#36.52 3/20/72

Memorandum 72-27

Subject: Study 36.52 - Condemnation (Partial Take)

SUMMARY

This memorandum presents for Commission consideration material relating to compensating partial takings. The memorandum first discusses the valuation problems involved in compensating partial takings. The memorandum next discusses in detail the California law of partial takings and its defects; several recent California cases are attached. The memorandum then discusses the before-and-after test for compensating partial takings and compares this test with the California law. The memorandum finally presents the compromise test, a hybrid between California law and the before-and-after test, suggested at the January 1972 meeting. A draft statute of the compromise test is attached as Exhibit I. The memorandum finds basically that the compromise test, while not as satisfactory as the before-and-after test, is better than the existing California law and appears to be workable.

In connection with this memorandum, Memorandum 72-28 presents material relating to the larger parcel, a matter inextricably connected with compensation for partial takings. Also in connection with this memorandum, the first supplement to this memorandum presents a wealth of significant background material on partial takings, some of which is new and some of which the Commission has seen before. These materials should be read if at all possible since the decisions in the partial take area will be among the most difficult and most important the Commission makes.

BACKGROUND

The crux of the problems involved in compensating partial takes appears to be the fundamental fact that property "value" is far from certain:

> Every qualified valuation witness will affirm that the appraisal of real property is an inexact science. Market value cannot be fixed with exact mathematical precision, but formulae, rules, experience and study are necessary before the formulation of an intelligent opinion. There are three approaches to market value used by the professional appraisers:
>
> 1. The market data or comparative approach;
>
> 2. The cost approach; and
>
> 3. The income or capitalization approach.
>
> It is the general rule that the price paid at voluntary sales for similar land to that taken, at or about the time of taking, is admissible as independent evidence of the value of the land taken. [In California such sales are admissible to show the basis of the expert's opinion, not as independent evidence of value.]
>
> The market data approach to the value of real estate is the most widely used and best understood. [PLI, Real Estate Valuation in Condemnation-3d 80-81 (1972).]

The comparable sales approach is used in almost every appraisal of the value of real property and generally is the most satisfactory and reliable method of determining the value of property before the condemnation. See 7 P. Nichols, Eminent Domain § 13.01 (1971).

It is often difficult to obtain truly comparable sales of property where an entire parcel is being acquired because all the sales in the area are affected by the proposed project. The same problem is often presented in determining the value of the part taken in a partial taking.

The valuation of the remainder in a partial taking in its after condition--as affected by the project--presents an even more difficult problem:

> This appraisal must reflect the effect on a property of the removal of a portion and of the construction of the highway facility immediately adjacent. Theoretically the methodology of the after appraisal could

be exactly the same as that used to determine the value before. However, a search of the immediate area for recent sales of similarly affected properties will almost always yield no result. This is understandable because in more than 10 yr. of freeway construction in California, less than 40,000 remainder parcels have been created in the entire state; it has been estimated that far fewer than half of these have been sold, while still fewer represent valid and useable sales.

There is, of course, a next best solution. Sales from other areas, which are neither timely nor near in location, might provide some indication of freeway effect from which an appraiser could form an opinion of value. However, the courts have been understandably reluctant to admit as evidence sales which are not near in time or location and appraisers are reluctant to use substantiating data which will not be accepted in court. Their logic is clear; value is a function of time and location and any comparison of properties in different areas or sold at different times is error prone. [Highway Research Board, Highway Research Record, Land Acquisition 1963, 93 (1964).]

With this background on the basic problem involved in valuing partial takings of property, let us turn next to the California approach.

California rule. California appears to have sidestepped some of the problems involved in valuing property in its after condition by not valuing the remainder at all. Rather, the rule in California is that the property owner is awarded the value of the property taken plus any damages that will accrue to the part not taken by reason of its severance from the larger parcel and as a consequence of the construction of the project in the manner proposed by the plaintiff. If the construction of the property would impose benefits on the remainder, those benefits may be offset against the damages but not against the value of the part taken. Code Civ. Proc. § 1248.

While this approach presents the facade of avoiding a valuation of the property in its after condition, it is clear that, in order to determine the extent to which the property is harmed or benefitted as a consequence of the project, some sort of market data will be necessary. Indeed, it is permissible to show damages and benefits simply by proving the market value of the

property not taken before the taking and its market value after the taking, leaving the computation to the jury. People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943). Because the courts have been faced with comparability problems even under the California rule, they have developed several limitations on the compensability of items of damage and benefit and on the admissibility of evidence.

Damages

Under California law, the owner of property, a portion of which is taken by eminent domain, is entitled to recover damage to the remainder that will result from "its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff." Code Civ. Proc. § 1248(2). Thus, there are two basic elements involved in the determination of damage to the remainder--damage caused by the fact of severance (e.g., leaving a lot under the minimum zoned size) and damage caused by the operation of the project for which the property was taken (e.g., noise, dust, and fumes).

There has been little controversy over the first of these elements--damage caused by the fact of severance. Basically, where severance of the property destroys the highest and best use of the remainder, the damage thus caused is compensable. Thus, an owner is entitled to compensation for a change to a less profitable use of the remaining property where the remaining area cannot support physically the normal enterprise (City of La Mesa v. Tweed & Gambrell Mill, 146 Cal. App.2d 762, 304 P.2d 803 (1956)) or for a resulting irregular or distorted shaped parcel where the most economical subdivision of the remaining land might be precluded. See Southern Pac. R.R. Co. v. Hart, 3 Cal. App. 11, 84 P. 218 (1906).

The second element--damage caused by the operation of the project for which the property was taken--has been a focus of controversy and has spawned a host of rules limiting compensation. There appear to be five basic rules of limitation on the right to recover for consequential damages to remaining property. These rules are:

(1) Consequential damages will be allowed only for damages caused by construction on the portion taken from the defendant. People v. Symons, 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960). This rule has been eroded to the point that damages will be allowed if caused by the project for which the defendant's property was taken, regardless of the precise location of the offending portion of the project. See People v. Ramos, 1 Cal.3d 261, 460 P.2d 992, 81 Cal. Rptr. 792 (1969)(loss of access), and People v. Volunteers of America, 21 Cal. App.3d 111, Cal. Rptr. (1971)(highway noise damage)(this case is attached as Exhibit II and has been previously distributed).

(2) The damage must result from a disturbance of an existing property right, which the owner possesses in connection with his property and which gives an additional value to it. City of Los Angeles v. Geiger, 94 Cal. App.2d 180, 210 P.2d 717 (1949). For example, a person has no property right in a particular flow of traffic past his property, hence any decline in property value due to an alteration of the traffic flow is not compensable. People v. Gianni, 130 Cal. App. 584, 20 P.2d 87 (1933). Likewise, loss of public street parking privileges due to freeway construction is not compensable since such privileges are in the nature of a revocable license rather than a property right. People v. Presley, 239 Cal. App.2d 309, 48 Cal. Rptr. 672 (1966).

(3) Damages are allowed only for a decrease in the value of the property itself. Thus, loss of business or damage to good will is not compensable. City of Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal.

392, 153 P. 705 (1915); City of Stockton v. Marengo, 137 Cal. App. 760, 31 P.2d 467 (1934). Also, personal annoyance or discomfort is not compensable to the extent it does not affect the value of the property. Eachus v. Los Angeles Consol. Elec. R. Co., 103 Cal. 614, 37 P. 750 (1894).

(4) A property owner may recover only for those damages that are peculiar to him rather than those that the community as a whole must suffer. City of Berkeley v. Adelung, 214 Cal. App.2d 791, 29 Cal. Rptr. 802 (1963) (noise, dust, and fumes). However, a recent case has abandoned this general-special damage distinction, indicating that the proper test for compensability is whether the property owner is being asked to bear more than his fair share of the expense of the public project. People v. Volunteers of America, 21 Cal. App.3d 111, Cal. Rptr. (1971)(highway noise damage)(Exhibit II).

(5) Remote possibilities that are highly speculative and conjectural should not be considered. City of Los Angeles v. Geiger, 94 Cal. App.2d 180, 210 P.2d 717 (1949). Thus, unfounded fear of harm or of torts that may be committed in the future is not a proper basis of damages. Arnerich v. Almaden Vineyards Corp., 52 Cal. App.2d 265, 126 P.2d 121 (1942). But, if such potential injuries are reasonably likely to occur, they are compensable. Pacific Gas & Elec. Co. v. W. H. Hunt Estate Co., 49 Cal.2d 565, 319 P.2d 1044 (1957).

With the limitations outlined above, severance damages include all matters and conditions which may reasonably be expected to follow the location and operation of the improvement and affect the value of the land. City of Los Angeles v. Frew, 139 Cal. App.2d 859, 294 P.2d 1073 (1956). A precise listing of the items of damage that are compensable under this test is fruitless, for the possibilities are as potentially unlimited as the mind

of counsel is imaginative:

> Where a partial taking is effected by eminent domain, the general rule is that any element of damage which results in a diminution of value of the remainder area is a factor which must be considered. The different elements of damage to remaining land recoverable when part of a tract is taken are as numerous as the possible forms of injury. The mere fact that injuries will be temporary and incident to the period of construction only is no ground for disallowing recovery, since a purchaser might pay less if he knew such injuries were to be inflicted. The impracticality of attempting to enumerate all the possible elements of damage to remaining land that may be recovered is illustrated by a case involving the taking of land for a railroad, in which it was held that the tendency of gophers or squirrels to propagate on a railroad location may be considered as an element of damage to the remaining land, so far as it affects market value. [Footnote omitted.][4A P. Nichols, Eminent Domain § 14.24.]

Suffice it to say that some of the items typically held compensable are:

Increased operation costs. Dunbar v. Humboldt Bay Mun. Wat. Dist., 254 Cal. App.2d 480, 62 Cal. Rptr. 358 (1967).

Noise. City of Oakland v. Nutter, 13 Cal. App.3d 752, 92 Cal. Rptr. 347 (1970).

Vibration. Los Angeles County Flood Cont. Dist. v. So. Cal. Bldg. & Loan Assn., 188 Cal. App.2d 850, 10 Cal. Rptr. 811 (1961).

Flood hazard. Colusa & Hamilton R.R. v. Leonard, 176 Cal. 109, 167 P. 878 (1917),

Necessity for fencing. Butte County v. Boydston, 64 Cal. 110, 29 P. 511 (1883).

Impairment of light and air. People v. Al. G. Smith Co. Ltd., 86 Cal. App.2d 308, 194 P.2d 750 (1948).

Impairment of view. People v. Symons, 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960).

Specific items of damage that have been held noncompensable include primarily those previously indicated--that are remote or speculative, that are not damages to the "property itself," that do not involve a "property right,"

or that are general to the community. Whether a particular item of damages is compensable or not, then, will depend on the particular facts of the case, such as the certainty with which the harm will result and its particular impact upon the defendant. The same item of damage has been held in some cases to be compensable and in others to be noncompensable. Compare San Benito County v. Copper Mountain Mining Co., 7 Cal. App.2d 82, 45 P.2d 428 (1935), with Hemmerling v. Tomlev, Inc., 67 Cal.2d 572, 63 Cal. Rptr. 1 (1967) (loss of water or water rights); compare Beckham v. City of Stockton, 64 Cal. App.2d 487, 149 P.2d 296 (1944), with People v. O'Connor, 87 P.2d 702 (1939) (traffic hazards); compare City of Berkeley v. Adelung, 214 Cal. App.2d 791, 29 Cal. Rptr. 802 (1963), with People v. Volunteers of America, 21 Cal. App.3d 111, Cal. Rptr. (1971)(noise); compare City of Fresno v. Hedstrom, 103 Cal. App.2d 453, 229 P.2d 809 (1951), with County of Los Angeles v. Sullivan, 32 Cal. App. 325, 162 P. 907 (1916)(fear of harm).

Perhaps the area of greatest uncertainty and conflict is the application of the rules governing compensability to impairment or loss of access. An owner of property abutting on a public street has not only the public right to use the street, but possesses a private right of ingress and egress to and from the property which, if destroyed or substantially impaired, entitles him to damages. People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943); Breidert v. Southern. Pac. Co., 61 Cal.2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964). The extent of this right is limited to that which is reasonably necessary, giving consideration to all the purposes for which the property is available and adaptable. Rose v. State, 19 Cal.2d 713, 123 P.2d 505 (1942). Thus, the determination whether the right of access has been substantially

impaired is necessarily a factual one and often gives rise to seemingly opposite results in similar fact situations. Compare People v. Giumarra Vineyards Corp., 245 Cal. App.2d 309, 53 Cal. Rptr. 902 (1966), with People v. Wasserman, 240 Cal. App.2d 716, 50 Cal. Rptr. 95 (1966)(added travel distance to commercial property). The determination of damages where a substantial impairment exists is also difficult since damages are often sought for business losses (Holloway v. Purcell, 35 Cal.2d 220, 217 P.2d 665 (1950)) and for decreased traffic flow (People v. Ayon, 54 Cal.2d 217, 352 P.2d 519, 9 Cal. Rptr. 151 (1960)), neither of which is compensable under the guise of deprivation of access to property.

Benefits

The statutory mandate in offsetting benefits against damages is to determine the amount by which the remainder "will be benefited, if at all, by the construction of the improvement in the manner proposed by the plaintiff." Code Civ. Proc. § 1248(3).

Not all benefits may be offset against damages, however. The courts have held that only special, as distinguished from general, benefits may be considered. Beveridge v. Lewis, 137 Cal. 619, 67 P. 1040 (1902). General benefits are those that are common to the community generally while special benefits are peculiar to the land in question. County of Los Angeles v. Marblehead Land Co., 95 Cal. App. 602, 273 P. 131 (1928). It has also been frequently stated that special benefits result from the mere construction of the improvement while general benefits result from advantages conferred by the operation of the improvement although this concept has been virtually ignored in recent decisions. See, e.g., People v. Giumarra Farms, Inc., 22 Cal. App.3d 98, Cal. Rptr. (1971)(attached as Exhibit III). A final limitation on the offset of benefits is that they be reasonably certain to result from the construction of the work. People v. McReynolds, 31 Cal. App.2d 219, 87 P.2d 734 (1939). It should be noted, moreover, that a reasonably certain benefit may be considered even if it is likely to be relatively impermanent--its duration affects the value of the benefit rather than its existence. People v. Thomas, 108 Cal. App.2d 832, 239 P.2d 914 (1952); People v. Edgar, 219 Cal. App.2d 381, 32 Cal. Rptr. 892 (1963).

The application of these principles in the cases has not been uniform and has been criticized as causing confusion in Gleaves, Special Benefits in Eminent Domain: Phantom of the Opera, 40 Cal. S.B.J. 245 (1965)(attached to the

First Supplement to Memorandum 72-27). As with severance damages, the classification of benefits as general or special is heavily dependent upon particular fact situations. The same type of benefit may be considered special in one case and general in another. A remarkable illustration of this point can be found in a publication of the Highway Research Board, Recognition of Benefits to Remainder Property in Highway Valuation Cases (1970). On pages 4-7, the report details items that have been considered special in nature and items that have been considered general in nature in the various jurisdictions. Of the approximately 50 items listed as special benefits, about half are also listed as general benefits, including improved access, cattle passes, improved drainage, new highway frontage, hard surface roads, interchange, and increased traffic.

Special benefits have been found by the California appellate courts in some of the following typical fact situations:

New access. County of Los Angeles v. Marblehead Land Co., 95 Cal. App. 602, 273 P. 131 (1928).

Improved access. People v. Hurd, 205 Cal. App.2d 16, 23 Cal. Rptr. 67 (1962); People v. Bond, 231 Cal. App.2d 435, 41 Cal. Rptr. 900 (1964).

Physical improvement to land. Los Angeles County Flood etc. Dist. v. McNulty, 59 Cal.2d 333, 379 P.2d 493, 29 Cal. Rptr. 13 (1963)(drainage ditch); Sacramento & San Joaquin Drainage Dist. v. W. P. Roduner Cattle & Farming Co., 268 Cal. App.2d 199, 73 Cal. Rptr. 733 (1968)(drainage ditch); People v. Thomas, 108 Cal. App.2d 832, 239 P.2d 914 (1952)(fencing).

