#36.52 3/16/72

First Supplement to Memorandum 72-27

Subject: Study 36.52 - Condemnation (Partial Take)

This supplement to Memorandum 72-27 collects background material relating to partial takings that should be of assistance to the Commission in making decisions in this area. Some of the material has been previously distributed, some is new.

Other materials that have been previously distributed that are not collected in this supplement because they are of marginal utility at this point are: Haar & Hering, The Determination of Benefits in Land Acquisition, 51 Cal. L. Rev. 833 (1963), and A Study Relating to the "Larger Parcel" in Eminent Domain (1961), prepared for the Commission by its former consultant.

A brief synopsis of the items collected in this supplement follows.

(1) A Study Pertaining to Benefits in Eminent Domain Proceedings (1961) has been previously distributed. It was prepared for the Commission by its former consultant. This study provides a thorough treatment of the law relating to benefits and its evolution. It criticizes the California law that permits special benefits to be offset only against damages to the remainder. The study suggests that special benefits be offset against both damages to the remainder and the value of the take.

(2) Gleaves, Special Benefits in Eminent Domain: Phantom of the Opera, 40 Cal. S.B.J. 245 (1965), demonstrates the peculiarities of the "general"-"special" benefit distinction and the uncertainties it engenders. The author, citing earlier Commission work in this area, recommends the rule that special benefits be offset against both damages to the remainder and the value of the take.

(3) Connor, Valuation of Partial Taking in Condemnation: A Need for Legislative Review, 2 Pac. L.J. 116 (1971), has been previously distributed. The article illustrates the numerous mechanical problems and inequities that may arise under the California method of valuing the part taken and then estimating damages and benefits to the remainder. The author recommends the adoption of the rule that special benefits be offset against both damages to the remainder and the value of the take.

(4) Beatty, The Eminent Domain Procedure Act, 32 Kans. Bar Ass'n J. 125 (1963), describes the effect of the new Kansas statute, which is a strict before-and-after test, in this excerpt. The author concludes that simplicity of operation will be a major benefit of the adoption of this test, enabling the direct computation of severance damage rather than the complex method of totaling up the part taken, damages, and benefits, as is done in California:

> Under the old law we have been operating like the statistician for the Department of Agriculture. He was sent into the state to count the cows. The method he was using was to count the "tits" and tails and divide by five. Under the new law, we will count the cows. [32 Kans. Bar Ass'n J. at 132.]

(5) The 1972 "Little Hoover Commission" report on Division of Highways' excess property practice illustrates some of the difficulties that may arise if condemnors are required to take more property than is needed for the project. This problem is discussed in more detail in Memorandum 72-27.

Respectfully submitted,

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A STUDY PERTAINING TO BENEFITS IN EMINENT DOMAIN PROCEEDINGS*

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

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A STUDY PERTAINING TO BENEFITS IN EMINENT DOMAIN PROCEEDINGS

INTRODUCTION

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

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

> "§1248. Hearing: items to be ascertained and assessed
>
> . . .
>
> . . .
>
> 3. Benefits. Separately, how much the portion to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiffs; and if the benefit shall be equal to the damages assessed under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if

> the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value; . . . "

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

> "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, . . . "
>
> [Emphasis added]

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

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

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

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

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

I. PRELIMINARY FACTORS IN THE TREATMENT OF BENEFITS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The "Distinction" Between Special and General Damages

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

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

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

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

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

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

NICHOLS states:[17]

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

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

ORGEL writes that:[18]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. THE TREATMENT OF BENEFITS: AN HISTORICAL BACKGROUND

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

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

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

were realized.

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

for this "special value".[30]

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

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

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

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

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

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

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

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

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

A. "The Law" In The Various Jurisdictions

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

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

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

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

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

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

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

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

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

not against the value of the part taken.

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

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

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

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

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

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

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

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

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

B. The Conflict In Policy Between The Divergent Rules

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. THE CALIFORNIA POSITION AND ITS EVOLUTION

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

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

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

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

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

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

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

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

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

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

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

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

"Corrective" action was not long in coming.

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

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

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

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

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

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

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

V. CONCLUSIONS AND RECOMMENDATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On closer analysis, we find it difficult

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

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

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

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

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

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

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

FOOTNOTES

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

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

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

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

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

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

(7) See, e.g., 1 ORGEL §7.

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

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

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

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

(12) See discussion at pp. , infra.

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

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

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

(16) 1 ORGEL 40-41.

(17) 3 NICHOLS §8.6203.

(18) 1 ORGEL 41.

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

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

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

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

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

(24) Idem at 77, et seq.

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

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

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

(28) Ibid at 65-67.

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

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

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

(31) 1 ORGEL 45.

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

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

(34) Cal. Const., art. 1, §14.

(35) 137 Cal. at 624.

(36) See n. 33, supra.

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

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

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

(39) Wis. Laws, 1959, § 32.09(3).

(40) W. Va. Code, c.54 art.2 §9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(55) Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

(65) See n.58, supra.

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

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

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

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

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

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

(72) Beveridge case at n. 70.

(73) See text at n. 78.

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

(75) See Beveridge opinion at 626, stating:

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

(76) See n. 61, supra.

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

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

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

(80) Ibid.

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

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

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

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

40 Cal. S.B.J. 245 (1965)

Special Benefits in Eminent Domain

Phantom of the Opera

By Milnor E. Gleaves of Los Angeles

The concept of special benefits as it arises in the evaluation of partial takings of land in condemnation proceedings is probably the most misunderstood aspect of a branch of the law not otherwise known for its susceptibility to the skills and experience of the general practitioner. To the over-enthusiastic right-of-way negotiator, it is a tempting, but not always valid, threat to discourage severance damage claims. To the owner and his counsel, it may prove to be that bane of every party in major litigation—a deep and costly trap for the unwary. The nature, existence, and amount of special benefits is a three-headed problem that is potentially present in every acquisition, whether by negotiation or trial, where a part of the owners' property is taken and a remainder left. It falls to the attorneys representing the owners, as well as those for the acquiring public agency, to advise their respective clients, and the appraisers who look to them for legal guidance, whether as a matter of law special benefits to the remainder can arise from the construction of the particular public improvement involved. The accuracy of that advice may have a considerable effect on the amount of money that changes hands between condemnor and condemnee.

I. Legal Nature and Parentage.

In California condemnation law, the process of *benefit* is directly linked to the *market value* of the property involved. If, as the result of the "construction of the improvement proposed by the plaintiffs" (*i.e.*, the acquiring entity), the remaining land of the owner is increased in value over what its value was before the taking, a benefit is said to have accrued to it. Under the language of the Code of Civil Procedure prescribing the manner in which the right of eminent domain is to be exercised, such benefit is to be offset against any severance damage caused to the remainder by the taking.[1]

[1] C.C.P. sec. 1248, subsec. 3.

Despite the general wording of the statute, however, not all benefits may be considered in determining the net compensation due to the owner. Under the case law, benefits are of two kinds, *special* and *general*, and only special benefits may be considered by the trier of fact in making such determination.[2] The difference between the two in a given case can often be a spectral one, to be pursued by counsel from pre-trial to appeal before it is finally put to rest.

The state Constitution is said to be the primary authority for the recognition of special benefit, but it is provided for in a very backhanded manner. Section 14 of article I reads in part (italics added):

> . . . (N)o right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, *irrespective of any benefits from any improvement proposed by such corporation*, ...

This provision appears on its face to mean (1) that no benefit of any kind may be set off against the compensation required to be paid to the owner if it is a right-of-way or reservoir site being condemned; (2) unless the condemning body falls within one of the public corporation exceptions. To switch it to more positive terms, the constitution seems to *permit* a deduction for general *or* special benefits in any partial taking by any authorized condemnor for any use except a right-of-way or reservoir, and such a deduction may be made even then if the condemnor is one of the excepted public bodies.

However, the appellate courts in California have thus far held that, in any case, *general* benefits may not be deducted from just compensation in a condemnation, but that special benefits may be deducted *if* the condemnor is a public body. The rule found in the code, while it draws no distinctions between special and general benefit, or between public and

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[2] *Beveridge* v. *Lewis* (1902), 137 Cal. 619.

private condemnors, has been uniformly interpreted accordingly.[3]

II. Deducted From What?

Since under our state law, and thus in state court practice, special benefit may only be deducted from severance damage, it cannot be set off against the value of the part actually taken.[4] There is, however, one instance where special benefit may *not* be offset against damages. Where land is being condemned for public use in connection with special assessment proceedings, no offset is allowed in the condemnation action, since otherwise the property owner would be subjected to a double charge for benefit received—once in the condemnation proceedings, and again when the assessment itself was made against his remaining property.[5]

In federal practice, on the other hand, special benefits are deducted from the value of the part taken, as well as from the amount of severance damage.[6] In that forum, therefore, it is possible that an owner might receive no compensation at all for the taking of part of his property. To date, however, it has never been held that an owner owed the government anything back, where the special benefit exceeded both the severance and the value of the remainder.

III. What's Special About Special Benefit?

One of the first Supreme Court cases to have a go at the Phantom was *Beveridge v. Lewis* (1902), 137 Cal. 619. There, a private individual, who in business life was a right-of-way agent for the Los Angeles Pacific Railway Co., brought an action in eminent domain to condemn a right-of-way for railroad purposes, under instructions to transfer it to his employer after judgment. The trial court admitted evidence to the effect that there would be benefit to the owner's remaining lands because of the railroad passing through it. The case was reversed on appeal, and the Supreme Court handed down the following statements which were intended to straighten the whole matter out:

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[3] See *Beveridge v. Lewis* (1902), 137 Cal. 619, and *People v. McReynolds* (1939), 31 Cal.App.2d 219.

