#36.40 6/30/72

Memorandum 72-51

Study 36.40 - Condemnation Law and Procedure (Excess Condemnation)

SUMMARY

The Commission distributed for comment its tentative recommendation relating to excess condemnation in August 1970. A copy of the recommendation is attached. See also Eminent Domain Law §§ 1240.410-1240.430. The Commission received numerous comments (Exhibits I-XX) displaying mixed reactions to the recommendation. The object of this memorandum is to discuss only the major policy questions raised concerning the proposed treatment of excess condemnation, reserving other suggestions and comments for later consideration.

EXISTING LAW

When a condemnor acquires property for a project, it may need only a portion of the land owned by the condemnee. Severance of the condemnee's land may leave a small and valueless remnant for which the condemnee has no use, or it may leave a large remnant that will suffer substantial severance damages--damages that may be so great that the condemnor will be required to pay the substantial equivalent of the value of the entire parcel. Various condemnors have been statutorily authorized to condemn such remnants. These statutes vary from entity to entity, often with little or no apparent reason for the difference. Many of the statutes authorize the condemnation of the entire parcel where there is a claim for severance or consequential damages. The authority to condemn excess land contained in these statutory grants, however, is limited by the constitutional requirement of a valid public use: "namely, condemnation of remnants or condemnations that avoid a substantial risk of excessive severance or consequential damages." People v. Superior

Court, 68 Cal.2d 206, 212, 436 P.2d 342, 65 Cal. Rptr. 342, 346 (1968)(citations omitted)(a copy of this case is attached). Other special statutes limit excess condemnation to cases where the condemnor would be required to pay the substantial equivalent of the value of the entire parcel in compensation for the part taken and in severance damages. A challenge to the right to take excess land on statutory or constitutional grounds may occur at varying stages of pretrial litigation.

COMMISSION'S RECOMMENDATION

The Law Revision Commission's tentative recommendation on excess condemnation alters existing law in several significant ways. To begin with, it provides a single, uniform pretrial procedure at which the right to take must be questioned, if at all. Next, in addition to continuing the authority of condemnors to take physical remnants, the recommendation limits the excess condemnation authority under existing law. Under the Commission's draft, a condemnor may take excess land if the severance creates a substantial risk that the condemnor would have to pay an amount for the partial take that is substantially equivalent to the amount it would have to pay for a whole take. Moreover, if the condemnee is able to demonstrate that the condemnor has a reasonable and economically feasible means to avoid leaving a remnant--i.e., if there is a "physical solution" to the severance problem--the excess taking will not be allowed.

The Commission's recommendation would make these standards, along with the uniform procedures for pretrial resolution of the right to take issue, applicable to all condemnors. In addition, condemnors are given express authority to acquire any types of property by voluntary transaction.

COMMENTS ON THE COMMISSION'S RECOMMENDATION

Of the 20 comments to the tentative recommendation that the Commission received, three state that they are not qualified to comment (Exhibits II, V, XV). Two comments indicate strong support for the proposal without exception or change (Exhibits I and XIII--City of Fullerton and Mr. Gleaves). All of the remaining 15 comments find fault with the recommendation in different aspects and to varying degrees. If any generalizations could be made about these comments, they would be:

(1) Property owners' attorneys favor the idea that a condemnor may not take a financial remnant unless compensation for the partial take would be "substantially equivalent" to compensation for the whole take; however, they would place all procedural burdens on the condemnor.

(2) Condemnors' attorneys strongly oppose the "substantially equivalent" test and would substitute the language of the Rodoni case: "excessive severance or consequential damages."

(3) The numerous objections to pretrial determination of excess issues did not follow condemnor-condemnee lines but were equally distributed. On the other hand, there were some strong approvals of early determination of right to take issues.

(4) There was some opposition to imposition of a "physical solution" by the court.

"Substantially Equivalent" Test

The major concern of most commentators was the test for permitting a taking of excess property. The Commission has in essence adopted a test that duplicates the facts in the Rodoni case: The condemnor may acquire excess property if there is a substantial risk that it will have to pay as much for the partial take as it would to acquire the whole property.

This test was assailed as overrestrictive by most of the attorneys who represent public entities. The City of Los Angeles (Exhibit III) points out that the Rodoni case arose in a rural area of the state:

> Special consideration should be given to the problems faced by the government in the urban areas. Excess or protective acquisitions are of greater necessity in cities than in rural areas. Such condemnations should be permitted even though the "substantially equivalent" test is not satisfied. [Exhibit III at 4.]

The Office of the Attorney General (Exhibit VI) likewise finds the "substantially equivalent" test "too stringent and not necessary to protect land owners from possible abuse of the power of excess condemnation." The Attorney General argues that the Supreme Court in Rodoni purposely avoided giving specific content to the concept of "excessive severance or consequential damages" because it recognized that:

> [W]hat constitutes excess severance or consequential damages will necessarily vary as do the facts of those cases wherein excess condemnation is sought. Rather than attempting to narrowly define excessive severance and consequential damages, the court sets reasonable limitations on the power of excess condemnation, namely, that the economic benefit to the state must be clear; that neither the economic benefit of avoiding the cost of litigating damages nor the fact that the condemnee claims severance damages is sufficient to authorize excess condemnation. [Exhibit VI at 2.]

The Department of Public Works (Exhibit VII) echoes the thoughts of the Attorney General:

> It occurs to the Department that the Supreme Court gave very careful consideration to the entire issue of excess taking and explicitly found that there probably were areas where excess taking was constitutionally justified for the public benefit even though, unlike the facts of the Rodoni case, the remainder was not rendered virtually valueless by the proposed taking and construction. In the proposed codification, the Commission would foreclose the application of excess takings in the areas envisioned by the Supreme Court to be constitutional and in the public interest. [Exhibit VII at 4.]

And finally, Mr. McCormick of Rutan and Tucker (Exhibit XIV), representing local public agencies, indicates that the "substantially equivalent" test is an unduly rough measure of justice:

> A few dollars difference between the severance damage amount and the value of the remainder will operate to prevent the public agency from acquiring the remainder and at the same time require that agency to pay substantial severance damages and receive nothing in return. [Exhibit XIV at 1.]

The basic argument of these comments is that there may be numerous situations where it would be just to allow the condemnor to take excess property even though the amount it would have to pay for a partial take, while great, would not be "substantially equivalent" to what it would have to pay for a whole take. The line drawn by the Commission is not a good measure for excess taking; the more general test of "excessive severance or consequential damages" should be adopted, leaving it to the courts to give content to this test.

The staff is persuaded that this is a superior approach and recommends that the Commission adopt the "excessive damages" test, i.e., codify the test of the Rodoni case. This would amount to retention of existing law. Cf. People v. Jarvis, 274 Cal. App.2d 217, 79 Cal. Rptr. 175 (1969):

> The Supreme Court, upholding the power of excess condemnation under Streets and Highways Code Section 104.1 (in People ex rel. Dept. of Public Works v. Superior Court, supra, 68 Cal.2d 206), stated that the power can be exercised only if--and not unless--the trial court "finds" that the excess taking is justified in order to avoid "excessive severance or consequential damages"; such finding, the court pointed out, provides assurance that the taking will be for a public use and precludes the state "from using the power of excess condemnation as a weapon to secure favorable settlements." (Id., at p. 210.) The requisite finding is necessarily one of fact, to be supported by the evidence. [274 Cal. App.2d at 222-223.]

Pretrial Determination of Right to Take Excess

A second major area of concern of the commentators is the Commission's approach to resolving the excess condemnation issue prior to trial. The Commission has preserved the existing approach of pretrial resolution of the right to take excess property. The basic reason for pretrial resolution is an economic one: Since it is much less expensive and time-consuming to try a

whole take than it is to try a partial take, the availability of a whole take should be determined prior to the time of trial.

To accomplish the pretrial determination of the right to take the excess, it is not possible to determine whether severance damages actually are excessive but only whether there is a "substantial risk" that they will be excessive.

The faults of this approach listed in the comments are numerous:

(1) Pretrial determination of the likelihood of excessive damages would require in effect two valuation trials.

(2) The issue involved is of a type not easily susceptible of pretrial determination by a law and motion judge.

(3) A judge would be prejudiced by a prehearing of valuation data, and material from the pretrial hearing is likely to affect the valuation trial itself despite efforts to keep it out.

(4) A determination that severance damages are not likely to be excessive will generate appeals and motions for new trial if it turns out that damages are excessive.

(5) A pretrial, at which the parties are emphasizing the "risk" that they will lose their main case badly, is basically unsatisfactory and calls for a spectrum of relevant and admissible evidence that is considerably broader than that admissible in a pure valuation case.

The solution proposed by the critics of pretrial resolution of the right to take excess is to go through the whole valuation trial, with separate findings as to a whole take and a partial take, and then to determine whether the excess can be acquired. What are the defects of such a scheme?

(1) Whereas it might be feasible to apply a posttrial determination of the right to take excess if there were a before-and-after measure of valuation for a partial take, the Commission's determination to retain the existing scheme of value-plus-damages renders a posttrial determination economically impracticable.

The posttrial determination of the right to take excess will require a trial of valuation for a whole take and a partial take in every excess case. Pretrial determination, on the other hand, would separate out those cases in which only a whole take valuation is required from those in which only a partial take valuation is required.

(2) The expense of a full valuation trial in order to determine the right to take the excess will be great compared with a pretrial determination that requires merely a court finding of substantial risk which can be accomplished by affidavits.

(3) While the parties to a pretrial determination will find themselves in the anomalous position of arguing the risk that they will do poorly in their main case, the parties to a posttrial determination will find themselves in the even more peculiar position of having to argue in their main case the opposite of their own economic interests in a gamble on the excessive damage test. That is, the condemnor will be arguing to the jury that its project will cause great damages in the hope that the damages awarded will be excessive; if the condemnor gambles and loses, it will have cut its own throat. Likewise, the condemnee will be arguing to the jury that its remainder is not hurt at all in the hope that the damages awarded will not be excessive; the only way the condemnee could avoid this dilemma is to waive severance damages altogether although this would not be fair to him if there are real severance damages.

(4) Early resolution of the right to take the excess, unlike posttrial resolution, will have the effect of encouraging settlements. Court Commissioner Barry (Exhibit XVIII) of Los Angeles indicates:

> [T]he right-to-take issue has been disposed of at various stages. Frequently such an issue is a hang-up for settlement negotiations but once it is resolved, then the parties are often able to agree on valuation matters.

> The various stages at which we have been able to dispose of the right-to-take issue have been as follows: At time of a first pretrial conference the issue can often be disposed of by agreement. For example, the condemnor may agree to reduce the size of the acquisition or may agree to substitute access if that is the problem. Or, the condemnee may withdraw the issue upon becoming convinced that in a particular case he does not have a justiciable issue. If there is no agreement, then dates are fixed for filing of briefs in advance of a non-jury trial. The investigation and research that is required for a brief brings about a more informed approach that often results in the issue being conceded. If it is not conceded then the non-jury trial is had and the appraisal reports are thereafter prepared on the basis of the court's determination. Because of the mutuality that has been achieved in that respect, settlements often follow--usually when the valuation data is exchanged at time of final pretrial.
>
> The procedures we follow are not being recited in this letter for the purpose of urging their adoption on a statewide basis but simply as an illustration of how we solve the problem you have referred to with reference to the right-to-take issue and why it is logical that such an issue be disposed of in the early stages of the proceedings. [Exhibit XVIII at 2-3.]

Considering the merits and demerits of pre- or posttrial determination of the right to take the excess, the staff believes that the Commission's tentative pretrial scheme is superior to a posttrial determination. It should be recognized that the pretrial determination scheme represents the present practice, and we see no good reason to change the present practice. While pretrial determination may require some added costs, these costs are insignificant compared with the trial time and costs for a partial take case where only a whole take was needed. And the procedural advantages of pretrial determination--greater settlement possibilities, more rational trial positions of the parties--far outweigh any procedural disabilities such a determination would engender.

"Physical Solution" Requirement

In the staff's opinion, a key provision of the entire excess condemnation recommendation is the requirement that the condemnor not take the excess if the defendant proves that the condemnor has a "reasonable, practicable, and

economically sound" means of avoiding or reducing the excessive damages. A typical example of this would be provision of substitute access to land- or water-locked property.

This provision received the general approval of most commentators. There were, however, several strong objections to the physical solution provision. The City of Los Angeles (Exhibit III) objected "strenuously" to the provision, stating that it should be eliminated:

> It would appear that the effect of this section is to give the court the power to compel cities, counties and the state to build roads which would not otherwise be constructed. The court could require a byroad to be constructed to a land-locked parcel which road may be unneeded except for the use of one owner. The comment points out that the court should consider matters other than the cost of building the byroad as compared to the value of the real property. The comment says the court should "consider questions of maintenance, hardship to third persons, potential dangers and so on." We question whether it is sound governmental policy to give the court the power to make these determinations rather than the elected or appointed officials who are responsible to the people. A court may determine that there are no "potential dangers" from a particular road. However, if the judge is incorrect it will be the city, county or state that will pay the damages resulting from improper design or insufficient maintenance. [Exhibit III at 3.]

A minority of the Southern Section of the State Bar Committee (Exhibit XX) also believed that the physical solution provision was undesirable:

> (a) it opens the door to evidence which amounts to second guessing of the design engineer;
>
> (b) a "reasonable, practicable and economically sound means of avoiding or substantially reducing the damages" on the property subject to the case being tried, may also be one that merely shifts the damages to the other nearby properties, i.e., as in flood control and drainage facilities;
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> (c) it could result in an extensive battle of expert witnesses presented by both sides, after which the court would have to resolve conflicting expert opinion on such technical matters as engineering, drainage hydrology and the economics of various types of construction in addition to the relative values of other properties. [Exhibit XX at 4.]

The staff believes the court is fully competent to evaluate and rule upon evidence of a technical nature and that the beneficial aspects of the physical solutions doctrine make it worth the risk that the court will make an unsound decision. The staff does agree, however, that it may be poor policy to impose liability on the condemnor for any damages caused by the operation of a court-ordered improvement. Perhaps an indemnity provision of the sort the staff is considering for incorporation in the compatible use area should be drafted to provide immunity to the condemnor.

Respectfully submitted,

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#36.40 Revised 7/29/70

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

EXCESS CONDEMNATION--PHYSICAL AND FINANCIAL REMNANTS

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

NOTE: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. For the most part, the Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

36.40

Revised 7/29/70

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

EXCESS CONDEMNATION--PHYSICAL AND FINANCIAL REMNANTS

BACKGROUND

In the broadest sense, "excess condemnation" includes any taking of property that is not to be actually devoted to the particular public work or improvement for which property is being acquired. In the more narrow sense usually intended by courts and legal writers, the term refers only to the taking of property which the condemnor intends, at the time of the taking, eventually to sell or otherwise dispose of to private persons. Excess takings of this latter type are generally recognized to fall within one of three categories, depending upon the situation of the land and the purpose of the condemnor: (1) "protective" condemnation, (2) "remnant" condemnation, and (3) "recoupment" condemnation. In protective condemnation, the condemnor acts to protect the utility, safety, or beauty of a public improvement by taking adjacent land, sometimes for resale to private persons on condition that future owners refrain from deleterious uses of the property. In remnant condemnation, the condemnor needs only a portion of a parcel for the improvement, but takes the entire parcel to avoid leaving a useless remainder or the payment of excessive severance damages. In recoupment condemnation, the condemnor takes land it considers to be "benefited" by the proposed improvement in an effort to recoup the value of such benefits through resale to private persons.

This recommendation relates only to the second of these categories: "remnant" or "remnant-elimination" condemnation. It does not deal with

"protective" condemnation as authorized in California by Section 14-1/2 of Article I of the Constitution* and various statutory provisions. Neither does it consider the theory or practice of "recoupment" condemnation--an activity generally denounced as unconstitutional for lack of the requisite public use, benefit, or purpose.