Creation of higher use. People v. Hurd, 205 Cal. App.2d 16, 23 Cal. Rptr. 67 (1962)(increased probability of rezoning).

Increased traffic flow. City of Hayward v. Unger, 194 Cal. App.2d 516, 15 Cal. Rptr. 306 (1961).

Concentration and funneling of traffic. People v. Giumarra Farms, Inc., 22 Cal. App.3d 98, Cal. Rptr. (1971).

Abandonment of public road. People v. City of Los Angeles, 220 Cal. App.2d 345, 33 Cal. Rptr. 797 (1963)(reversion of fee).

Improved fishing, swimming, flood control. Dunbar v. Humboldt Bay Mun. Water Dist., 254 Cal. App.2d 480, 62 Cal. Rptr. 358 (1967).

Site prominence. People v. Edgar, 219 Cal. App.2d 381, 32 Cal. Rptr. 892 (1963). But contrast People v. Loop, 127 Cal. App.2d 786, 274 P.2d 885 (1954); People v. Lipari, 213 Cal. App.2d 485, 28 Cal. Rptr. 808 (1963).

Other Aspects

The California rule, with its judicial gloss, presents numerous other problems compared to which the determination of damages and benefits is elementary.

(1) Mechanical problems. To require an appraiser to estimate the value of property, taking into consideration only some of the factors that affect its value and disregarding other important factors, makes a difficult task nearly impossible, particularly if there are no real comparable sales upon which to base an opinion. Moreover, by requiring separate assessments of the part taken and damage to the remainder, the California rule has spawned a whole host of mechanical valuation problems chronicled at length in Connor, Valuation of Partial Taking in Condemnation: A Need for Legislative Review, 2 Pac. L. J. 116, 126-134 (1971).

One such mechanical problem is the measurement of the value of the property taken as "unaffected" by the project for which it is taken. The extent to which knowledge of the project affects the value of the property, by way of enhancement or blight, is a complex area in which there are

several recent Supreme Court decisions. See, e.g., Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971). A related problem is whether a taking of additional property subsequent to the original acquisition permits consideration of value changes due to the influence of the project. Cf. People v. Miller, 21 Cal. App.3d 467, Cal. Rptr. (1971). These problems also arise in valuing a total take. For this reason, the staff plans to present the problem for full consideration at another time.

Another mechanical problem, but one that is unique to partial takings, is illustrated by the following situation. The defendant owns a piece of property bordering on a public road. The property frontage is more valuable than the rear of the property. A condemnor takes the frontage for a road widening, moving the frontage rearward on the lot. The defendant claims compensation for the frontage taken at frontage value even though he may be left with a remainder having a value in excess of the value of the original lot since it still has frontage and, in addition, is now on a principle thoroughfare.

California law has treated this situation in two different ways--compensating the defendant for the property taken at an averaged value rather than at frontage value (City of Los Angeles v. Allen, 1 Cal.2d 572, 36 P.2d 611 (1934)) and compensating the defendant at the frontage value (People v. Silveira, 236 Cal. App.2d 604, 46 Cal. Rptr. 260 (1965)). The holdings of these two cases are reconciled in the recent decision, People v. Corporation etc. of Latter-Day Saints, 13 Cal. App.3d 371, 91 Cal. Rptr. 532 (1970) (attached as Exhibit IV). The conclusion reached by the court in that case is that, where the property taken is of a size and shape that is independently

saleable as an individual parcel, it is valued at its independent sale value. But where the property taken is of such size and shape that it is not independently saleable as an individual parcel, it is valued as a part of the larger parcel, i.e., at an average value.

(2) Compensation problems. Perhaps more serious than these mechanical problems generated by the California rule are basic defects in the way it compensates property owners for partial takings. On the one hand, it denies to property owners recovery for real damage to property value on the basis that certain types of damage are noncompensable. This was the focus of contention in the Volunteers of America case (21 Cal. App.3d 111, Cal. Rptr. (1971)(Exhibit II), which ultimately breached the rule that noise damage general to the community is not compensable, noting that the decisive consideration in compensation is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.

On the other hand, the California rule denies to condemnors the right to set off against damages some types of benefit to remainder property on the basis that the benefits are "general." This was the focus of contention in People v. Giumarra Farms, Inc., 22 Cal. App.3d 98, Cal. Rptr. (1971) (Exhibit III), which ultimately held that a unique combination of traffic and access conferred on remainder property by a highway construction project could be considered a special benefit. Thus, there results under the California rule the anomalous situation that diversion of traffic toward property may be charged to the owner while diversion away from property is not compensable.

The California rule also denies to condemnors the ability to set off benefits conferred on the remainder against the part taken. This may result

in double compensation to a property owner--compensation for the value of the part taken in the form of cash and an equal or greater amount of compensation in the form of enhanced value to the remainder.

(3) Summary. In its effort to avoid some of the speculation involved in compensating partial takings, the California law appears to encapsule the worst of two possible worlds--it fails to compensate adequately or fairly and, in avoiding some valuation problems, it has spawned worse ones. What are the alternatives?

BEFORE-AND-AFTER TEST

At recent Commission meetings, the staff has presented its alternative --the before-and-after test. This test basically concentrates on arriving at a fair measure of valuation as between condemnor and property owner by measuring the difference between the value of what the property owner had to start with and the value of what is left and awarding him the difference, if any.

> The question for the tribunal which makes the award is merely how much less is the tract as a whole worth with a piece taken out of it (or an easement established over or through it), than it was worth before the dismemberment. It necessarily follows that, in determining the value of the property after the taking (for the purpose of estimating the amount of depreciation), the tribunal which assesses the damages is bound to take into consideration every element which a purchaser willing but not obliged to buy would consider. The separate items may be considered not as specific items of loss, but merely with respect to their effect upon market value. In any event, the after value may not be determined by deducting the aggregate of all damages from the before value.
>
> One of the elements to be considered is the use to which the land taken is to be devoted, if it is such a use as to have an injurious effect upon adjacent land. Consequently, the condemnor is bound to pay for damages stemming from construction and operation of its works, which would not by themselves constitute a taking of adjacent property in the constitutional sense, or even be actionable at common law, and which are not necessarily special and peculiar to the property affected. Thus, when part of a tract is taken for a highway, and as part of the original construction the grade is changed, the injury resulting therefrom is a

> proper element of damages. There are decisions that an injury to remaining land cannot be considered if it is one suffered by the general public, or shared with those whose land was not taken. These decisions, however, seem hardly consistent with the principle that all damages which affect market value can be considered. The only damages which need not be considered are those which are too remote and fanciful to affect present market value, and those which, although caused by the construction or operation of the public improvement in question, do not arise from the taking of the particular property which is the basis of the claim. [4A P. Nichols, Eminent Domain § 14232 (1971)(footnotes omitted).]

To the extent that the comparable sales approach is to be used in determining the "after" value, the test presents the difficult, if not impossible, problem of finding comparable sales for valuing the remainder in its after condition. Thus, the before-and-after test may result in a heavier reliance on the income-capitalization approach and the reproduction approach and may require use of sales that are not in the immediate area of the proposed project. Accordingly, in some cases, it may open the door for limited speculation as to the effect of the project on the remainder but, as Nichols points out, most jurisdictions utilizing a before-and-after test limit the admissibility of appraisals based on overly remote and speculative considerations. At least one commentator feels that such speculation based on market data is far better than unsupported valuation estimates of damage and benefit that are now used under the present rules:

> Just as Courts have indicated that the market data (comparable sales) approach is the most satisfactory method of determining the value of the property before the improvement, sales of similar properties can be equally valuable in determining the value of the remainder.
>
> * * * * *
>
> Characteristics of the sale property such as size, shape, terrain, distance from the subject remainder, and time of the sale must be examined to determine comparability.
>
> * * * * *
>
> In essence, the argument is that evidence of comparable sales is a preferable means of estimating the value of the remainder than to

> exclude such evidence and rely totally on some less reliable approach to value. The unsupported opinion of the appraiser that the remainder will sell for more or less as a result of the construction or proposed construction of the improvement carries far less weight if unsupported by market data. [Highway Research Board, Recognition of Benefits to Remainder Property in Highway Valuation Cases 11 (1970).]

Advantages of Before-and-After Test

The before-and-after test eliminates numerous problems in valuing the remainder by simply looking to its market value, including all reasonably certain consequences of the project.

As an example of the simplified operation of the test, the Silveira problem, where there exist varying zones of value within one parcel, is eliminated. The test, rather than to place an average value or a zone value on the property taken, looks to the value of the whole and then to the value of the remainder and awards the defendant the difference, if any.

Another example of the simplified operation of the test occurs where there are joint public projects affecting the value of the remainder. This occurs frequently where a public entity commences a project since others often plan concurrent projects. This was the case, for instance, in People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959). There the construction of a freeway by the state necessitated street changes by the city which resulted in the taking of an easement by the city over the defendant's land. In such a case, the defendant may recover only for damages caused by the project for which his property is taken, and only benefits created by that project may be offset. Cf. County of Santa Clara v. Curtner, 245 Cal. App.2d 730, 54 Cal. Rptr. 257 (1966), and People v. Curtis, 255 Cal. App.2d 378, 63 Cal. Rptr. 138 (1967). This presents an intricate task of separating out which benefits and damages are precisely caused by which project, which may be impossible to do with integrated projects.

The before-and-after test eliminates this problem because it calls for a consideration of all factors that affect market value as of the date of valuation, including the effect of related projects, and the test calls for consideration of all consequences of the project, including the need for or probability of related projects.

To a large extent, this difference between California law and the before-and-after test will be minimized if condemnors make use of joint powers agreements to condemn property jointly, as provided for in Section 1240.060 of the Eminent Domain Law. In such a case, the rule would be the same under both tests--all the damages and benefits caused by the joint project can be considered.

The basic arguments for a before-and-after test, then, are that, even though it may allow some leeway and speculation in determining value based on comparable sales, it eliminates many other mechanical problems involved in valuation and provides a fair measure of compensation as between the parties. "[T]he simplicity of application of the before and after rule commends itself to the courts as the method most likely to attain a result that is fair both to the condemnor and the condemnee." 4A P. Nichols, Eminent Domain § 14.232(a).

Disadvantages of Before-and-After Test

The before-and-after test, while simpler than the California rule in operation, is not a panacea, for it presents some of the same difficulties the California rule presents plus some difficulties not present under the California rule.

The problem of valuing the property in its "before" condition unaffected by the project is present with the before-and-after test as well as under the California rule.

One other negative aspect of the before-and-after test requires mention. It has been stated that the offsetting of general benefits places the condemnee at a disadvantage vis-a-vis his neighbors since property owners generally are not assessed those benefits.

This is true. However, the before-and-after test provides an automatic equalizer in that the condemnee is compensated for general damages that his neighbors do not recover. Moreover, the object of the before-and-after test is to make the condemnee whole. One who has had his property totally taken is denied the benefits his neighbors reap, and there appears to be no injustice in that. One who has had his property partially taken is placed in as good a position as he would have been had his whole property been taken.

The benefits conferred by a public project are almost always extensive and immeasurable. A freeway affects not only land values in its vicinity but affects in more subtle ways the profits of General Motors and Standard Oil. It is the object of a public improvement to confer benefits to the general public. In this sort of situation, the best that can be done is to provide a full measure of indemnity as between the condemnor and condemnee. In drafting a new eminent domain statute, it is hopeless to attempt to achieve parity between property owners and others--some of whom are damaged and some of whom are benefited--through manipulation of the valuation formula. This was also the view of the California Supreme Court in San Francisco, A. & S. R.R. v. Caldwell, 31 Cal. 367 (1866), an early case adopting a strict before-and-after test (see excerpts from this decision on pages 44-46 of A Study Pertaining to Benefits in Eminent Domain Proceedings (1961), attached to the First Supplement to Memorandum 72-27).

Compensation Under Before-and-After Test Compared With California Rule

What factors are considered in a before-and-after test that would not be considered under the California test? The before-and-after test does not purport to redefine the scope of the project but permits compensation to the remainder for all effects of the project for which the property was taken. The before-and-after test does not itemize damages or benefits but subsumes all damages and benefits in valuing the remainder in its after condition. As such, it takes into consideration all damages whereas the California rule considers only those damages that are special, that involve a property right, that affect property value, and that are reasonably certain. It should be noted, however, that this theoretical difference boils down to very little practical difference, for most jurisdictions that employ the before-and-after rule do so only as to factors that are reasonably certain, not remote and speculative, and only as to property value rather than business losses. As a consequence, the before-and-after test would encompass such items of damage as diversion of traffic and minor impairments of access to the extent that they are reflected in property value which go currently uncompensated in California. Likewise, damages that may be "general" in California, such as noise, dust, and fumes, would be compensated--although California appears to be moving in this direction also.

On the benefit side, the before-and-after test would not attempt to distinguish between general and special benefits but would encompass any benefit to property that had an impact on its fair market value.

The obvious advantages of the before-and-after test over the California test are that it is simpler to administer, it provides a more accurate measure of value, and it provides consistency of result. It is the conclusion of

Beatty, The Eminent Domain Procedure Act, 32 Kans. Bar Ass'n J. 125 (1963) (an excerpt of which is attached to the First Supplement to Memorandum 72-27), that the compensation changes between a rule like the California rule and the before-and-after test are not that earthshaking in most cases but that the simplicity of the test made it far superior.

Another advantage is that it permits the setoff of benefits against the value of the take, a concept that has been argued for by nearly all commentators. See Connor, Valuation of Partial Taking in Condemnation: A Need for Legislative Review, 2 Pac. L.J. 116 (1971)(attached to the First Supplement to Memorandum 72-27); Note, Benefits and Just Compensation in California, 20 Hastings L.J. 764 (1969); Haar and Hering, The Determination of Benefits in Land Acquisition, 51 Cal. L. Rev. 833 (1963); see also the study pertaining to benefits in eminent domain proceedings prepared for the Commission by its consultant in 1961 (special benefits but not general benefits should be offset against the part taken)(attached to First Supplement to Memorandum 72-27).

With respect to this last advantage, the Commission has expressed fear that the before-and-after test will create such great potentialities for speculation that a property owner may well be denied his just compensation.

COMPROMISE TEST

At the January 1972 meeting, the Commission requested the staff to attempt to draft a statutory scheme which we will call the compromise rule. This rule is basically to compensate the property owner for the part taken and to apply a before-and-after test to the remainder so that all benefits are offset against all damages but not against the value of the part taken. Further, the condemnor has the option to apply a full before-and-after test,

allowing benefits to be offset against the value of the part taken; but, in this case, the property owner may compel a taking of the whole and have it valued as such. The object of this option scheme is to achieve the fairness and simplicity of the before-and-after test with restraints on the possibility of speculation as to value. Thus, under this rule, the defendant is entitled to have all damages to the remainder recognized, and the plaintiff is entitled to have all benefits to the remainder recognized. But the defendant will always have inviolate the value of the part taken, no matter how wild the speculation over the value of the remainder may be. The plaintiff is given something, too--if it believes that the benefits it is conferring on the remainder are sufficiently great, it can request a full before-and-after test, thus enabling it to offset benefits against the part taken. In such case, if the defendant believes the alleged benefits are mere speculation, he can compel the taking of the whole property, leaving the plaintiff to garner the profit, if any, on the remainder.

How will this scheme operate in practice? Since the basic measure of valuation is the value of the part taken, plus damages to the remainder measured on a before-and-after basis, there will have to be three appraisals--the part taken and the remainder before and after--unless, of course, the defendant waives severance damages, which is not likely in those cases that the plaintiff choses not to employ a before-and-after test. This approach is also less satisfactory than a full before-and-after test in that it retains many of the mechanical problems inherent in measuring the before value of the part taken. It also retains the present feature of a windfall to the property owner where great benefits are bestowed. It does, however, make a simpler and more equitable valuation of the remainder than under present California law.

