is well to make reference and consider one further aspect of the problem of benefits. While a subsequent study will devote itself entirely to the question of burden of proof in eminent domain actions, it is pertinent to recognize here that as a general rule the burden of proof regarding benefits is placed upon the condemnor. No cases in California, however, specifically indicate that this state follows the general rule in this regard. Statements are found in various texts and digests that this is the accepted rule and a number of cases in other jurisdictions state that the condemnor both must plead and bear the burden of proving the extent, if any, of benefits.[83]

Insofar as the condemnee usually must bear the burden of proof in regard to value and damages, it seems appropriate that anything which would go to offset compensation should be both pleaded and proven by the condemning body.[84] Accordingly, it is recommended that statutory provision be made

indicating that the burden in these instances is to be borne by the condemnor.

FOOTNOTES

(1) This section was originally enacted in 1872. Subsequent amendments (1889, 1911, 1913, 1915, 1953) did not in any way change the wording of subsection 3 herein discussed.

(2) This constitutional provision was enacted in the 1879 Constitution and its primary purpose apparently was to allow the condemnee the right to receive compensation for various types of damages theretofore held non-compensable. See Study "Taking Possession of Passing of Title In Eminent Domain Proceedings," pp. B-31-33 (Oct. 1960) (This series).

(3) The question of benefits, and whether or not they should be offset against the award, also arises in situations where there is no taking of the property but merely a consequential damage. However, since almost all jurisdictions treat the question of benefits in consequential damage-type cases in the same manner as in severance cases, the Study shall not

differentiate benefits as between consequential and severance instances. See 1 ORGEL on VALUATION under EMINENT DOMAIN, § 7 nn. 57, 59. (2d Ed. 1953) (hereinafter cited as "ORGEL"). See also Note, "Right to Set-off Benefits Against Damages to Property in Eminent Domain Proceedings", 46 W.VA. LAW Q. 320 (June 1940).

(4) See United States v. Miller, 317 U.S. 369 (1943) See, generally, Study "Taking in Eminent Domain Proceedings" and "The Treatment of Consequential and Severance Damages in Eminent Domain" (This series). See also, Phelps & Bishop "Enhancement in Condemnation Cases," 7 RIGHT OF WAY 8 (1960); 2 Kaltenbach, JUST COMPENSATION 25 (Apr. 58); Note, 43 IOWA L. REV. 304 (1958); Kaltenbach, JUST COMPENSATION, Special Bull. #10, (1959).

(6) ANNOT., "Deduction of Benefits in Determining Compensation or Damages in Eminent Domain", 145 A.L.R. 7 (1943).

(7) See, e.g., 1 ORGEL §7.

(8) See La. Society v. Board of Levee Comm'rs., 143 La. 90, 78 S. 249 (1918).

(9) See 4 NICHOLS on EMINENT DOMAIN 336 (hereinafter cited as "NICHOLS"); Diamond, "Condemnation Law," 23 APPRAISAL JOUR. 564, 574 (1955); 1 ORGEL §65.

(10) See Note, Univ. of Ill. L.F. 313, 324-25 (1960). See generally cases collected in 1 ORGEL §7 n. 57.

(11) 57 W. Va. 417, 50 S.E. 521 (1905).

(12) See discussion at pp. , infra.

(13) Note, Univ. of Ill. L.F. 313, 330 (1960); Brand v. Union Elevated R.R., 258 Ill. 133, 101 N.E. 247 (1913).

(14) See, e.g., Kaltenbach, JUST COMPENSATION, "Benefits" Special Bull. #10 (1959).

(15) Lincoln v. Board of Street Comm'rs., 176 Mass. 210, 213, 57 N.E. 356 (1900).

(16) 1 ORGEL 40-41.

(17) 3 NICHOLS §8.6203.

(18) 1 ORGEL 41.

(19) McRea v. Marion County, 222 Ala. 511, 133 S. 278 (1931).

(20) Note, 43 IOWA L. REV. 303, 305 (1958).

(21) Peoria B&C Traction Co. v. Vance, 225 ILL. 270, 273, 80 N.E. 134 (1907)

(22) Beveridge v. Lewis, 137 C. 619, 623-24, 67 P. 1040 (1902).

(23) Annot., 145 A.L.R. 55-58 (1943). Similarly, an increase in market value, in itself, will not in most jurisdictions, justify a benefit as being classified as a special benefit. Id. at 84-85.

(24) Idem at 77, et seq.

(25) See, e.g., San Luis Valley Irrig. Dist. v. Nofsinger, 85 Col. 202, 274 P. 827 (1929); Forest Preserve Dist. v. Chicago Title & T. Co., 351 Ill. 48, 183 N.E. 819 (1932).

(26) See Study, "Incidental Losses in Eminent Domain" (this series).

(27) "Eminent Domain Valuations In an Age of Redevelopment: Incidental Losses," 67 YALE L. J. 61, 65 (1957).