The land actually needed for a public improvement often consists of only a portion of various individual parcels. This is most often the case where the location and physical extent of the project are determined by engineering and functional considerations. For example, condemnation of only the portions actually required for the construction of a new street or highway often would leave a string of relatively small, odd-shaped strips and wedges in private ownership. These "physical" remnants would be virtually useless in private hands; but, if the entire parcels were condemned, the condemnor could often consolidate the remnants and return them to private ownership in usable condition. Occasionally, remnants of appreciable size would be rendered economically useless if only the portion of the parcel needed for the public improvement were acquired. This situation arises, for example, where a large portion of a parcel is landlocked or waterlocked by a highway or water project. Condemnation of these "financial" remnants permits the condemnor to avoid having to pay severance damages substantially equal to market value and, at the same time, acquiring substantially less than the entire parcel. Nonetheless, providing the proper scope and a means of implementing an appropriate authority to condemn such physical or financial remnants has not proven to be an easy matter for either courts

* The Constitution Revision Commission has recommended the repeal of Section 14 1/2 as unnecessary.

or legislatures.[1]

Generally speaking, California's condemnors with any substantial need therefor have been granted specific statutory authority to engage in remnant condemnation.[2] These statutes vary from agency to agency, often with little or no apparent reason for the difference.[3] All, however, clearly authorize takings of physical remnants and takings of this sort rarely cause the courts much difficulty.[4]

Moreover, the California Supreme Court has recently held that statutory authority for remnant condemnation may include authority to condemn "financial" remnants. In People v. Superior Court, commonly known as the

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1. The material presented here only highlights the most critical aspects of the relevant background. For a more complete presentation of this background, the reader is referred to the background study prepared for the Commission. See Matheson, Excess Condemnation in California: Proposals for Statutory and Constitutional Change, 42 So. Cal. L. Rev. 421 (1969). See also Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L. J. 571 (1969).

2. E.g., Code Civ. Proc. § 1266 (city and county highway authorities); Sts. & Hwys. Code § 104.1 (Department of Public Works); Water Code § 254 (Department of Water Resources), § 43533 (water districts).

3. For example, the remnant-condemnation authority of the following adjoining flood control and water districts varies with no apparent justification. Compare San Diego County (Water Code App. § 105-6(12)) and Orange County (Water Code App. § 36-16.1); Alameda County (Water Code App. 55-28.1) and Santa Clara County (Water Code App. § 60-6.1).

4. E.g., Kern County Union High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919); People v. Thomas, 108 Cal. App.2d 832, 239 P.2d 914 (1952).

Rodoni case,[5] The California Supreme Court upheld a remnant taking for the single purpose of "avoid[ing] a substantial risk of excessive severance or consequential damages." The Department of Public Works condemned 0.65 acres of a parcel which exceeded 54 acres in size for the construction of a freeway through farmland in Madera County. In doing so, however, the Department had to cut across the only access road to the parcel, rendering it landlocked and presumably of little economic value. Fearing that it would have to pay severance damages for the remainder equal to its original market value, the Department sought to condemn the 54-acre remainder under Section 104.1 of the Streets and Highways Code. That section authorizes the taking of an entire parcel in the course of state highway construction whenever "the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage . . . ."

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According to the majority opinion:

> Although a parcel of 54 landlocked acres is not a physical remnant, it is a financial remnant: its value as a landlocked parcel is such that severance damages might equal its value . . . . There is no reason to restrict . . . [remnant takings to] parcels negligible in size and to refuse to apply it to parcels negligible in value.
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> In the present case the entire parcel can probably be condemned for little more than the cost of taking the part needed for the highway and paying damages for the remainder. It is sound economy for the state to take the entire parcel to minimize ultimate costs.
>
> Under these circumstances excess condemnation is constitutional.

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5. Roy and Thelma Rodoni were owners of the parcels in question, and the initial stages of the litigation were conducted under their names. See People v. Rodoni, 243 Cal. App.2d 771, 52 Cal. Rptr. 857 (1966). When the Rodonis' contentions were upheld by the trial court, the condemnor petitioned for a writ of mandate ordering that court to proceed with the trial of the original complaint or in the alternative for a writ of prohibition forbidding the court from proceeding in accordance with its original order. People v. Superior Court, 68 Cal.2d 206, 210, 436 P.2d 342, 345, 65 Cal. Rptr. 342, 345 (1968).

6. Id. at 212-213, 436 P.2d at 346-347, 65 Cal. Rptr. at 346-347.

The Rodoni decision necessitates substantial revision of California remnant-condemnation statutes.[7] According to the court:

> [These statutes] may reasonably be interpreted to authorize only those excess condemnations that are for valid public uses; namely, condemnation of remnants [citations omitted] or condemnations that avoid a substantial risk of excessive severance or consequential damages.

Certain provisions of the statutes referred to appear clearly to violate the Rodoni constitutional standards, as where authority to take depends only on a mere assertion of severance damage claims[8] or a mere showing of damage to the remainder.[9] Other provisions appear to fall within the Rodoni criteria, as where the condemnor may take only remainders that are of little or no value to the owner[10] or are in such damaged condition as to require payment of compensation equal to the value of the entire parcel,[11] but may fall short of the full scope of remnant-condemnation powers now recognized by the California Supreme Court. In any case, all of these provisions are in need of revision to achieve uniformity and to eliminate purposeless differences among the powers of various condemnors.

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7. Id. at 212, 436 P.2d at 346, 65 Cal. Rptr. at 346.

8. Sts. & Hwys. Code § 104.1 (Department of Public Works), § 943.1 (county highway authorities); Water Code § 254 (Department of Water Resources), § 8590.1 (Reclamation Board), § 11575.2 (Department of Water Resources), § 43533 (water districts).

9. Water Code App. § 28-16 5/8 (Los Angeles County Flood Control District), § 36-16.1 (Orange County Flood Control District), § 48-9.2 (Riverside County Flood Control and Water Conservation District), § 49-6.1 (San Luis Obispo County Flood Control and Water Conservation District), § 51-3.4 (Santa Barbara County Water Agency), § 60-6.1 (Santa Clara County Flood Control and Water Conservation District), § 74-5(12.1) (Santa Barbara County Flood Control and Water Conservation District); see also Water Code App. § 28-16 3/4 (Los Angeles County Flood Control District).

10. Sts. & Hwys. Code § 104.1 (Department of Public Works), § 943.1 (county highway authorities); Water Code § 254 (Department of Water Resources), § 8590.1 (Reclamation Board), § 11575.2 (Department of Water Resources), § 43533 (water districts).

11. Code Civ. Proc. § 1266 (city and county highway authorities); Water Code App. § 105-6(12)(San Diego County Flood Control District).

In the Rodoni decision, the Court explicitly recognized the two problems that have most often been thought to inhere in a broad authority to engage in remnant-elimination condemnation: (1) the possibility that the power will be used coercively by the condemnor in all partial taking cases and (2) the sub rosa opportunity afforded condemning agencies to engage in "recoupment" condemnation. With respect to the first matter, the court concluded:

> We also hold, however, that it [the trial court] must refuse to condemn the property if it finds that the taking is not justified to avoid excessive severance or consequential damages. The latter holding will assure that any excess taking will be for a public use and preclude the department from using the power of excess condemnation as a weapon to secure favorable settlements.

The Court dismissed the question of "recoupment" as follows:

> Nor does section 104.1 authorize excess condemnation for recoupment purposes, as the term is used in those cases that disfavor it. The statute does not authorize the state to condemn for the sole purpose of taking lands enhanced by the improvement in order to recoup that increase in value or for the sole purpose of developing the area adjacent to the improvement for a profit. [Citation omitted.] The department's purpose is to avoid the windfall to the condemnee and the substantial loss to the state that results when severance damages to a severed parcel are equal to its value.

RECOMMENDATION

The authority to acquire physical or financial remnants can be of substantial benefit both to public entities and their taxpaying citizens and to the owners of such property. The Commission concludes, therefore, that public entities should be given such authority but that a procedure should be provided to assure that the authority will not be abused. Accordingly, the Commission recommends:

1. Uniform statutory provisions, covering all public entities, should be enacted to replace the numerous and diverse statutes that now provide specific authority to engage in remnant condemnation. Both the number and diversity of these statutes lack any justification. On the other hand, nongovernmental condemnors (essentially public utilities), have no statutory authority to acquire excess property and no change in this regard is recommended.

2. Public entities should be given express statutory authority to acquire both physical and financial remnants by voluntary transactions, to dispose of the remnants, and to credit the proceeds therefrom to the fund available for the acquisition of property being acquired for the public project. Inasmuch as this authority would only permit voluntary acquisitions, it could hardly be detrimental to either side. On the contrary, it could substantially benefit both the public entity and the property owner. The process of appraising, negotiating, and--if necessary--litigating the elements of severance damage in a partial taking case often proves considerably more difficult and costly than determining and paying the fair market value of the entire parcel. Authority to acquire the entire parcel permits both sides to avoid this expense. In addition, this authority will be of assistance in cases where the property owner otherwise would be left with property for

which he has no use and would himself have to bear the cost of disposition of the property.

3. A public entity should be authorized to condemn the remainder, or a portion of the remainder, of a larger parcel of property if it is a true physical remnant or if the taking poses a substantial risk that the entity will be required to pay in compensation an amount substantially equivalent to the value of the entire parcel. The Rodoni decision held that "condemnations that avoid a substantial risk of excessive severance or consequential damages may constitutionally be authorized." However, it is difficult to determine what the court meant to include within the term "excessive severance or consequential damage." The Court seemed to make clear that total parcel takings are not justified merely (1) to avoid the cost and inconvenience of litigating damages; (2) to preclude the payment of damages, including damages substantial in amount, in appropriate cases; (3) to coerce the condemnee to accept a lesser value for the property actually needed for the project; or (4) to afford to the condemnor an opportunity to "recoup" damages or unrecognized benefits by speculating as to the future market for the property. The statutory test should make it clear that, in general, a usable and generally saleable piece of property is neither a physical nor financial remnant even though its "highest and best use" has been downgraded by its severance or a controversy exists as to its best use or value after severance. However, if it is totally landlocked, reduced beneath minimum zoning size, rendered unusable for any of its plausible applications, or made to be of significant value to only one or a few persons (e.g., adjoining landowners), it should be considered a "remnant" irrespective of its size.

4. The resolution, ordinance, or declaration authorizing the taking of a remainder, or portion of a remainder, should be given the effect of a

presumption affecting the burden of producing evidence (Evidence Code Sections 603, 604). The basic burden of proof to establish the facts that bring the case within the statutory authorization should be left with the condemnor.

5. The condemnee should be permitted to contest the "excess" taking upon the grounds that the condemnor has a reasonable and economically feasible means of avoiding the leaving of a remnant that is either unusable or valueless.[12] If the court should find that such a practicable "physical solution" is available, the remainder, or portion of the remainder, sought to be taken should be deleted from the proceeding.

6. Finally, existing procedures should be clarified by specifying that either party may obtain a judicial determination of the right-to-take issue in excess takings before the valuation trial.

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12. For example, condemnees should be permitted to avoid the taking of the entire parcel where the condemnor, through the taking of access easements or the construction of access roads or structures, could economically reduce or eliminate the damage to the remainder. The condemnation of property by a public agency to provide access to a parcel landlocked by its own project would be a valid taking for a public use, and separate proposals have been prepared by the Law Revision Commission to make California's statutory authority for such takings explicit and uniform.

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by the enactment of the following legislation:*

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* The Commission is presently engaged in the task of preparing a comprehensive statute relating to eminent domain. For convenience, the legislation proposed here is numbered with reference to that statute. It should also be noted that the repealed sections do not include the many uncodified sections dealing with special districts. The latter sections will be dealt with at a future time.

Division 4. The Right to Take

Chapter 7. Excess Condemnation

§ 420. Voluntary acquisition of physical or financial remnants

420. Whenever a part of a larger parcel of property is to be acquired by a public entity for public use and the remainder, or a portion of the remainder, will be left in such size, shape, or condition as to be of little value to its owner or to give rise to a claim for severance or other damages, the public entity may acquire the remainder, or portion of the remainder, by any means expressly consented to by the owner.

Comment. Section 420 provides a broad authorization for public entities to acquire physical or "financial" remnants of property by voluntary transactions, including condemnation proceedings initiated with the consent of the owner. Compare Section 421 and the Comment to that section relating to the condemnation of remnants. The language of this section is similar to that contained in former Sections 104.1 and 943.1 of the Streets and Highways Code and Sections 254, 8590.1, 11575.2, and 43533 of the Water Code [all to be repealed]. Inasmuch as

exercise of the authority conferred by this section depends upon the consent and concurrence of the property owner, the language of the section is broadly drawn to authorize acquisition whenever the remnant would have little value to its owner (rather than little market value or value to another owner) or would give rise to a "claim" for "damages" (rather than raise a "substantial risk" that the entity will be required to pay an amount substantially equivalent to the amount that would be required to be paid for the entire parcel). Compare Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App.2d 762, 304 P.2d 803 (1956). This section does not specify the procedure to be followed by the entity in disposing of the property so acquired. That matter is provided for by Section 422. See Section 422 and Comment thereto.

The Right to Take

§ 421. Condemnation of physical or financial remnants

421. (a) Whenever a part of a larger parcel of property is to be taken by a public entity through condemnation proceedings and the remainder, or a portion of the remainder, will be left in such size, shape, or condition as to be of little market value or to give rise to a substantial risk that the entity will be required to pay in compensation an amount substantially equivalent to the amount that would be required to be paid for the entire parcel, the entity may take such remainder, or portion of the remainder, in accordance with this section.

(b) The resolution, ordinance, or declaration authorizing the taking of a remainder, or a portion of a remainder, under this section and the complaint filed pursuant to such authority shall specifically refer to this section. It shall be presumed from the adoption of the resolution, ordinance, or declaration that the taking of the remainder, or portion of the remainder, is justified under this section. This presumption is a presumption affecting the burden of producing evidence.

(c) If the condemnee desires to contest the taking under this section, he shall specifically raise the issue in his answer. Upon motion of either the condemnor or the condemnee, made not later than 20 days prior to the day set for trial of the issue of compensation, the court shall determine whether the remainder, or portion of the remainder, may be taken under this section. If the condemnee does not specifically raise the issue in his answer, or if a motion to have this issue heard is not timely made, the right to contest the taking under this section shall be deemed waived.

(d) The determination whether the remainder, or portion of the remainder, may be taken under this section, shall be made before trial of the issue of compensation. If the court's determination is in favor of the condemnee, the taking of the remainder, or portion of the remainder, shall be deleted from the proceeding, and upon trial of the issue of compensation no reference shall be made to the fact that the public entity previously sought to invoke this section to acquire the remainder, or portion of the remainder.

(e) The court shall not permit a taking under this section if the condemnee proves that the public entity has a reasonable, practicable, and economically sound means of avoiding or substantially reducing the damages that might cause the taking of the remainder, or portion of the remainder, to be justified under subdivision (a).

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

Comment. Section 421 provides a uniform standard and a uniform procedure for determining whether property may be taken to eliminate physical and financial "remnants." With respect to physical remnants, see Kern County High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919); People v. Thomas, 108 Cal. App.2d 832, 239 P.2d 914 (1915). As to the concept of "financial remnants," see Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); People v. Jarvis, 274 Adv. Cal. App. 243, Cal. Rptr. (1969); People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967); La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App.2d 762, 304 P.2d 803 (1956). See generally 2 Nichols, Eminent Domain § 7.5122 (3d ed. 1963); Capron, Excess Condemnation in California--A Further Expansion of the Right to Take, 20 Hastings L.J. 571 (1969); Matheson, Excess Condemnation in California: Proposals for Statutory and Constitutional Change, 42 So. Cal. L. Rev. 421 (1969). This section supersedes Section 1266 of the Code of Civil Procedure, Section 104.1 and 943.1 of the Streets and Highways Code,

Sections 254, 8590.1, 11575.2, and 43533 of the Water Code, and various sections of special district laws.