[4] *County of Ventura v. Thompson* (1877), 51 Cal. 577; *People v. Fair* (1964), 229 A.C.A. 918, 920.

[5] Sts. & Hwys. Code, sec. 4206(b); *Frank v. McGuire* (1927), 201 Cal. 414, 421; *Oro Loma San. Dist. v. Valley* (1948), 86 Cal.App.2d 875.

[6] *U. S. v. Miller* (1943), 317 U.S. 369.

> Benefits are said to be of two kinds, general and special. General benefits consist in an increase in the value of land common to the community generally, from advantages which will accrue to the community from the improvement. They are conjectural and incapable of estimation. They may never be realized, and in such case the property-owner has not been compensated save by the sanguine promise of the promoter.
>
> Special benefits are such as result from the mere construction of the improvement, . . . and are peculiar to the property which . . . has been damaged, [and] . . . are reasonably certain to result from the construction of the work. Illustrations are afforded where a marsh will be drained or a levee built which will protect the land from floods, . . . [or anything which will] afford protection to the land, or at once render it more productive. . . .

In a nutshell, this may be reduced to the following definition, which the court in the *McReynolds* case took from the court in *County of Los Angeles* v. *Marblehead Land Co.*,[1] and which was said to have been decided in *Beveridge*:

> Such benefits must be special in character as distinguished from general benefits enjoyed by the public at large. [They are] . . . those which result from the mere construction of the improvement, and are peculiar to the land in question. These special benefits must be such as are reasonably certain to result from the construction of the work.

This is the test. From the condemnor's standpoint, its application in a given instance generally requires the combined efforts of the right-of-way agent, the appraiser, and the attorney handling the case. Where their joint conclusion indicates the presence of special benefit, it frequently meets with objection from the owner's side of the case, and the matter then becomes an issue for decision in court.

One thing is certain: unless an identical factual situation has been decided by an appellate court and has become precedent, no one can be sure whether special benefit is factually *and* legally present in a contested case until the judgment becomes final. The factual decision is one that must be arrived at by the appraiser, as his opinion, upon

[1] (1938) 95 Cal.App. 602.

the basis of fact, experience, common sense, and the ability to forecast the future of the land remaining. The legal decision must be that of the attorney charged with the responsibility of presenting the case in court.

IV. The Proof of the Pudding.

A cross-section of representative special benefit cases, covering a 35-year period of appellate review in California, will serve to demonstrate that, if nothing else, the scope of confusion concerning this issue has continued to widen in the field of condemnation. From these, the individual practitioner may well conclude that the only good special benefit decision is a final one, decided in favor of his own client. From these cases, however, certain basic principles can be extracted which may indicate the presence or absence of special benefit as the result of the construction of a proposed public project.

A. Newly-created access. One of the latter-day landmark cases is *County of Los Angeles* v. *Marblehead Land Co.*,[8] an action brought to condemn an 80 foot highway right-of-way through the old Rindge Ranch in the Malibu area. There was testimony by a county witness that the market value of the remaining land would be greatly increased by the laying out and construction of the highway due to new access and transportation facilities, and by reason of frontage values thus created. The witness stated in his testimony that this benefit was "separate and apart from the general benefit which the entire district would receive." The appellate court upheld the judgment allowing a complete offset of all severance by reason of these benefits, which it held to be *special*. The case is good authority for the basic principle that new access to a public road or highway, where none existed before, can be a special benefit to the adjoining land *if* there is competent opinion evidence that an increase in its market value will result.

B. Physical improvement. Where part of a tract of land is taken for a public project and the project itself directly accomplishes some improvement of the land which the owner would otherwise have to make to develop it to its highest and best use, a special benefit will usually be recognized. Two examples will suffice. In *Los Angeles County*

[8] (1928) 95 Cal.App. 602.

Flood Control District v. *McNulty*,[9] the Supreme Court held that where a county flood control channel was built through a property that was subject to natural flooding, and the owner was thus relieved from building a drainage ditch of his own, the estimated cost of the private ditch was properly offset against severance. Likewise, in *People* v. *Thomas*,[10] where the state condemned certain abutters' rights of access along a pre-existing highway through a ranch in Riverside County, a special benefit was recognized because the evidence showed that the state proposed to build and maintain a four-strand barbed wire fence on steel posts along the right-of-way.

C. Increased traffic flow. Not infrequently, a new highway or freeway is opened up along an axis parallel to an existing road which previously carried all the through traffic. When the old road is left open at both ends, and is not changed in width or elevation, the owner of an abutting property, as a matter of law, has no claim for severance damages—even though the through traffic no longer passes in front of his land, and any commercial value it may have had has now been sharply reduced.[11] However, where as part of the new improvement, the old street is narrowed,[12] or converted into a cul-de-sac,[13], and as a result of such change the through traffic no longer flows down the street, the owner is entitled to claim damages for any proven loss of value to his adjacent property.[14]

In *City of Hayward* v. *Unger*,[15] one block of a city street was being widened, and a portion of the land and building owned by the defendant was taken. For what were dryly termed "economic reasons," the city decided not to take as much of the corner property next door as of the remainder of the block. As a result, defendant's store was set back three feet farther than the corner store next to it. He claimed severance damage because of the adverse effect on

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[9] (1963) 59 Cal.2d 333.
[10] (1952) 108 Cal.App.2d 832. It should be noted, however, that there was no evidence concerning how long the state was obligated to maintain the fence, or for how long the highest and best use of the property was expected to remain as it was.
[11] See BAJI Instruction for Condemnation cases, No. 506-C.
[12] *People* v. *Ricciardi* (1943), 23 Cal.2d 390.
[13] *Valenta* v. *County of Los Angeles* (1964), 61 Adv.Cal.Rep. 728.
[14] See *People* v. *Ayon* (1960), 54 Cal.2d 217, 224, 225.
[15] (1961) 194 Cal.App.2d 516.

visibility of his building and of a sign formerly projecting beyond it. The trial court found severance damage, but also found that there was a special benefit that exceeded, and therefore offset, the severance damage. This benefit was found to be the result of an *increased flow of traffic past defendant's building*, to which the city's expert witness had testified. The court based its decision on the *Marblehead* case, holding that if the opening of a new road could legally result in special benefit to the adjoining property, so could the widening of an existing one. Since the physical street frontage involved in the *Unger* case was the same in the after condition as it was in before, and the view of the property was actually impaired by the widening, it would appear that the increase in traffic flow was the only real benefit to the property resulting from the improvement.

D. Site prominence. One generally-recognized asset of a commercial property is its ability to be seen from some distance away. For many years it was accepted as a general and logical principle in condemnation that where a portion of such a property was taken for street or highway use, and as a result of the public improvement it thereafter was on a corner or was otherwise more visible than before, any added value could be offset against severance as a special benefit. This position was the converse of the case law relating to severance damages whereby any impairment of the owner's easement of reasonable view of his property from the street or highway was compensable.[16] However, a serious question now exists whether such benefit can be considered at all in determining net compensation to the owner.

In *People* v. *Loop*,[17] a small triangular piece of a commercially-zoned property on Wilshire boulevard in Los Angeles was taken for the Harbor Freeway. The state's witness testified to special benefit, giving as his reason the fact that the remainder of the property would have added "site prominence" because it could be seen in its after condition from the new Statler Hotel and office building, which was then under construction a block away. A judgment based in part on this testimony was reversed on appeal.

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[16] *People* v. *Ricciardi* (1943), 23 Cal.2d 390, 399.
[17] (1954) 127 Cal.App.2d 786.

The court held that such was a *general* benefit, just as was the growth of population in Los Angeles, and that such a factor may properly be reflected in the value of the part taken, but may *not* be offset against severance damage.

In 1963, the site prominence theory was further limited, on a different ground, in the case of *People* v. *Lipari*.[13] A right-of-way for a new freeway was being condemned through the middle of a large tract of land in Riverside County. Appraisal witnesses for the state testified to a special benefit in the amount of $12,500 by reason of the right to view the property from the freeway. Upon motion of the defendants, the testimony of these witnesses in this respect was stricken, and the jury instructed to disregard it. On appeal by the State, the judgment was affirmed on two grounds. It was first held that the construction of the new freeway did not of itself "create" a right and easement of view. It was held that the rights of the owner of real property abutting a highway to the use of that highway, and to the view therefrom, are rights that are inherent in the title to the property itself, and attach to any highway which abuts or which may abut the property. In other words, the right is automatically created by the creation of the highway, and the state or other public body cannot take credit for such creation in the form of special benefits in a condemnation case. The court further held that the whole basis of the state's theory of special benefit in such a case was predicated upon the fallacious assumption that a person traveling along the new freeway would see the property and its improvements, and would thereupon be attracted to the places of business thereon and become customers. The court pointed out that "it is the very essence of the idea of a freeway to prevent just that sort of thing." The court noted that the proposed improvement included the construction of a six-foot chain link fence on either side of the freeway which was expressly designed to prevent any access to the property abutting the freeway.