If the plaintiff elects to employ a full before-and-after test, it is subject to the risk that the defendant will force a taking of the whole parcel. There is evidence that excess property is difficult to dispose of: The Division of Highways indicates that, between 1964 and 1969, it acquired excess properties (remnants) at a cost of $45.6 million, which it was able to sell at a project-enhanced value of $48.0 million, for a paper profit of $2.4 million. But since overhead costs of sale were $5.8 million, the division suffered a net loss on excess lands of $3.4 million. The division still has a large inventory of excess lands on its hands which it has been attempting to reduce, apparently somewhat ineffectually according to the Little Hoover Commission report (a copy of the report is attached to the First Supplement to Memorandum 72-27). However, the risk of disposal of land taken pursuant to the defendant's request under the compromise proposal would be minimal. Ordinarily, the remainder taken will be more than a mere remnant. Usually, the land acquired will be land whose value is substantial due to benefits conferred by the project. Otherwise, the plaintiff would not have elected a before-and-after test in the first place. This will be especially true if the remainder is an independent parcel, brought in under the "integrated use" test of the larger parcel. Such land should be relatively easy for it to dispose of.

The risk is present nonetheless and, because the taking and disposal of excess land is a burden, the plaintiff may be discouraged from making use of the before-and-after test in cases where it is bestowing great benefits as well as in ordinary cases where it might wish to use the test because of its simplicity of administration.

It is difficult to say whether the plaintiff's taking the whole parcel upon the defendant's demand is a public use in the classical sense. This

sort of situation is unique. However, in an analogous situation, it does not offend the public use doctrine for a condemnor to take a fee interest where it plans to use only a lesser interest. Moreover, the taking would serve the public purpose of avoiding extensive severance damage trial costs, would insure that the plaintiff recoups any benefits provided, and would benefit the property owner who does not wish to be left with a remainder or who believes that he will not obtain a fair trial on remainder value. Although the Supreme Court has held that none of these factors alone is sufficient to constitute a public use--cf. People v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968)--it is likely that the combination of these factors in a situation where the defendant has the option to retain the property if he wishes would amount to a public use. The Rodoni case indicated that:

> It is for the Legislature to determine what shall be deemed a public use for the purposes of eminent domain, and its judgment is binding unless there is no "'possibility the legislation may be for the welfare of the public.'" [68 Cal.2d at 210, 436 P.2d at , 65 Cal. Rptr. at .]

The compromise solution also presents procedural problems. Under present condemnation procedure, the plaintiff indicates the larger parcel in its complaint, and the defendant claims damage to the remainder in the answer. The Commission has tentatively decided, however, to omit these pleading requirements as premature and to require the assertion of claims at some later stage of the proceedings not yet specified. In this connection, it is advisable to also designate that stage of the proceeding as the stage at which the plaintiff must elect the before-and-after test if it so desires, and the defendant must exercise his option to compel the whole taking. This will insure the maximum coordination for appraisal purposes. Time limits are proposed in the draft statute (Exhibit I).

Under the proposed time limits, the defendant may claim damage within 10 days following the determination of the larger parcel, which may occur up to 45 days prior to trial under the staff draft bifurcation provisions. The plaintiff may exercise the before-and-after option within 10 days thereafter. And the defendant has 10 days following the plaintiff's option to require a taking of the whole. This means that it is in theory possible that the parties will learn that the trial will be as to the whole property within 15 days of trial. If this time is not adequate for preparation, the trial can be delayed.

One final item requires mention. The compromise proposal as drafted follows the California rule of allowing damage for only alteration of the fair market value of the property and does not include damages for losses to business. This limitation is based on the concept that the condemnor need pay only for what he takes rather than for damages to the defendant. The Commission may wish to expand the items of damage recoverable beyond the traditional concept of damage to the "property itself" in order to cover other "incidental" losses. However, this is a general valuation problem that the staff plans to take up in depth at a later time.

What, then, is the staff's evaluation of the compromise proposal? Because it is a compromise, it is certain to please neither condemnors nor condemnees. It is more complicated, and the procedure is more complex than a straight before-and-after test. Yet the compromise proposal does have the merits of being a little simpler to administer than the present rule and of affording a more equitable measure of compensation. It appears to be basically fair as between the opposing parties. And, despite a few mechanical

difficulties, it appears to be workable. Although the staff would prefer to see a straight before-and-after test, we would prefer the compromise proposal over existing California law.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

Memorandum 72-27

EXHIBIT I

CHAPTER 5. JUST COMPENSATION

Article 1. General Provisions

§ 1245.010. Definitions

1245.010. As used in this chapter:

(a) "Date of valuation" means

(b) "Fair market value" means

(c) "Highest and best use" means

Comment. These terms are used in the draft statute, but their definitions have not yet been drafted.

§ 1245.120. Measure of compensation for partial taking

1245.120. Except as provided in Sections 1245.130 and 1245.140, the measure of compensation for an acquisition by eminent domain of part of a larger parcel is the fair market value of the part taken on the date of valuation.

Comment. Section 1245.120 provides the basic measure of compensation for a partial taking of property. Exceptions to this rule are where the defendant claims damage to the remainder (Section 1245.130) and where the plaintiff elects the measure of compensation provided in Section 1245.140 (before-and-after test).

"Larger parcel" is defined in Section , and "fair market value" and "date of valuation" are defined in Section 1245.010.

This measure of value codifies the rule under former Code of Civil Procedure Section 1248(1) where the defendant waived severance damage.

Matters for future consideration:

(1) Effect of enhancement and blight.

(2) Compensability of "incidental" damage.

(3) Retention of Silveira rule.

(4) Treatment of improvements and fixtures.

§ 1245.130. Claim of damage to remainder; measure of compensation

1245.130. (a) If a plaintiff seeks to acquire by eminent domain part of a larger parcel, the defendant may claim damage to the remainder. Such claim shall be made by notice filed and served on the plaintiff no later than 45 days prior to trial of the issue of compensation or, if a hearing to determine the larger parcel is held, no later than 10 days following such determination.

(b) Except as provided in Section 1245.140, the measure of compensation where the defendant claims damage to the remainder as provided in this section is the greater of the following:

(1) The fair market value of the part taken on the date of valuation; or

(2) The amount by which the fair market value of the larger parcel on the date of valuation exceeds the fair market value of the remainder on the date of valuation as affected by the project for which the property is taken. In determining the fair market value of the remainder as affected by the project, all consequences of the project as planned that are reasonably certain and that enhance or diminish such value shall be considered, regardless of the location of the project with respect to the remainder.

Comment. Section 1245.130 provides new rules for claiming damage to the remainder and for determining the compensation where such damage is claimed in an eminent domain partial taking case.

Subdivision (a). Former law required the defendant in an eminent domain proceeding to claim any damages to the remainder in his answer. See former Code Civ. Proc. § 1246.

Subdivision (a) provides the defendant more time to make the claim of severance or consequential damage but limits the time to 45 days preceding the trial of compensation matters. Where the issue of the larger parcel is heard pursuant to Section 1260. , the defendant has 10 days within which to make his claim.

Subdivision (b). Subdivision (b) provides in essence that, where the defendant claims damage to the remainder, he is entitled to recover the difference between what he had before the taking and what he had after the taking, but in no case shall he recover less than the value of the part taken. It is another way of estimating the value of the part taken plus damage to the remainder, the rule formerly provided by Code of Civil Procedure Section 1248. Subdivision (b) differs from the former rule in that it does not require a separate estimation of damage and benefit to the remainder, but looks simply to its decline in value on a market value basis. The operation of this before-and-after test is described more fully in the Comment to Section 1245.140.

The measure of compensation provided in this section does not apply if the plaintiff makes the election specified in Section 1245.140 (strict before-and-after test with no minimum recovery for defendant).

The "larger parcel" is defined in Section ., and "fair market value" and "date of valuation" are defined in Section 1245.010.

Matters for future consideration:

(1) Same matters as those listed under Section 1245.120.

(2) Integration of damage claim time limits with pretrial conference time limits.

(3) Constitutional limitation on offsetting benefits where property taken for right of way or reservoir by private condemnor.

(4) Order of proof.

(5) Form of jury verdict.

§ 1245.140. Election of before-and-after test; right to compel taking of larger parcel

1245.140. (a) If a plaintiff seeks to acquire by eminent domain part of a larger parcel, the plaintiff may elect to apply the measure of compensation provided in this section. Such election shall be made by notice filed and served on the defendant no later than 45 days prior to trial of the issue of compensation or, if a hearing to determine the larger parcel is held, no later than 10 days following such determination; except that, if the defendant claims damage to the remainder as provided in Section 1245.130, the plaintiff has an additional 10 days following service of notice of the claim in which to make such election.

(b) Notwithstanding Sections 1245.120 and 1245.130, the measure of compensation where the plaintiff makes the election provided in this section is the amount by which the fair market value of the larger parcel on the date of valuation exceeds the fair market value of the remainder on the date of valuation as affected by the project for which the property is taken. In determining the fair market value of the remainder as affected by the project, all consequences of the project as planned that are reasonably certain and that enhance or diminish such value shall be considered regardless of the location of the project with respect to the remainder. For the purpose of this section, if the fair market value of the remainder as affected by the project exceeds the fair market value of the larger parcel, the measure of compensation is zero.

(c) If the plaintiff makes the election provided in this section, the defendant may require, by notice filed and served on the plaintiff within 10 days following receipt of the notice of election, that the plaintiff take the larger parcel. In this case, the measure of compensation is the fair market value of the larger parcel on the date of valuation.

Comment. Section 1245.140 provides an optional scheme for valuing partial takings of property new to California eminent domain law.

Subdivision (a). The optional valuation scheme provided in this section comes into play only if the plaintiff elects to take advantage of it. The plaintiff may make its election any time up to 45 days before trial of the issue of compensation unless a hearing on the larger parcel is held pursuant to Section 1260. , in which case the plaintiff must make the election within 10 days following the court's decision. In addition, if the defendant claims damage to the remainder within 10 days of the time the plaintiff is required to make the election, the plaintiff may have 10 days following service of the defendant's notice in which to make his election.

Subdivision (b). Subdivision (b) provides that, if the plaintiff takes advantage of the option, it may have the partial taking valued on a before-and-after basis. That is, the fair market value of the property as a unit unaffected by the project for which it is taken is first measured and then the fair market value of the remainder as affected by the project is measured, and the defendant is awarded the differrnce between the two values. This rule differs from former California law as provided in Code of Civil Procedure

Section 1248 in several significant ways. Under former law, the value of the part taken, the damage to the remainder, and the benefits to the remainder were separately assessed; under this section they are not. (But see People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943), permitting lump-sum valuation of the remainder in its before-and-after condition.) Under former law, benefits to the remainder could not be set off against the value of the part taken; under this section they may be. (But see San Francisco, A. & S.R.R. v. Caldwell, 31 Cal. 367 (1866), an early case before present Section 1248 permits offset of benefits against value of part taken.) Under former law, as construed by the cases, only certain damages and certain benefits to the remainder could be considered; under this section all damages and all benefits that are not remote or speculative must be considered. (But see People v. Volunteers of America, 21 Cal. App.3d 111, Cal. Rptr. (1971), and People v. Giumarra Farms, Inc., 22 Cal. App.3d 98, Cal. Rptr. (1971), cases expanding the damages and benefits that may be considered.) For analyses of some of the numerous California cases that are overruled under this section; see, e.g., Gleaves, Special Benefits in Eminent Domain: Phantom of the Opera, 40 Cal. S.B.J. 245 (1965); Note, Benefits and Just Compensation in California, 20 Hastings L.J. 764 (1969); Connor, Valuation of Partial Taking in Condemnation: A Need for Legislative Review, 2 Pac. L.J. 116 (1971).

It should be noted that, if the fair market value of the remainder as affected by the project exceeds the fair market value of the whole property in its original condition, the defendant is not assessed the difference but is awarded zero compensation.

The compensation available under this section is based upon the value of the remainder as affected by the project for which the part taken was acquired. Under this rule, the damaging or benefitting portion of the project need not be physically located on the property taken; rather, the effects of the project as a whole on the remainder are considered. Cf. People v. Ramos, 1 Cal.3d 261, 460 P.2d 992, 81 Cal. Rptr. 792 (1969); People v. Volunteers of America, 21 Cal. App.3d 111, Cal. Rptr. (1971).

The "larger parcel" is defined in Section , and "fair market value" and "date of valuation" are defined in Section 1245.010.

Subdivision (c). Where the plaintiff elects to apply the before-and-after test, the defendant may require the taking of the whole property provided he makes a timely demand. This provision is new to California law. For an analysis of the law governing compensation for a taking of the defendant's whole property, see Comment to Section 1245.

Matters for future consideration:

(1) Same matters as those listed under Section 1245.120 with the exception of the Silveira problem.

(2) Integration of election time limits with pretrial conference time limits.

(3) Constitutional limitation on offsetting benefits where property taken for right of way or reservoir by private condemnor

(4) Integration of method of valuing whole with measure of compensation for total taking (not yet drafted).

(5) Delay of trial if options exercised so that there is insufficient time for trial.

Memorandum 72-27

EXHIBIT II

[Civ. No. 27477. First Dist., Div. One. Nov. 15, 1971.]

THE PEOPLE EX REL. DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent, v. VOLUNTEERS OF AMERICA, Defendant and Appellant.

SUMMARY

In an action to condemn a narrow strip of a single parcel of defendant's property in connection with the building of a new freeway, defendant's proffered evidence of severance damages with respect to the remainder of the parcel was excluded. Such evidence related to the diminution in the value of the remainder of the parcel caused by noise emanating from the use of the freeway that would render the premises uninhabitable and unusable, that would reduce the highest and best use of the property from multiple housing to low grade residential or commercial, and that would depreciate its value from $3 to $1.50 per square foot. The court's basis for excluding the proffered evidence was that the freeway itself, which at that point was to be elevated, was not to be built over the condemned strip, but beyond it. The strip was merely to be fenced off as an integral part of the right of way, which, under the elevated freeway, was to be converted into a small park project. Judgment was entered awarding defendant only the stipulated market value of the strip itself. (Superior Court of Santa Clara County, No. 204555, Peter Anello, Judge.)

The Court of Appeal reversed. It was held that although an owner whose land is being condemned in part, may not generally recover damages to the remainder of his land caused by the manner in which the works are to be constructed or operated on the lands of others, this rule does not apply where, as here, the property taken is an integral part of the right of way upon which the improvement is to be constructed, maintained, and used. The court, tracing judicial and other comment on the line of demarcation between, on the one hand, a proper exercise of the police power, through routing and controlling traffic, and, on the other, the invasion of private rights, noted that there was some question whether elements of damage that are general to all property owners in the neighborhood, and not special to the defendant, may be recovered, even if some property is taken. How-

ever, the court determined that where property is taken, traffic noise could be a proper consideration for assessing the diminution of the value of the remaining property, and held the exclusion of defendant's proffered evidence thereon to be reversible error. (Opinion by Sims, J., with Molinari, P. J., and Elkington, J., concurring.)

HEADNOTES

Classified to McKinney's Digest

(1) **Eminent Domain § 71—Damages to Contiguous Land—Severance Damages—Where Improvements on Land of Others.**—Although an owner, whose land is being condemned in part, may not generally recover for damages to the remainder of his land caused by the manner in which the works are to be constructed or operated on the lands of others, this rule does not apply where the construction or use of the improvement causes tangible damage to, or affects an established right of access to, adjoining property, nor does it apply where the property taken is an integral part of the right of way on which the improvement is to be constructed, maintained, and used.

(2) **Eminent Domain § 182—Reversible Error—Exclusion of Evidence on Severance Damages.**—In an action to condemn a narrow strip of a single parcel of defendant's property for freeway purposes, it was reversible error to exclude, on the sole ground that none of the elevated, paved part of the highway was to be built over the condemned strip, evidence of severance damages proffered by defendant to show the diminution of the value of the rest of the parcel that would be occasioned by the construction and operation of the freeway, where the strip was to be fenced off as an integral part of the right of way.

(3) **Eminent Domain § 74(0.5)—Compensation—Damages to Contiguous Land—Elements in Ascertainment of Damage.**—When part of a landowner's parcel is being condemned, the value of the remainder before and after the construction of the public improvement is not a conclusive test as to the compensation to which the landowner is entitled. The damage for which compensation is to be made is damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment.