Subdivision (a). It should be noted preliminarily that the terms "larger parcel" and "entire parcel" are not synonymous. "Larger parcel" refers to the original, contiguous, unified parcel held by the condemnee. See Code of Civil Procedure Section 1248(2); People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967). "Entire parcel" refers to the entire parcel sought to be acquired by the condemnor; this includes the part taken for the improvement itself and the remainder, or portion of the remainder sought to be acquired under this section. The term "portion of the remainder" is used in various subdivisions of this section to allow for the case in which a taking affecting a parcel leaves more than one remnant (e.g., the complete severance of a ranch by a highway). In certain cases, the taking of only one remnant (i.e., "a portion of the remainder") might be justified. The term does not mean or refer to artificially contrived "zones" of damage or benefit sometimes used in appraisers' analyses.

Subdivision (a) undertakes to provide a common sense rule to be applied by the court in determining whether physical remnants (those of "little market value") or financial remnants (those raising a "substantial risk" that assessed damages will be "substantially equivalent" to value) may be taken. The test is essentially that stated as a matter of constitutional law in Dep't of Public Works v. Superior Court, supra, except that the confusing concept of "excessive" damages is not used and "sound economy" alone, or an estimate as to "sound economy" on the part of the condemnor, is not made a basis for total-parcel takings. As the Supreme Court made clear in that decision, such takings are not justified (1) to avoid the cost and inconvenience of litigating damages; (2) to preclude the payment of damages, including damages substantial in amount in appropriate cases; (3) to coerce the condemnee to accept whatever value the condemnor offers for the property actually needed for the project; or (4) to afford the condemnor an opportunity to "recoup" damages or unrecognized benefits by speculating as to the future market for the property not actually devoted to the public work or improvement. In general, a usable and generally salable piece of property is neither a physical nor financial remnant even though its "highest and best use" has been downgraded by its severance or a serious controversy exists as to its best use or value

after severance. See, e.g., La Mesa v. Tweed & Gambrell Planing Mill, supra; State Highway Commission v. Chapman, 446 P.2d 709 (Mont. 1968). However, if it is totally "landlocked" and no physical solution is practical, or reduced beneath minimum zoning size and there is no reasonable probability of a zoning change, or rendered unusable for any of its plausible applications, or made to be of significant value to only one or a few persons (e.g., adjoining landowners), it is a "remnant" irrespective of its size. See, e.g., Dep't of Public Works v. Superior Court, supra; State v. Buck, 226 A.2d 840 (N.J. 1968). The test provided by subdivision (a) is the objective one of marketability and market value generally of the remainder, rather than "value to its owner" as specified in Section 420 (which authorizes the purchase of remnants) and certain superseded provisions such as former Section 104.1 of the Streets and Highways Code. See State Highway Commission v. Chapman, supra. The term "substantial risk" and the concept of "substantial" equivalence of damages and value are taken directly from Dep't of Public Works v. Superior Court, supra. Obviously, those general terms are only guides to the exercise of judgment on the part of the court. They are intended to serve as such, rather than to indicate with precision the requisite range of probability or the closeness of arithmetical amounts.

Subdivision (b). Although this subdivision requires a specific reference in both the resolution and the complaint to Section 421 as the statutory basis for the proposed taking, it does not require either the recitation or the pleading of the facts that may bring the case within the purview of the section. See People v. Jarvis, supra. The resolution (or ordinance or declaration) is given the effect of raising a presumption that the taking is justified under this section. Thus, in the absence of a contest of that issue, the subdivision permits a finding and judgment that the remainder be taken. However, the presumption is specified to be one affecting the burden of producing evidence (see Evidence Code Sections 603, 604), rather than one affecting the burden of proof (see Evidence Code Sections 605, 606). Accordingly, the burden of proving the facts that bring the case within the section is left with the plaintiff (i.e., the condemnor). See People v. Van Garden, 226 Cal. App.2d 634, 38 Cal. Rptr. 265 (1964); People v. O'Connell Bros., 204 Cal. App. 34, 21 Cal. Rptr. 890 (1962). In this respect, the subdivision eliminates any greater effect that might be attributed to the resolution (compare People v. Chevalier, 52 Cal.2d 299, 340 P.2d 603 (1959)) or that might be drawn from a legislative (see Los Angeles County v. Anthony, 224 Cal. App.2d 103, 36 Cal. Rptr. 308 (1964)) or administrative (see San Mateo County v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960)) determination or declaration as to "public use."

Subdivisions (c) and (d). Remnant-elimination condemnation inevitably raises the problem of requiring both condemnor and condemnee to assume one position as to the right-to-take issue and an opposing position in the valuation trial. Thus, to defeat the taking, the property owner logically contends that the remainder is usable and valuable, but to obtain maximum severance damages, his contention is the converse. To sustain the taking, the condemnor emphasizes the severity of the damage to the remainder, but if the right-to-take issue is lost, its position in the partial-taking valuation trial is reversed. Under decisional law, the right-to-take issue as to remnants has been disposed of at various stages. See, e.g., Dep't of Public Works v. Superior Court, supra (mandamus as to preliminary adverse decision by trial court); People v. Nyrin, supra (appeal from condemnation judgment as to trial motion to delete remnant); People v. Jarvis, supra (appeal from condemnation judgment as to motion prior to pre-trial to add remnant); La Mesa v. Tweed & Gambrell Planing Mill, supra (appeal from condemnation judgment following post-trial attempt to amend complaint to add remnant). To obviate this procedural confusion and jousting, subdivision (c) makes clear that either party is entitled to demand a determination by the trial court of the right-to-take issue before the valuation trial. Moreover, failure to make such demand shall be deemed a waiver of this issue. Subdivisions (c) and (d) make no change in existing law as to the appellate remedies (appeal from final judgment of condemnation, prohibition, mandamus) that may be available as to the trial court's determination. However, these

subdivisions do not contemplate that results of the valuation trial as to values, damages, or benefits may be invoked either in post-verdict proceedings in the trial court or on appeal to disparage a determination of the right-to-take issue made before the valuation trial. Such a determination is necessarily based on matters made to appear at the time it is made and it should be judged accordingly.

The preliminary hearing will be concluded and a determination reached prior to the trial of issue of compensation. Where the court's determination is in favor of the condemnee, the taking of the remainder, or portion of the remainder should be completely removed from the proceeding. Moreover, subdivision (d) specifically forbids reference in the valuation trial to the fact that the condemnor sought to take under this section. Whether specific evidence introduced at the preliminary hearing may be used for impeachment or other purposes at the valuation trial should be determined under the usual rules of evidence (see below). However, subdivision (d) makes clear that it is improper to refer directly or indirectly to the resolution, pleadings, or other papers on file to show that the condemnor previously sought to invoke this section to take the entire parcel. For a somewhat analogous provision, see Code of Civil Procedure Section 1243.5(e)(amount deposited or withdrawn in immediate possession cases).

Subdivision (e). This subdivision permits the condemnee to contest a taking under this section upon the grounds that a "physical solution" could be provided by the condemnor as an alternative to either a total

taking or a partial taking that would leave an unusable or unmarketable remainder. In at least a few cases, the condemnee may be able to demonstrate that, given construction of the public improvement in the manner proposed, the public entity is able to provide substitute access or take other steps that would be equitable under the circumstances of the particular case. If he can do so, subdivision (e) prevents acquisition of the remainder. Clearly, in almost every case, some physical solution would be possible. Subdivision (e), however, requires that the solution also be "reasonable, practicable, and economically sound." To be "economically sound," the proposed solution must, at a minimum, reduce the overall cost to the condemnor of the taking. Thus, the cost of the solution plus compensation paid for the part taken plus any remaining damages must never exceed the amount that would be required to be paid if the entire parcel were taken. The court should, moreover, consider questions of maintenance, hardship to third persons, potential dangers, and so on, in determining whether the solution is also "reasonable and practicable."

Subdivision (f). Subdivision (f) makes clear that the procedure provided by this section has no bearing upon the privilege to abandon or the consequences of abandonment. The subdivision makes no change in existing law. See Section 1255a and People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967).

The Right to Take

§ 422. Disposal of acquired physical or financial remnants

422. A public entity may sell, lease, exchange, or otherwise dispose of property taken under Section 420 or Section 421 and may credit the proceeds to the fund or funds available for acquisition of the property being acquired for the public work or improvement. Nothing in this section relieves a public entity from complying with any applicable statutory procedures governing the disposition of property.

Comment. Section 422 authorizes the entity to dispose of property acquired under Sections 420 and 421.

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

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

Comment. Section 1266 is superseded by Section 421 of the Comprehensive Statute.

Sec. . Section 1266.1 of the Code of Civil Procedure is repealed.

~~1266.1.--A county or a city may acquire land by gift or purchase from the owner thereof for any of the purposes enumerated in Section 1266 of this code.~~

Comment. Section 1266.1 is superseded by Section 420 of the Comprehensive Statute.

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

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

Comment. Section 104.1 is superseded by Sections 420 through 422 of the Comprehensive Statute.

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

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

Comment. Section 943.1 is superseded by Sections 420 through 422 of the Comprehensive Statute.

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

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

Comment. Section 254 is superseded by Sections 420 through 422 of the Comprehensive Statute.

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

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

Comment. Section 8590.1 is superseded by Sections 420 through 422 of the Comprehensive Statute.

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

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

Comment. Section 11575.2 is superseded by Sections 420 through 422 of the Comprehensive Statute.

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

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

Comment. Section 43533 is superseded by Sections 420 through 422 of the Comprehensive Statute.

[S. F. No. 22510. In Bank. Feb. 1, 1968.]

THE PEOPLE ex rel. DEPARTMENT OF PUBLIC WORKS, Petitioner, v. THE SUPERIOR COURT OF MERCED COUNTY, Respondent; ROY L. RODONI et al., Real Parties in Interest.

[1a-1c] Eminent Domain—Uses—Excess Condemnation—To Avoid Excessive Damages: Mandamus.—Mandate must issue to compel the trial court to proceed with that part of the Department of Public Works' suit seeking to condemn, for purposes of public economy under Sts. & Hy. Code, § 104.1, 54 acres of a farmer's land that would be left landlocked by an associated condemnation, for highway purposes, of 0.65 acres of his land, where the record suggested that the entire parcel could probably be condemned for little more than the cost of taking the part needed for the highway and of paying damages for the remainder; but the excess condemnation must be denied unless justified by the avoidance of excessive severance or consequential damages.

[2] Id.—Uses—Province to Determine.—It is for the Legislature to determine what shall be deemed a public use for the pur-

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[1] Right to condemn property in excess of needs for a particular public purpose, note, 6 A.L.R.3d 297. See also Cal.Jur.2d, Eminent Domain, §§ 8, 105; Am.Jur.2d, Eminent Domain, § 115.

McK. Dig. References: [1] Eminent Domain, §§ 31.5, 184; Streets, § 16; Highways, § 43; [2] Eminent Domain, § 14; [3] Eminent Domain, §§ 2, 31.1; [4] Eminent Domain, §§ 31.3, 31.5; Streets, § 15; Highways, § 44; [5] Eminent Domain, § 31.5; Streets, § 15; Highways, § 44; [6] Eminent Domain, § 31.1; Streets, § 15; Highways, § 44; [7] Eminent Domain, § 6; Constitutional Law, § 85; [8] Eminent Domain, § 27; Streets, § 15; Highways, § 44; [9] Eminent Domain, § 14; Streets, § 15; Highways, § 55.5; [10] Eminent Domain, § 31.7; Streets, § 16; Highways, § 49.

poses of eminent domain, and its judgment is binding unless there is no possibility that the legislation may be for the welfare of the public.

[3] **Id.—Nature of Right: Excess Condemnation.**—Eminent domain being an inherent attribute of sovereignty, constitutional provisions relating thereto merely place limitations on its exercise. Thus, Cal. Const., art. I, § 14½, while expressly limiting excess condemnations for protective purposes, in no way limits the power of the Legislature to authorize excess condemnations for other than protective purposes.

[4] **Id.—Uses—Excess Condemnation—Remnants: To Avoid Excessive Damages.**—Despite its broad statutory language, Sts. & Hy Code, § 104.1, may reasonably be interpreted to authorize only those excess condemnations that are valid for public uses, namely, condemnation of remnants, or condemnations to avoid a substantial risk of excessive severance or consequential damages.

[5] **Id.—Uses—Excess Condemnation—To Avoid Excessive Damages.**—Cal. Const., art. I, § 14, precludes excess condemnations under Sts. & Hy. Code, § 104.1, unless the economic benefit to the state is clear, and the mere avoidance of the cost of litigating damages claimed by the condemnee is not sufficient; nor does the state authorize condemnations for the sole purpose of taking lands enhanced by the improvement in order to recoup that increase in value, or for the sole purpose of developing the area adjacent to the improvement for a profit.

[6] **Id.—Uses—Excess Condemnation.**—Sts. & Hy. Code, § 104.1, providing for excess condemnation, is not an unconstitutional delegation of legislative power, since the statute contains adequate standards for the guidance of the agency, and the conditions in Sts. & Hy. Code, §§ 102, 103 and 104, themselves providing adequate standards governing the necessity of such condemnations, have first to be met.

[7] **Id.—Who May Exercise—Delegation.**—The power of eminent domain may be delegated by the Legislature to an administrative body as long as the delegating statute establishes an ascertainable standard to guide the administrative agents.

[8] **Id.—Uses—Province to Determine Necessity.**—Sts. & Hy. Code, § 103, by making conclusive the determination of the Highway Commission on the necessity of taking particular land, thus taking such issue outside the scope of judicial review, does not infringe the constitutional rights of the condemnee.

[9] **Id.—Uses—Province to Determine What Is a Public Use.**—

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[3] See Cal.Jur.2d, Eminent Domain, § 9; Am.Jur.2d, Eminent Domain, §§ 2, 7.

The issue of whether a taking of particular land under the Streets and Highways Code is for a public use is within the scope of judicial review.

[10] Id. — Uses — Excess Condemnation — Evidence.—To raise an issue of improper excess taking in eminent domain, the condemnees must show that the condemner is guilty of fraud, bad faith or abuse of discretion in the sense that the condemner does not actually intend to use the property as it resolved to use it, or that the contemplated use is not a public one.

PROCEEDING in mandamus to compel the Superior Court of Merced County to proceed with the condemnation of three instead of two parcels of real property owned by the real parties in interest. Writ granted.

Harry S. Fenton, Holloway Jones, Jack M. Howard, William C. DeMartini, Charles E. Spencer, Jr., and William R. Edgar for Petitioner.

Thomas C. Lynch, Attorney General, and Robert L. Bergman, Deputy Attorney General, as Amici Curiae on behalf of Petitioner.

Linneman, Burgess, Telles & Van Atta, L. M. Linneman and James E. Linneman for Real Parties in Interest.

Fadem & Kanner and Gideon Kanner as Amici Curiae on behalf of Real Parties in Interest.

TRAYNOR, C. J.—The Department of Public Works seeks to compel the trial court to proceed with the condemnation of three instead of two parcels of real property owned by the real parties in interest. Roy and Thelma Rodoni.

The department built a freeway across a farm owned by the Rodonis. The farm consists of a southern rectangular parcel and a northern triangular parcel. The northeast corner of the former touches the southwest corner of the latter. The freeway crosses the adjoining corners, taking a tip of each, which total .65 acres. As a result, the northern parcel of approximately 54 acres is landlocked.