From the viewpoint of logic, and harking back from *Lipari* to *Marblehead*, it is difficult to understand why a newly-created easement of access is a special benefit to an abutting property and a newly-created easement of view is not—

[13] (1963) 213 Cal.App.2d 485.

particularly when the loss of either because of a highway project is compensable as severance damage. It may well be that a future decision in this field will limit the *Lipari* holding to the ground either that (a) the new view was a *general* benefit only, as in *Loop*, or that under the particular facts of the case no monetary benefit could result because of the inability of the potential customers traveling the new freeway to get over the fence to spend their money.[19]

E. Increased probability of zone change. In the valuation of property being taken in condemnation, if it can be shown that there is a reasonable probability in the near future that the zoning of such property can be changed to a higher and more valuable use, the owner is entitled to compensation based on the higher use.[20] In *People* v. *Hurd*,[21] this principle was imported into the issue of special benefit. The state was condemning portions of an unimproved 1000-acre tract in the Santa Monica Mountains in the City of Los Angeles, between Mulholland drive and a point near Sunset boulevard, for the San Diego Freeway. It was zoned R-1. Under the proposed plan of improvement, several existing streets were to be relocated and certain new ones opened as part of the freeway complex. The state's appraisers testified to a substantial special benefit, which they attributed in part to the reasonable probability of rezoning some of the R-1 property for multiple residence use after the complex was constructed. The owners appealed, claiming that this was a general benefit to the entire neighborhood, for which they should not be charged twice. The court held, however, that the reasonable probability of rezoning is as applicable to special benefits as to value of the part taken, if there is a causal connection between the proposed improvement and the probability.

F. General vs. special benefits. The absence of any workable formula by which special benefit can be distinguished from general has resulted in something less than *stare decisis* in the appellate courts. The court in the *Unger* case frankly stated the situation:[22]

> The rule is clear that only special benefits, which directly enhance the value of the propery remain-

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[19] Compare *People* v. *McReynolds* (1939), 31 Cal.App.2d 219.
[20] *People* v. *Donovan* (1962), 57 Cal.2d 346.
[21] (1962) 205 Cal.App.2d 16.
[22] (1961) 194 Cal.App.2d 516, 518.

> ing after condemnation, can be offset against severance damages. General benefits, accruing to the community or the neighborhood as a whole, cannot be so offset. But few California cases involve this question, and as a result the distinction between general and special benefits is by no means clearly drawn. Decisions from other jurisdictions are conflicting, and in general do little more than point up the difficulty of stating a rule of broad application. The bases for refusing offset of general benefits are usually stated to be the unfairness of charging only to condemnees benefits which accrue to the entire neighborhood or community, and the uncertainty and speculation involved in attempting to apportion such benefits.

In the *Loop* case,[23] the new site prominence of the subject property was held to be general, apparently on the theory that it was not the only property to be seen from the new Statler. In *Hurd*,[24] the probability of rezoning some of the remaining property was held to be a special benefit, though other properties in the neighborhood and outside the right-of-way unquestionably received a similar benefit. In *People v. Lillard*,[25] the legal line between special and general benefits seems to have completely disappeared. There, a four-lane highway (U.S. 40) just outside of the City of Davis was being converted into a six-lane freeway. The city limits were north of the highway, and defendant's land consisted of 300 acres of farm land on the south side of both the highway and a parallel set of railroad tracks. Traffic was heavy along the highway. Part of defendant's land was taken for the widening, together with all access to the new freeway. Under the plans for the new improvement, overpasses spanning the new freeway were to be constructed about a mile north and a mile south of the subject property. The State's appraisers testified that before the improvement, the defendant's property was, for all practical purposes, separated from the city of Davis, the expansion of which had been effectively blocked by U.S. 40, its traffic, and the tracks. After the improvement, they felt

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[23] (1954) 127 Cal.App.2d 786.
[24] (1962) 205 Cal.App.2d 16.
[25] (1963) 219 Cal.App.2d 368.

that the subject property would be opened up by the overpasses, and that its value for potential commercial uses would be well above its value as farm land. This they classified as special benefit, and the District Court of Appeal affirmed a judgment based on their opinion.

Plainly, the land involved in *Lillard* was not the only land that would be "opened up" for development by the overpasses, although, as in *Marblehead*, the defendants' land might be the first to receive the benefit, and to receive more of it. On precedent, therefore, the court might well have held, as a matter of law, that this was a general benefit to the whole community theretofore on the wrong side of the tracks. Unfortunately, however, the legal question whether the benefit was general or special use was apparently never raised by the owners, and the comment by the Court of Appeal that "substantial evidence supported the award" is *dictum*.[26] The comment, however, is indicative of the growing tendency of the appellate courts to avoid the question by treating it as one of fact, to be resolved by the trial court as a matter of equity *ad hoc*.

V. The Shape of Things to Come.

There is no doubt among practitioners active in this field that the law on the subject of benefits could stand serious re-examination and clarification, both at the legislative and the judicial level. Contemporary studies are available as a matter of academic interest,[27] and it is understood that the California Law Revision Commission has had the matter under preliminary study as part of its excellent work on the law of eminent domain in this state, although no recommendations have yet been made.

Two general areas within the subject of benefits are frequently discussed in terms of change: (1) whether *general*, as well as special, benefits should be considered in arriving at just compensation, and (2) whether benefits of either kind should be offset against the *value* of the part taken, as well as against severance damages.

A legislative abolition of the difference between general

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[26] 219 Cal.App.2d 368, 373.

[27] See Haar and Hering, "The Determination of Benefits in Land Acquisition," (Dec. 1963) 51 Cal. Law Rev. 833; Judge Thomas Yager, "Just Compensation," (Dec. 1964) Amer. Right of Way Assn. "Right of Way," p. 19.

and special benefits would, of course, be the easiest solution to most of the problems of segregation now besetting bench and bar when this difference is sought to be resolved in a given case. In effect, it would permit a simple "before and after" test to be applied in valuing the property under partial condemnation. This approach might be expected to receive the approval of those primarily concerned with the administration of right-of-way acquisition programs in California. However, such a proposal would immediately raise a mixed question of law and equity which might best be labelled *double taxation*. Obviously, the general taxpayer is the financial source that makes most public right-of-way projects possible, and as such he reaps the general benefit. If, however, one of his class happens also to be a property owner from whose land a portion is condemned for the use of the proposed project, and if *some* increment of *general* benefit to the remainder of his land is deducted from what is owed him for the taking, then he is in effect paying twice for the *same* benefit, while his neighbor next door, from whom no land is taken, pays only once. Vote-conscious legislators might well hesitate to embrace such a proposal which, if it ever were to be adopted, would immediately be suspect on a consitutional basis.

Whether *special* benefits should be offset against the value of the land condemned, as well as against severance damages, is a question that appears to be free from constitutional restrictions, and to be solely a question of public policy. A recognized reference authority in the field states that "the modern rule seems to be that only special benefits may be considered and that they may be set off only against the damages to the remainder area."[28] However, one basic and meritorious objective of studies in the field of eminent domain is to eliminate hardship and injustice where the property owner is concerned. One example is the recommendation of the Law Revision Commission that such an owner should be reimbursed for the expense of moving his personal property to a new location,[29] the effect of which is to restore the owner, in an added degree, to his former

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[28] 3 Nichols on Eminent Domain, (3d ed., 1964 Supp.) p. 82, citing the present California rule as the paramount example.

[29] Cal. Law Rev. Comm., "Recommendation and Study Relating to the Reimbursement for Moving Expenses When Property Is Acquired for Public Use" (Oct. 1960).

pecuniary position. It is therefore conversely argued in the matter of special benefit that if such an owner will receive a substantial *special* benefit to the remainder of his property because of the proposed public project, the general public should receive credit for it in the final reckoning, and the owner should not receive a windfall of value by having such credit limited only to the item of severance damage. The argument has merit in both logic and equity, and there is an ample body of experience in the Federal courts for the application of such a procedure.[40] It should have the support of all points of view in bringing the law in this field more in line with the practicalities of our modern society.

[40] See *U. S. v. Miller* (1943), 317 U.S. 369; "Legal Aspects of Real Estate Transactions," (State Bar of Calif., 1958), pp. 666, 675.

The Journal of the Bar Association of the State of Kansas

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THE EMINENT DOMAIN PROCEDURE ACT*

By MARION BEATTY, *Topeka, Kansas*

Judge of Second Division, Shawnee County District Court

JUST COMPENSATION, FORMULAS

Let's move to Section 13. For the first time in Kansas history, there is a clear-cut pronouncement that:

> "Private property shall not be taken, or damaged, for public use without just compensation."

Except for the words "or damaged" now added, these are identical words to those used in the Fifth Amendment to the U. S. Constitution, but the Fifth Amendment is a direction only to federal courts.

The Fourteenth, which is a direction to the states, a limitation upon the states, gets at it only obliquely:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

Paragraph 18 of our Bill of Rights bears on this matter in a general way. It provides:

> "All persons, for injuries suffered in person, reputation or proprety, shall have remedy by due process of law. . . ."

There never has been any question about a property owner's right to recover in

Kansas, but the measure of damages has varied somewhat with the particular statute involved. Under some statutes benefits are to be considered, under others, not.

Where all of a property owner's tract is taken, the measure of damages will be the value of the property or interest at the time of the taking, the same as before. Where only a part of it is taken, we have a new formula. We have adapted the usual federal rule, the difference between the value of the entire property or interest immediately before the taking, and the value of that portion of the tract or interest remaining immediately after taking [Section 13(b) and (c)].

Several of our stock instructions will undergo some change on this measure, I believe. The definition of market value will remain the same, of course, but instead of telling the jury to determine the value of the land taken and "you should then proceed to determine whether the property owner has suffered any damage to the remainder of his land," we will tell the jury to determine market value before and after.