[See **Cal.Jur.2d**, Eminent Domain, § 148; **Am.Jur.2d**, Eminent Domain, § 310.]

(4) **Eminent Domain § 74(3)—Compensation—Damages to Contiguous Land—Elements in Ascertainment of Damage—Severance Damages Based on Noise From New Freeway.**—In an action to condemn a narrow strip of a single parcel of defendant's property in connection with the building of a new freeway, defendant would have been entitled, if proper proof were adduced, to recover severance damages based on the diminution in the value of the remainder of the parcel caused by noise emanating from the use of the freeway that would render the premises uninhabitable and unusable, that would reduce the highest and best use of the property from multiple housing to low grade residential or commercial, and that would depreciate its value from $3 to $1.50 per square foot. It was thus reversible error to exclude defendant's proffered evidence to this effect.

COUNSEL

Morgan, Beauzay & Hammer for Defendant and Appellant.

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

OPINION

SIMS, J.—The Volunteers of America, a corporation, the property owner and defendant in an action in eminent domain instituted by the Department of Public Works to acquire certain real property for freeway purposes, including a part of the entire parcel owned by defendant, has appealed from a judgment which granted it $1,365 as the stipulated market value of the portion of the property taken, including the improvements thereon. The appeal is directed to the failure of the judgment to award the property owner claimed severance damages, and particularly attacks the ruling of the trial court which excluded the evidence of severance damages proffered by the property owner in an offer of proof, the finding of the court that the property owner suffered no severance damages for the parcel taken and for all damages suffered or to be suffered by the property owner by reason of the taking of the parcel and the construction of the improvement in the manner proposed by the state.

The issues, as framed by the respondent condemnor which initiated the proceedings in the trial court by its motion to exclude evidence, are (1)

whether the property owner can recover severance damages when those damages admittedly flow from the construction and use of improvements which are to be physically located on lands acquired from others; and (2) whether, in any event, the property owner can recover severance damages when the alleged diminution in the value of its remaining property is caused by noise emanating from the use of the freeway which would render the premises, as then improved, uninhabitable and unusable.[1]

The property involved is a narrow triangle along the northerly boundary of the parcel owned by the defendant. The property taken measures 82.01 feet along that boundary from the northeasterly corner, 5.89 feet southerly from that corner along the boundary, and then 82.23 feet on a hypotenuse westerly back to the northerly boundary. The area taken is approximately 223 square feet.[2] The parcel before the taking was approximately 125 feet

[1]The background of the question presented is well stated in Orgel, Valuation under Eminent Domain (2d ed. 1953) section 54, page 253 et seq., where the author comments on the distinction between damages due and damages not due to the taking of a portion of the owner's property, as follows: "The courts have all recognized that the depreciation in market value of the remainder caused by the physical separation or severance of the part taken is due to the taking and they have held that compensation for this type of injury must be included in damages to the remainder. But they have distinguished these severance damages from the 'consequential' damages arising by reason of the use to which the condemner intends to put the part taken. It is with reference to these so-called consequential damages that the problem of differentiating between damage that is due and damage that is not due to the taking chiefly arises.

"The attempt of the courts to draw this distinction is due to the fact that, with certain exceptions, an owner of property is not entitled to recover for any diminution in value which it may suffer by virtue of the construction and operation of adjacent public works where no part of his property is deemed to have been 'taken.' It would seem, therefore, to be unfair discrimination to reimburse a property owner for all similar damages done to his property simply because a portion of it, however small, may have been condemned. Bearing this point in mind, the courts have attempted, some of them more vigorously than others, to distinguish between damages which a particular owner has suffered *because* a part of his property has been taken, and damages which this same owner may have suffered along with adjacent property owners because public works, detrimental to the remainder of his property, have been located in the neighborhood. Needless to say, there are great difficulties, both practical and theoretical, in making a distinction between these two types of damages, and courts have differed not only in the manner, but also in the zeal, with which they have attempted to draw it." (Fns. omitted.)

See also, 4A Nichols on Eminent Domain (rev. 3d ed. 1971) § 14.1 at p. 14-5, fn. 4 and accompanying text; and Van Alstyne, *Intangible Detriment* (1969) 16 U.C.L.A. L.Rev. 491, 503-505.

[2]The complaint seeks, in addition to this triangle, the underlying fee interest, if any, appurtenant to the triangle, in and to a 25-foot lane which adjoins the whole parcel on the easterly side and the extinguishment of any right of access the remainder of the whole parcel may have over that lane, as such access will be curtailed by the closing of the lane, as it runs northerly, by the general southerly line of the freeway. No mention of these matters is found in the findings or judgment other than a general reference to the parcel number which included those interests. Whether abandoned, or included in the taking, they are not at issue on this appeal. Although appellant in

from its westerly to its easterly boundary, and 100 feet from its northerly to its southerly boundary, and had a total area of about 12,957 square feet.

The record revealed that the only improvement planned to be located on the property taken would be a fence approximately six inches inside the right of way line for the freeway. It was suggested that by arrangement with the city the city would erect an ornamental fence in connection with a project to put a park under the freeway. The traveled roadway itself would be 23 feet above ground level on an elevated platform 16½ feet above the ground. The traveled portion of the freeway was planned to be located at a distance of 23 feet inside the southerly line of the freeway after the taking, but the structure itself, with allowance for a shoulder, would be 8 feet closer, or 15 feet from the new property line. The structure would be tilted toward and slightly lower to the south.

The defendant's property is located on the northeast corner of two intersecting streets. The improvement which was taken consisted of a shed in the northeasterly corner of the property. It is not a factor in this appeal. The property is also improved by two houses which had been connected for joint use. The foundation line of the northerly rear corner of the northerly house is located about 5 feet from the new freeway right of way line at the closest point. This structure's northerly wall parallels the original northerly property line for about 50 feet at a distance of between 6 and 7 feet. The westerly point of the property taken is opposite a point about half way back from the front of the house. The structure itself overhangs the foundation slightly.

The plaintiff concluded its presentation of the foregoing physical facts on the first day of trial. At the outset of the proceedings on the second day, the following offer of proof was made on behalf of the property owner: ". . . we would offer testimony, (1) that the freeway which is to be constructed, must be considered as a whole . . . as one integral part, and that you cannot separate the portion of the improvement, which is going to be on the land of the defendant Volunteers of America; that the location of the freeway at the point at which it is to be located, including the portion thereof which is on the land of the defendant Volunteers of America, will cause a serious diminution in value to the property of the defendant, approximately $55,000 by way of severance damages; that . . . before the take and before the construction of the improvement, the highest and best

its brief has alluded to the fact that the condemnation closes the east alley and the property owner's right to use it to go north from the residue of its property, this element of damage was not mentioned in its offer of proof, and cannot be considered for the first time on appeal.

use of the property, as presently improved, is that of either student housing or of the present use to which it is being made, that is, a home for unwed mothers and women in distress, sort of a boarding house; that after the take and the construction of the improvement proposed by the state, both on the defendant's land and the land of others, the highest and best use of the property will be that of, what would be testified to as low-grade residential or commercial, that is, either one-story duplex or apartment house or one-story commercial use such as a warehouse; that it would be economically impossible for the property to be sold for the erection of multi-level residential use or any other multilevel procedures, any other multiheight use;

"That the sound level which will be created by the erection of the improvement, as proposed by the state, would be such as to make the premises, as presently improved, uninhabitable and unusable; that all of the property of the defendant Volunteers of America is within 118 feet of the location of . . . the freeway proper, that the improvements are considerably closer . . . one hundred eighteen feet, . . . being the furthest distance; that the property, as presently used, real property without improvements, is worth approximately three dollars per square foot; that the property's after use is worth approximately $1.50 per square foot; that the improvements, as presently on the property, would be virtually useless . . . with this freeway located as it is."

It was further stipulated that the physical location of the traveled portion of the freeway would be on the land of others; that no part of the bridge structure would be closer than 9 feet from the existing property line of defendant's property; and that the defendant's witnesses would not be able to testify to severance damages unless they were permitted to testify as to the effect of the freeway on defendant's property.

The court thereupon ruled that the testimony would be excluded. The parties stipulated to the compensation for the property taken. The court ordered judgment accordingly and excused the jury. The defendant unsuccessfully pursued its contention that it should be awarded severance damages by filing objections and proposed counterfindings to those proposed by the condemnor, but findings and judgment were entered as ordered by the court, and this appeal ensued.

I

Section 1248 of the Code of Civil Procedure provides in relevant part: "The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

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

"2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff; . . ." This court recently stated, "Accordingly, when a portion of private property consisting of a contiguous parcel of land is condemned for public use under the state's power of eminent domain, compensation is due not only for the value of the land directly taken, but also for so-called severance damages, that is, the damages to the remaining property as the result of its being severed from the part actually taken for public use. [Citations.]" (*People* ex rel. *Dept. Pub. Wks.* v. *Romano* (1971) 18 Cal.App.3d 63, 69 [94 Cal.Rptr. 839].)

(1) The condemnor, however, relies on the following rule: "An owner, whose land is being condemned in part, may not recover damages in the condemnation action to the remainder of his land caused by the manner in which the works are to be constructed or operated on the lands of others. The detriment for which he may recover compensation is that which will result from the operation of the works upon his land alone. [Citations.]" (*Sanitation Dist. No. 2* v. *Averill* (1935) 8 Cal.App.2d 556, 561 [47 P.2d 786]. See also *People* v. *Symons* (1960) 54 Cal.2d 855, 861 [9 Cal.Rptr. 363, 357 P.2d 451]; *People* ex rel. *Dept. Pub. Wks.* v. *Romano, supra*, 18 Cal.App.3d 63, 69-70; *Lombardy* v. *Peter Kiewit Sons' Co.* (1968) 266 Cal.App.2d 599, 602-603 [72 Cal.Rptr. 240] [app. dism. 394 U.S. 813 (22 L.Ed.2d 748, 89 S.Ct. 1486)]; *People* ex rel. *Dept. of Public Works* v. *Wasserman* (1966) 240 Cal.App.2d 716, 723-726 and 732 [50 Cal.Rptr. 95]; *People* ex rel. *Dept. Pub. Wks.* v. *Elsmore* (1964) 229 Cal.App.2d 809, 811 [40 Cal.Rptr. 613] [disapproved in *People* ex rel. *Dept. Pub. Wks.* v. *Ramos* (1969) 1 Cal.3d 261, 264, fn. 2 [81 Cal.Rptr. 792, 460 P.2d 992], as discussed below]; *City of Berkeley* v. *Von Adelung* (1963) 214 Cal.App.2d 791, 793 [29 Cal.Rptr. 802]; 4A Nichols, Eminent Domain (Rev. 3d ed. 1971) § 14.1[1], p. 14-6 et seq., § 14.21[1], p. 14-53 et seq. and § 14.2462, fns. 6-10, and accompanying text, pp. 14-276/14-278; 1 Orgel, Valuation Under Eminent Domain, §§ 56-57, pp. 257-266; and Van Alstyne, *Intangible Detriment* (1969) 16 U.C.L.A. L.Rev. 491, 504, fn. 51, and accompanying text.)

The *Symons* rule does not apply in two other situations. If the construction or use of the improvement on public property causes tangible damage

to, or affects an established right of access to adjoining property, there may be compensable damage. (See *Albers* v. *County of Los Angeles* (1965) 62 Cal.2d 250, 256-264 [42 Cal.Rptr. 89, 398 P.2d 129]; *House* v. *L.A. County Flood Control Dist.* 1944) 25 Cal.2d 384, 392 [153 P.2d 950]; *Bacich* v. *Board of Control* (1943) 23 Cal.2d 343, 349-352 [144 P.2d 818]; *Eachus* v. *Los Angeles etc. Ry. Co.* (1894) 103 Cal. 614, 617-622 [37 P. 750]; and *Reardon* v. *San Francisco* (1885) 66 Cal. 492, 505-506 [6 P. 317].) Under such circumstances, where there is a special detriment to the private land involved, it should be immaterial whether the works which caused the damage were wholly, or partially, or in no way upon some land which was taken from the private owner.

In the second place, since the trial of this case, it has been recognized that even though the roadbed, or paved portion of a freeway is not on the property taken, if the strip taken is a part of the freeway right of way, the rule of *People* v. *Symons, supra*, does not apply. In *Symons* the court ruled that an owner, whose property was taken for purposes other than the construction of the freeway itself, was not entitled to compensation, or severance damages, for those impediments to the property resulting from the objectionable features caused by the maintenance and operation of the freeway proper on lands other than those taken from the defendants. (54 Cal.2d at pp. 860-862. See also *People* ex rel. *Dept. of Pub. Wks.* v. *Elsmore, supra*, 229 Cal.App.2d 809, 811.) In *Symons* the property condemned was for the enlargement of a turnaround for a cul-de-sac necessitated by but not a part of the freeway project, and the property owners sought as severance damages "the decreased value of their property arising from such factors, among others, as the change from a quiet residential area, loss of privacy, loss of view to the east, noise, fumes and dust from the freeway, loss of access over the area now occupied by the freeway, and misorientation of the house on its lot after the freeway construction." (54 Cal.2d p. 858. See also *People* ex rel. *Dept. of Public Works* v. *Wasserman, supra*, 240 Cal.App.2d 716, 723-727.) In *Elsmore*, as in this case, the land taken was not to be used for the construction of the roadway itself. The opinion recites: "The only improvement to be constructed on the land taken from appellants is a chain link fence to be placed on or near the property line separating the state-acquired property from the remainder of Parcel 2. The part of Parcel 2 acquired by the state was taken for freeway purposes but not for the construction of the freeway proper. It is to be a portion of an unimproved and cleared strip about 25-30 feet wide located to the side of the freeway roadbed. This cleared strip, designed to run along the entire length of the freeway from San Jose to San Francisco, is to be used only for emergency and maintenance vehicles and operations. All of the land taken from appellants is included within this proposed road-

side strip." (229 Cal. App.2d at p. 810.) The trial court properly applied *Elsmore* to the facts before it in this case.[8]

Thereafter in *People* ex rel. *Dept. Pub. Wks.* v. *Ramos* (1969) 1 Cal.3d 261 [81 Cal.Rptr. 792, 460 P.2d 992], the court overruled a judgment denying severance damages in a situation where the property taken was not used for the paved portion of the freeway. In distinguishing *Symons* the court said, "In the present case, however, Parcel 3-A of the defendants' property was taken for use as a part of the freeway itself, and the chain link fence was constructed on it. Although Parcel 3-A was not used for the paved portion of the freeway, but for a dirt strip or shoulder paralleling the traffic lanes, it was taken as a part of the freeway right-of-way, and the fence was placed on it to act as a physical barrier to the limited access freeway. Accordingly, the rule of the *Symons* case is not applicable, and the trial court's contrary ruling was in error." (1 Cal.3d at p. 264, fn. omitted.) In a footnote the court stated, "Any implications found in *People* ex rel. *Dept. of Public Works* v. *Elsmore* (1964) 229 Cal.App.2d 809 . . ., contrary to the views we express today must be deemed disapproved." (*Id.*, fn. 2.)

It is therefore concluded that the condemnor cannot rely upon the rule of the *Averill* case when, as here, the property taken is an integral part of the right of way upon which the improvement is to be constructed, maintained and used. It is urged that *Ramos* should be limited to its facts, that is, since the fence which deprived the property owner of access was erected on property taken from him, the test of *Averill* was satisfied.

(2) On the other hand, the authority under which the property was taken in this case was allegedly and admittedly "For Freeway purposes." The condemnor could have placed its freeway six feet northerly and avoided taking any of defendant's property. It did not, and having found his property necessary for the project, it should be bound by the general rules concerning severance damages.[9]

[8]At the time of its decision, May 5, 1969, and the entry of judgment, June 11, 1969, the trial court was also relying on the opinion of the Court of Appeal for the Fifth District in *People* ex rel. *Department of Public Works* v. *Ramos*, Civ. No. 1035, decided April 18, 1969 (77 Cal.Rptr. 130). In that opinion the court reluctantly followed *Elsmore*. Its challenge was accepted, and the opinion was vacated when the Supreme Court granted a hearing June 18, 1969, a week after the entry of judgment in this case.