In addition to the .65 acres the freeway occupies, the department seeks to condemn the remaining landlocked 54 acres pursuant to Streets and Highways Code section 104.1.[1] Its purpose is to protect the fisc by eliminating the risk that

[1] "Whenever a part of a parcel of land is to be taken for State highway purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation

excessive severance damages to the landlocked parcel might be awarded for the taking of the corner that provided access to it. The department points out that if it is allowed to condemn the entire parcel the Rodonis will receive full value for their property, the risk of excessive severance damages will be eliminated, and ultimately it will be able to reduce the cost of the freeway by selling the part of the parcel not needed for freeway purposes.

The Rodonis challenge the excess condemnation on the ground that taking property for such a purely economic purpose violates article I, section 14 of the California Constitution[2] because such taking is not for a "public use." They contend that excess condemnation must be limited to parcels that may properly be deemed remnants with respect to which the public interest in avoiding fragmented ownership comes into play. In their view, 54 acres, even if landlocked and of little value, cannot be deemed a remnant of .65 acres. They insist that the state pay severance damages for the landlocked parcel and allow them to retain it, even though severance damages may be equal to its full original market value. They also assert that the excess condemnation is prohibited by section 14½ of article I of the California Constitution[3] because it is not limited to land lying within 200 feet of the freeway.

The trial court decided in favor of the Rodonis and ordered the complaint dismissed insofar as it seeks to condemn the landlocked parcel. It held that to allow the taking of any land

concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for State highway purposes."

[2]California Constitution article I, section 14: "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. . . ."

[3]"The State, or any of its cities or counties, may acquire by gift, purchase or condemnation, lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred fifty feet from the closest boundary of such public works or improvements; provided, that when parcels which lie only partially within said limit of one hundred fifty feet only such portions may be acquired which do not exceed two hundred feet from said closest boundary, and after the establishment, laying out and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works.

"The Legislature may, by statute, prescribe procedure."

not physically necessary for the freeway would be a taking for other than the public use and that if section 104.1 were construed to allow such a taking it would be unconstitutional. The department then petitioned for a writ of mandate ordering the Merced County Superior Court to proceed with the trial of the original complaint or in the alternative for a writ of prohibition forbidding the court from proceeding in accordance with its order dismissing the complaint in part. (See *Tide Water Assoc. Oil Co.* v. *Superior Court* (1955) 43 Cal.2d 815 [279 P.2d 35]; *Financial Indem. Co.* v. *Superior Court* (1955) 45 Cal.2d 395, 399 [289 P.2d 233]; *People* ex rel. *Dept. Public Works* v. *Rodoni* (1966) 243 Cal.App.2d 771 [52 Cal.Rptr. 857].)

[1a] We hold that section 104.1 validly authorizes the trial court to proceed with the action to condemn the 54 acres. We also hold, however, that it must refuse to condemn the property if it finds that the taking is not justified to avoid excessive severance or consequential damages. The latter holding will assure that any excess taking will be for a public use and preclude the department from using the power of excess condemnation as a weapon to secure favorable settlements.

[2] It is for the Legislature to determine what shall be deemed a public use for the purposes of eminent domain, and its judgment is binding unless there is no "'possibility the legislation may be for the welfare of the public.'" (*Linggi* v. *Garovotti* (1955) 45 Cal.2d 20, 24 [286 P.2d 15], quoting *University of Southern Cal.* v. *Robbins* (1934) 1 Cal.App.2d 523, 525-526 [37 P.2d 163]; see also *Housing Authority* v. *Dockweiler* (1939) 14 Cal.2d 437, 449-450 [94 P.2d 794]; *Lux* v. *Haggin* (1886) 69 Cal. 255, 303-304 [4 P. 919, 10 P. 674]; *County of Los Angeles* v. *Anthony* (1964) 224 Cal.App.2d 103, 106 [36 Cal.Rptr. 308]; *Tuolumne Water Power Co.* v. *Frederick* (1910) 13 Cal.App. 498, 503 [110 P. 134].) "Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.". (*United States* ex rel. *T.V.A.* v. *Welch* (1946) 327 U.S. 546, 552 [90 L.Ed. 843, 848, 66 S.Ct. 715].)

Sections 104.1, 104.2, 104.3 and 104.6 of the Streets and Highways Code set forth the purposes for which the department may acquire or condemn property not immediately needed or property not physically needed for state highway

purposes. In addition to the excess condemnation authorized by section 104.1, the department may condemn property for nonhighway public uses to be exchanged for property already devoted to such nonhighway uses when the department wishes to acquire the latter property for highway use. (§ 104.2)[4] It may condemn property adjacent to highways and other public works to be constructed by it and thereafter convey the adjacent property to private parties subject to restrictions protecting the highway or other public use. (§ 104.3.)[5] It may also acquire property for future needs and lease such property until it is needed. (§ 104.6.)[6] None of these sections limits the others, and each "is a distinct and separate authorization." (§ 104.7.)

Section 104.3 is patterned after section 14½ of article I of the California Constitution and, like that section, limits the property to be taken for protective purposes to property lying within 200 feet of the public work. It may be assumed without deciding that the constitutional provision compelled the statutory limitation; that the reference to streets in section 14½ includes state highways and that protective condemnations

[4] "Whenever property which is devoted to or held for some other public use for which the power of eminent domain might be exercised is to be taken for State highway purposes, the department may, with the consent of the person or agency in charge of such other public use, condemn, in the name of the people of the State of California, real property to be exchanged with such person or agency for the real property so to be taken for State highway purposes. This section does not limit the authorization to the department to acquire, other than by condemnation, property for such purposes."

[5] "The department may condemn real property or any interest therein for reservations in and about and along and leading to any State highway or other public work or improvement constructed or to be constructed by the department and may, after the establishment, laying out and completion of such improvement, convey out [*sic*] any such real property or interest therein thus acquired and not necessary for such improvement with reservations concerning the future use and occupation of such real property or interest therein, so as to protect such public work and improvement and its environs and to preserve the view, appearance, light, air and usefulness of such public work; provided, that land so condemned under authority of this section shall be limited to parcels lying wholly or in part within a distance of not to exceed one hundred fifty feet from the closest boundary of such public work or improvement; provided that when parcels which lie only partially within such limit of one hundred fifty feet are taken, only such portions may be condemned which do not exceed two hundred feet from said closest boundary."

[6] "The authority conferred by this code to acquire real property for state highway purposes includes authority to acquire for future needs. The department is authorized to lease any lands which are held for state highway purposes and are not presently needed therefor on such terms and conditions as the director may fix and to maintain and care for such property in order to secure rent therefrom. . . ."

authorized by section 14½ are also limited by it. [3] Section 14½, however, does not limit the power of the Legislature to authorize excess condemnation for other than protective purposes. "Because eminent domain is an inherent attribute of sovereignty, constitutional provisions merely place limitations upon its exercise." (*People* ex rel. *Dept. of Public Works* v. *Chevalier* (1959) 52 Cal.2d 299, 304 [340 P.2d 598].)

Section 14½ was adopted in 1928 at a time when the validity of any excess condemnation was doubtful. It was not adopted to limit the power of eminent domain but to authorize condemnations that its sponsors believed would not be permitted under then current rules of constitutional law. (1928 Ballot Pamphlet, Argument for Proposed Senate Constitutional Amend. No. 16.) Although it includes limitations on the condemnations it authorizes and to that extent limits the state's inherent power of eminent domain, it in no way limits those condemnations that it does not authorize. Accordingly, since it only authorizes condemnations for protective purposes, it does not restrict condemnations for other purposes. (*People* ex rel. *Dept. of Public Works* v. *Garden Grove Farms* (1965) 231 Cal.App.2d 666, 668-673 [42 Cal.Rptr. 118]; see also *State* ex rel. *Highway Com.* v. *Curtis* (1949) 359 Mo. 402 [222 S.W.2d 64]; *State* ex rel. *Thomson* v. *Giessel* (1955) 271 Wis. 15, 51-54 [72 N.W.2d 577, 595-597]; *State* ex rel. *Evjue* v. *Seyberth* (1960) 9 Wis.2d 274, 279-281 [101 N.W.2d 118, 121-122].)

[4] In section 104.1 the Legislature has determined that excess condemnation is for a public use whenever remaining parcels are of little value or in such a condition as to give rise to claims or litigation concerning severance or other damages. Although the statutory language is broad, it may reasonably be interpreted to authorize only those excess condemnations that are for valid public uses; namely, condemnation of remnants (see e.g., *Kern County High School Dist.* v. *McDonald* (1919) 180 Cal. 7, 16 [179 P. 180]; *People* v. *Thomas* (1952) 108 Cal.App.2d 832, 836 [239 P.2d 914]; *In re Opinion of Justices* (1910) 204 Mass. 616, 619-620 [91 N.E. 578]; 2 Nichols, Eminent Domain (3d ed. 1963) § 7.5122 [1], p. 717) or condemnations that avoid a substantial risk of excessive severance or consequential damages. On the record before us, the taking in the present case is justified on the latter ground.

Although a parcel of 54 landlocked acres is not a physical

remnant, it is a financial remnant: its value as a landlocked parcel is such that severance damages might equal its value. Remnant takings have long been considered proper. "The reasoning behind the 'remnant theory,' . . . is that by limiting the acquisition to only such parts of the property as are needed by the particular improvement, fragments of lots would remain of such shape and size as to render them separately valueless, with the result that the city would be required to pay for the whole, although it took only a part, and with the further result that because of the lack of such value, the city would thereafter be deprived of collecting taxes on these remnants." (Annot., 6 A.L.R.3d 297, 317 (1966); see also, 2 Nichols, Eminent Domain (3d ed. 1963) § 75122 [1] p. 718.) There is no reason to restrict this theory to the taking of parcels negligible in size and to refuse to apply it to parcels negligible in value.

[1b] In the present case the entire parcel can probably be condemned for little more than the cost of taking the part needed for the highway and paying damages for the remainder. It is sound economy for the state to take the entire parcel to minimize ultimate costs.

Under these circumstances excess condemnation is constitutional. "The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of costs. [Citations.] And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public." (*United States* ex rel. *T.V.A.* v. *Welch*, *supra*, 327 U.S. 546; 554 [90 L.Ed. 843, 849]; see also *United States* v. *Agee* (6th Cir. 1963) 322 F.2d 139; *Boston* v. *Talbot* (1910) 206 Mass. 82, 89 [91 N.E. 1014]; *New Products Corp.* v. *State Highway Comr.* (1958) 352 Mich. 73, 86 [88 N.W.2d 528]; *Kern County High School Dist.* v. *McDonald*, *supra*, 180 Cal. 7, 16; *People* v. *Thomas*, *supra*, 108 Cal.App.2d 832, 836.)

[5] We need not decide in what specific cases other than those mentioned the statute authorizes excess condemnation. It should be emphasized, however, that the economic benefit to the state must be clear. The economic benefit of avoiding the cost of litigating damages is not sufficient. The statute does not authorize excess condemnation anytime the condemnee claims severance or consequential damages. To allow such condemnation would nullify the constitutional guarantee of

just compensation (Cal. Const., art. I, § 14) by permitting the state to threaten excess condemnation, not because it was economically sound, but to coerce condemnees into accepting whatever value the state offered for the property actually taken or waiving severance or consequential damages to avoid an excess taking.[7]

[6] As so construed section 104.1 is not an unconstitutional delegation of legislative power. Adequate standards appear in other provisions of the code. Section 102 of the Streets and Highways Code requires the Highway Commission, before authorizing condemnation by the department of any real estate for highway purposes, to make a determination that the "public interest and necessity require the acquisition" and that "the real property or interest therein described in such resolution is necessary for the improvement."[8] Section 103 makes the decision of the commission on the necessity of the improvement and of the taking of given property conclusive.[9] Section 104 provides a nonexclusive list of various purposes for which property is deemed necessary.[10]

[7]Nor does section 104.1 authorize excess condemnation for recoupment purposes, as the term is used in those cases that disfavor it. The statute does not authorize the state to condemn for the sole purpose of taking lands enhanced by the improvement in order to recoup that increase in value or for the sole purpose of developing the area adjacent to the improvement for a profit. (See Annot., 6 A.L.R.3d 297, 311-314.) The department's purpose is to avoid the windfall to the condemnee and the substantial loss to the state that results when severance damages to a severed parcel are equal to its value.

[8]Streets and Highways Code section 102: "In the name of the people of the State of California, the department may condemn for State highway purposes, under the provisions of the Code of Civil Procedure relating to eminent domain, any real property or interest therein which it is authorized to acquire. The department shall not commence any such proceeding in eminent domain unless the commission first adopts a resolution declaring that public interest and necessity require the acquisition, construction or completion by the State, acting through the department, of the improvement for which the real property or interest therein is required and that the real property or interest therein described in such resolution is necessary for the improvement."

[9]Streets and Highways Code section 103: "The resolution of the commission shall be conclusive evidence: (a) Of the public necessity of such proposed public improvement. (b) That such real property or interest therein is necessary therefor. (c) That such proposed public improvement is planned or located in a manner which will be most compatible with the greatest public good and the least private injury."

[10]Streets and Highways Code section 104: "The department may acquire, either in fee or in any lesser estate or interest, any real property which it considers necessary for State highway purposes. Real property for such purposes includes, but is not limited to, real property considered necessary for any of the following purposes: [Herein are listed such purposes as rights of way, offices, parks adjoining the highway, landscaping, drainage, maintenance, etc.]"

Only after these other conditions are met does section 104.1 come into play.

[7] The power of eminent domain may be delegated by the Legislature to administrative bodies. (*Holloway* v. *Purcell* (1950) 35 Cal.2d 220, 231 [217 P.2d 665].) Discretion cannot be absolute, but "if the delegating statute establishes an ascertainable standard to guide the administrative agents no objection can properly be made to it." (*Wotton* v. *Bush* (1953) 41 Cal.2d 460, 468 [261 P.2d 256].) In the *Holloway* case we held that standards found in Streets and Highways Code section 100.2 governing the discretion of the State Highway Commission in fixing the location of freeways were sufficiently definite. Section 100.2 authorizes the commission to approve the location of freeways whenever that location "in its opinion will best subserve the public interest." The standards found in section 104.1 are no less definite, and are similarly constitutional.

[8] The question remains of the scope of review of the department's decision to condemn excess property. Section 103 of the Streets and Highways Code makes the determination of the Highway Commission conclusive on the necessity of taking particular land. If the taking is for a public use and just compensation is paid, no constitutional rights of the condemnee are infringed by making the issue of necessity nonjusticiable. (*People* ex rel. *Dept. of Public Works* v. *Chevalier, supra,* 52 Cal.2d 299; see also *Rindge Co.* v. *County of Los Angeles* (1923) 262 U.S. 700, 708-710 [67 L.Ed. 1186, 1193-1194, 43 S.Ct. 689].)

[9] The issue of whether a taking is for a public use, however, is justiciable. (*People* ex rel. *Dept. of Public Works* v. *Chevalier, supra,* 52 Cal.2d 299.) The distinction between the scope of review of the questions of public use and necessity was properly recognized in *People* ex rel. *Dept. of Public Works* v. *Lagiss* (1963) 223 Cal.App.2d 23, 39 [35 Cal.Rptr. 554]: "The necessity for the construction of a highway at the place designated and in the manner determined by the Commission, together with the amount of land required therefor, are matters which were conclusively established by the adoption of the resolution [of necessity]. The question as to whether the land was to be devoted to a public use, however, as distinguished from private purposes or to accomplish some purpose which is not public in character, became a proper

issue for the judicial determination of the court." [10] To raise an issue of improper excess taking, condemnees must show that the condemner is guilty of "fraud, bad faith, or abuse of discretion in the sense that the condemner does not actually intend to use the property as it resolved to use it" (*People* ex rel. *Dept. of Public Works* v. *Chevalier, supra,* 52 Cal.2d 299, 304), or that the contemplated use is not a public one (see also *People* ex rel. *Dept. of Public Works* v. *Lagiss, supra,* 223 Cal.App.2d 23, 35-44; *Yeshiva Torath Emeth Academy* v. *University of Southern Cal.* (1962) 208 Cal.App. 2d 618, 619-620 [25 Cal.Rptr. 422]; *County of San Mateo* v. *Bartole* (1960) 184 Cal.App.2d 422, 430-434 [7 Cal.Rptr. 569]; *People* ex rel. *Dept. of Public Works* v. *Nahabedian* (1959) 171 Cal.App.2d 302, 306-309 [340 P.2d 1053]).