The old law sends us in a quest for damages. It speaks in terms of damages to the remainder rather than market value. Of course we will still be concerned about the remainder being damaged and how, but we will focus attention on the real issue, namely, how all this affects market value. Incidentally, I believe in light of the thousands of interpretations to date we can accept value, market value, fair market value, and reasonable market value as being synonymous.

Where part of a tract is taken, I believe a proper instruction under the new act will read something like this:

> "You are instructed that the measure of full compensation to be paid to the property owner, is the difference between the reasonable market value of the entire tract or interest immediately before the taking and the reasonable market value of the remainder immediately after the taking.
>
> "You may consider all the factors in evidence which actually weigh on market value, but these must not be speculative, conjectural or remote.
>
> "As these factors apply to market value of the remainder, they must be such as result from the severance or the taking, and be so reasonably possible and probable as to have an effect upon market value at the time of the taking."

Both formulas, the old and the new, usually produce the same result, but the new formula does it quicker and easier, and with less fiction and fiddle faddle. Is there a difference? Can they produce different results? Yes, I think this is possible in some cases.

Orgel, in his work on Eminent Domain, tells us that many courts over the land have confused the formulas and treated them as if they were the same. We have been doing some of this too.

I wonder if we aren't mixing the old and new at present in asking appraisers to testify as shown in the chart below and in sending this chart to the jury room as we often do. Appraisers go through all 6 columns in the chart below to fortify their conclusions, but they often assume routinely that column 3 minus 4 equals 5. As will be pointed out later, this is not always so. All the present statute calls for is columns 2, 5, and 6. (But the formula for this chart was approved in *Clagget v. Phillips*, 150 K 187, 191.)

(1) Value of entire tract immediately before taking	(2) Value of land taken	(3) Value of remainder immediately before taking	(4) Value of remainder immediately after taking	(5) Damage to remainder (3) − (4)	(6) Total compensation due (2) + (5)
$5,000	$1,500	$3,500	$2,500	$1,000	$2,500

The slightly changed and simplified formula under the new statute appears next below. The emphasis is on value and we stop going around Robin Hood's barn to reach it.

(1) Value of entire tract immediately before taking	(4) Value of remainder immediately after taking	(6) Total compensation due (1) − (4)
$5,000	$2,500	$2,500

Under the old law we have been operating like the statistician for the Department of Agriculture. He was sent into the state to count the cows. The method he was using was to count the "tits" and tails and divide by five. Under the new law, we will count the cows.

The old statute, G. S. 49, 26-101, spoke in terms of damages to the remainder, not market value of the remainder before and after. We were supposed to ascertain *damages* to the remainder, only damages, not benefits, and give the property owner all his damages. We were not supposed to consider general benefits like those that ensue from a new or improved highway adjacent to his property, benefits that might follow if a lake was built and he was left with excellent shoreline, for example.

And we sometimes tried to make a difficult and unrealistic differentiation between special and general benefits. (In re special and general benefits see: *Emery v. Riverside Drainage District*, 132 K 98; *Cullen v. Junction City*, 43 K 627, 630, criticized, *Town of Fairbanks v. Barrack*, 282 F 420; *Hall v. Electric Railroad Co.*, 89 K 70, 72.)

I believe the new formula, in seeking the market value before and after, has a built-in device, an automatic device for ascertaining damages and offsetting benefits, all benefits, that sometimes flow from condemnation. If this is so, it is a change from the present general condemnation law and it will repeal some case law. (See Nichols on Eminent Domain, Vol. 4, Sections 14.23 et seq.) Consideration of benefits is nothing new to the law and special assessments to pay for benefits are common.

STATE OF CALIFORNIA

RONALD REAGAN, Governor

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Executive Officer

FOR JANUARY 12, 1972 A.M. RELEASE

P R E S S R E L E A S E

A sub-committee of California's "Little Hoover Commission" today accused the State Division of Highways of mismanaging more than $100 million worth of excess land. Chairman H. Herbert Jackson has announced that a full Commission hearing will be held to investigate the charges on Wednesday, January 26, 1972, at 9:30 a.m., in Room 6031, of the State Capitol.

A study conducted by the Commission on California State Government Organization and Economy's Sub-Committee on Highway Right-of-Way has revealed:

*The "loss" of excess parcels valued at more than $15 million which are owned by the State, but which do not appear on the Division of Highways' inventory lists.

*Parcels of land acquired for possible future highway use have been held for periods as long as 40 years without utilization.

*Division of Highways Headquarter policies and regulations have, in many instances, been ignored or deliberately disobeyed by district personnel.

*Procedures and policies regarding excess right-of-way differ among various districts of the Division of Highways.

*No real effort is being made to assure maximum utilization of existing right-of-way parcels.

*Despite earlier assurances, the Division of Highways has failed to reduce significantly its inventory of property not required for highway right of way.

*Local governments have suffered untold loss of tax revenues since excess right of way properties are not being developed for their highest and best use. This is particularly true in the Los Angeles and Orange County areas and to a lesser extent in San Diego and San Francisco.

*There is a lack of centralized organizational responsibility and authority over the right of way excess land program resulting in ineffective management of the program.

A major reason for the present condition of the excess land program, according to the sub-committee, is the engineering orientation of the Division of Highways: "We have serious reservations whether there will be lasting improvement in this program unless there are organizational changes which will remove the program from engineering jurisdiction...Their interest is in building highways. In relation to total dollars, the excess lands program, $100 million, is regarded as of minor importance and, consequently, has little (if any) status of priority."

Members of the sub-committee include Nathan Shapell, Chairman; Manning J. Post; James E. Kenney; and Andrew L. Leavitt. The study involved more than 7,000 man-hours of work by the sub-committee and staff. The Sub-Committee report is an outgrowth of work begun in 1966 under the chairmanship of Commissioner Post. Previous

studies of the Commission have been concerned with other aspects of the Department of Public Works, as well as analysis of operations in the Departments of Finance, Industrial Relations, Highway Patrol, P & V Standards, General Services, Personnel Board, Agriculture, and other departments and agencies.

"We found conclusive evidence that the Division of Highways is not doing an adequate job with regard to management and disposition of right of way property," according to Commissioner Shapell. "The result is a significant loss of revenue for the State and local government and an unnecessary drain on our taxpayers. Unfortunately, this situation, which has existed for at least 25 years, is going to continue until such time as the Division of Highways adopts and implements sound management and real estate practices."

PRELIMINARY FINDINGS OF SUBCOMMITTEE ON CALIFORNIA DIVISION OF HIGHWAYS EXCESS RIGHT OF WAY

January 1972

Commission on California State Government Organization and Economy

STATE OF CALIFORNIA RONALD REAGAN, Governor

COMMISSION ON CALIFORNIA STATE GOVERNMENT ORGANIZATION AND ECONOMY
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Executive Officer

January 12, 1972

Mr. H. Herbert Jackson, Chairman
Commission on California State Government
Organization and Economy
455 Capitol Mall, Suite 700
Sacramento, California 95814

Dear Mr. Chairman:

Transmitted herewith is the report of preliminary findings of the study conducted by your Subcommittee on excess highway right of way.

As you know, this matter has been under study by several subcommittees of this Commission since 1966. In 1969 the State Highway Engineer, J. A. Legarra and Highway Right of Way officials made definite commitments and assurances to this Commission, in writing, as to right of way acquisition, management and disposal practices. On the basis of more than 7000 man hours of work by this Subcommittee and its staff since that time, it has become evident that the excess land program involving inventory, sales, leases, engineering holds and property management, is not producing the results the Commission had been led to believe. Significant changes in procedures and organization are necessary.

The data compiled for the Subcommittee has documented that:

- There are serious defects in excess land inventory records.
- Land has been withheld from sale without justification and at the whim of engineers and for unlimited periods of time.
- The Department has failed to reduce the excess land inventory.
- There has been little effort to develop productive usage of space available within right of way.
- Inefficiency and administrative insubordination has been ignored by those with authority to take appropriate action.

The result of these deficiencies has been a loss of millions of dollars to the taxpayers of the State of California--resources tied up and not available for other purposes. In addition, local governments have suffered untold loss of tax revenue since these properties have not been developed for their highest or best use.

The members of the Subcommittee unanimously recommend that public hearings be held by the full Commission at the earliest possible date in order that these preliminary findings may be presented, thus forming the basis of a formal report containing conclusions and recommendations for submission to the Governor and members of the Legislature.

Respectfully submitted,

Nathan Shapell, Chairman,
Subcommittee on Highway Right of Way
James E. Kenney
Andrew L. Leavitt
Manning J. Post

Enclosure

SUMMARY OF FINDINGS

The scope of the work done in this study was on a sample basis and by no means inclusive of all facets of the highway right of way excess lands program. There are major problems however which must be solved first. It was on these problems that this effort was concentrated.

- There is a lack of centralized organizational responsibility and authority over the right of way excess lands program resulting in ineffective management of the program.

- The excess land inventory system in its present form is incomplete, inaccurate and ineffective in providing for early disposal of land and in reducing the inventory to a minimum number of parcels.

- There has been almost a total lack of control over engineering holds. Headquarter policies concerning engineering holds have been ignored or deliberately disobeyed.

- There have been no positive steps taken to insure an ongoing and productive program for development and management of airspace.

- Substantial amounts of revenue are lost because of current policies and practices (which vary between districts) relating to the use of properties from the time of purchase until needed for construction purposes.