[9]In *Andrews* v. *Cox* (1942) 129 Conn. 475 [29 A.2d 587], a small triangle appraised at $9 was taken. Damages amounting to $1,700 were also suffered by reason of the highway construction not only on the land taken but also upon the adjoining lands not belonging to the property owner. The court ruled it was error to fail to

As will be noted below, the dividing line between those who are entitled to consequential damages, and those who are not, is at best arbitrary. On the one hand it can be said that certain diminution of the value of its property resulting to the defendant is no greater than that suffered by neighboring property owners who lost no land by reason of the improvement (see below). By the same token this diminution of value is just as great as that suffered by a landowner who retains an equivalent parcel after giving up a strip of greater width which falls under part or all of the projected improvement. It is concluded that the court erred insofar as it denied the defendant an opportunity to show the diminution in the value of its remaining property which would be occasioned by the construction and operation of the freeway in the manner proposed by plaintiff on the ground that the property taken from plaintiff did not extend under the roadway itself.

---

allow the latter sum. It said, "The element of cause and effect is present in any award for depreciation in the value of the remaining land due to use of the land taken for the making of the improvement; damages of that kind are given because they are caused by the use of the land taken; and where the making of the improvement requires as an integral and inseparable part the use of the land taken, though the improvement as a whole extends to adjoining land, that use is a contributing cause of the effect produced by the entire improvement." (129 Conn. at p. 481 [29 A.2d at p. 590]. See also *Hollister* v. *Cox* (1943) 130 Conn. 389, 393-394 [34 A.2d 633, 634]; *Chicago, K. & N. Ry. Co.* v. *Van Cleave* (1893) 52 Kan. 665, 667-669 [33 P. 472, 473-474], app. dism. 41 L.Ed. 1177, 17 S.Ct. 992]; and cf. *De Vore* v. *State Highway Commission* (1936) 143 Kan. 470, 472-474 [54 P.2d 971, 972-973]; *City of Crookston* v. *Erickson* (1955) 244 Minn. 321, 325-328 [69 N.W.2d 909, 912-914]; and cf. *Thomsen* v. *State* (1969) 284 Minn. 468, 472-476 [170 N.W.2d 575, 579-581]; *State Highway Commission* v. *Bloom* (1958) 77 S.D. 452, 461-462 [93 N.W.2d 572, 577-578, 77 A.L.R.2d 533]; *Dennison* v. *State* (1968) 22 N.Y.2d 409, 413 [293 N.Y.S.2d 68, 71, 239 N.E.2d 708, 710]; and *Purchase Hills Realty Associates* v. *State* (1970) 35 App.Div.2d 78, 81-82 [312 N.Y.S.2d 934, 937-938]; and *Bronxville Palmer, Ltd.* v. *State* (1971) 36 App.Div.2d 10, [318 N.Y.S.2d 57, 61].)

Andrews v. *Cox, supra; Chicago, K. & N. Ry. Co.* v. *Van Cleave, supra;* and *City of Crookston* v. *Erickson, supra,* were all distinguished in *People* ex rel. *Dept. Pub. Wks.* v. *Elsmore, supra,* (see 229 Cal.App.2d at pp. 811 and 813) because, as to the first two cases, the court in *Elsmore* believed "the damages to the remainder attributable to the taking and use of appellants' land acquired are readily severable from the overall damages caused by the entire 200-foot freeway strip and thus can be determined." This distribution is understandable if the strip were an addition to the existing freeway. The situation was then one in which the property owner's property line was moved back from the roadway, with no change in the relationship between the objectionable features and the residue of the property. (Cf. *People* v. *O'Connor* (1939) 31 Cal.App.2d 157, 159 [87 P.2d 702].) The distinction is questionable when, as in this case, a new freeway of prescribed dimensions is partly interposed on the claimant's property. Although, as pointed out in *Elsmore,* the *Erickson* case does refer to the fact that the property owner cannot, as in this state, recover in the future for additional damage occasioned by further improvements on the property acquired, the court in *Erickson* did follow *Andrews* v. *Cox, supra,* insofar as it indicates that any taking is sufficient to give rise to a right to consequential damages.

II

The property owner relies upon the general rule for ascertaining severance damages which is stated in *People* v. *Loop* (1954) 127 Cal.App.2d 786 [274 P.2d 885], as follows: "Severance damages are determined by ascertaining the market value of the property not taken as it was on the date fixed for determining such damages, and by deducting therefrom the market value of such remaining property after the severance of the part taken and the construction of the improvement in the manner proposed by the plaintiff. [Citation.] Severance damages may be shown by proving the market value of the remainder before and after taking and leaving the computation of the difference to the jury, or by competent evidence of severance damages in a lump sum" (127 Cal.App.2d p. 799. See also *San Bernardino County Flood Control Dist.* v. *Sweet* (1967) 255 Cal.App. 2d 889, 904 [63 Cal.Rptr. 640]; 4A Nichols, *op cit.*, §§ 14.23, 14.231, 14.232 and 14.232[1], pp. 14-76 et seq.; and 1 Orgel, *op. cit.*, §§ 50, 51, pp. 234-236.) It claims it was entitled to show that the remaining property would be depreciated 50 percent by the construction, maintenance and use of the freeway.

(3) "The constitution does not . . . authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable, but this is not an injury to the property itself so much as an influence affecting its use for certain purposes; but whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation." *Eachus* v. *Los Angeles etc. Ry. Co., supra,* 103 Cal. 614, 617. See also *People* v. *Symons, supra,* 54 Cal.2d 855, 858-859; *City of Oakland* v. *Nutter* (1970) 13 Cal.App.3d 752, 769 [92 Cal. Rptr. 347]; *Lombardy* v. *Peter Kiewit Sons' Co., supra,* 266 Cal.App.2d 599, 603; *People* ex rel. *Dept. of Pub. Wks.* v. *Presley* (1966) 239 Cal.App. 2d 309, 312 [48 Cal.Rptr. 672]; *People* ex rel. *Dept. Pub. Wks.* v. *Elsmore, supra,* 229 Cal. App.2d 809, 811; and *City of Berkeley* v. *Von Adelung, supra,* 214 Cal.App.2d 791, 793.)

That the value of the remainder before and after the construction of the improvement in the manner proposed is not a conclusive test is demonstrated by *People* v. *Gianni* (1933) 130 Cal.App. 584 [20 P.2d 87]. There a small portion of the property was taken, and the value of the remainder was diminished by reason of the relocation of the highway. In denying recovery for the latter loss the court observed, "We might concede the claim that a test of damage is the value of the property before the taking and its value thereafter. But this test is not conclusive. By way of illustration, it cannot be denied that in a vast majority of cases a development of new territory reacts to the damage of established districts. Almost every large city demonstrates a decrease in realty values consequent upon a branching out of business and population. To apply the test of values, before and after, in those cases would be beyond any notion of law or reason. [Citation.]" (130 Cal.App. at p. 587.)

(4) The question here is whether the property owner, on a proper showing, is entitled to recover for the diminution of the value of the remainder which is occasioned solely by the fact that the sound level which will be created will render the premises, as presently improved, uninhabitable and unusable, will reduce the highest and best use of the property from multiple housing to low grade residential or commercial, and will depreciate its value from $3 to $1.50 per square foot. A learned commentator has said, "It is clear . . . that if the project responsible for the claimed proximity damage [defined as vehicular noise, fumes, dust, glare, and loss of light or view—the incident and intensity of which are dependent upon proximity to the highway] is constructed upon land taken from the claimant, his recovery of severance damages to the remainder of the parcel may include losses caused by increased noise, dust and fumes, as well as interference with air, light, and view, unfavorable consequences of the project which would be taken into account by an informed potential purchaser.

"The cutting edge of the prevailing rules of proximity damages is not the logic of distance but the accident of location of the injury-producing activity upon land taken from the claimant. If no part of the claimant's land has been taken for the project, though it be immediately adjoining, he must suffer resulting proximity losses without recourse; but if a partial taking occurs, however slight, those losses are compensable as severance damages. Concededly of rough utility, this rule of thumb—like the 'next-intersecting-street' rule applied in cul-de-sac cases—manifestly yields indefensible results in a significant number of specific cases." (Van Alstyne, *op. cit.*, U.C.L.A. L.Rev., at pp. 504-505, fns. omitted.)

The cases do not reveal the clarity which the commentator professes.

In *Pierpont Inn, Inc.* v. *State of California* (1969) 70 Cal.2d 282 [74 Cal.Rptr. 521, 449 P.2d 737], the court adopted the following statement from the vacated decision of the Court of Appeal, "Where the property taken constitutes only a part of a larger parcel, the owner is entitled to recover, inter alia, the difference in the fair market value of his property in its 'before' condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken. Items such as view, access to beach property, *freedom from noise*, etc. are unquestionably matters which a willing buyer in the open market would consider in determining the price he would pay for any given piece of real property. Concededly such advantages are not absolute rights, but to the extent that the reasonable expectation of their continuance is destroyed by the construction placed upon the part taken, the owner suffers damages for which compensation must be paid." (70 Cal.2d at p. 295, italics added. Cf. 68 Cal.Rptr. at p. 243.) There is nothing in the opinion as adopted and republished (*id.*, at p. 284, fn. 1), to indicate that "freedom from noise" of the traffic was an element considered in determining severance damages. The remarks were addressed to the following question: "Appellant contents that the trial court erred in permitting the jury to consider the property's loss of view and relatively unrestricted access to the beach in determining severance damages." (*Id.*, pp. 294-295.) The court did approve damages for the period of construction when heavy equipment, including pile drivers, were creating noise, dust and disturbing vibrations that affected its remaining property. . . ." (*Id.*, p. 300.) This is a thin reed upon which to float recovery of severance (consequential) damages (see 4A Nichols, *op. cit.*, § 14.1[3], pp. 14-31/14-35) for prospective traffic noise alone. In *Symons*, cited by the commentator and by the court in Pierpont, the court stated, "It is established that when a public improvement is made on property adjoining that of one who claims to be damaged by such general factors as change of neighborhood, *noise*, dust, change of view, diminished access and other factors similar to the damages claimed in the instant case, there can be no recovery where there has been no actual taking or severance of the claimant's property. [Citations.]" (54 Cal.2d at p. 860, italics added.) The reference to noise is acknowledgedly dictum.

Symons (54 Cal.2d at p. 859), and *Pierpont* (in quoting it without credit) (70 Cal.2d at p. 295; and cf. 68 Cal.Rptr. at p. 243) do give vitality to *People* v. *O'Connor* (1939) 31 Cal.App.2d 157 [87 P.2d 702], a case in which the state took a 10-foot strip of land along the front of the defendant's property for the purpose of widening an existing highway. In *O'Connor* the jury awarded, and the judgment provided for, an award of $35 for the parcel taken, and $1,500 severance damages. The condemnor

contended that the court erred in denying its motion to strike all of the testimony of defendant's two valuation witnesses as to severance damages because it was based on speculative, remote and conjectural elements of damage. According to the opinion: "Both of them, after giving their opinions as to the severance damage, stated that said opinions were based on the fact that the widening of the highway right of way would decrease the distance from the house to the right of way line from 37 to 27 feet; that the lawn and landscaping in front of the house would be adversely affected; that the highway being slightly raised, would be more difficult of access, and ingress and egress to and from the premises would be more difficult; and that the increased closeness of the highway would increase *traffic noises and hazards.*" (31 Cal.App.2d at p. 159, italics added.) The court concluded, "All of the matters mentioned were proper reasons to be advanced by the experts as bases for their opinions as to value, and the jury could determine what weight to give the opinions in proportion to the weight the reasons had with them." (*Id.*,) The question of whether the 10-foot strip would be used for the traveled portion of the highway or for a shoulder (see part I above) was not raised. It is obvious, however, that even if the 10-foot strip was used for one lane of traffic it would be impossible to disassociate the traffic noises emanating from that lane, from those occasioned by the overall traffic. *O'Connor* was also recognized and followed by this court in *City of Oakland* v. *Nutter, supra,* 13 Cal.App.3d 752, where it was concluded "that the court properly permitted evidence of the effect on the value of the subjacent land of excessive noise, vibration, discomfort, inconvenience and interference with the use and enjoyment of that land as such factors were occasioned by flights through the easement condemned." (13 Cal.App.3d at p. 772.) In *Nutter*, however, it was clear that consideration was limited to damages arising by use of the airspace actually condemned (see part I above).

Support for the property owner's view is also found in *Pacific Gas & Elec. Co.* v. *Hufford* (1957) 49 Cal.2d 545 [319 P.2d 1033], where among the approved elements considered in determining the diminution in value to the remaining property occasioned by the taking of an easement for the construction, operation and maintenance of an electric transmission line, was the fact that cattle would not gain weight for quite a while under a power line because the noise (buzzing) would disturb them and they would not bed down under it. (49 Cal.2d at p. 559. See also *Sacramento, etc. Drainage Dist.* ex rel *State Reclamation Bd.* v. *Reed* (1963) 215 Cal. App.2d 60, 71 [29 Cal.Rptr. 847].)

In *City of Pleasant Hill* v. *First Baptist Church* (1969) 1 Cal.App.3d 384 [82 Cal.Rptr. 1], the condemnor complained because "there were re-

peated references to noise and distraction and inconvenience caused by having the public street in front of the church." (1 Cal.App.3d at p. 435.) This court observed, referring to *Pierpont* and *Symons*, "The evidence was properly admitted and alluded to, not because it showed elements which interfered with the condemnee-church's particular pleasure or enjoyment, or because it showed the church property was subjected to detrimental factors which were common to all properties in the neighborhood, but because the matters adduced were proper elements to be considered in determining the value of the remainder of the property of which the city had taken a portion. [Citations.]" (*Id.*)

On the other hand, it appears in *People* ex rel. *Dept. of Pub. Wks.* v. *Presley, supra*, that a portion of the property owners' property was condemned, that is, the fee of so much of their parcel as underlay an existing street, and their right of access to that street. The trial court refused to include in the damages any compensation for the increased noise, fumes and annoyance which would result from the more heavily trafficked freeway, or any compensation for the loss of the parking privileges which they had enjoyed on the former street. The court stated, ". . . consideration of the problem in terms of whether the damage suffered is unique to the condemnee or only that which he shares in general with the rest of the traveling public is one of the more vital factors which aid in reaching a solution of the question . . . ." (239 Cal.App.2d at p. 314.) With respect to the damages claimed for the increased traffic, the court followed *City of Berkeley* v. *Von Adelung, supra*. (*Id.*, at p. 317.) In *Von Adelung* a portion of the property owners' property was taken to round off a corner of the existing street which was being improved to make it a major thoroughfare. His efforts to prove that the value of the remainder would be depreciated by the increased fumes and traffic noises was rejected. In affirming the court opined, as an alternative ground of decision, ". . . the asserted injury is not compensable because it is general to all property owners in the neighborhood, and not special to defendant [citation]." (214 Cal. App.2d at p. 793.)

Although a hearing in the Supreme Court was not requested in either of the foregoing cases, they demonstrate that there may be some question whether elements of damage which are "general to all property owners in the neighborhood, and not special to the defendant" may be recovered even if some property is taken. The principle relates back to the issue of determining the line of demarcation between a proper exercise of the police power, through routing and controlling traffic, and an invasion of private rights (see fn. 1, *supra*). In *Albers* v. *County of Los Angeles, supra*, 62 Cal. 2d 250, the governing principles, as expounded in earlier cases, were re-

viewed as follows: "This court in considering a similar policy question in *Clement* v. *State Reclamation Board, supra,* said at 35 Cal.2d 628, 642: 'The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.' In the concurring opinion of Traynor, J., in *House* v. *Los Angeles County Flood Control Dist., supra,* 25 Cal.2d 384, 397, the same statement is followed by the language: 'It is irrelevant whether or not the injury to the property is accompanied by a corresponding benefit to the public purpose to which the improvement is dedicated, since the measure of liability is not the benefit derived from the property but the loss to the owner.'