[1c] When, as in this case, the property is not needed for the physical construction of the public improvement, the question of public use turns on a determination of whether the taking is justified to avoid excessive severance or consequential damages. Accordingly, if the court determines that the excess condemnation is not so justified, it must find that it is not for a public use.

Let a writ of mandate issue ordering the trial court to proceed with the trial of the case under the original complaint in accordance with the views expressed herein.

McComb, J., Tobriner, J., Burke, J., and Sullivan, J., concurred.

MOSK, J.—I dissent.

Whenever an illustration of the voracious appetite of acquisitive government is desired, the action of the public agency here will serve well as Exhibit A.

To state the facts is to decide the case. Needing slightly more than a half acre for a public use (65/100 of an acre, to be precise), this governmental department seeks to take 54.03 acres of private property which it does not need and cannot use. Its avowed purpose is to speculate on resale to a private purchaser.

No further discussion should be required to decide that the proposed condemnation is improper. Yet the agency advances a strange latter-day economics theory that taking more costs less, and cites as authority Streets and Highways Code section 104.1. If the section purports to grant any such power to the state, it is clearly in conflict with article I, section 14, of the

California Constitution, which provides that "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. . . ." (Italics added.) Clearly no public use is involved in the taking of the 54 acres, for the land is admittedly more than 83 times in excess of that actually required for highway purposes.

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

A statute must be given a reasonable interpretation. (*People* v. *Murata* (1960) 55 Cal.2d 1, 7 [9 Cal.Rptr. 601, 357 P.2d 833], and cases cited.) It seems clear that when the Legislature adopted the foregoing section referring to "the remainder" after a taking, it contemplated situations in which an insignificant remnant might remain. As a leading authority explains, it is "not an uncommon provision in the statutes relating to the laying out and widening of highways in force in the cities in which such conditions exist that, when part of a parcel of land is taken and the remainder is left in such condition or in such a shape as to be of little value to its owner, the city may take the whole and use or sell what it does not need for the highway, it being felt that it will be less expensive in the end for the city to take and pay for the whole of such lots and either to devote the remnants to municipal purposes, or, by consolidating contiguous remnants, sell them for a fair price, than to engage in protracted litigation over the question of damages to the remaining land with each owner. If the owner consents or if the statute provides merely that he may surrender the whole tract if he chooses, no constitutional objections can arise, for such a proceeding doubtless tends to save the public money; but, if the owner insists upon keeping what is left of his land, *grave constitutional difficulties* would be encountered if it was attempted to compel him to part with it. Construing such a statute as *limited in its application to trifling and almost negligible remnants* which would be unsuitable for private use after the part actually

needed for public use had been appropriated, it would probably be sustained in some jurisdictions at least as authorizing a taking for a purpose reasonably incidental to the laying out of public ways. However, if the proposed taking savored at all of a municipal land speculation, no court would hesitate to hold it unconstitutional." (Italics added; footnotes omitted.) (2 Nichols on Eminent Domain (3d ed. 1963) § 7.5122(1), pp. 718-719.)

Such a "trifling and almost negligible remnant" could result, for example, from a taking of 54 acres leaving an irregular half-acre residue; but to reverse that ratio, and deem 54 acres to be the remainder of a half acre, is truly a case of the tail wagging the dog.

The majority concede that the parcel of 54 acres here is not a physical remnant. That should end the lawsuit. But then they advance a novel theory, neither urged by the parties nor supported by authority, that "remnant" refers not only to geography but also to value.

If so, an inevitable query follows: "Value to whom?" Section 104.1 makes it crystal clear that the criterion is not value to the state, as the majority erroneously assume; to justify taking, the remainder must be "of little value *to its owner.*" By his resistance the owner here demonstrates that to him there is more than "little value" in the 54 acres. Even if the owner did not so contend, however, the court may take judicial notice that in the context of California's current population explosion, no 54-acre parcel in the state is without ascendant value. In the case at bench the purported "little value" of the 54 acres is attributed to the resultant landlocked condition of the property. Without deciding whether any property need remain totally inaccessible, property in a landlocked condition may readily become marketably valuable merely by acquisition of an easement for access, or by annexation of or to adjacent property.

The second clause of section 104.1 suggests that the excess taking must provide a benefit to the state. Without pursuing the dubious constitutional aspect of that overly broad provision, in this instance its application is fallacious; so long as just compensation for the taking must be paid, by condemning over 83 times more property than it needs, *a fortiori* the state is paying more than it must necessarily pay.

The theory of the agency is that by taking the land not required for public use, assertedly of little value, it will

recoup by resale.[1] But there is no repeal of the basic laws of the marketplace when the state becomes a vendor. If the land is truly of little value, the state will obtain little return by way of sale. Thus, there is no significant benefit to the state, as required by the statute, in depriving the owner of his property.

Nevertheless, the majority insist that "The entire parcel can probably be condemned for little more than the cost of taking the part needed for the highway and paying damages for the remainder. It is sound economy for the state to take the entire parcel to minimize ultimate costs," and again later, the majority stress "that the economic benefit to the state must be clear." While as indicated above, I doubt there is clear economic benefit to the state from this excessive taking, fundamentally I find the concept of economy, rather than public use or public purpose,[2] to be a unique and unsupportable rationalization to justify the seizure of an individual's private property.[3] The state relies heavily on *United States* ex rel. *T.V.A.* v. *Welch* (1945) 327 U.S. 546 [90 L.Ed. 843, 66 S.Ct. 715], in which 6,000 acres beyond that needed for dam purposes were taken, and the court there referred to "a common sense adjustment." Factually, however, the case offers no guidance to us, for the excess land was not resold but was adapted to public recreational purposes, authority for which was specifically provided in the T.V.A. act.

What constitutes a public use is basically a question of fact. In *Linggi* v. *Garovotti* (1955) 45 Cal.2d 20, 24 [286 P.2d 15],

[1]The recoupment theory has been roundly condemned in Nichols (2 Nichols on Eminent Domain (3d ed. 1963) § 7.5122(3), p. 720): "although sanctioned in countries in which the power of the legislature is not restricted by a written constitution," recoupment, which "involves the taking of the property of one person and the sale of it to another for his own private use," has not been approved in American jurisdictions. (See also *In re Opinion of Justices* (1910) 204 Mass. 607 [91 N.E. 405, 27 L.R.A. N.S. 483]; *Atwood* v. *Willacy County Nav. Dist.* (Tex. Civ. App. 1954) 271 S.W.2d 137, 141.)

[2]As indicated in *Redevelopment Agency* v. *Hayes* (1954) 122 Cal. App.2d 777, 789 [266 P.2d 105], "the more modern courts have enlarged the traditional definition of public use to include 'public purpose.'" Thus slum clearance was deemed a public purpose, even though after the taking and demolition of the slums, redevelopment was to be undertaken by private industry.

[3]In *Cincinnati* v. *Vester* (6th Cir. 1929) 33 F.2d 242, 245, an Ohio statute authorizing excess condemnation was criticized: "If it means . . . that the property may be taken for the purpose of selling it at a profit and paying for the improvement, it is clearly invalid. . . . [I]t violates the due process clause of the Constitution." (Affd. in 281 U.S. 439, with the United States Supreme Court refraining from an opinion on any subject other than compliance with the statute.)

this court approved the rule: "whether, in any individual case, the use is a public use must be determined by the judiciary from the facts and circumstances of that case." Here the trial court, after hearing evidence and reviewing the facts, found that the proposed acquisition was not related to any public use and was therefore constitutionally impermissible. The state does not complain of an abuse of discretion, or, indeed, of erroneous conclusions by the trial court; it merely maintains that no court has the power to review its reliance on section 104.1. To the contrary, however, this court held in *People* v. *Chevalier* (1959) 52 Cal.2d 299, 304 [340 P.2d 598], that the issue of public use is justiciable in eminent domain proceedings.

Section 104.1, as interpreted by the state, would lack any definitive standards and thus clearly do violence to the constitutional requirement of due process. The trial court noted in its memorandum opinion that the state's right-of-way agent, as a witness, gave as his opinion under the provisions of section 104.1 "the state would have a right to take as much as one thousand acres of private property, even though it was not for a public use." If a thousand acres, why not 6,000 acres as in *Welch*, or 10,000 or 100,000 acres? If there is any limitation whatever on the amount of land the state may take, without intent to devote it to a public use, neither section 104.1 nor the majority opinion suggests the boundaries. Government's cavalier treatment of private property rights, abjectly approved by the majority, evokes apprehension that Big Brother may have arrived 16 years before 1984.

Amici curiae have complained that the power of the Department of Public Works to condemn any excess property without limitation becomes a potent weapon to be used against prospective condemnees who refuse to sell at the price offered by the department. Right-of-way agents, it is indicated, demand acquiescence in sale of the desired part of the land at the proffered price with a threat of a punitive taking of all the owner's property. This could be disregarded as a fanciful fear were it not for the state agency's petition for writ of mandate, which candidly admits that denial of the right of excess condemnation "will also have important and substantial side effects upon the heretofore successful policy of petitioner in negotiating the settlement of land acquisitions." We cannot be oblivious to the "tremendous power in government" and the need for "a growing sensitivity to the protection of the individual in his relation with govern-

ment," as Justice Tobriner has written. (Tobriner, *Individual Rights in an Industrialized Society* (1968) 54 A.B.A.J. 21, 22.)

The majority finally propose this doctrine: "the question of public use turns on a determination of whether the taking is justified to avoid excessive severance or consequential damages." This concept is completely wrong. It ignores the key word: *use*.

Condemnation is not a necessary antidote for excessive damages, since the law has always been clear that excessive damages are indefensible in any case and under all circumstances, and a ready remedy by trial and appellate courts is available. (Code Civ. Proc., § 657, subds. 5 and 6; *Koyer* v. *McComber* (1938) 12 Cal.2d 175, 182 [82 P.2d 941] [new trial granted]; *Barrett* v. *Southern Pac. Co.* (1929) 207 Cal. 154, 166 [277 P. 481] [reversal on appeal]; *Maede* v. *Oakland High School Dist.* (1931) 212 Cal. 419, 425 [298 P. 987] [reduction on appeal]; 2 Witkin, Summary of Cal. Law (7th ed. 1960) Torts, § 443, pp. 1636-1637.) Indeed, that the trial judge was well aware of his responsibility is indicated by his written memorandum, noting that if excessive severance damages were awarded, the court would "be remiss in its duty if it did not reduce whatever amount was excessive." Once the word "excessive" is eliminated from the majority's rule, we come to the nub of the problem: the state agency proposes no *use* of the property whatever, but merely seeks to avoid paying any severance or consequential damages even though the law recognizes such damages as being assessable in appropriate cases. (Code Civ. Proc., § 1248, subd. 2; 3 Witkin, Summary of Cal. Law (7th ed. 1960) Constitutional Law, § 236, p. 2046.)

I would substitute for the majority's rule the following: *the question of public use or purpose turns on a factual determination of what the public agency proposes to do with the property after acquisition.*

Employing that test, the trial court found as a fact that the property was not being taken for a public use. Since land speculation is clearly not a public use, the trial court was correct. I would therefore affirm the order.

Peters, J., concurred.

The petition of the real parties in interest for a rehearing was denied February 28, 1968. Peters, J., and Mosk, J., were of the opinion that the petition should be granted.

Memorandum 71-5

STATE OF CALIFORNIA — EXHIBIT I — RONALD REAGAN, Governor

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305

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LEWIS K. UHLER
GEORGE H. MURPHY
Ex Officio

LETTER OF TRANSMITTAL

As you know, the California Law Revision Commission is drafting a comprehensive eminent domain statute. The Commission has prepared a tentative recommendation dealing with condemnation of physical and financial remnants (so-called excess condemnation). A copy of the tentative recommendation is enclosed.

The Commission solicits any comments you may have on the tentative recommendation. It is just as important to advise the Commission that you approve of the tentative recommendation as it is to advise the Commission of your objections or revisions.

Please send your view concerning the tentative recommendation to the Commission not later than December 15, 1970.

Sincerely,

John H. DeMoully
Executive Secretary

CITY OF FULLERTON

TO D. Reginald Gustaveson DEPT. Legal

FROM Hugh L. Berry DEPT. Public Works

SUBJECT Eminent Domain Statute DATE August 31, 1970

This proposal provides the statutes for what we have been doing over the past years. We support this proposal.

Two other areas need attention, and you might forward these to the Commission.

1. Constitutional amendment broadening power of use of immediate possession, especially for public parking lots.

2. Statutory provision for issuance of writ of assistance where occupant refuses to vacate premises.

HLB:eg

36.40-30

STATE OF CALIFORNIA
BUSINESS AND TRANSPORTATION AGENCY

RONALD REAGAN
Governor

J. R. CROTTI
Director of Aeronautics
Sacramento Executive Airport
Sacramento, California 95822
916 • 445-2582

Memorandum 71-5

Exhibit II

DEPARTMENT OF AERONAUTICS

AUG 21 1970

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Representatives of the Department have reviewed the California Law Revision Commission's proposed tentative recommendations dealing with condemnation of physical and financial remnants (so-called excess condemnation).

As you are aware, the Department does not have a legal officer on its staff and legal counsel is provided by the Attorney General's Office. A Departmental Staff Aviation Consultant has been assigned to assist the Law Revision Commission on technical aviation matters.

The Department appreciates the opportunity of reviewing the proposed recommendations but does not feel that sufficient competency exists to make valid recommendations or objections on the proposals.

Sincerely,

JOSEPH R. CROTTI
Director

Harold H. Woodward

Harold H. Woodward
Aviation Consultant

HHW/led

Memorandum 71-5

EXHIBIT III

OFFICE OF
CITY ATTORNEY
CITY HALL
LOS ANGELES, CALIFORNIA 90012

ROGER ARNEBERGH
CITY ATTORNEY

December 11, 1970

The California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Tentative Recommendation relating to excess Condemnation - Physical and Financial remnants

Gentlemen:

We have examined your staff's recommendation relating to revisions to the California statutes for "excess condemnation". Our comments are as follows:

The recommended revisions are ambiguous regarding their effect upon Article I, Section 14 1/2 of the California Constitution. The report of your staff indicates that the recommendation "does not deal with 'protective' condemnation". However, an ambiguity would exist within the proposed statutes unless language is placed in the proposed legislation, or at least in the comments, to indicate that the right to acquire property to protect the proposed public improvement is not affected by the proposed sections.

We believe that Section 14 1/2 provides needed flexibility in planning public improvements, particularly streets. The impact of a street improvement upon the abutting properties in the crowded portions of the city and the impact of such abutting properties upon the street improvement cannot be fully appreciated until the street is completed. For example, a project to expedite the flow of traffic through a major intersection may be partially frustrated if sight clearance within a corner property is not preserved. Therefore, the traffic engineers may desire that a large portion of the corner property be kept free of improvements. The amount of land to be so restricted is not always known until the job is complete.