- There is no formal review and approval of use of excess or airspace sites by Highways' units prior to occupancy, and no economic analysis is made to determine the justification of such usage.

- The present computer inventory system does not provide management with adequate information to control the program effectively.

INTRODUCTION

The Division of Highways of the Department of Public Works is in the real estate business in a big way. Its activities in acquiring real property, either by condemnation or by negotiation, are well known and often the subject of much controversy and publicity. Not so well known, but nevertheless materially significant to the California taxpayer, is that these activities result in a substantial inventory of property that is excess to actual needs for highway right of way for which the parcels were acquired. That this inventory is significant is apparent from the following table:

Inventory Date	Number of Parcels	Book Value
January, 1970	11,607	$29,067,424
July, 1970	11,487	33,686,539
January, 1971	11,221	33,732,877
April, 1971	10,695	30,454,159

What is also significant about this data is that, while there has been a gradual reduction in the number of parcels, there has not been the significant reduction which the Subcommittee had expected, based on commitments made by the Division of Highways in 1969.

The inventory book value is based upon the sales or exchange value of the excess parcels at the time of acquisition. This valuation concept is that recommended to the Division of Highways by the Office of the Auditor General. Since current appraisal data is not available, only a rough estimate of the current value of excess lands is possible. Sales experience in the Division's largest district, Los Angeles, showed that the market value of parcels sold approximated three times the inventory value. On that basis, the total inventory value state-wide would be $90 million dollars. However, as will be discussed later, apparently some 15% of the excess parcels were not on the inventory. The estimated total value of the excess lands inventory thus would run well over $100 million dollars.

The objectives of the Division of Highways in acquiring, managing, and disposing of such a massive excess lands inventory--indeed, the Division's obligations to the taxpaying public--should be to:

- Minimize creation of excess lands.
- Minimize creation of unsalable excess lands.
- Dispose of surplus at the earliest possible date.

- Permit no internally controlled "holds" without full justification and rigorous economic analysis.

- Maximize the return on necessary excess or right of way held prior to highway needs.

The Subcommittee's decision to study the Division of Highway's excess lands program was made because the members were convinced that the above objectives were not being met. The study objective was to develop concrete evidence in support of that conviction. The Subcommittee is satisfied that the study objective has been attained without further field work at this time.

SCOPE OF THE STUDY

It was apparent from the outset that time constraints on staff availability would not permit the comprehensive management review of the highway right of way program which the Subcommittee had contemplated. Based on a preliminary review by the staff and discussions with the Subcommittee, it was agreed that the work would concentrate on selected highway routes in five districts as a representative sample.

On the selected sample routes, detail maps were studied carefully to:

- Identify all excess parcels.

- Determine their status under stated policies.

- Compare this status to existing records.

- Analyze the results of the work with particular emphasis on:

    - Accuracy of the inventory.

    - Justification for engineering holds.

    - Status of airspace development.

    - Management and disposal of excess lands.

Exhibit A identifies the routes studied in each district and classifies the parcels as they were on the dates the detail maps were examined. All parcels summarized in this exhibit were identified and plotted on freeway maps which are much too large to be included as exhibits in this report. However, they are included herein by reference, and will be retained by the Commission in its files.

Exhibit A is summarized as follows:

Parcels on inventory records as excess			
On detail maps as excess:			
Available for sales or exchange	1,304		
Held by engineers	544		
Undetermined right of way	608		
Time sales not yet recorded	374	2,830	
Not on detail maps as excess:			
Sold, still on inventory	4		
Within right of way, still on inventory as excess	42	46	
Total parcels on inventory records			2,876
Parcels on maps, not on inventory			
Excess not on inventory		448	
Advance acquisitions, from Right of Way Acquisition Fund		21	
Owned by Division of Bay Toll Crossings		40	
Sold, but still on maps		7	
Total parcels not on inventory			516
Total parcels reviewed by the study			3,392

DISCUSSION OF FINDINGS

FINDING: There is a lack of centralized organizational responsibility and authority over the right of way excess lands program resulting in ineffective management of the program.

Probably the most consistent finding of this review was the inconsistency in procedure and practices from district to district in the Division of Highways. This was true as to inventory records, mapping techniques, files, land sales and rental practices. One would expect to find some differences because of district size, but by and large there should be one best way of doing things and a central management should be able to work them out.

In the present Division of Highways organization, the Chief Right of Way Agent in Sacramento presumably has overall program responsibility. If true, then he is in a completely untenable position, since in fact he does not have the authority to carry out responsibility in this area. The Division's policy is clearly laid out in the following quote from a Right of Way Manual change issued in March 1969.

> "It must be clearly understood by all operating units of the Division of Highways that final responsibility for the State's excess land program is delegated to the District, and to this end procedures have been developed having a primary purpose of disposing of excess land at the earliest possible date and the maintenance of an absolute minimum of property in the State's inventory."
>
> There remains however, "...a degree of flexibility so that each district may implement detailed procedures found locally to be the most beneficial in accomplishing the primary goal 'effectively disposing of the excess land inventory'." (Underlining added)

This, in our view, is the basis of the problem from which stems most of the criticism of the program studied by the Subcommittee. Uniform administration, as far as possible, is needed to attain effective management and control of the program.

The fact is that in the Division of Highways, as now organized, the District Engineer is to all intents and purposes autonomous. Thus, the status which the excess lands program has in any one district depends upon the District Engineer's interest in it. To illustrate this, March 1969 policy statements from Division headquarters included one statement to the effect that districts would initiate procedures

which would lead to the most expeditious clearance of excess lands (release from engineering holds). Two years later, in March 1971, District 07 Los Angeles took official action by issuing its own circular letter requiring specific management level approval of such holds. However, the first instance of a hold receiving this approval was not dated until May 14, 1971. An earlier headquarters policy statement (January 1970) called for immediate review of all engineering holds for conformance to certain standards, and for a subsequent annual review by the District Engineer. In May 1971 our staff was informed that the first review had only recently begun in Los Angeles.

This kind of failure to comply with policy from Sacramento was apparent to some degree in each of the five districts visited, at least as related to the excess lands program. We have serious reservations whether there will be lasting improvements in this program unless there are organizational changes which will remove the program from engineering jurisdictions. The Division of Highways is an engineering-oriented organization. Their interest is in building highways. In relation to total dollars the excess lands program is regarded as of minor importance and, consequently, has little if any status or priority.

FINDING: The excess land inventory system in its present form is incomplete, inaccurate and is ineffective in providing for early disposal of land and in reducing the inventory to a minimum number of parcels.

Shortly after filing its reply to the Commission's 1969 questionnaire, the Division revised its excess lands inventory system and policies. The vehicle was a Right of Way Manual amendment dated March 21, 1969, subsequently expanded upon by another amendment dated January 26, 1970.

Briefly, the changes were to have accomplished the following:

- A complete and accurate inventory of all excess lands as of July 1, 1969.
- An accurate and uniform record system in the districts and computer record in Sacramento headquarters.
- A uniform categorization of parcel status.
- Clearance of parcels for sale at the earliest possible date.
- Disposal of excess lands at the earliest possible date.
- Maintenance of an absolute minimum of property in the State's inventory.

The findings of this Subcommittee are that none of these anticipated accomplishments have been realized. The July 1, 1969 inventory effort was ineffective, inaccurate, and incomplete. The system and its operation since that time are such that it is highly unlikely that any material improvement can be expected.

A system to identify and catalog excess lands should be an aid to attain the objective of prompt and efficient disposal of excess. A condensed description of a system as it should work, using the Division's present parcel categorization, would be:

- A parcel containing excess is placed in the inventory upon acquisition. Its first classification is Category 3, Undetermined Right of Way.

- A request for clearance is sent immediately to the Design Engineers, who must respond within 30 days. The response would indicate that the excess will be needed for a project (Category 2, Held for Projects), or that it should be transferred to Category 1, Available for Immediate Sale.

- The process to dispose of Category 1 parcels is set in motion immediately upon transfer to that category.

- Category 2 parcels are flagged for periodic review and rejustification.

In its present form the system is incomplete and is not producing the desired results. The staff has discussed the system and its use with Excess Lands personnel in six districts that contain about 86% of the excess parcels on the inventory. These discussions reinforced our findings that the system has many deficiencies. The principal deficiencies are as follow:

1. An estimated 1650 parcels of excess land, worth at least $15 million dollars are not on inventory.

A detailed examination of the record maps for 16 routes in five highway districts disclosed 448 parcels of excess land in addition to the 2,876 parcels on the official inventory records. The staff furnished the districts' personnel with lists of all additional parcels found; they were not disputed.

The number of additional parcels found on the routes reviewed was 15% of those on inventory. If the same rate of error prevailed over the state-wide inventory of 10,573 on the record as of August 31, 1971, it would have meant that some 1,650 parcels of land were not recorded as excess.

Without current appraisals, it would be impossible to determine the value of unrecorded excess lands. Based strictly on the state-wide average book value per parcel of the recorded inventory as of August 31, 1971, the book value of unrecorded excess would have been approximately $5 million dollars. On the basis of a division headquarter's statement that current values average about three times current book values, it is estimated that the value of unrecorded excess lands held by the Division of Highways is at least $15 million dollars. The Subcommittee believes that this is a highly conservative estimate.

The inaccurate condition of the inventory record exists because:

- Districts did a poor job of setting up the 1969 inventory.

- The system does not provide controls to insure that every excess parcel reaches the inventory promptly, if at all.