"The competing principles are stated in *Bacich* v. *Board of Control, supra,* 23 Cal.2d 343, 350: 'It may be suggested that on the one hand the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements. . . . On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost.' " (62 Cal.2d at pp. 262-263.)

The case for denial of consequential damages occasioned by reason of fumes, noise, dust, shocks and vibrations incident to the operation of a freeway is most forcefully stated in *Lombardy* v. *Peter Kiewit Sons' Co., supra,* an action however in which no property was taken. The court said: "The mental, physical and emotional distress allegedly suffered by plaintiffs by reason of the fumes, noise, dust, shocks and vibrations incident to the construction and operation of the freeway does not constitute the deprivation of or damage to the property or property rights of plaintiffs for which they are entitled to be compensated." (266 Cal.App.2d at p. 603.) Subsequently in considering whether there a nuisance was created, the opinion states, "All householders who live in the vicinity of crowded freeways, highways and city streets suffer in like manner and in varying degrees. The roar of automobiles and trucks, the shock of hearing screeching brakes and collisions, and the smoke and fumes which are in proportion to the density of the motor vehicle traffic all contribute to the loss of peace and quiet which our forefathers enjoyed before the invention of the gas engine. . . . [¶] The conditions of which appellants complain are obnoxious to all persons who live in close proximity to the state's freeways but they must be endured without redress." (*Id.,* at p. 605.)

Lombardy can, of course, be readily distinguished from this case because no property was taken. *Presley* and *Von Adelung* may be, and have been distinguished, because in each case it was only the enlargement of an

existing public use which occasioned the factors which allegedly resulted in the diminution of the value of the property. An even broader distinction may be drawn between the improvement of an existing street and the rerouting of traffic (*City of Berkeley* v. *Von Adelung*, *supra*; and see *People* v. *Avon* (1960) 54 Cal.2d 217, 223-224 [5 Cal.Rptr. 151, 352 P.2d 519]), and the creation of a freeway, particularly when the latter is not patterned on an existing street (*People* ex rel. *Dept. of Pub. Wks.* v. *Presley*, *supra*) but is carved anew through established neighborhoods. The property owner properly may be charged with knowledge that traffic patterns may be upset by traffic regulations and the establishment of ordinary thoroughfares which control the local flow of traffic. In such a case he may have to anticipate growth and increased use of existing facilities which necessitate their improvement, or the substitution of new thoroughfares. It is quite another thing to say that he should suffer comparable, but probably more inconvenience and loss in property value, because the public elects to put a nonaccessible freeway over or next to his property to accommodate the flow of traffic from community to community, or from one center of population or trade to another, without any regard for the needs of his neighborhood. In the latter case the consequential damages are more akin to that caused by railroads and airports, and commensurate principles should apply.[5] It is difficult to justify principles of law which permit consideration of the well being of Mr. and Mrs. Causby's chickens (see *United States* v. *Causby* (1946) 328 U.S. 256, 259 [90 L.Ed. 1206, 1209, 66 S.Ct. 1062]), and the Hufford's cows (see *Pacific Gas & Elec. Co.* v. *Hufford*, *supra*, 49 Cal. 2d 545, 549), but refuse to permit consideration of the mental, physical and emotional distress of the present and prospective occupants of defendant's residences, insofar as that distress, and the noise which occasions it, is reflected in a diminution of the value of the property.

It has already been pointed out that the test of whether the property taken is used for the portion of the project giving rise to the detrimental conditions is an arbitrary one (see part I above). It is also obvious that adjacent property is damaged to the same degree by the detrimental factors of a freeway

[5] In *City of Yakima* v. *Dahlin* (1971) 5 Wash.App. 129, —— [485 P.2d 628, ——] the analogy to overflights was applied to the diminution in property value caused to a particular parcel from noise occasioned by the manner of construction of a freeway ramp even though no property was taken. Other jurisdictions, however, have refused to recognize noise and other inconveniences caused by traffic as an element to be considered in determining damage. (See *Northcutt* v. *State Road Department* (Fla. App. 1968) 209 So.2d 710, 711; *State* v. *Galeener* (Mo. 1966) 402 S.W.2d 336, 340; and *Arkansas State Highway Commission* v. *Kesner* (1965) 239 Ark. 270, 273 [388 S.W.2d 905, 908], but note *Arkansas State Highway Commission* v. *Kennedy* (1970) 248 Ark. 301, 307 and 309, fn. 1 [451 S.W.2d 745, 748 and 749, fn. 1] in which both majority and dissenting opinions suggested reconsideration of the rule.

whether no property is taken,* whether a mere narrow strip is taken, or whether a substantial portion of the property is taken for the construction of the improvement. (See Van Alstyne, *op.cit.*, 16 U.C.L.A. L.Rev., at pp. 503-505.) Until such time as provision is made for compensation of those who are merely adjacent (see *id.*, at pp. 517-518; and *Andrews* v. *Cox* (1942) 129 Conn. 475, 478 [29 A.2d 587, 588-589]), they presumably may not recover proximity damages. Two wrongs do not make a right. Though illogical, the taking of the strip warrants the allowance of consequential damages under existing precedents. The trial court erred in refusing to receive the evidence proffered by the property owner.

In *Bacich* v. *Board of Control* (1943) 23 Cal.2d 343 [144 P.2d 818], former Chief Justice Traynor, then an associate justice, in dissenting observed, "The cost of making such improvements may be prohibitive now that new rights are created for owners of property abutting on streets that would be at right angles to the improvements, for these rights must be condemned or ways constructed over or under the improvements. The construction of improvements is bound to be discouraged by the multitude of claims that would arise, the costs of negotiation with claimants or of litigation, and the amounts that claimants might recover. Such claims could only be met by public revenues that would otherwise be expended on the further development and improvement of streets and highways." (23 Cal.2d at p. 380.) Here the right recognized, although not clearly established, is not a new right. In any event, with changing concepts of the rights of an individual to his privacy and to enjoy an environment unpolluted by noise, dust, and fumes, it may not be improper to consider whether other means of transportation should be substituted for the private automobile. Any consideration of this question is clouded if the true economic burden of providing freeways for motor vehicle traffic is concealed by requiring adjacent owners to contribute more than their proper share to the public undertaking. If there is, as in this case, warrant for the compensation of such an owner, because a portion of his property has been taken, it should be granted if established by proper proof.

The judgment is reversed.

Molinari, P. J., and Elkington, J., concurred.

*There is some precedent for recovery of damages peculiar to the adjacent property, even when no property is taken. (See *United States* v. *Certain Parcels of Land in Kent County, Mich.* (W.D.Mich. 1966) 252 F.Supp. 319, 323; *City of Yakima* v. *Dahlin* (1971) 5 Wash.App. 129, —— [485 P.2d 628, 630]; and *Bd. of Ed. of Morristown* v. *Palmer* (1965) 88 N.J. Super. 378 [212 A.2d 564, 568-571], revd. as premature (1966) 46 N.J. 522 [218 A.2d 153].)

[Civ. No. 13102. Third Dist. Dec. 17, 1971.]

[As modified Dec. 21, 1971.]

THE PEOPLE ex rel. DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent, v. GIUMARRA FARMS, INC., Defendant and Appellant.

SUMMARY

In a condemnation case, the jury found that the construction of a new freeway across, and of an interchange contiguous to, the condemnee's 145-acre parcel of farm land, 23 acres of which were taken for the construction of the freeway, conferred a special benefit to the remainder of the parcel and that the value of such benefit, as an offset against the $37,000 severance damages, was $26,250. The condemnor's expert had testified to "sight prominence" and "highway speculation" benefits to the remainder, based on a reasonable probability of a zone change from agricultural to commercial use (such as service, rest, and food facilities), estimated to be worth nearly $42,000 according to comparable sales. Judgment on the verdict was entered accordingly. (Superior Court of Kern County, No. 96018, Marvin E. Ferguson, Judge.)

The Court of Appeal affirmed. Noting that decisional law in California was conflicting as to whether the existence, as distinguished from the amount, of special benefits to the remainder of the condemnee's land resulting from the condemnor's improvements is a factual issue or whether it is one of law, the court nevertheless rejected the condemnee's claim of error based on the argument that such issue should not have been determined by the jury; in the instant case, the trial court had independently made a finding to the same effect. As to whether special benefits may attach to the owner's remaining land by the concentration and funneling of vehicular traffic caused by the location, construction, and operation of a freeway and interchange on the land taken, the court, observing that the question was apparently one of first impression in California, held that they may. Supporting its conclusion by a summary of the law applicable

to "special" benefits, the court held that such benefits are not restricted to results of physical alterations in the character of the remainder; they may result from a nonphysical effect thereon, such as improved access and better accommodation of transportation, or access to improved roads and increased traffic, vehicular or pedestrian. In the present case, there was substantial evidence to support the existence and amount of the benefits as found in the trial court, and such finding could not be disturbed on appeal. (Opinion by Richardson, P. J., with Friedman and Regan, JJ., concurring.)

HEADNOTES

Classified to McKinney's Digest

(1) **Eminent Domain § 161—Province of Court and Jury—Existence of Special Benefits to Remainder.**—Decisional law in California is conflicting as to whether, in a condemnation case, the existence (as distinguished from the amount) of special benefits to the remainder of the condemnee's land resulting from the condemnor's improvements is a factual issue or whether it is one of law; nevertheless, on the condemnee's appeal in a highway improvement case, he could not successfully urge that it was error for the jury to have found the existence of such special benefits, where a similar finding was independently made by the court itself.

(2a-2d) **Eminent Domain § 75(4)—Compensation—Damages to Contiguous Land—Setoff of Benefits—Highways—Benefits From Interchange.**—On appeal from a condemnation judgment, the reviewing court was bound by the finding, in the trial court, that the construction of a new freeway across, and of an interchange contiguous to, the condemnee's 145-acre parcel of farm land, 23 acres of which were taken for the construction of the freeway, conferred a special benefit to the remainder of the parcel and that the value of such benefit, as an offset against the $37,000 severance damages, was $26,250, where there was substantial evidence, in the form of testimony by the condemnor's expert, of "sight prominence" and "highway speculation" benefits to the remainder, based on a reasonable probability of a zone change from agricultural to commercial use (such as for service, rest, and food facilities), estimated to be worth nearly $42,000 according to comparable sales, and where such evidence indicated that the improvement left the remainder in a special and unique position

of benefit with respect to the freeway, to the flow of traffic along it, and to the surrounding neighborhood.

(3) **Eminent Domain § 75(0.5)—Compensation—Damages to Contiguous Land—Setoff of Benefits—Restricted to Special Benefits.**—Under the constitutional guaranty of just compensation in condemnation cases (Cal. Const., art. I, § 14), offsets based on a condemnor's improvements may be made only against severance damages and only for "special" benefits to the condemnee, namely, for benefits that result from the mere construction of the improvement and that are peculiar to the remainder of the condemnee's land.

[Eminent domain: Deduction of benefits in determining compensation or damages in proceedings involving opening, widening, or otherwise altering highway, note, 13 **A.L.R.3d** 1149. See also **Cal.Jur.2d, Rev.,** Eminent Domain, § 152; **Am.Jur.2d,** Eminent Domain, § 368.]

(4) **Eminent Domain § 75(1)—Compensation—Damages to Contiguous Land—Setoff of Benefits—Special and General Benefits.**—If benefits to the remainder of a condemnee's land arising from the condemnor's improvements are "special," they remain so despite the enjoyment of benefits by other residents in the immediate neighborhood or upon the same street, and despite the possibility that the special benefits might be terminated by the condemnor. The duration of such benefits is merely a factor in determining their value.

(5a, 5b) **Eminent Domain § 75(1)—Compensation—Damages to Contiguous Land—Setoff of Benefits—Special and General Benefits.**—Where there is an enhancement in the value of the remainder of a condemnee's land caused exclusively by the condemnor's improvement, the public is entitled to an appropriate credit against severance damages for the special benefit conferred upon him. Such benefit need not result from physical alteration in the character of the remainder; it may result from a nonphysical effect, such as improved access and better accommodation of transportation, or access to improved roads and increased traffic, vehicular or pedestrian.

(6) **Eminent Domain § 71—Estimation of Damages—Damages to Contiguous Land—"Just Compensation."**—The constitutional guaranty of "just compensation" in condemnation cases means that compensation must be just, not merely to the individual whose property is taken, but also to the public, which has to pay for it. Thus, when only part of a parcel of land is taken for a highway, the value of

that part is not the sole measure of compensation; if 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, and, conversely, if the part that 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.

COUNSEL

Mack, Bianco, Means, Mack & Stone for Defendant and Appellant.

Harry S. Fenton, John Matheny, Robert A. Munroe and Stephen A. Mason for Plaintiff and Respondent.

OPINION

RICHARDSON, P. J.—Defendant property owner appeals from a judgment in condemnation wherein the jury found that the remaining property received special benefits in the sum of $26,250, resulting from the construction of the condemnor's improvements.

Before the commencement of these proceedings, defendant Giumarra Farms, Inc., owned a parcel of farm land consisting of 145.362 acres, situated west of Tehachapi and east of Bakersfield in Kern County. Prior to condemnation the land was bordered on the north by existing State Highway 58, known as the Edison Highway, on the east by Towerline Road, and on the south by Muller Road. Plaintiff condemnor constructed on the parcel a four-lane limited access freeway running generally east and west and dividing the subject property into two remaining parcels, 33.43 acres to the north and 89.03 acres to the south. Condemnor constructed a complex of on-and-off-ramps on the easterly edge of the subject property, which interchange served to funnel east and west bound freeway traffic to and from Towerline Road. The result of the construction is that both the northwest and southwest quadrants of the interchange are immediately contiguous to the remainder of the real property of defendant Giumarra Farms both north and south of the freeway.

The parties stipulated that the fair market value of the take was $28,663 and the total severance damage to the remainder was $37,000. Expert testimony presented by the condemnor indicated that a special benefit was

conferred on the remainder of the property as to the northerly 5 acres by virtue of "sight prominence from the freeway to a westbound traveler," and as to 10 of the remaining southerly 89 acres "by virtue of suitability for highway speculation purposes." Additionally, construction of the interchange and the freeway was found to make the remainder of the property "a point for all traffic; the only part of this particular area where they can depart the freeway and enter the freeway and it becomes a magnet to the highway traffic that is going by in this area." Condemnor's expert testified that the construction of the off-ramps made the subject property accessible and inviting to the traveling public. This, in turn, would result in rezoning to a higher use and a markedly greater land value to the remainder.

(1) Defendant contends, first, that the issue of the existence of any special benefits should have been determined by the trial court rather than the jury.

The present state of the California law is not altogether clear on whether the existence (as distinguished from amount) of special benefits constitutes a factual issue or one of law. The later decisions appear to assume that both the existence and amount of special benefits are factual issues to be resolved by the jury. (*L. A. County Flood etc. Dist.* v. *McNulty* (1963) 59 Cal.2d 333, 338-339 [29 Cal.Rptr. 13, 379 P.2d 493]; *United Cal. Bank* v. *People ex rel. Dept. Pub. Wks.* (1969) 1 Cal.App.3d 1, 8 [81 Cal.Rptr. 405]; *People ex rel. Dept. Pub. Wks.* v. *Schultz Co.* (1954) 123 Cal. App.2d 925, 936 [268 P.2d 117].) *City of Hayward* v. *Unger* (1961) 194 Cal.App.2d 516, 519 [15 Cal.Rptr. 301], is a clear holding that both the existence and nature of benefits is a fact question, the trier in that case being the court. However, in *People* v. *Ricciardi* (1943) 23 Cal.2d 390, at page 402 [144 P.2d 799], the Supreme Court, quoting from the earlier case of *Vallejo etc. R. R. Co.* v. *Reed Orchard Co.*, 169 Cal. 545, 556 [147 P. 238] stated: " 'It follows that, except those relating to compensation, the issues of fact in a condemnation suit, are to be tried by the court, and that if the court submits them to a jury it is nevertheless required to make findings either by adopting the verdict thereon or making findings in its own language.' " The *Ricciardi* court, quoting from *Oakland* v. *Pacific Coast Lumber etc. Co.*, 171 Cal. 392 [153 P. 705], added (at pp. 402-403): " '. . . It is only the "compensation," the "award," which our constitution declares shall be found and fixed by a jury. All other questions of fact, or of mixed fact and law, are to be tried, as in many other jurisdictions they are tried, without reference to a jury. [Citation.]' . . .