Another example of the need for taking for protective purposes is where vehicle access to the abutting street should be eliminated. A driveway near the improved intersection may cause an extremely dangerous situation which did not exist in the before condition because traffic proceeded at a much lesser speed. If the City merely acquired the right of vehicle access it would pay substantial severance damages; particularly if the property were suitable for service station purposes. If the property were used for service station purposes before the improvement, the buildings may continue to be used by the owner for low grade commercial purposes. In many cases it is desirable that the City acquire the entire property, destroy the existing improvements and dispose of the property for a use beneficial to the neighborhood and not harmful to the street use.

In other words, we believe that Section 14 1/2 is necessary, either within the Constitution or in legislation. Your staff's report states that the Constitution Revision Commission has recommended the repeal of Section 14 1/2. If so, we believe an equivalent section or sections should be placed within the Codes. Otherwise, this city and other cities may be forced to condemn rights within real properties which substantially cripple the property, and yet leave the remainder available for private use. This use will be marginal and, as a result, will blight the property, and cause detrioration in the surrounding neighborhoods. To prohibit such use may exceed the City's police power. The exercise of the power of eminent domain may be necessary for such purpose.

Your staff's report recognizes two major reasons for "remnant" condemnations. They are that a number of substandard size parcels which are "virtually useless" by themselves could be consolidated by a condemnor and returned to private ownership in useable size. The report further points out that properties "reduced beneath minimum zoning size" may properly be subject to remnant condemnation. Certainly we agree that these are valid reasons for permitting remnant condemnation. We disagree, however, that the remnant should be "virtually useless" before such condemnations are permitted. Such acquisition should be permitted if the usefulness of the remainder is so impaired as to cause the remainder to be only marginally useful or to become a "nuisance" to the community. Further, the proposed Code sections do not indicate that remnant taking to eliminate under-sized parcels is permitted.

With respect to the "virtually useless" test many sub-standard size parcels are not useless to the private owner. They may be used for news stands, hamburger stands or other substandard commercial uses. If in a residential area, they may be used for long and narrow houses. These may be profitable uses to an owner. They also may be permitted under a strict interpretation of a zoning ordinance. Nevertheless, they may be seriously detrimental to the surrounding neighborhood, whether it be commercial or residential.

We suggest that further study be given to this problem. We recommend that cities and counties not be prohibited from dealing with this problem as necessary to prevent detrioration of their neighborhoods.

The City objects strenuously to subsection E of proposed Section 421. It would appear that the effect of this section is to give the court the power to compel cities, counties and the state to build roads which would not otherwise be constructed. The court could require a byroad to be constructed to a land-locked parcel which road may be unneeded except for the use of one owner. The comment points out that the court should consider matters other than the cost of building the byroad as compared to the value of the real property. The comment says the court should "consider questions of maintenance, hardship to third persons, potential dangers and so on." We question whether it is sound governmental policy to give the court the power to make these determinations rather than the elected or appointed officials who are responsible to the people. A court may determine that there are no "potential dangers" from a particular road. However, if the judge is incorrect it will be the city, county or state that will pay the damages resulting from improper design or insufficient maintenance.

Subsection E of proposed Section 421 should be eliminated.

We also believe that some consideration should be given expressly authorizing condemnation of an entire building when a portion only of it is located within the proposed street right of way. This is a type of "remnant condemnation" which is often necessary in older sections of this city. Often a building lying partially within and partially outside of a right of way should be demolished rather than remodeled. However, the remainder of the land is suitable for future development and should not be acquired as a remnant or otherwise. The City of Los Angeles has been making

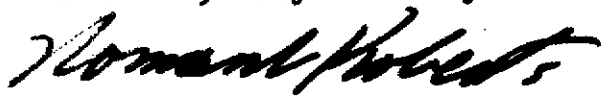
such building remnant acquisitions without specific statutory authority. We do not know what the effect of enacting Section 421 would be upon such acquisition.

We believe that there should be a conclusive presumption available to allow the acquisition of a building remnant. We feel this is needed because: (1) It is extremely difficult for the City to perform remodeling on a remainder of a building. In the past, we have received cooperation from owners. They have done this work at the expense of the City. Absent such cooperation, the problem of the City contracting to do work of a private nature and designed for private purposes is extremely difficult of solution. (2) The question of liability for loss of personal property or for injury to trespassers should the building be "cut and shored" and not closed up, is serious and not settled; and (3) The existence of an old and poorly oriented or mis-oriented building upon a remainder of a lot will adversely affect the neighborhood.

As your staff points out, the leading case on this issue is the "Rodoni" case. That case arose in a rural area of this state. Special consideration should be given to the problems faced by government in the urban areas. Excess or protective acquisitions are of greater necessity in cities than in rural areas. Such condemnations should be permitted even though the "substantially equivalent" test is not satisfied.

Yours very truly,

ROGER ARNEBERGH, City Attorney

By 

NORMAN L. ROBERTS
Deputy City Attorney

NLR:ph

Memorandum 71-5

EXHIBIT IV

JOHN D. FLITNER
CITY ATTORNEY

MICHAEL J. DONOVAN
ASSISTANT CITY ATTORNEY

MRS. AGNES M. BICK
CITY CLERK

FRANCIS J. MAIETTA
RIGHT OF WAY AGENT

OFFICE OF THE CITY ATTORNEY
AND CITY CLERK
CITY HALL, P. O. BOX 1678, SANTA ROSA, CALIF. 95403

(707) 528-5261 100 SANTA ROSA AVE.

November 23, 1970

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 95403

Dear Mr. DeMoully:

Thank you for your letter of November 16, 1970, in which you enclosed a copy of "Tentative Recommendation Relating to Excess Condemnation--Physical and Financial Remnants."

My comments are as follows:

1. Proposed §420. There should be no problem here since the express consent of the owner is required.

2. Proposed §421 (a). By what test or in whose opinion will it be determined whether "substantial risk" exists which would require the public entity to pay compensation substantially equivalent to the cost of the entire parcel? The same question arises as to the size, shape or condition of the property.

3. Proposed §421 (b) (c) (d) (e). This section deals with the procedure for condemning remainder property and when the issues may be raised and by whom they are determined. It seems to me that leaving the question as to whether a remainder parcel may or may not be taken for determination by the Court before the trial and before all of the evidence is submitted is premature and inadequate. I would offer this alternative for committee consideration.

If a condemnor desires to condemn a remainder parcel or any portion thereof and if that determination is challenged by the condemnee, why not let the matter go to trial, to a court or jury, as demanded, with the mandatory issues relative to the following:

(a) The value of the whole parcel.

(b) The value of the remainder parcel after the taking (severance damages).

(c) Any curative work that can be done to minimize damages to the remainder parcel and the cost of such curative work.

(d) Benefits to the remainder parcel.

If the curative work is less than the severance damages, it seems to me that the answer has been given in economic or financial terms. The Court would be required to make the award that costs the public agency the lesser of the two alternatives of (1) taking the entire parcel or (2) allowing the public agnecy to do the curative work for the remainder parcel retained by the condemnee. If desired, benefits could be eliminated from consideration since it might be the most conjectural.

Paragraph (f) of §421 is all right as drafted.

4. Proposed §422. My only suggestion here would be to change the word "may" to "shall" in line 2, making it mandatory to apply any receipts from excess condemned property to the fund from which it was obtained. In my opinion, receipts from the sale of property should be returned to the acquisition fund so that (1) the public agency might obtain an exact and accurate idea of the cost of the property (2) the temptation to use receipts to the condemnation fund would be avoided or at least delayed. If the funds were needed for other uses the body responsible for the funds would have to transfer them to some other fund or reappropriate them for another acquisition. In my opinion, this would result in better control of the fund.

Could you advise if any of the committee members represent public agencies?

While on the subject of condemnation, some time ago we corresponded relative to CCP §998 and the fact that it does not apply in eminent domain proceedings. It is my recollection that you advised that certain public agencies in the Los Angeles area objected to the extension of this statute to cover eminent domain proceedings. Could you advise why these agencies take this position and the name and address of those individuals known to you who feel this way?

Thanking you for your consideration in this matter, I am

Very truly yours,

John D. Flitner

JOHN D. FLITNER
City Attorney

JDF/jes

EXHIBIT V

36.43-80

. OF CALIFORNIA — MARTIN HUFF, *Executive Officer*

FRANCHISE TAX BOARD
SACRAMENTO

August 26, 1970

California Law Revision Commission
School of Law
Stanford University
Stanford, CA 94305

Gentlemen:

We have reviewed your tentative recommendation for the revision of California's laws dealing with excess condemnation and the questions of physical and financial remnants.

This department has no direct interest in the problems involved with the use of the power of eminent domain and therefore we have no comment on the technical aspects of the revisions you have proposed. These revisions may indirectly affect the administration of the tax laws by eliminating some of the problems involved in accounting for the proceeds of condemnation sales. The proposed revisions insofar as they will eliminate these problems have our approval.

Very truly yours,

Martin Huff
Executive Officer

THOMAS C. LYNCH
ATTORNEY GENERAL

STATE OF CALIFORNIA

CHARLES A. O'BRIEN
CHIEF DEPUTY ATTORNEY GENERAL

T. A. WESTPHAL, JR.
CHIEF ASSISTANT ATTORNEY GENERAL
DIVISION OF CIVIL LAW

ARLO E. SMITH
CHIEF ASSISTANT ATTORNEY GENERAL
DIVISION OF CRIMINAL LAW

Memorandum 71-5

Exhibit VI

OFFICE OF THE ATTORNEY GENERAL
Department of Justice
ROOM 500, WELLS FARGO BANK BUILDING
FIFTH STREET AND CAPITOL MALL, SACRAMENTO 95814

November 24, 1970

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford, California 94305

Re: Tentative Recommendation Relating to Excess Condemnation

Dear Mr. DeMoully:

This is to express our objection to the tentative recommendations of the Law Revision Commission relating to excess condemnation. Specifically, our objection is to proposed Section 421(a) wherein authorization to condemn excess land is denied absent a showing of a substantial risk that the condemning agency will be required to pay in compensation an amount substantially equivalent to the amount that would be required to be paid for the entire parcel.

It is our view that the language of proposed Section 421(a) may reasonably be construed to require a showing that severance or consequential damages might be found to exceed 95 percent or more of the value of the remainder or portion of the remainder sought to be condemned as excess. Such a requirement is too stringent and not necessary to protect land owners from possible abuse of the power of excess condemnation.

We believe the better rule to be that set forth in People v. Superior Court, 68 Cal.2d 206, wherein the Supreme Court declared excess condemnation of financial remnants authorized to "avoid a substantial risk of excessive severance or consequential damages".

While the Supreme Court does not define "excessive severance or consequential damages", it does appear that such damages may be something less than the substantial value of the remainder sought to be acquired as excess.

It is reasonable to conclude that the court avoided defining "excess severance or consequential damages" recognizing that what constitutes excess severance or consequential damages will necessarily vary as do the facts of those cases wherein excess condemnation is sought. Rather than attempting to narrowly define excessive severance and consequential damages, the court sets reasonable limitations on the power of excess condemnation, namely, that the economic benefit to the state must be clear; that neither the economic benefit of avoiding the cost of litigating damages nor the fact that the condemnee claims severance damages is sufficient to authorize excess condemnation.

We are also concerned that some confusion may result from use of the terms "larger parcel" and "entire parcel" notwithstanding that these terms are defined in the comments to section 421(a). It is suggested, therefore, that consideration be given to incorporating appropriate definitions of these terms within the section itself.

Very truly yours,

THOMAS C. LYNCH
Attorney General

JOHN M. MORRISON
Deputy Attorney General

JMM/kd

Memorandum 71-5

EXHIBIT VII

TE OF CALIFORNIA—BUSINESS AND TRANSPORTATION AGENCY RONALD REAGAN, Governor

DEPARTMENT OF PUBLIC WORKS
LEGAL DIVISION
1120 N STREET, SACRAMENTO 95814

October 23, 1970

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

In re: Tentative Recommendation Relating to Excess Condemnation - Physical and Financial Remnants

The Department wishes to take this opportunity to comment in writing on the tentative recommendation relating to Excess Condemnation-Physical and Financial Remnants, revised July 29, 1970. As previously verbally stated at the Commission's meetings, the major objection of the Department relates to the test set forth in proposed Section 421(a) to the effect that a condemnor may only take, as excess, a remainder when there is substantial risk that the entity will be required to pay in compensation an amount substantially equivalent to the before value as part of the entire parcel. In the first instance, the Department feels that such a test is entirely artificial in that even landlocked property will retain some residual value, if but only for speculation under the current California real estate market. The Department feels that the test, as distinguished from the holding of the Rodoni decision (People v. Superior Court, 68 Cal.2d 206) is not only more realistic but is broad enough to cover the various instances where present Streets and Highways Code Section 104.1 could, under present law, be constitutionally applied. The Rodoni test, if codified, would allow the condemnor to take a remainder where there was a substantial risk that the entity would have to pay excessive severance damage and where the economic benefit to the condemnor was clear.

One example of such application which the Department was prepared to test before the case settled, occurred in the San Joaquin Valley. A relatively small remainder from a large

ranch was isolated by a freeway taking. Discovery revealed that the owner would claim severance damage under the theory of the Cozza case (People v. Cozza, 143 Cal.App.2d 661) which would have reduced the after value of the remainder to less than $200.00 per acre. These alleged damages consisted of releveling the acreage in the isolated remainder and completely revamping the irrigation system of the entire ranch to provide water to said remainder. These damages did not include the considerable extra cost to the State to provide facilities under the freeway to accommodate utilization of the isolated remainder with the main ranch. The adjoining owner whose property adjoined said remainder in the after condition would abut an interchange and was in opposition to any provision of access to the isolated remainder through his property on the basis that such would interfere with its future commercial potential. He did indicate, however, that if such a road was not sought to be imposed upon him, he would settle his case and acquire the relatively small isolated remainder from the State for approximately $500.00 per acre. He was in a particularly favorable position to utilize this remainder because in connection with his existing acreage, it would not have to be releveled nor would his irrigation system have to be revamped since he had direct access to water on his property nor would his utilization require facilities to be provided under the freeway. The Department feels that this is a clear case for the constitutional utilization of Streets and Highways Code, Section 104.1, to obviate the risk of the payment of excessive severance damage for the clear economic benefit of the public. This and other opportunities for constitutional application of present Streets and Highways Code Section 104.1 would be prevented by the codification proposed in Section 421.

The above example points out the difference between the Commission's theory and what we believe to be the theory in the Rodoni case. That is, even though a remaining parcel is not "valueless" there may well be a very substantial risk that excessive severance damages (those which do not actually exist) will be imposed upon the condemnor. The basic theory behind the broad theory of excess taking is that, assuming both sides to be honestly appraising the remaining property, there is a difference of opinion as to its value. If the condemnee is actually correct and the jury returns a verdict on the condemnor's testimony, then the condemnee has sustained a substantial loss. On the other hand, if the condemnor is correct but the jury believes the condemnee's testimony, the condemnor has sustained a substantial loss. It would seem that in this situation, the risk of loss should be on the condemnor which can only be accomplished by permitting the condemnor to take the excess property.

The Department takes particular exception to the comments on subdivisions (c) and (d) of proposed Section 421 relating to the position taken by the condemnor under present law in contested excess taking cases. Far from emphasizing the severity of the damage to the remainder, a condemnor merely emphasizes the severity of the risk that it will have to pay excessive severance damage. The condemnor's position, at all times, is that actually the damages are not as severe as the property owner will claim. Thus, in the case example above, the condemnor was prepared to prove, at the larger parcel hearing, that even if it did construct expensive improvements under the freeway to facilitate the isolated remainder and was forced to pay by jury verdict the heavy cost claimed to refurbish the irrigation system, that probably the owner after trial would never so utilize the remainder as claimed but would pocket the damages and the underfreeway facilities would have gone unused. Under the law applicable to the valuation phase of the case an offer by the adjoining owner to buy the remainder at a certain price could well have been held inadmissible and the relevant offer was what the adjoining property owner was willing to pay the State for the severed remainder in return for not seeking to impose a roadway on his potential commercial frontage. Thus, the Department took the position that if it tried the condemnation case with the remainder excluded from the taking, under the evidentiary and legal rulings applicable, it would have run a substantial risk of paying severance damages over those which would actually have been suffered by the owner. This evidence was contemplated to be presented not by an appraiser but by attorneys and right of way agents with the Department experienced in the exposures in similar fact situations.