In support of this finding are the results of district-wide reviews of all routes by district personnel. This review was ordered in all districts by the Director of Public Works as a result of our findings in District 07; Los Angeles. As a result, Right of Way Engineering and Excess Lands personnel reviewed the record maps and have identified at least 1,000 additional parcels in District 07, Los Angeles and District 04, San Francisco. No doubt a proportionate number of additional parcels would be discovered in the other nine districts.

2. Right of Way Engineering and Excess Lands personnel often interpret maps differently.

Many of the uninventoried parcels can be attributed to a lack of uniformity in the techniques of preparing and interpreting maps. Right of Way Engineering personnel prepare the maps; their techniques vary between districts and often within a district.

A list of excess parcels prepared by engineers will not always agree with a list prepared by excess lands personnel even though they are both made from the same maps. An informal telephone survey by the staff elicited rather interesting results. Several districts were asked how many new parcels were discovered when they reviewed all routes in July as ordered by the Director. The first replies indicated that there were disagreements between staff assigned to the job. Districts were then asked who did the job, who reviewed it, and what the final outcome was.

The result of the survey was as follows:

District No.	Headquarters	Number of Parcels found by Right of Way Engineering	Excess Lands
03	Marysville	("We have until the end of the year to do it")	
04	San Francisco	299	299
07	Los Angeles	1,400	700
10	Stockton	None	None
	(The staff later found 23 parcels in a limited sample of routes. District personnel agreed)		
11	San Diego	400	20
	(The staff later found 40 in a limited sample of routes. District personnel agreed)		

3. The inventory system does not include two types of acquisitions:

   - Those made from the Highway Right of Way Acquisition Fund.

   - Those made from non-depleted material sites.

The Highway Right of Way Acquisition Fund was created in 1952 by the Legislature to provide funds for the advance acquisition of right of way to prevent development to a higher use and the consequent higher acquisition cost if the development were permitted to proceed (so-called protection acquisitions). On August 31, 1971, its principal asset was $28,717,800 invested in some 529 parcels. The very long holding periods for these parcels, during which right of way lines may be relocated, increases the changes that they will contain excess; the Division estimates that probably 25% of the parcels are of this kind.

Parcels acquired for use as highway construction material sites are often held for long periods of time without being used. There are some 78 of these, some of which have been held for many years. In District 11, San Diego, material sites had been acquired in 1931 and 1955 and had never been used. Another was acquired in 1953 and has not been used since 1954.

These parcels and others like them are not included in the inventory and are not reviewed from time to time to determine if they are excess.

4. A significant number of parcels are not made available for sale or placed on engineering hold at the earliest possible date.

Stated Division of Highways policy is to do this as soon as possible after acquisition. Districts differ in practice. District 07 Los Angeles usually waits until all project plans, specifications and estimates are completed. This unnecessary delay has prevented the timely sales of many parcels. Other districts are able to determine excess almost immediately upon acquisition.

Excess land is not normally sold until it has been transferred to Category 1 as available for immediate sale. Excess land required for projects should be transferred to Category 2. Regarding such transfers, the Right of Way Manual provides that excess land should be reclassified "...at the earliest possible date following the determination of a calculated right of way line..."

Except for advance acquisitions (hardships and protections) a calculated right of way line is always available at the time of acquisitions. Thus, the stated policy is to transfer parcels to Categories 1 or 2 as soon as possible after acquisition.

An analysis of the parcels in Category 3, Undetermined Right of Way, disclosed that about 60% (some 2,800 parcels) were entered into the system in the last six months of 1969 and had not yet been reclassified. Since this was the period when the new system was being initiated, it is reasonable to assume that most of these parcels had been acquired previously and should already have been reclassified. The same analysis disclosed that about 20% of them (some 900 parcels) were entered into the system in 1970 and were still not reclassified.

This apparent disregard for the policies established by the Division has prevented the timely sale of many parcels. Staff analysis by district indicates the practice is fairly common.

A specific example of this situation was found on Interstate 210 Freeway in District 07. On one section of this freeway, not only had the plans, specifications, and estimates been completed (May 28, 1969) but the contract had been let (on October 15, 1970) and this section was actually under construction. There were 62 parcels in this section which were still in Category 3 as undetermined right of way. This is an example of gross violation of Division policy. It must not be tolerated by the Division; the system should be such that the situation should automatically be brought to management's attention and appropriate action taken to correct it and to discipline the staff responsible for it.

5. Changes in right of way lines that create, eliminate, increase or decrease excess often are not communicated to the Excess Lands Section.

When a parcel is acquired, the location of the then current right of way line indicates the existence and size of excess land. If the right of way line changes, the status of the excess may be altered. It is important that the new line be drawn on the record maps and that excess lands personnel be notified of any excess land change.

There is no established procedure to assure that this is done. As a result, many parcels contain excess now, although they did not at the time of acquisition and should be on the inventory. Conversely, many parcels now in the inventory are located within a right of way. Parcel size alone can also be affected.

6. Two or more separate parcels of excess contained within one acquisition are often not separated in the inventory records.

Many acquisitions contain two or more separate parcels of excess. There are no procedures to assure that each separate parcel will be shown on the inventory.

The information relative to each parcel must be readily available and accurate. If one inventory record contains the combined data relative to several parcels, it cannot serve its purpose.

7. There has been no overall reconciliation between the headquarters computer record and the districts' inventory cards. Neither are accurate.

Only in District 03, Marysville, did we find the computer inventory list reconciled to the property cards or excess land files. This was done quarterly. In the other districts, attempts to reconcile had been made, but after being unsuccessful several times, they stopped trying.

8. District personnel who work with the computer inventory lists often do not understand that portion of their job. They have not been properly trained and do not possess all the prerequisite skills.

The staff discussed the excess land inventory system with Highways personnel in six districts. Without exception they expressed a lack of confidence in the system. Most of them said they ignored the system to a great extent and have developed substitutes for it in their own offices.

The lack of confidence was usually attributed to failure to understand how the system worked and what it could do for them. None of the excess land personnel who work with the system acknowledged having received any training.

The August 1971 computer inventory list contained 86 parcels with minus dollar values in eight districts. Staff analysis indicates the condition is wide-spread through the system.

FINDING: There has been almost a total lack of control over engineering holds. Headquarter policies concerning engineering holds have been ignored or deliberately disobeyed.

In its reply to the Commission's 1969 questionnaire, the Division committed itself to developing certain policies regarding justification for engineers' withholding property from sale. The policies subsequently issued included these:

- Written approval of the District Engineer for all holds.
- Properties can be held for projects other than those for which purchased only if:
    - Required for a project on which the State has a route adoption.
    - Analysis shows the economic feasibility for holding for the required period of time.
- Written approval of the Deputy State Highway Engineer for held property with an inventory value of $25,000 or more or a market value of $50,000 or more.
- Immediate review of all holds by the District Engineer for conformance to the above standards.
- Annual review by the District Engineer to assure that only parcels conforming to the above standards are being retained.

Our findings are that these standards and instructions have either been ignored or deliberately disobeyed. In many cases, the effect is that an engineer had simply to "stick a pin in a map" to hold a parcel for an indefinite period. This should be amply demonstrated in the discussion of deficiencies which follows.

1. Justification or documentation for engineering holds is often either inadequate or nonexistent.

When holds are placed on excess parcels it is usually done by designating a number of parcels rather than by individual parcel. This practice was found in all districts visited. In these instances, no attempt is made to justify the hold for individual parcels and the justifications are usually in such general terms as "May be needed for proposed widening"; "Hold until construction completed"; "Hold for future interchange"; or "Hold until completion of design". Approval by higher authority based on these brief and generalized statements depends completely on the judgment of the person placing the hold and amounts to little more than a "rubber stamp" approval.

An example of this practice in District 07 was noted in which a memorandum from a design engineer placed a hold on 142 parcels"... as they maybe (sic) required for the proposed widening of the San Diego Freeway". This hold was made on February 13, 1970; however, most of these parcels have since been earmarked for a future interchange of Routes 405/105. Since the District has reached an impasse in attempting to complete a freeway agreement with the City of Hawthorne, it is not known when future construction will take place. The acquisition dates of these parcels range from 11 to 13 years. Approximately 90 of the parcels were not on the inventory at the time of the study and their value was not ascertained. However, of the parcels that were inventoried, two had high inventory value, one of .70 acres at $30,000 and the other of .24 acres at $13,000.

In the review of documentation and justification of engineering holds in District 07 an attempt was made to verify all parcels held on Route LA-405. In addition to the inventory cards in the Excess Lands Section, a file is maintained in the Right of Way Engineering Section. A comparison was made of these two files for holds on Route 405. Excess Lands had 39 inventory cards in Category 2, Held for Projects, while Right of Way Engineering files indicated there were 21 parcels on hold. However, only 3 parcels were classified as engineering holds in both files. Of the other 54 parcels involved 28 were in one file, but not in the other, while 26 were in both files, but not in agreement as to hold status. Attempts to document current status of parcels required searching in several locations and in some cases the search was abandoned after several attempts as district personnel had begun a review of all excess parcels in compliance with a headquarters directive prompted by the study findings.

2. Frequently there is no time limit placed on engineering holds.

Documentation for engineering holds rarely contained a specific time that parcels were to be held. The limit was usually expressed in terms of some future indefinite point in time such as design completion, determination of right of way requirements or completion of construction. In many cases not even this kind of reference was made, indicating only such things as that holds were for future widening or a proposed interchange.