(28) Ibid at 65-67.

(29) See nn. 26, 27, supra.

(30) See 9 & 10, Geo. 5, c. 57, §2(3)(1919);

McCORMICK, DAMAGES, 524, 526, n.24.

(31) 1 ORGEL 45.

(32) See Elks v. Board of Commissioners, 179 N.C. 241, 245, 102 S.E. 414 (1920). A rough estimate of the cases on the books prior to 1900 indicates that almost half of the condemnation actions involved railroads.

(33) See individual state constitutional provisions collected in Annot., 170 A.L.R. at 158-299.

(34) Cal. Const., art. 1, §14.

(35) 137 Cal. at 624.

(36) See n. 33, supra.

(37) See, e.g., Phelps and Bishop "Enhancement in Condemnation Cases," 7 RIGHT OF WAY 8, 11; 2 LEWIS EMINENT DOMAIN 1177 (3d Ed. 1909); Bauman v. Ross 167 U.S. 548 (1897) ANNOT. 145 A.L.R. 16 et seq.; Kaltenbach, JUST COMPENSATION, "Benefits", Spec. Bull. #10 (1959); Enfield and Mansfield "Special Benefits and Right of Way Acquisition"

25 APPRAISAL JOURNAL, 551, 555 (1957); Note, 46 W. VIR. L.Q. 320 (1940); McCORMICK, LAW OF DAMAGES 548; Note, 43 IOWA L. REV. 303, 305 (1958).

(38) Phelps and Bishop "Enhancement in Condemnation Cases" cited at note 37, supra.

(39) Wis. Laws, 1959, § 32.09(3).

(40) W. Va. Code, c.54 art.2 §9.

(41) See, e.g., State v. Jacobs, 5 S.E. 2d 617 (W.Va. 1939); See, generally, Note, 46 W. VA. L.Q. 320 (1940).

(42) Phelps and Bishop "Enhancement in Condemnation Cases" cited at note 37, supra; 2 LEWIS EMINENT DOMAIN §465.

(43) See Eutaw v. Botnick, 150 Ala. 429, 43 S. 739 (1907).

(44) Enfield and Mansfield, "Special Benefits and Right of Way Acquisition," 25 APPRAISAL JOURNAL 551, 555 (1957).

(45) Stoner v. Iowa State Hwy. Comm., 27 Iowa 115, 287 N.W. 269 (1939); Schoonover v. Fleming, 239 Iowa 539, 32 N.W. 2d 99 (1948);

Electric Cooperative Corp. v. Thurman, 275 S.W. 2d 780 (Ky.App.1955); Commonwealth v. Powell, 258 Ky. 131, 79 S.W.2d 411 (1935); In Re Bagley Ave., 248 Mich. 1, 226 N.W. 688 (1929); Finley v. Board of Commissioners, 291 P.2d 333 (Okla. 1955); Brown v. Beattey, 34 Miss. 227 (1957); but cf., Miss, State Hwy. Comm. v. Hillman, 189 Miss. 850, 198 So.565, 569 (1940). See also, Annot., 145 A.L.R. 22, et seq.

(46) See Becker v. Metropolitan El.Ry.Co. 131 N.Y. 509, 510, 30 N.E. 499 (1892).

(47) See Note 46, W.VA. L.Q. 320, et seq. (1940).

(48) Compare, Kaltenbach JUST COMPENSATION, "Benefits" at n.37 with Note, 43 IOWA L. REV. 303, 305 (1958) and Phelps and Bishop, "Enhancement in Condemnation Cases", 7 RIGHT OF WAY 8, 11; Bauman v. Ross, 167 U.S. 548 (1897); Collum v. Van Buren Co., 223 Ark. 525, 267 S.W.2d 14 (1954); State v. Powell, 226 S.W.2d 106 (Mo. App. 1950); Petition of Reeder, 110 Or.484, 222 Pac. 724

(1924); State v. Ward, 41 Wash.2d 794, 252 P.2d 279 (1953).

(49) Cf., 1 ORGEL 44, n.60; Phelps and Bishop "Enhancement in Condemnation Cases," 7 RIGHT OF WAY 8, 11 (1960); Board of Commissioners v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953); Gallimore v. State Hwy. & Public Works Comm. 241 N.C. 350, 85 S.E.2d 392 (1955).

(50) See, e.g., Broadway Coal Mining Co. v. Smith, 136 Ky. 725, 125 S.W. 157 (1910).

(51) See Annot., 145 A.L.R. 46 et seq.

(52) Wyona & St. Paul R. Co. v. Waldron Co., 11 Minn. 515 (1866) (Dissenting Opinion).

(53) Detroit v. Daly, 68 Mich. 503, 37 N.W. 11 (1888) (Dissenting Opinion).

(54) See, Enfield and Mansfield, "Special Benefits and Right of Way Acquisition", 25 APPRAISAL JOURNAL 551, 558-59, n.28 (1957).