Section 421(c) provides that the motion for a hearing on the right to take the excess must be made no later than 20 days prior to the day set for trial of the issue of compensation. It would seem that if the condemnee must contest the taking in his answer that the motion for a bifurcated trial should be made at the time of the request for setting (that is when the at issue memorandum is filed). The bifurcated hearing should be held as early as possible to avoid the expense of preparing for one trial and actually having a different trial. This will also insure that trial dates will be predictable and continuances not necessary since the larger parcel issue may be settled well in advance of the date set for the valuation phase of the case. Moreover, after this issue is disposed of, settlement possibilities may be more fully explored without incurrence of preparation expense.

Should the present test set forth in proposed Section 421(a) be retained, the Department feels it desirable that if the property owner is going to contest a proposed excess taking, as part of his contesting pleadings, he be required to state his position of the before value of the remainder as part of the whole and the after value. Under the test of the Commission, if the condemnee is not going to claim that the remainder, in the after condition, is valueless, he must unfortunately win. Under the Commission's test, the property owner is afforded all the advantages in that he can claim 90 to 95 percent damage to the remainder and defeat the proposed excess taking. For the clear economic benefit of the public, he should at least not be afforded the additional advantage at the valuation trial of claiming the additional 5 to 10 percent damage he did not claim in the bifurcated hearing on the proposed excess taking. The second sentence in the proposed statute 421(d) would permit the condemnee to claim a value of the remainder in the hearing on the right to take and then in the valuation phase to testify that the remainder was valueless.

Obviously, where the relevant issue to be litigated is risk of a jury verdict as to valuation rather than actual valuation, the spectrum of relevant and admissible evidence is considerably broader than that admissible in a pure valuation case. It occurs to the Department that the Supreme Court gave very careful consideration to the entire issue of excess taking and explicitly found that there probably were areas where excess taking was constitutionally justified for the public benefit even though, unlike the facts of the Rodoni case, the remainder was not rendered virtually valueless by the proposed taking and construction. In the proposed codification, the Commission would foreclose the application of excess takings in the areas envisioned by the Supreme Court to be constitutional and in the public interest.

Very truly yours,

Robert F. Carlson

ROBERT F. CARLSON
Assistant Chief Counsel

Enc. 20 copies

Memorandum 71-5 EXHIBIT VIII

California State Automobile Association

SERVING THE MOTORIST SINCE 1900
150 VAN NESS AVENUE • SAN FRANCISCO
CALIFORNIA • 94101
AREA CODE 415 • TELEPHONE • 626-3000

GOVERNMENTAL AFFAIRS DEPARTMENT
VIRGIL P. ANDERSON, MANAGER

October 14, 1970

John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Excess Condemnation

Dear Mr. DeMoully:

I have your recent letter transmitting the proposed draft of legislation on excess condemnation. We appreciate the opportunity to review this matter and to comment on its provisions.

As you know, our interest in this subject is related to the condemnation of property for street and highway purposes. Existing law on this subject is, of course, well defined and, as indicated in your brief, has been extensively interpreted by the Courts. In this respect, we note that the thrust of your proposal is to extend some of these principles to the taking of property for other public purposes.

It is our opinion that this would be a worthwhile objective insofar as uniformity of the law is concerned. At the same time, however, we are concerned about the potential effect of the repeal of Street and Highways Code section 104.1. This Code section has been extensively reviewed and interpreted by the California Supreme Court in the case of People vs. Superior Court, 65 Cal.Rptr. 342. The repeal of this section could serve to negate the effect of this substantial body of law.

In this respect, we would ask that Street and Highways Code section 104.1 be retained in the law and not repealed as proposed by your draft. I am sure that this could be accomplished without affecting the other beneficial provisions of your proposed draft.

At the same time it would provide certainty and continuity in the law dealing with the important street and highway program.

We will appreciate your giving this recommendation your earnest and serious consideration in conjunction with this proposed revision.

Sincerely,

Virgil P. Anderson

VIRGIL P. ANDERSON, Manager
Governmental Affairs Department

VPA:sr

EXHIBIT IX

BLADE & FARMER
ATTORNEYS AT LAW
POST OFFICE DRAWER III
1560 LINCOLN STREET
OROVILLE, CALIFORNIA
95965

ROBERT V. BLADE
PERRY M. FARMER
RAOUL J. LECLERC

TELEPHONE 533-5661
AREA CODE 916

August 25, 1970

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California 94305

Re: Tenitive recommendation relating to excess condemnation - physical and financial remnance

Dear Mr. DeMoully:

I have reviewed the proposal revised July 29, 1970, and find it to be unacceptable in several respects.

First, whether the courts agree or not, I believe that Section 14 and 1/2 of Article 1 and related legislation are inconsistent with the Federal Constitution, in theory, if not in fact. Private property, in my opinion, should be subject to public taking, only where necessary for a public project. I have strong reservations about redevelopment taking. I note rapid growth of the acquisition and sale of property by the Division of Highways. Presumably other agencies are similarly engaged in greater or lesser degree. Such agencies with their extensive engineering staffs are capable of rendering a particular taking of a character where the remainder falls within the present definition and is slated for acquisition or not, simply by granting or denying access or in the manner in which construction is designed. In other words, a real estate program, i.e., the acquisition and sale of land and with a credit resulting from profit can be "managed" by engineering cooperation. Placing the burden of proof on the land owner, eliminates the possibility of redress for all but the well financed land owner in situations where it can meet engineering challenge with engineering challenge. Even so, most superior court judges will accept the administrative decision as final.

The decision to take a remnant of property because the land owner might receive a "windfall" resulting from its proximity to the project is grossly discriminatory against

such land owner a portion of whose land is needed as compared to the land owner in the same vicinity no portion of whose land is required. The land owner should have the first right of decision, not the condemnor. If the land owner determines that the remainder of the land is damaged by severance, loss of access or other cause resulting from the taking and construction of the improvement in the manner planned, he can and may make a claim by his pleading. When he makes such a claim, the condemning agency then ought to be able to determine whether it is feasible or practical from the standpoint of the agency as representative of the taxpayers to relieve or minimize the claim by providing substitute facilities, payment of the claim or in the alternative acquisition of the entire parcel. The agency should be required to make such a determination and when it has done so, then such a determination might be deemed prima facie correct. In other words, a land owner should be able to challenge the determination having access to the basis for such determination and submit the same to the court for decision with the burden of proof upon the land owner. However, in those situations in which the land owner is willing to abandon a claim for severance in order to retain the remainder, there is, in my opinion, no justification legally or morally for the agency to acquire his property.

Specifically, I would rewrite your proposed Section 421 as follows:

> "421(a) Whenever a part of a larger parcel of property is being taken by a public entity through condemnation proceedings and the owner of record claims by his answer severance damage to the remainder, the public entity shall have ? days after the service and filing of such answer within which to elect one of the following courses of action: (1) Determine that the size,shape or condition of the remainder will be such that severance damage thereto will be caused in such amount as to be substantially equal to the value thereof as part of the whole; (2) That severance damage will be caused to the remainder which can be minimized or ameliorated at a lesser cost than the acquisition of such remainder by making substitute access rights and/or structures available thereto; (3) That it is not to the best public interest to acquire such portion or to revise the nature and extent of the taking as provided by subparagraph (1) and subparagraph 2) above. If the public entity elects to proceed pursuant to (1) or (2), it shall manifest the same by appropriate amendment to its complaint. If it shall fail to make such amendment within said period of time, it shall be deemed conclusively to have elected pursuant to (3).

(b) (This subparagraph need not be revised.)

(c) If the condemnee desires to contest the taking under this section of a remainder he shall do so by written objections to the proposed amendment to the complaint. Upon the filing of such written objections, the court shall set the matter down for hearing after first affording the parties adequate discovery. If the condemnee does not file written objections to the proposed amendment to the complaint, his right to contest the taking pursuant to this section shall be deemed waived.

(d) (This subparagraph need not be revised.)

(e) The court shall not permit the filing of the amendment to the complaint under this section if it shall find that the public entity can reduce or ameliorate damages to the portion not being taken or condemned which means or method the court shall find and specify in writing. Upon the entry of such a finding by the court, the public agency may, at its election, amend its complaint consistent with such finding, decline to amend in accordance with the finding, in which event, the remainder shall not be acquired therein or it may abandon the proceedings as elsewhere provided by law."

The foregoing is rough, and probably requires revision. However, it should serve to illustrate the proposition being advanced, i.e., that where an acquiring agency believes in good faith that severance damage will result, it should be willing to pay for such damage or allow the land owner to retain the property plus appropriate severance damage, or if it feels that the amount is so great as to justify taking the whole the land owner should be allowed to test before the court the good faith of that determination. Substitute facilities substantially reducing damage to the remainder should always be made available, where practicable.

Yours very truly,

Robert V. Blade

RVB/cam

Capsule Background: I have carried on acquisition proceedings with U.S. Department of Justice (1943-1948), later for the City of Oroville and currently for the City of Colusa. I have represented landowners more than plaintiffs in federal and state courts during the past 20 years.

Memorandum 71-

EXHIBIT X

DESMOND, MILLER & DESMOND
ATTORNEYS AT LAW
816 "I" STREET
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TELEPHONE: (916) 443-2051

EARL D. DESMOND
(1895-1958)
E. WAYNE MILLER
(1904-1965)

RICHARD F. DESMOND
LOUIS N. DESMOND
CAROL HALL
JOHN R. LEWIS, JR.
FRANK REYNOSO

September 1, 1970

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

I have reviewed your tentative recommendations relative to excess condemnation of physical and financial remnants. Generally, I approve of the changes, although, since the Rodoni case, I do not feel that they are absolutely necessary. There are two exceptions, however, to my approval.

The first is that I do not feel that there is any reason to create the presumption in support of the right to take the physical remnant. I feel that the burden of proceeding forward with the proof in the event that the right is contested should be with the condemnor who asserts the affirmative of that issue.

I also feel that it should be made clear that the facts giving rise to the right to take under the "substantial risk that the entity will be required to pay in compensation an amount substantially equivalent to the amount that would be required to be paid for the entire parcel" should be based upon the appraisal of the condemning agency and not upon a comparison of the appraisals of the agency and the property owner.

This problem is suggested by the following example: Assume that the condemnor contends that the entire parcel is worth $100,000, and they are taking half of it for $50,000 and admitting severance damages amounting to $10,000. Let us also suppose that the condemnee claims that the property is worth $200,000, and that the value of the take is $100,000 and there is $30,000 in severance damages. Under these circumstances, because of the claim of the condemnee, there would be a substantial risk that the condemning agency would have to pay

considerably more than its estimate of the value of the entire parcel.

I therefore feel that the legislation should make it abundantly clear that the decision of the Court cannot be based upon the weighing of the two respective positions and an evaluation of the entire case, but it must be made based upon some kind of a percentage evaluation of the case of each party separately.

Yours very truly,

DESMOND, MILLER & DESMOND

By Richard F. Desmond
RICHARD F. DESMOND

RFD:bk

EXHIBIT XI

FITZGERALD, ABBOTT & BEARDSLEY

ATTORNEYS AT LAW

1730 FIRST WESTERN BUILDING

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AREA CODE 415 451-3300

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GERALD C. SMITH

LAWRENCE R. SHEPP
LLEWELLYN E. THOMPSON II

R. M. FITZGERALD 1858-1934
CARL H. ABBOTT 1867-1933
CHARLES A. BEARDSLEY 1882-1963

August 18, 1970

Mr. John H. DeMoully
Executive Secretary
CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

Re: Excess Condemnation--Physical and Financial Remnants, Tentative Recommendation 7/29/70

Dear Mr. DeMoully:

My partner, Philip Jelley, and I have reviewed the tentative recommendations with respect to excess condemnation referred to above and have these observations to make:

The quality of the work, typical of what we have seen in the past, is extremely high, the research is obviously carefully done and the statements and explanations are quite lucid and to the point.

We agree with and support the proposed statutory changes with one exception:

Specifically, subsections (b) and (c) of proposed Section 421: We feel that the condemning agency should have the burden of at least making a prima facie case supporting the excess taking rather than to have it the subject of a presumption that casts the burden of producing evidence on the condemnee. When an agency is considering a condemnation and has decided to proceed on a series of acquisitions, having already completed the process of deciding on the project, or where a single parcel is to be acquired, have already considered the major issues involved, the matter of the resolution authorizing the agency's staff to proceed tends to become somewhat ministerial.

Mr. John H. DeMoully, Executive Secretary
CALIFORNIA LAW REVISION COMMISSION August 18, 1970

It would seem to us appropriate to require, unless waived in the pleadings, actively or passively, the condemning authority to produce evidence first.

Certainly it is no handicap to the agency to produce such proof since it would necessarily have made studies and determinations preparatory to recommendations to the governing body leading up to the adoption of a resolution.

This would seem to be particularly valid an approach in light of the scope of the Rodoni decision, as pointed out in the report.

Obviously our experience and studies fall short of that of the Commission and we, therefore, commend this point to its consideration with the knowledge that, in its wisdom, it will make appropriate recommendations to the legislature.

Sincerely,

Stacy H. Dobrzensky

SHD:ajr

Memorandum 71-5

EXHIBIT XII

P. O. Box 185
Downieville, California 95936
December 9, 1970

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Excess Condemnation #3640
Revised 7/29/70
Physical and Financial Remnants

Gentltmen:

The division of excess condemnation into the three divisions is certainly one step toward discussing it with some sense.

Originally the D.H. made us an offer - one only - based on 104.1 and up until 30 seconds before serving with papers on a partial had made no offer on a partial. Now this would seem to me an admission that the remainder had no real value. The negotiator was questioned on this: he stated "due to the Rodoni Case they could not condemn the whole." At that time a decision had not been rendered by the California Supreme Court.

The basic power under 104.1 seems logical - the presentation of the D.H. through their negotiators leaves a sour taste with many landowners, particularly when very often a minor change could well be of material benefit to both - thus salvaging usable physical remnants even before created.

I certainly agree that this power as used by several of the agencies puts a real strain on the intent of the 104.1 and requires clarification, for, as now practiced, comes too close to confiscation of private property.

On page 8 - paragraph 4, burden of proof and page 9, paragraph 5, if contested, and page 9, paragraph 6 with the comment in paragraph 12 should be made as painless as possible for the landowner who, under the current law is in fact a "victim," if he so much as intimates the agency could make any changes.

This they resist strongly and well they might, for with the threat of costs, are in a position to "club" the landowner into submission. Someday remeding this by law will solve many of these problems. I hope you tackle this cost problem shortly - few people will risk $18,000 in one case, $3,000 in another, as I did to defend their beliefs and even after coming out ahead dollar-wise, be considered a real jackass for doing so.

Page #11, #420. This, when tied together with (1970) AB 125 is certainly a step in the right direction.

Page #22 - line 14. Questions of Maintenance. #421. Add - slope easements.

Utilities - if not to be replaced, provision for later - (often excessive cost of these precludes any use of remainder) particularly where beyond a divided freeway. Quite possibly too technical but often the stumbling block.

Page #23 - #422.

Presuming that the section 420 and 421 are performed in good faith, the sale of remnants without offering first to the prior owners will not invoke the criticism that it does now. In many cases such a procedure is nearly impossible due to the small size, irregularities, zoning, which requires consolidation as now done.