3. No analyses are made to evaluate economic feasibility of engineering holds.

There is no evidence to indicate that any meaningful economic justifications have been made. There are a few instances in response to specific inquiries where statements are made to the effect that it would be more economical to retain a parcel. Undoubtedly, in some cases the conclusion is correct, but it appears the conclusion was based on superficial analysis and "horseback" opinions rather than sound economic analysis and scientifically based criteria.

4. District engineers do not periodically review engineering holds.

Existing policy requires that written approval of the District Engineer must be obtained to place a hold on excess land and that an annual review shall be made by the District Engineer to assure that the hold is still justified. In the districts visited the authority for original approvals has been delegated to various management levels and the procedures and documentation vary considerably. As pointed out earlier the documentation, justification, and procedures are such that the approval actually is made by the person who requests the hold.

There was no established procedure for a systematic, periodic review and re-evaluation of justification for existing holds. The only time an existing hold was reviewed was when the project for which a parcel is held was completed or when inquiries were made regarding the availability of specific parcels.

5. Holds are not approved by the Deputy State Highway Engineer as required by stated policy.

Headquarters policy issued in January 1970 requires that engineering holds which have an inventory value of $25,000 or more or market value of $50,000 or more must be authorized in writing by the Deputy State Highway Engineer. This policy had not been implemented prior to the start of this study. For example, the first request by District 07 for such approval was dated May 14, 1971.

6. Parcels are "unofficially" held by improperly retaining them in Category 3 as Undetermined Right of Way.

The study review disclosed numerous parcels classified as Category 3, Undetermined Right of Way, which according to established criteria should have been reclassified in category 1 or 2. While it may or may not have been intentional, this breakdown in procedure results in an "unofficial" hold and by-passes the requirement for approval at the district level and in the case of high value parcels, headquarters approval.

One example of this in District 07 is Parcel 7467 on Route LA 405. This is a 9.934 acre parcel acquired in December 1959 with an inventory value of $230,000. The parcel was certified as excess available for disposal on May 28, 1964, however it has been placed on hold and released several times since then. When the new inventory was established in 1969 this parcel was placed in category 3. A hold was placed on the parcel on January 22, 1971 for proposed interchange of Routes 405/47, but the parcel was never transferred out of category 3. The design unit placing the hold does not expect construction of this interchange until after 1980.

7. Parcels are sometimes not released for sale because of breakdown in communications between organizational units of the Division of Highways.

In District 07, after a field review with a project resident engineer, a letter is prepared in the district office for the resident's signature indicating parcels on hold that can be released as excess and sold. If the resident fails to sign the release and return it, this fact may go undetected for some time. In a specific instance, such a letter was prepared and sent out on January 14, 1970. On June 21, 1971, when the staff inquired about the parcels involved, it was found that the release letter had not been returned from the field. As a result, 28 parcels were withheld from sale for 18 months.

8. Parcels are unofficially held by "shelving" a project to delay the final deadline date.

Division of Highways policy is that all parcels which are not to be held will be cleared for disposal not later than the "PS and E date". This is the date of the project report from the district to the State Highway Engineer, which includes project plans, specifications and cost estimates. Division policy also requires districts to send this report to headquarters in Sacramento four months prior to the target date set for advertising the project for bids.

In some cases the district completes its design work before the report can be sent to headquarters. When this happens in District 07, the district "shelves" the project until the time comes to send the report forward; only then are excess parcels cleared. Some examples of the time lag involved are as follow:

Project	Date PS&E Completed	Target Date to Hq.	Months on Shelf
LA-91, R11.0/R12.1 LA-7, 12.0/14.3	12/28/70	12/71	12
LA-101, 34.8/38.2 Ven-101, 0.0/1.6	1/21/71	6/71	6

Project	Date PS&E Completed	Target Date to Hq.	Months On Shelf
LA-210,R5.0/12.1 LA-118,R13.0/14.0	1/4/71	11/71	11
Ora-1, 0.2/1.2	5/6/71	6/72	13
Ora-57, 10.9/12.5	3/30/71	12/71	9

This practice was also found in other districts. It obviously results in "holding" substantial amounts of property without official sanction.

Vigorous action by the Department is essential to bring this completely unjustifiable condition under control. This control cannot be attained, in our view, simply by requiring districts to report progress and activity. There must be departmental level review and follow-up in the field on a continuing basis.

The value of departmental level review and control is possibly demonstrated by what has happened to engineering holds in the districts visited during this study. The following data reflects holds reviewed by the staff in four districts, representing 2/3 of the holds in those districts and over 1/3 of the state-wide total.

	Number of Parcels	% of Total	Length of Holds Shortest	Longest
Since released or can be released now	287	42%	8 mos.	37 yrs.
Can be released by July 1972	61	9%	2 yrs.	24 yrs.
Sub-total	348	51%		
Still to be held after July 1972	328	49%	2 yrs.	Indefinite
TOTAL	676	100%		

To emphasize the point--if the Department's policies regarding engineering holds had been adopted in these four districts, 42% of the holds would not have existed at the time of the study and another 9% would be available for release within a year.

FINDING: There have been no positive steps taken to insure an ongoing and productive program for development and management of airspace.

Airspace is defined as "...any non-operating property within highway right of way limits which is capable of other uses without undue interference with the operation and future expansion of the transportation corridor for highway or other transportation uses." The Division's 1969 report to the Commission showed a high degree of interest in promoting the use of freeway airspace. The Division indicated that it was taking the initiative in development of airspace by contacting brokers, developers, builders--all firms with the ability and financial capability to develop airspace in California.

In the intervening two years, there has been little evidence at the district level of the promotional effort to which the Division was committed. To the contrary:

- None of the five districts visited by the staff had made a real attempt to identify its available airspace.
- There has been minimal effort to rent known airspace. Most new rentals come as the result of unsolicited inquiries.
- Until very recently, districts have not attempted to staff the function so that a proper job can be done.
- Assigned staff receive little or no cooperation from other units.
- There is little indication of an aggressive promotional program which this activity requires.

The situation in the airspace program is simply another example, in the Subcommittee's view, of the fragmentary result of a program with no priority status and operating on an almost completely decentralized basis.

The safe and efficient operation of a road requires that control be maintained over areas within the right of way, but not actually used in the operation of the road. Those areas include the space over, under and between the traveled lanes of the road. Fee ownership is usually required in order to maintain the necessary control; often the areas can be made available for other purposes by means of restrictive leases. Such leases are authorized by the Streets and Highways Code.

Few projects have been considered that propose the use of space over freeways. Independent analyses have indicated that this utilization is not now economically feasible. Statistics are cited which indicate it is less expensive to purchase improved land adjacent to the freeway and demolish the existing improvements, as compared to a construction cost of $50 per square foot of pad over a freeway. In addition, the purchaser could have title to land outside a right of way, whereas only a leasehold interest is available under the other alternative. Only two over-the-freeway projects are currently under consideration. Both are in District 07; one a library, and the other a hotel.

The latter project may offer a possible means of achieving over-the-freeway development if district personnel can contact interested companies soon enough. The hotel is to be built over a freeway not yet constructed. The builders have worked with the highway design group to incorporate changes into the freeway construction. Some $2 million dollars additional cost would be borne by the hotel builder, which could make over-the-freeway construction economically feasible.

If this procedure can be demonstrated to improve an economic analysis, the Division should attempt to contact potential builders far in advance of freeway construction so that highway design can be coordinated with subsequent development to minimize costs.

There are many sites under and between the lanes of roads. They have generally been used for parking, but many have potential for higher uses, including use by the district itself. The Division's program to seek occupants for these sites has been passive. Factors contributing to the lack of success of the program are:

- A prescribed competitive bid procedure.
- Inadequate staff.
- Inaccurate and incomplete airspace inventory.
- Other Highways units are not cooperating.

The competitive bid procedure prescribed by the California Highway Commission was designed to insure that fair market rates would be obtained. However, in fact there has been very little competition for most sites. At the same time, the bid procedure decreases the chance that a site will be leased. This is because of the approximately 90-day period which is required to (1) prepare public notices, (2) advertise, (3) receive and evaluate bids, and (4) issue a lease. Many potential lessees will not tolerate this type of delay, since a similar lease can be consummated with private parties in three to five days, at about the same lease rates and with far less lease restrictions.

What actually happens is that a potential lessee contacts the Division, an approximate lease rate is quoted (which will be about the minimum bid set by the Division) and the Division then sets in motion the bid procedure. When the bids come in, there is usually only one bidder who gets his lease at the quoted rate.

The State Highway Commission has given permission for negotiated leases under certain circumstances. Conceivably, these leases can be consummated in a short time and eliminate much of the red tape now involved in leasing airspace. However, the State Highway Commission has retained the prerogative of reviewing each lease before it becomes effective. Blanket authority to negotiate leases could improve the attractiveness of leasing airspace sites, without any change in the lease rate. Obviously, where an unusually attractive site is sought by more than one potential lessee, the bid procedure would be essential to fairly lease the site and get the best price.

Lack of sufficient staff assigned has hindered the program. The leasing of airspace achieved prominence in recent years due to the construction of more elevated roads. Most of the sites are under elevated roads and most are located on interstate routes. The increased amount of airspace created a need for a larger and more specialized staff. For most of the last two years, headquarters office had one position assigned. The two districts having most of the existing airspace when this study started and had a total of three staff for this function. Additional personnel have been added since the Commission expressed an interest in this activity. Considering the size and importance of the job that needs doing, resources available have been minimal.