(55) Ibid.

(56) Young v. Harrison, 17 Ga. 30 (1855).

(57) Eutaw v. Butnick, 150 Ala. 429, 43 S. 739 (1907).

(58) Compare the language in Broadway Coal Mining Company vs. Smith, 136 Ky. 725, 125 S.W. 157 (1910), where the court recognized the inconsistency and held that benefits may be neither set off against damages from the remainder nor against value from the part taken:

> "The person for whose benefit the land is taken should not be allowed to diminish this compensation by evidence of prospective benefits that the proposed improvement will confer upon the owner. The improvement is not made for the benefit of the owner of the land. He may, in fact be strongly opposed to it. In his opinion it may be of no advantage to him, and yet, according to the view of many courts, he must against his consent not only part with his land, but be paid for it in probable benefits. It is, too, a curious fact

that many courts, although holding to the view that benefits may be set off against direct injury to the remainder of the tract, refuse to permit these benefits to be set off against the damage caused by the loss of so much of the property as is actually taken for the improvement. Why this distinction should be made is not apparent. When it is conceded that the owner is entitled to compensation for the injury to the residue of his land - and upon this point there is entire unanimity of opinion - why should this injury be diminished by benefits, and yet benefits not be allowed to reduce the damage caused by the loss of the property actually taken? The injury to the owner, except in degree, is the same in both instances. The part taken is lost to him, and the

part remaining has been reduced in value. We therefore submit that there are only two positions that can be logically taken - one is that benefits may be set off against the injury whether it grow out of the loss of the land actually taken or the damage to the residue of the tract, and the other is that benefits should not be permitted in any state of case to diminish the actual loss sustained." (Emphasis added).

(59) 167 U.S. 548 (1897).

(60) 79 F.2d 139 (1935).

(61) McIntire v. State, 5 Ind. 384 (1840).

(62) Jones v. Clarksburg, 84 W.Va. 257, 99 S.E. 484 (1919).

(63) Hempstead v. Salt Lake City, 32 Utah 261, 90 Pac. 397 (1907).

(64) Henderson & N.R. Co. v. Dickerson, 17 Ky. 173 (1856).

(65) See n.58, supra.

(66) Phelps & Bishop "Enhancement in Condemnation Cases," 7 RIGHT OF WAY 8, 9 (1960).

(67) See, e.g., County of Ventura v. Thompson, 51 Cal. 577 (1877); People v. McReynolds 31 C.A. 2d 219, 87 P. 2d 734 (1939); L. A. County v. Marblehead Land Co. 95 Cal. App. 602, 273 Pac. 131 (1928).

(68) People v. McReynolds, 31 C.A. 2d 219, 87 P. 2d 734 (1939). But cf., Crum v. Mt. Shasta Power Corp., 117 Cal. App. 586, 609, 4 P.2d 564 (1931).

(69) 31 Cal. 367 (1866). See also Cal. Pac. R.R.Co. v. Armstrong, 46 Cal. 85 (1873).

(70) See Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040 (1902).

(71) See Study "Taking Possession and Passage in Eminent Domain Proceedings" (This series).

(72) Beveridge case at n. 70.

(73) See text at n. 78.

(74) Beveridge v. Lewis, 137 Cal. 619, 624-626, 67 Pac. 1040 (1902). Cf., Collier v. Merced Irr. Dist., 213 Cal. 554, 571, 2 P.2d 790 (1931); People v. McReynolds, 31 C.A. 2d 219, 87 P. 2d 734 (1939).

(75) See Beveridge opinion at 626, stating:

> "Often special benefits, which afford protection to the land, or will at once render it more productive, are taken into consideration in determining how much land not taken will be damaged. Only the arbitrary rule of the statute which requires separate findings of benefit and damage will prevent this. These are matters, however, which need not be determined in this case."

(76) See n. 61, supra.

(77) 43 C. 2d 13, 271 P. 2d 507 (1954).

(78) 117 Cal. App. 584, 609, 4 P. 2d 564 (1931).

(79) See Gilmore v. Central Maine Power Co., 127 Me. 522, 145 Atl. 137 (1929) where this argument apparently was raised; 1 ORGEL §93. See also, Note, 65 YALE L. J. 96, 103 (1955). Cf., McCORMICK, DAMAGES 524, 526 & n. 24.

(80) Ibid.

(81) 194 A.C.A. 536 (Aug. 1961).

(82) 145 A.L.R. at 103.

(83) See, 3.g., United States v. Crary, 2 F. Supp. 870 (1932); State v. Baumhoff, 230 Mo. App. 1030, 93 S.W. 2d 104 (1936); Cape Girardeau v. Hunze, 314 Mo. 438, 472-73, 284 S.W. 471 (1926); 18 AM. JUR., "Eminent Domain," §342.

(84) Enfield and Mansfield, "Special Benefits and Right of Way Acquisition", 25 APPRAISAL JOURNAL, 551, 556 (1957).