"It was therefore within the province of the trial court and not the jury to pass upon the question whether under the facts presented, the defendants' right of access will be substantially impaired. If it will be so impaired,

the extent of the impairment is for the jury to determine. This is but another way of saying that the trial court and not the jury must decide whether in a particular case there will be an actionable interference with the defendants' right of access. . . ."

Notwithstanding the apparent force of the later decisions, we need not attempt to resolve these divergent views because the record before us reflects that the trial court did in fact make and enter its independent findings of fact herein, which findings, like those of the jury, were adverse to defendant.

(2a) Defendant's second contention raises a more serious and complicated issue. Briefly and narrowly stated, the question posed is whether special benefits may attach to the owner's remaining land by the concentration and funneling of vehicular traffic caused by the location, construction and operation of a freeway and interchange on the land taken.

Surprisingly, this appears to be a matter of first impression in California.

(3) Certain principles of general application have long been accepted. The constitutional guarantee of just compensation contained in article I, section 14, of the California Constitution has been construed to permit an offset against damages of benefits to the remainder, but two important refinements have developed. While initially the offset was permitted against damages generally, only severance damages may now be so reduced. (*Contra Costa County Water Dist.* v. *Zuckerman Const. Co.* (1966) 240 Cal.App.2d 908, 909-912 [50 Cal.Rptr. 224]; compare *S. F., A. & S. R.R. Co.* v. *Caldwell* (1866) 31 Cal. 367, 374-376; see *Benefits & Just Compensation in California* (1969) 20 Hastings L.J. 764, 765-767.) Secondly, the kinds of benefits for which an offset has been permitted have been limited. In *Beveridge* v. *Lewis* (1902) 137 Cal. 619, 623-624 [67 P. 1040, 70 P. 1083], the court in a classic statement distinguished general benefits, which it defined as those which "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," from special benefits, defined "as result[ing] from the mere construction of the improvement, and [which] are peculiar to the land in question." It is special benefits alone that are offset against severance damages.

The California rule of special benefits has been criticized as illogical, inequitable and unduly favorable to the landowner. (*Benefits & Just Compensation in California* (1969) 20 Hastings L.J. 764, 772.) There it has been compared unfavorably with the federal rule (33 U.S.C.A., § 595), which, in effect, compares the value of the entire parcel before the take and the value of the remainder, taking into consideration any elements of

severance and benefits. Such a rule would conform to the original California doctrine. (*S. F., A. & S. R.R. Co.* v. *Caldwell, supra,* 31 Cal. 367.) Nonetheless, the *Beveridge* principle remains the law of California.

The enunciation of the rule, however, has proven somewhat easier than its application. Appellate courts have found special benefits in varying factual situations: for example, new access to a public road or highway where none existed before, if accompanied by an increase in market value (*Los Angeles* v. *Marblehead Land Co.*, 95 Cal.App. 602 [273 P. 131]); direct improvement to the land occasioned by the public project (*L. A. County Flood etc. Dist. v. McNulty* (1963) 59 Cal.2d 333 [29 Cal.Rptr. 13, 379 P.2d 493]; *People* v. *Thomas* (1952) 108 Cal.App.2d 832 [239 P.2d 914]); probability that a higher and better use of the land will result from the project (*People* ex rel. *Dept. of Public Works* v. *Hurd* (1962) 205 Cal.App.2d 16 [23 Cal.Rptr. 67]); and an increase in the flow of accessible traffic (*City of Hayward* v. *Unger* (1961) 194 Cal.App.2d 516 [15 Cal.Rptr. 301]). The application of the *Beveridge* principle has not been uniform and it has been criticized as causing "confusion." (See Gleaves, *Special Benefits in Eminent Domain, Phantom of the Opera* (1965) 40 State Bar J. 245, 249.)

Nor has there been uniformity of opinion in other jurisdictions as to what constitutes benefits chargeable against the landowner in a condemnation action. "Upon this subject there is a great diversity of opinion and more rules, different from and inconsistent with each other, have been laid down than upon any other point in the law of eminent domain." (3 Nichols on Eminent Domain 57.)

Certain principles helpful to a resolution of the problem herein presented have been generally accepted, however. **(4)** The benefit does not cease to be special because it is enjoyed by other residents in the immediate neighborhood or upon the same street. (*United States* v. *River Rouge Improvement Co.*, 269 U.S. 411 [70 L.Ed. 339, 46 S.Ct. 144].) The possibility that benefits might subsequently be terminated by the condemnor does not preclude the deduction of the benefit, although its duration may properly be considered in determining its present value. (*People* ex rel. *Dept. of Public Works* v. *Edgar*, 219 Cal.App.2d 381 [32 Cal.Rptr. 892].) **(5a)** The benefit may come from a nonphysical effect on the land, such as improved access and the better accommodation of transportation. (*People* v. *Edgar, supra.*) Finally, access to improved roads and increased traffic, both vehicular and pedestrian, constitutes a special benefit. (*City of Hayward* v. *Unger, supra,* 194 Cal.App.2d 516.)

The problem remains to establish a standard for differentiating between

general benefit to the community and special benefits to the specific property in a consistent and meaningful way.

(2b) In the instant case, no new access to the remaining property is afforded by the construction of the freeway and off-ramps. In the before condition, the landowner could move freely and fully in all directions along a state highway with access from 590 feet on the northerly boundary of the property, along Muller Road on the southerly boundary and along Towerline Road on the easterly boundary. Nonetheless, what is added to the picture, and what constitutes the claim of special benefit, is that by virtue of the construction the landowner's property is now located on two quadrants of a freeway interchange. The property presently zoned agricultural reasonably can be expected to be rezoned to a higher use, and portions of the property are suited for service, rest and food facilities. In short, the property has become a magnet for traffic related commercial activity with measurable financial value and profit to defendant.

Do such factors, coupled with evidence of enhanced value, provide a basis upon which a trier of fact may conclude that special benefits exist in mitigation of severance damages?

(6) The federal and state constitutions only assure the landowner "just compensation." As was said 75 years ago by the United States Supreme Court, compensation must be " 'just, not merely to the individual whose property is taken, but to the public which is to pay for it.' [Citation.] 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." (*Bauman* v. *Ross*, 167 U.S. 548, 574 [42 L.Ed. 270, 283, 17 S.Ct. 966].)

It has been said by one highly respected authority in the field: "Subject to these limitations the tribunal is entitled to consider the entire plan of

improvement and the probable effect of the improvement upon the use and value of the land, and it may consider all of the evidence, pro and con, on that issue. It may consider evidence of improved outlet to market to said premises, of higher and better use, as for subdivision, residential, or commercial purposes, frontage on a better road, modes of access, and, in general, any substantial evidence that the improvement will add to the convenience, accessibility, use, and value of the land if such benefit is not shared by nonabutting lands. The fact that other lands abutting on the improvement are also specially benefited, is immaterial.

"One of the distinguishing tests of special benefit has been said to depend on whether or not the special facilities afforded by the improvement have advanced the market value of the property beyond the mere general appreciation of the property in the neighborhood." (3 Nichols on Eminent Domain 72.)

(2c) The enhancement in value of the subject property was described in the testimony of the condemnor's expert, Gerald E. Fisher. Fisher pointed out freeway entrances and exits at two-mile intervals. His opinion was that as to 5 acres in the northerly portion of the remainder a benefit accrued from sight prominence to a westbound traveler and as to 10 acres in the southerly remainder adjacent to Towerline Road a "highway speculation" benefit was conferred. He estimated the net benefit accruing to the northerly 5 acres to be $37,250, and the net benefit to the southerly 10 acres at $4,500. Fisher defined "highway speculation" as "those uses that would be consistent with those found around other interchanges in the state highway system," such as mobile home sites, drive-ins, fruit stands and truck-stop restaurants. He inquired of the appropriate public officials regarding "reasonable probability" of a zone change from agricultural to commercial use, and he supported his appraisals and opinions with comparable sales.

The court holds that the trier of fact could properly find that the value of the subject property was enhanced by the unique combination of access and traffic conferred upon it by the improvements. There is no satisfactory basis upon which the two elements can be separated. Access without traffic or traffic without access would not have conferred a benefit, but the combination of the two, coupled with the site situation immediately contiguous to the quadrants of the freeway interchange, constitutes a benefit which was special and measurable. **(5b)** In principle, where there is an enhancement in value to the remainder caused exclusively by the improvement, there is a conferred benefit. And if a conferred benefit, the condemning public is entitled to an appropriate credit against severance damages. No

California authority has been cited, nor has our independent research disclosed any support for defendant's contention that benefits, to be special, must result from physical alteration in the character of the land which is claimed to be benefitted. **(2d)** This court finds no persuasive policy reason why the trier of fact should not be permitted to find such benefit. Therefore, its determination that such benefits exist in the sum of $26,250, based as it is on sufficient evidence, is binding upon this court on appeal. (See *City of Hayward* v. *Unger, supra*, 194 Cal.App.2d 516, 519.)

We are mindful that the possibility of inequity may be inherent in permitting a deduction from severance damages of the kind of claimed benefit herein presented. The property of the landowner's neighbor may also be enhanced to some extent by the improvement, yet the neighbor is not charged with that benefit. However, although increased facilities for travel by the public usually benefit, to some extent, the entire adjacent community, it is clear from the testimony of condemnor's experts that they were well aware of the distinction between special and general benefits, and that their opinions, based upon comprehensive analysis of the issue, provided substantial evidence that construction of the improvement left defendant's remaining property in a special and unique position of benefit with respect to the freeway, the flow of traffic along the freeway and the surrounding neighborhood.

The judgment is affirmed. Appellant is to recover costs on appeal.

Friedman, J., and Regan, J., concurred.

EXHIBIT IV

[Civ. No. 35956. Second Dist., Div. One. Dec. 8, 1970.]

THE PEOPLE ex rel. DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent, v. CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF THE LATTER-DAY SAINTS, Defendant and Appellant.

SUMMARY

The state, through its Department of Public Works brought an eminent domain proceeding to acquire land for construction of a freeway. Over objection of the property owner, the state introduced evidence that after construction of the freeway, the property remaining would have the same general potential for development that it had before the taking. The owner had made no claim for severance damage. The trial court refused the owner's offered instruction to the effect that the property taken should be valued as a distinct piece of property if that value was higher than its value as part of the whole. The jury returned an award based on a valuation substantially lower than that sought by the owner. (Superior Court of Los Angeles County, John W. Holmes, Judge.)

On appeal by the property owner, the Court of Appeal reversed the judgment of the trial court, holding that it was error to admit the evidence of potentially higher value and to refuse the offered instruction as to valuation as a distinct parcel, and that the errors undoubtedly prejudiced the property owner. The court pointed out that under Code Civ. Proc., § 1248, special benefits to remaining property may be offset only against severance damages and not against the value of the property taken. Considering that the property condemned was of a size and shape susceptible of valuation as an independent parcel, the court deemed it appropriate to determine what a willing buyer would pay a willing seller for the land actually taken. (Opinion by Thompson, J., with Wood, P. J., concurring. Gustafson, J., concurred in the judgment.)

HEADNOTES

Classified to McKinney's Digest

(1a, 1b) Eminent Domain §§ 80, 102(0.5)—Evidence as to Damages—Admissibility: Instructions.—In an action to condemn real property for a freeway, it was prejudicial error to receive evidence of potential commercial and multiple residential uses of the remaining property which would be created by the project, and to refuse to instruct the jury that the property taken should be valued as a distinct parcel if that value were higher than its value as a part of the whole, where no claim of severance damage was made (Code Civ. Proc., § 1248), and where the property condemned was of a size and shape susceptible to valuation as an independent parcel.

[See **Cal.Jur.2d, Rev.,** Eminent Domain, § 129; **Am.Jur.2d,** Eminent Domain, § 283.]

(2) Eminent Domain § 67—Compensation—Value of Property Taken—Market Value.—Where property taken in an eminent domain proceeding is not of a size and shape which renders it independently usable, it cannot be valued on the basis of the amount that a willing buyer would pay a willing seller for the land taken, but the property must be valued as a part of a larger whole, and the whole of which the condemned property is a part cannot arbitrarily be separated into zones of value where the possibility of those zones is uneffected by the taking.

(3) Eminent Domain § 67—Compensation—Value of Property Taken—Market Value.—Where property condemned is of a size and shape that renders it independently usable, it is appropriate to determine what a willing buyer would pay a willing seller for the parcel taken; in such case, the highest and best use of the parcel taken is critical and the proposition that the project may shift a similar highest and best use to the remainder of the property becomes significant only as a matter of special benefits.

COUNSEL

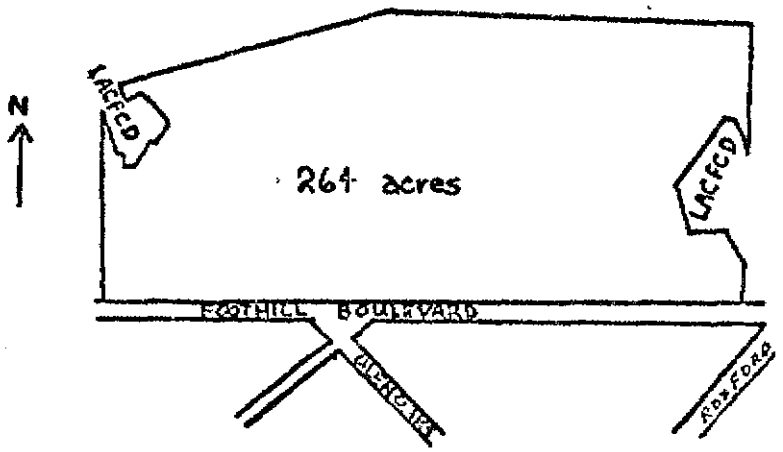
Gibson, Dunn & Crutcher, Samuel O. Pruitt, Jr., and John L. Endicott for Defendant and Appellant.

Harry S. Fenton, Joseph A. Montoya, Richard L. Franck, Robert L. Meyer and Charles E. Spencer, Jr., for Plaintiff and Respondent.

OPINION

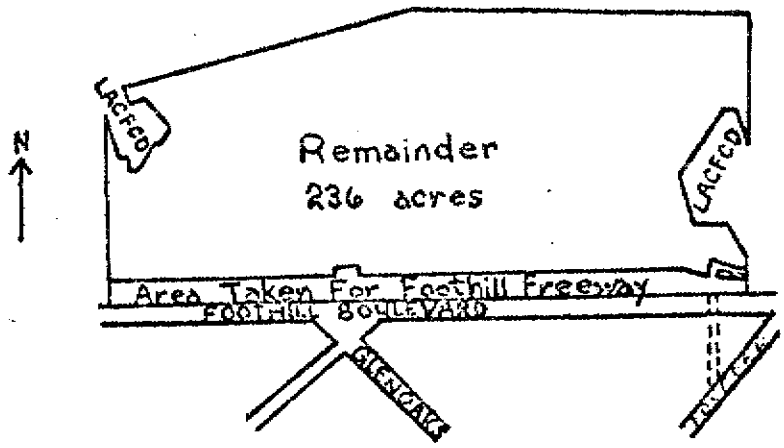
THOMPSON, J.—This is an appeal by the landowner, defendant in an eminent domain proceeding. We reverse the judgment upon the authority of *People* v. *Silveira*, 236 Cal.App.2d 604 [46 Cal.Rptr. 260].