Paramount among the needs of the program is an accurate inventory of airspace sites. Although the program has been in operation for several years, there is still no accurate inventory. The following summary shows a comparison of the reported inventory of three districts with an inventory made by the staff.

	District Inventory	Staff Inventory
Sites in use	279	309
Available for lease	78	115
Total sites	357	424
% of sites not on inventory:		18+%

In addition to reviewing leases and occupancy reports, on-site inspections of some areas were made. Since on-site inspections were so few and limited to District 07, the additional sites discovered should not be considered to be all inclusive.

Up to this time the principal way that airspace sites came to the attention of airspace staff was when a prospective lessee would inquire about a site. In the case of many sites occupied by the Maintenance Department and other Highways units, airspace personnel have not been aware of the existence of the space. District 07 and 04 said they were going to start inspecting all of their routes to locate all potential airspace sites. District 03 is now in the process of doing this.

A serious problem in the management of airspace is encroachment by other units of the Division. The Maintenance Department is the most frequent offender. They often move in and set up a facility without prior approval from or notice to airspace personnel. A few months later, after they have made some improvements on the site, they are very resistive to any action to move them out.

An example of this encroachment was found in District 07. While making an on-site tour of a prime leasing area for airspace, a Highways unit was found on a site which was not on inventory. The District Airspace Unit had no knowledge of the site nor of the occupancy. After extensive checking, the Maintenance Unit made several telephone calls and identified the occupying unit as the Construction Unit.

In many instances, other Highways units are making very uneconomical use of sites. Again in District 07, it was found that the Highway Test Laboratory had tied up several sites within a prime leasing area. An on-site visit showed that only about one-half of the area was being utilized effectively. The remainder of the area was used for storage and parking, all of which could have been done on less desirable sites.

Since the Subcommittee began inquiring into this area, additional Highways staff has been assigned to prepare an accurate inventory. They are being assisted by other units of the Division in ways which are appropriate to their special skills. This is in response to a directive from the Division Headquarters, and is being done in all districts.

FINDING: Substantial amounts of revenue are lost because of current policies and practices (which vary between districts) relating to the use of properties from the time of purchase until needed for construction purposes.

This was not the subject of special emphasis in our current study since it is not related directly to excess lands. However, in the work on Interstate 210, District 07 Los Angeles, some analysis was done on two small sections (a few square blocks) of that freeway where the lands had been purchased but construction was not scheduled until 1972. The analysis produced these findings:

- Parcel acquisitions began in 1964.

- Under District policy, improvements on all parcels were removed when the occupant at the time of acquisition vacated the property.

- Other then minimal maintenance, no efforts were made to maintain the appearance of the property or develop it for any useful interim purpose.

- If the District had not removed the improvements but had maintained and rented them, it is estimated that the District incurred a net loss of $535,997 to June 30, 1971 because of its no re-rental policy, based on the following calculation:

Optimum Rent	$654,380*
Less: Vacancy Factor 4.2%	27,483
Gross Rental	$626,897
Less: Assumed Rental Commission 5% in lieu of Highway's administrative cost	31,345
	$595,552
Less: Maintenance Cost 10%	59,555
Net Rental Income Lost	$535,997

*For each of 105 parcels in the two sections, the number of months available for rent (one month after acquisition to June 30, 1971) times the monthly rental taken from the appraisal report, or comparable rentals in the area when rental not listed in appraisal report.

- Under current law local governments are paid 24 percent of all rent received in lieu of taxes. Because total potential rental was not received, local governments incurred a "tax loss" of some $150,000.

The Subcommittee would ask several questions in this situation, such as:

- Why was it necessary to begin acquisition so far in advance of construction?

- Are the reasons for the no re-rental policy such that they out-weigh the economic loss incurred?

- Does the Division of Highways, in fact, perform an economic analysis in these situations?

- Does each district develop its own policy, or are decisions subject to headquarters review and approval?

- What obligation does the Division have, or should it have to maintain such properties in an esthetically pleasing condition?

- What efforts are made to develop interim use of these properties if, in fact, removal of improvements can be justified? What uses are possible?

The Subcommittee suggests that this would be a profitable area for study by the appropriate legislative committee in a position to consider and give proper weight to all the pertinent factors involved.

FINDING: There is no formal review and approval of use of excess or airspace sites by Highways' units prior to occupancy, and economic analyses are not made to determine the justification of such usage.

During the review of the status of excess property and a limited field inspection of specific parcels of excess land and airspace sites, the staff became aware of the unauthorized and virtually uncontrolled use of property by other Highways' units.

In several instances construction and maintenance units had occupied and were using airspace and excess land without the knowledge of the Right of Way Department. Other airspace and excess sites were used of which the Right of Way Department was aware, but some were prime sites which could have and should have been developed for a better

use. Some examples are as follow:

- A house had been used for more than eight years as a resident engineer's office. The property was not on the excess land inventory.

- A house with a swimming pool (inventory value of $30,000) was being used as a field office by a survey crew.

- Thirteen parcels were on a hold status because the access to them was blocked by the use of one parcel with a building as a survey field office.

The Maintenance Department has need for many sites in widespread locations. However, it was found that Maintenance owned in fee many large sites which were not really meeting their needs, plus are acting as a drain on the tax rolls.

An example, again in District 07, is the central maintenance station. Here is a site, with a current appraisal in excess of $1,000,000. Most of the maintenance work handled by this station is at considerable distances, thus morning and evening travel of maintenance crews goes through major traffic congestion and hours of work time are lost each day.

Currently, there is a proposal to close this station and locate it more centrally (in the heart of prime freeway lease area) on airspace. Certainly, this is a start in the right direction, but analysis might indicate that the proposed prime lease sites may not be the most efficient location for a maintenance station. If one would maximize maintenance activity, stations would be located every mile or so which would minimize travel, but capital costs for construction would be prohibitive. Conversely, with centralized maintenance stations, capital costs are minimized but travel becomes prohibitive and maintenance service will deteriorate. There should be some location for maintenance stations where a break-even point between travel costs and capital costs would optimize the maintenance function. Where maintenance is performed mainly on freeways, it seems logical to locate sites on or adjacent to freeways, on airspace.

An economic analysis could be made prior to future construction of maintenance stations that will optimize the operations of the maintenance function and reduce the amount of fee owned land by placing stations where possible on the less desirable airspace sites.

While it is the Department's policy that the District Right of Way Agent will make suitable facilities available to other Highway units upon request, it is more generally the practice that other units find and occupy prime sites and then tell Right of Way not to dispose of them. In many cases even the latter action is not taken.

There is no formal system for the review and approval of the use of excess or airspace sites by Highway's units and no evidence was found that consideration had been given to the economic justification of such usage.

FINDING: The present computer inventory system does not provide management with adequate information to control the program effectively.

The system currently produces a "management" report monthly which is so highly summarized it is of little use. Parcel data input to the system is limited to the point where the system lacks capability to produce useful management reports. The system should be expanded so that reports can be produced which will permit management to:

- Compare performance with goals and objectives.
- Observe trends in the acquisition, management and sales activities of the program.
- Evaluate the condition of the inventory.
- Be aware of exceptions to stated policies with respect to individual parcels.

At least three districts are working on system changes independently. From a management standpoint, it would seem prudent to take advantage of the work done thus far, and consolidate future effort at the headquarters level.

DIVISION OF HIGHWAYS
SUMMARY OF EXCESS PARCELS ON ROUTES REVIEWED IN THE FIVE DISTRICTS VISITED

PARCEL STATUS	District 7-Los Angeles			Dist. 11-San Diego			Dist. 10-Stockton		District 4-San Francisco				District 3-Marysville				Total All
On Inventory & Maps: Category:	Rte 210	Rte 405	Rte 10	Rte 5	Rte 8	Rte 76	Rte 99	Rte 5	Rte 101	Rte 280	Rte 17	Rte 480	Rte 5	Rte 50	Rte 80	Rte 99	Dist.
1A-Avail. f/Imm. Sale	477	87	11	56	8	4	36	72	33	16	18		83	54	93	6	1,054
1B-Held f/Public Agen.	60	20		2				7	5	2			25	1	29		151
1C-Unsalable "A" & "B"	13	8			1			4	3	21	11		6	4	23	5	99
2-Engineering Holds	90	40		86	37		10	1	88	31	96		5	11	49		544
3-Undetermined R/W	357	63	5	22	10		5	7	41	19	15	1	10	8	45	1	608
Timef Sales Not Yet Recorded	94	59		10	2				19	48	19	4	20	37	39	3	374
Sub-Total On Invent. and Maps	1,091	277	16	176	58	4	51	91	189	136	159	5	149	135	278	15	2,830
On Inventory, Not On Maps:																	
Sold Not Removed From Inventory		4															4
In R/W Not Removed From Inventory	3	25							10	3	1						42
Sub-Total On Invent. Not Maps	3	29							10	3	1						46
Sub-Total On Inventory	1,094	306	16	176	58	4	51	91	199	139	160	5	149	135	278	15	2,876
On Maps, Not on Inven:																	
Excess Not On Inven.	160	151	9	24	12	4	5	18	18	3	3		12		19	10	448
Advance Acquisitions-From R/W Acq. Fund									21								21
Acq. Owned by Bay Toll Cross.												40					40
Sold, Not Recorded on Maps				5		1		1									7
Sub-Total-Not on Inv.	160	151	9	29	12	5	5	19	39	3	3	40	12	0	19	10	516
Total Parcels Review	1,254	457	25	205	70	9	56	110	238	142	163	45	161	135	297	25	3,392

EXHIBIT A