The essential facts of the case at bench are not in dispute. Respondent filed the action in eminent domain which results in the appeal now before us to acquire property for the construction of the Foothill Freeway. Prior to the taking incident to the action, appellant owned a 264-acre parcel of property located to the north of Foothill Boulevard in the Sylmar area of San Fernando Valley. The property was approximately one mile long and one-half mile deep with access to Foothill Boulevard for most of its length. Prior to the taking the property appeared generally as follows:



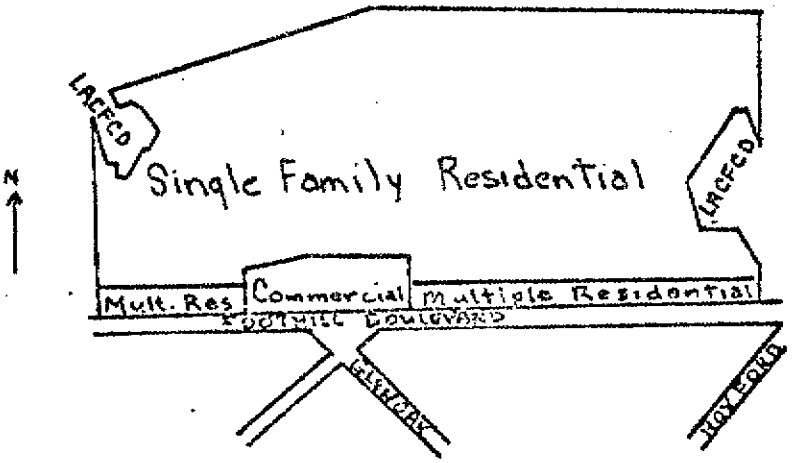
Respondent, by the eminent domain action, condemned two parcels consisting of a strip of land approximately 240 feet deep running the entire

length of the property adjoining Foothill Boulevard. After the taking, the property appeared generally as follows:



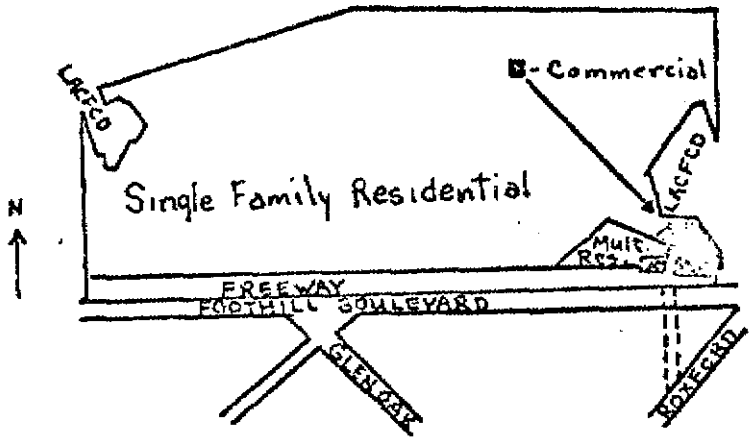
Prior to the taking, the land had unrestricted access to Foothill Boulevard. After the taking, access was limited on the south to the southeast corner and to Glenoaks to the south via a tunnel.

Appellant's expert witnesses testified to a value of the property taken based upon a highest and best use consisting of commercial development near the intersection of Glenoaks and Foothill, multiple residential development along the remainder of the Foothill frontage, and single-family residential development on the rest of the property in the following fashion:



Appellant made no claim to severance damage. It sought compensation for the portion of the property taken at the rate of $65,000 per acre for the "commercial area," $40,000 per acre for the "multiple residential area," and $22,500 for the "single family residential area."

Respondent's expert witnesses testified to a value of the property taken based upon a "holding use," an investment holding for a period of time until market demand justified development. Those experts assigned a uniform value of $17,000 per acre to all of appellant's land. Respondent offered evidence that after the condemnation of the property and the construction of the freeway, the property remaining to appellant would have a potential commercial and multiple residential use generally as follows:



The newly created commercial and multiple residential uses are projected at a freeway interchange at the southeast corner of the remaining property. Respondent also offered evidence that after the construction of the freeway, the property remaining will have the same general potential for development that it had before the taking.

Appellant objected to the evidence upon the ground of irrelevancy. It argued that no claim of severance damage was made and that the potential of commercial and multiple dwelling uses created by the project tended only to establish a special benefit from the project which could not be offset against the landowner's compensation where severance damage was not claimed. The trial court overruled the objection and permitted the introduction of the proffered evidence. No direct evidence of enhancement in

value of the newly created potential of commercial and multiple dwelling uses was offered.

The trial court instructed the jury that it must value the property as a whole and that: "Value as a part of the whole is not, however, necessarily based upon the average value of the whole. . . . The relative worth of the lands taken, as compared to other parts of the property, should be considered. Therefore, in arriving at the value of the property taken, proper allowances should be made for differences in value if any." The court refused instructions tendered by appellant that it should not use the average method of valuation if it found the property taken to be the most valuable of the whole and that it should award the value of the property taken as a distinct piece of property if that value was higher than its value as part of the whole. The jury returned an award based upon a valuation of $18,000 per acre.

Issues on Appeal

(1a) Appellant contends: (1) the trial court erred in receiving evidence of the potential commercial and multiple residential uses of the remaining property created by the project; and (2) the court erred in refusing its instruction that the property taken should be valued as a distinct parcel if that value were higher than its value as a part of the whole.

Higher Zone of Value

Code of Civil Procedure section 1248 requires that the trier of fact determine the value of the property sought to be condemned, the severance damage to the property remaining if the condemned property consists of part of a larger parcel, and the value of special benefits to the remaining property. Those benefits, however, may be set off only against severance damage and "shall in no event be deducted from the value of the portion taken." The rule in section 1248 essentially codifies a long-standing rule of determination of compensation in California eminent domain proceedings. (*Contra Costa County Water Dist.* v. *Zuckerman Constr. Co.*, 240 Cal.App.2d 908, 912 [50 Cal.Rptr. 224].) The evidence of potential higher (and hence more valuable) uses of land on the property remaining occasioned by the project is thus irrelevant if it tends only to establish a special benefit because no severance damages are claimed in the case at bench. It is relevant if it goes to the valuation of the property taken. Our problem is to determine whether the former or latter situation prevails in the case at bench.

Two California cases have considered the problem aptly designated the "reestablishment of a higher zone of value on the remainder." (Matteoni,

The Silveira case and Reestablishment of the Higher Zone of Value on the Remainder (1969) 20 Hastings L. J. 537.) Unfortunately for our peace of mind, those two cases reach contrary results on very similar facts.

City of Los Angeles v. *Allen*, 1 Cal.2d 572 [36 P.2d 611], involves an eminent domain proceeding instituted by the City of Los Angeles to acquire a 33-foot strip of land for the widening of Santa Monica Boulevard. The total parcel consisted of 38.6 acres fronting on Santa Monica for a distance of 800 feet. The property was 2,000 feet deep. The property to a depth of 107 feet from Santa Monica Boulevard was assigned the highest and best use of commercial and appraised at $1.64 per square foot. The rear portion of the property was appraised at 25¢ per square foot. The condemnee contended that it was entitled to be compensated at the rate of $1.64 per square foot, the value directly assignable by the appraisers to the property taken. The trial court awarded compensation at the rate of 32¢ per square foot, the average of the two zones of value. Our Supreme Court affirmed the determination of the trial court. In so doing, it said: "[T]he appellant . . . contend[s] that it is entitled to be awarded the potential value of the strip taken, that is, its value for city lot purposes [$1.64 per square foot] and not as part of the entire acreage. To comply with appellant's request would be to award indirectly to it severance damage when in fact no severance damage exists." (1 Cal.2d 572, 576.) The court rationalized its rejection of the condemnee's argument that the method of computation utilized by the trial court in effect charged it with special benefits when no severance damage was claimed (1 Cal.2d 572, 575) by stating that to award compensation at the rate of $1.64 per square foot for the property taken where the zone of higher use was shifted to the 107 feet adjoining the widened street would unjustly enrich the landowner. (1 Cal.2d 572, 576-577.)

Twenty-one years after the decision of our Supreme Court in *City of Los Angeles* v. *Allen*, *supra*, a similar issue reached the Court of Appeal of the First District in *People* v. *Silveira*, 236 Cal.App.2d 604 [46 Cal.Rptr. 260]. In *Silveira*, the State Division of Highways condemned a parcel of property along Highway 101 for freeway purposes. The parcel consisted of 9.304 acres and varied in depth from 30 feet at the southerly end to 850 feet at the northerly end. The portion taken was part of a larger 354-acre parcel. Prior to the action, the parcel had highway access at four points. The taking for freeway purposes destroyed that access to Highway 101 and the state was precluded from presenting evidence of a substitute access by a pre-trial order which ruled that the condemner had admitted that all access was taken. The condemnee presented evidence based upon division of the property into various zones of value that the highest and best use of the bulk of property taken which had adjoined Highway 101 was highway commercial. Other

property within the taking was assigned the highest and best use as a part of a subdivision for single and multiple family residences. The highest and best uses assigned the property within the take gave it a higher value than the remaining property in the larger parcel. The trial court instructed that the jury should value the property taken either as a separate parcel or as part of the entire tract, whichever resulted in the greater value. The jury returned a verdict valuing the property separately and taking into account the higher value resulting from the highest and best use as highway commercial. The Court of Appeal affirmed the judgment and hearing was denied in the Supreme Court. The Court of Appeal for the First District expressly approves the earlier decision in *Allen*. It distinguishes *Allen* with the following statements: "In *City of Los Angeles* v. *Allen* on which plaintiff relies . . . [t]here was no evidence of the value which the part taken would have if separately owned and unconnected with the remainder and the parties seemed to have assumed that a piece of land of such slight depth could not have been put to a very valuable use. It was clear, however, that the acreage near the boulevard was more valuable than that remote from it. Accordingly, the referees averaged out the higher values ($1.64) per square foot of the front area with the lower value (25 cents) of the rear area and arrived at an average value (32 cents) per square foot for the entire tract. . . . Since the condemnee in the case claimed no severance damages, the portion of the property not taken under the above method of computation had the same value after the severance. The court therefore properly rejected the condemnee's claim on appeal that the part taken should have been valued at the higher per square foot rule of $1.64 since this would leave the condemnee in possession of more than it had originally and its receipt 'could be justified only if damage resulting to the remaining portion by the severance reduced its value to that extent.' . . . But *Allen* does not stand for the proposition . . . that where the property sought to be condemned is part of a larger parcel, it must in all instances be valued as a part of the whole, despite the fact that it may have a greater value as a separate and distinct piece of property."

There are factual distinctions between *Allen* and *Silveira* not considered significant by the Court of Appeal in the latter case. For example, in *Silveira*, all access to the highway was taken while in *Allen* it was not. We do not consider those distinctions, however, since the denial of hearing in *Silveira* dictates that we seek to reconcile that case with *Allen* on the basis of its decision.

We view the significant disinction to be that in *Allen* the parcel taken was of such a size and shape that it was not susceptible to being valued as a separate and distinct parcel. It was therefore necessary to compute its value as a

portion of a larger piece of property. *Allen* holds that in such a circumstance the larger piece of property must be the entire parcel and not a part of it to which a theoretical value is assigned by the appraisers. Thus the Supreme Court says, "The line between the two portions of the tract [the 107 feet and the remainder] was arbitrarily chosen." (1 Cal.2d 572, 575.) In *Silveira*, the portion taken was of a size and shape susceptible of valuation as a separate parcel. Hence the court could approve a jury instruction that it was to be valued as such if that method of valuation resulted in a greater award.

The distinction between *Allen* and *Silveira*, which we draw here, reconciles the result of the two cases upon the basis of decision used in each. It also treats *Allen* as compatible with the ruling principle that special benefits from the project may not be offset against compensation to the landowner for the value of his land which is condemned. **(2)** Where the property taken is not of a size and shape which renders it independently usable, it cannot be valued on the basis of the amount that a willing buyer would pay a willing seller for the land taken, for by definition there could not be a willing buyer and seller of unusable land. The property must be valued as a part of a larger whole. In that situation, says *Allen*, the whole of which the condemned property is a part cannot arbitrarily be separated into zones of value where the possibility of those zones is unaffected by the taking. **(3)** Where, however, the property condemned is of a size and shape that renders it independently usable, it is appropriate to determine what a willing buyer would pay a willing seller for the parcel taken. If the value is so determined, the highest and best use of the parcel taken is critical and the proposition that the project may shift a similar highest and best use to the remainder of the property becomes significant only as a matter of special benefits.

(1b) In the case at bench, as in *Silveira*, we deal with property condemned which is of a size and shape susceptible to valuation as an independent parcel. We conclude, therefore, that we must be guided by the rule of that case and not by the principle of *Allen*. The rule of *Silveira* renders the evidence to which appellant objected irrelevant and the jury instructions tendered by appellant appropriate. Unquestionably, the improperly received evidence and the refusal of the jury instructions prejudiced appellant. The judgment must therefore be reversed.

Respondent argues that the result for which appellant contends and which we reach here is unfair because the condemnee receives a windfall in the form of an enhanced value in a portion of his remaining land resulting from the creation of a higher use upon it by the project of the same general char-

acter as the highest and best use of the land taken. Thus it argues that the "potential" of the land was not taken. The argument must be rejected. The "unfairness" noted by respondent is that which is always inherent from application of the rule of Code of Civil Procedure section 1248, which precludes the offset of special benefits against the value of the portion of the land taken. Respondent's argument might properly be directed to the Legislature but it is not dispositive of the problem before us. Similarly, the argument ignores that in eminent domain proceedings it is land that is taken and not "potential," and that it is the value of the land that must be determined in the manner dictated by the governing statute.

Disposition

The judgment is reversed.

Wood, P. J., concurred.

GUSTAFSON, J.—I concur in the judgment.

The result of the court's effort to reconcile *Los Angeles* v. *Allen* (1934) 1 Cal.2d 572 [36 P.2d 611] with *People* v. *Silveira* (1965) 236 Cal.App.2d 604 [46 Cal.Rptr. 260] is that when the land taken has a higher unit value than the remainder of the parcel, the landowner is entitled to an award based upon the higher value if the land taken can be sold as a distinct piece of property for a price based upon the higher value, but the landowner is not entitled to an award based upon the higher value if, because of the size or shape of the land taken, the property taken cannot be sold as a distinct piece of property for a price based upon the higher value. I think that such a rule is unfair and that it is not compelled for the reason that *Allen* no longer has vitality.

The Supreme Court in *L.A. County Flood etc. Dist.* v. *McNulty* (1963) 59 Cal.2d 333 [29 Cal.Rptr. 13, 379 P.2d 493] held that "it is not proper to attribute a per-square-foot value to defendants' entire property and then apply the value to the parcel condemned unless each square foot of defendants' land has the same value and that, if the parcel condemned is different in quality from the rest of the land, it should be assigned a different value." There was no limitation confining this rule to a case where the taken property can be sold as a distinct piece of property for a price based upon the higher value. I think that *Allen* was impliedly overruled.

In its petition for rehearing, the condemner asserts that since 1954 it has conceded that a condemnee is entitled to an award based upon the

unit value of the property taken when that property is part of an area having a higher unit value than the balance of the entire property of the condemnee, even though the property taken is of such size or shape that it cannot be sold in the open market for the amount of the award. I agree with the condemner that the court's decision "will be unjust to property owners in situations where small unusable areas are taken."

Suppose that a landowner owns highway frontage of 100 feet with a depth of 500 feet. To a depth of 200 feet the property is usable for commercial purposes and is worth $10 a square foot. The remainder is best suited for residential purposes and is worth $1 per square foot. The entire parcel is worth $230,000 or an average of $4.60 a square foot. To widen a street, a condemner seeks a depth of 2 feet or 200 square feet. The remaining commercial property to a depth of 198 feet retains its value of $10 a square foot so there is no severance damage. The narrow strip being taken would not be saleable on the open market. If by reason of that fact the landowner is entitled to only $920 ($4.60 per square foot), he is left with property of a value of $228,000 and has lost $1,080. Only if he receives $2,000 ($10 per square foot for land worth $10 per square foot) will he be made whole. If the landowner owned only the commercial property and not the residential property, he would unquestionably be entitled to $2,000. The fact that he happens to own the residential property should not penalize him.

A petition for a rehearing was denied January 6, 1971, and the opinion was modified to read as printed above. Respondent's petition for a hearing by the Supreme Court was denied February 3, 1971.