A goodly amount of information on our case was sent you along with a suggestion re: COSTS.

Howard Foulds

Howard Foulds

HF:ch

Memorandum 71-5

EXHIBIT XIII

MILNOR E. GLEAVES
ATTORNEY AT LAW
SUITE 545 BRADBURY BUILDING
204 SOUTH BROADWAY
LOS ANGELES, CALIFORNIA 90013
TELEPHONE (213) 680-0078

October 27, 1970

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Attention: John H. DeMoully
Executive Secretary

Gentlemen:

I have now had an opportunity to examine your tentative recommendation relating to excess condemnation. I thoroughly approve of it in detail, and would certainly hope that it is enacted by the legislature.

Yours very truly,

Milnor E. Gleaves

MILNOR E. GLEAVES

MEG:mk

Memorandum 71-5

36.40 - 30

EXHIBIT XIV

RUTAN & TUCKER

ATTORNEYS AT LAW

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ROBERT L. RISLEY
ROBERT C. TODD
NICK E. YOCCA
FRITZ R. STRADLING
HARRY J. KEATON
PAUL FREDERIC MARX
HOMER L. McCORMICK, JR.
EDMUND R. CASEY
HOWARD F. HARRISON
JAMES E. ERICKSON
JOHN R. VINCENT
WILLIAM P. BIEL

RICHARD A. GURNUTT
LEONARD A. HAMPEL
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IN REPLY PLEASE REFER TO

September 9, 1970

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

I recently reviewed the Tentative Recommendation relating to Excess Condemnation--Physical and Financial Remnants proposed by the Law Revision Commission on July 29, 1970.

As you may be aware, Rutan & Tucker and I represent a number of condemning agencies. I am somewhat concerned with Section 421, paragraph (a) as it is now proposed. Section 104.1 of the Street and Highways Code, 943.1 of the Street and Highways Code, and Sections 254, 8590.1, 11575.2 and 43533 of the Water Code, together with the holding of Department of Public Works v. Superior Court present a substantially broader test for determining when an excess taking may occur than is found under Code of Civil Procedure Section 1266 and that section's interpretation in the decision entitled La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 2d 762 (1956). This latter section, which has been a limitation on cities and counties, has been a matter of no little concern to city attorneys. The problem arises because Section 1266 of the Code of Civil Procedure allows an excess taking only if the damages would be in an amount equal to the fair and reasonable value of the whole parcel sought to be taken. The La Mesa case says this means substantially equal, and the courts are finding that even a few thousand dollars difference in a relatively large taking is enough to block the taking.

When the Commission uses the terms "substantially equivalent" in Section 421, it is presenting the same problem that now exists under Code of Civil Procedure Section 1266. Furthermore, it is insuring that the problem will occur with all public entities, not just cities and counties. A few dollars difference between the severance damage amount and the value of the remainder will operate to prevent the public agency from acquiring the remainder and at the same time require that agency to pay substantial severance damages and receive nothing in return.

Another problem is presented by a requirement that prior to the trial the court determine that damages are substantially equivalent to the amount that would be required to be paid for the entire parcel. The only way the court can make such determination is to have a great deal of evidence presented to it as to the respective parties' contentions respecting severance damages. In the usual case the condemnee will claim much higher value on the remainder of the parcel in the before condition than the condemnor. Although the condemnee's damages will be also greater than the condemnor's, it will not equal the condemnee's opinion of the value of that remainder. Thus, we can have a full fledged valuation determination under these sections, and this in itself presents too many problems to make the operation of the section realistic for a number of reasons:

1. The condemnees already are faced with substantial costs for appraisal fees and attorneys fees. They can ill afford to have in effect two trials over the issue of valuation.

2. Under our master calendar system cases are not assigned to a judge for trial until the actual trial date arises. Unless we are going to wait until the morning of the trial to make this determination as to whether the excess can be taken, we are faced with a situation where a law and motion judge would have to make such a decision. This means it would have to be made probably on affidavits, since a law and motion judge is not in a position to have witnesses testify. And further, this is not the type of decision that any law and motion judge would want to make. For example, we now have a provision that if the condemnee is dissatisfied with the security deposit deposited pursuant to an order of immediate possession, he can challenge it. Yet in the event that a challenge has been made to a law and motion judge of a security deposit, the court has said that it could not make such a determination unless it heard the entire trial, and therefore the court is not disposed to disturb the previously ordered security deposit amount, even though it appears to be wholly inadequate.

3. Another problem arises in connection with some kind of a predetermination as to value which would be required under this section. Since both sides are entitled to a jury trial on the issue of valuation, it would be improper for any predetermination of value to have any effect in the trial. Yet it is difficult to see how such a determination would not have some effect on the trial judge.

If in the first instance the predetermination of the value were properly reduced to Findings, so that there could be a later appeal of this decision, the direct question will arise as to what degree these Findings are binding on the trial court. In addition to this, is is unknown at present whether the specific evidence introduced at the preliminary hearing could be used in the trial. In your comments you say that this is somewhat analogous to the procedure under the Code of Civil Procedure Section 1243.5(e) (amount deposited or withdrawn in immediate possession cases). However, recent cases interpreting that section have opened the door to the use of even that type of data in the trial court to the detriment of one party or the other.

Finally, what is going to happen in a situation where a law and motion judge makes a preliminary determination that the damages are not substantially equal to the value of the remainder and then later on the jury returns a verdict of damages which is of such size that had the law and motion judge considered that value he would have allowed the taking? Isn't this going to simply lead to more appeals and motions for new trial?

In conclusion, I am somewhat concerned with the apparent change in the policy from that announced in the Department of Public Works v. Superior Court decision referred to in your study. I think the statute as proposed will present a substantial problem for public agencies, and in reality for landowners, too.

Sincerely,

Homer L. McCormick, Jr.

HLM:ehe

Memorandum 71-5

SIMON, McKINSEY & MILLER
ATTORNEYS AT LAW

HARRY J. SIMON
THOMAS W. McKINSEY
ARTHUR W. MILLER
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2750 BELLFLOWER BOULEVARD
LONG BEACH, CALIFORNIA 90815
TELEPHONE 421-9354

EXHIBIT XV

August 25, 1970

FILE NO. _____

California Law Review Commission
School of Law
Stanford University
Stanford, California 94305

Attention: John H. DeMoully
Executive Secretary

Gentlemen:

I have received the tentative recommendations relating to excess condemnation. I have insufficient experience in this area to express an opinion one way or the other.

I am sorry that I cannot be of assistance.

Very truly yours,

SIMON, McKINSEY & MILLER

T. W. McKinsey

TWM/jo

Memorandum 71-5

EXHIBIT XVI

ROGERS, VIZZARD & TALLETT
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
369 PINE STREET
SAN FRANCISCO, CALIFORNIA 94104

JOHN D. ROGERS
THOMAS F. VIZZARD
JOHN H. TALLETT

YUKON 1-2470

August 19, 1970

Mr. John H. DeMoully, Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

I wish to compliment you and the Commission upon the thoroughness with which the problem of excess condemnation has been studied.

As a firm, representing both condemning agencies and owners, we have had numerous occasions in which we have been involved with this problem. Our suggestions for modification are therefore based upon practical considerations affecting clients and attorneys on both sides.

Concerning the tentative draft of COMPREHENSIVE STATUTE § 421, we would suggest the following:

421. (a): Insert the words "to the owner" between the words "value" and "or" in line four thereof.

We have read and appreciate the reasons given for the elimination of this phrase as indicated in your study, but agree with the spirit of the existing statute (Streets and Highways Code Section 104.1) that the taking of property not needed for the project itself from a private owner should be based upon the consideration of the reasonable use of the property to him. Elimination of this phrase may lead to situations wherein the excess property, especially in interim conditions, may be extremely usable and vitally needed by the particular owner for his own purposes, and yet not marketable to the general public.

421. (b): Delete the latter portion of the sentence commencing with the words "It shall be presumed" and ending with the words "the burden of producing evidence."

The legislative purpose for attaching presumptions to condemnors' resolutions is to fortify the taking of private property for the public use and thus avoid delay of the project. An excess parcel, or remainder, will not interfere with or delay the public project if it is not included. Its taking, therefore, should rest upon its own merits and the condemnor required to sustain fully its burden of proof.

421. (c): This section should be deleted.

As a matter of practice, many attorneys not experienced in the field of eminent domain may well overlook the pleading of the section referred to in 421(b). Since 421(c) provides for a forfeiture of the owner's rights as a result of procedural defects, we find it unacceptable. Moreover, since constitutional questions need not be pleaded and the matter of excess taking inherently involves constitutional issues, serious problems could arise involving the waiver of constitutional rights and involve the constitutionality of this "forfeiture" subsection itself. The matter of determination of justifiability of taking the excess property is adequately provided for in subsection (d).

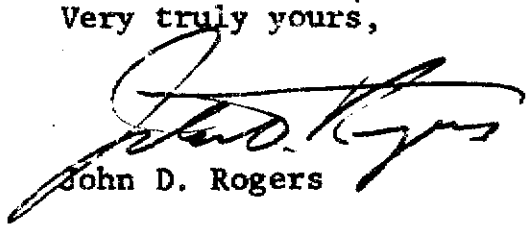
421. (d): Add the following sentence to this subsection:

"A court determination in favor of the condemnee shall be considered an abandonment pursuant to the provisions of Section 1255a of the Code of Civil Procedure."

While subsection (f) does generally refer to the "privilege of the entity to abandon," the addition of this language would protect the owner in his efforts to save his property and deter the condemnor from overreaching. If the condemnor does seek to take that which it does not need, and the court rules in favor of the condemnee, it is only fair that the condemnee should be paid for the cost and expense of defending against an unnecessary acquisition. The additional language would also avoid the defense by the condemnor against costs involved in those cases wherein injunctive proceedings give rise to "involuntary" abandonment.

Again, we wish to commend you for your efforts in this very important area of condemnation law.

Very truly yours,



John D. Rogers

JDR:pb

Memorandum 71-5

UNIVERSITY OF CALIFORNIA, BERKELEY

EXHIBIT XVII

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW (BOALT HALL)
BERKELEY, CALIFORNIA 94720

September 11, 1970

John H. DeMoully,
Executive Secretary
California Law Revision Commission
Stanford University School of Law
Stanford, California 94305

Dear John:

I am enclosing the excess taking recommendation with my minor comments on it. The major problem that I find with the recommendation is that the parties can take inconsistent positions before the judge, who has to make a determination as to whether the whole may be taken, and before the jury in the event that only partial taking is to be allowed. I am not sure that there is a satisfactory answer, but at the present time I am not convinced that the matter is insoluble. If I should have additional thoughts on this I shall communicate with you.

Sincerely,

Sho Sato

enc.
SS:cb

Memorandum 71-5

EXHIBIT XVIII

The Superior Court

111 NORTH HILL STREET

LOS ANGELES, CALIFORNIA 90012

RICHARD BARRY
COURT COMMISSIONER

July 6, 1970

John H. DeMoully, Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear John:

The following refers to your study 36.40 and your Memorandum 70-68 (The Right to Take--Excess Condemnation).

I should like to particularly refer to the procedure that has been tentatively adopted as set forth in subdivision (c) of Section 421 of your Comprehensive Statute on condemnation.

(I also note from your agendas that the Right to Take issue is being studied in eight other aspects. Therefore, I assume the suggestions I am now offering may be material to each of the other studies, although I have not yet received the other Memoranda).

The said subdivision (c) requires that the right-to-take issue be raised in the answer of the condemnee and if it is to be a contested issue a motion for determination by the court must be made by either the condemnor or the condemnee not later than twenty days prior to the date set for the trial of the issue of compensation. The issue is deemed to be waived unless such a motion is timely made. If timely made, the court is required to make a determination of the right-to-take in a preliminary trial. As presently worded, if a motion is noticed to be heard ten days after it is made then the preliminary trial would have to be set within ten days of the date set for the valuation trial.

For the reasons set forth in your Comments, I agree that the right-to-take issue should be tried separately and in advance of the valuation trial. Having such a separate trial

on such short notice, however, would make it very difficult for the court to accommodate its calendar for the purpose of such preliminary trials and therefore because one side could upset the timetable of the other side, it does not appear to be a practical solution of the problem discussed in your Comments.

On page 20 of your Comments you point out that remnant-elimination condemnation inevitably raises the problem of requiring both condemnor and condemnee to assume one position as to the right-to-take issue and an opposing position in the valuation trial. You point out that either party might have to reverse his position as to the extent of damages after the right-to-take and the size of the remainder is resolved. That would seem to be so, but if a party must reverse his position, then he should have an opportunity to do so before he incurs final appraisal costs and other trial preparation costs. It would seem that the most appropriate deadline for setting a trial on the right-to-take issue would be at the time of a setting conference or a pretrial conference and, in any event, when the case is also being set for the valuation trial.

As you know, in Los Angeles we have a bifurcated pre-trial in eminent domain proceedings. At time of first pretrial, the case is calendared for a trial of non-jury issues, if there are any, so that they will be resolved in advance of the dates that are also set for final pretrial and valuation trial. From our experience, it has been particularly important to resolve issues such as the right-to-take issue or larger parcel issues before the appraisers' reports are prepared. Our purpose is to see that each appraiser receives the same instructions as to all legal matters.

Speaking broadly, if the property cannot be taken, then there is no point in having it appraised. In any case, the extent of the taking permitted by the court has a very important impact on the appraiser's approach to valuation.

As you have pointed out in your Comment, decisional law recognizes that the right-to-take issue has been disposed of at various stages. Frequently such an issue is a hang-up for settlement negotiations but once it is resolved, then the parties are often able to agree on valuation matters.

The various stages at which we have been able to dispose of the right-to-take issue have been as follows: At time of a first pretrial conference the issue can often be disposed of by agreement. For example, the condemnor may agree to reduce the size of the acquisition or may agree to substitute access if that is the problem. Or, the condemnee may withdraw the issue upon becoming convinced that in a particular case he does not have a justiciable issue. If there is no agreement, then dates are fixed for filing of briefs in advance of a non-jury trial. The investigation and research that is required for a brief brings about a more informed approach that often results in the issue being conceded. If it is not conceded then the non-jury trial is had and the appraisal reports are thereafter prepared on the basis of the court's determination. Because of the mutuality that has been achieved in that respect, settlements often follow --usually when the valuation data is exchanged at time of final pretrial.

The procedures we follow are not being recited in this letter for the purpose of urging their adoption on a statewide basis but simply as an illustration of how we solve the problem you have referred to with reference to the right-to-take issue and why it is logical that such an issue be disposed of in the early stages of the proceedings. I think if we are to have a legislative right to have a preliminary trial on the right-to-take issue, it would be a mistake to permit a motion for a trial of such an issue to be made so close to the valuation trial.

I would urge that you strike that portion of subsection (c) that provides for a motion "made not later than twenty days prior to the date set for trial of the issue of compensantion, ..." and add language to the following effect at the end of the subsection:

> "Such a motion is timely if it is noticed so that the motion may be heard on or before the date on which the court sets a date for trial of the compensation issue. If granted, the court may thereupon set a date for a non-jury trial sufficiently far in advance of the trial of the issue of compensation to allow for a determination of the non-jury issue under this section and also allow an adequate interval of time thereafter as may be required in the premises for preparation of and exchange of valuation data and without prejudice to priorities as provided by law."

However the provision may ultimately be phrased the important point is that the court should not be required to grant sudden priority for a trial which could have been calendared months before; which would have been more consistent with orderly administration of justice and a more efficient management of civil trial settings.

I am aware that either side may make the motion and if the issue is seriously raised we can probably depend on one side making it early in the proceedings. However, for a number of reasons that would not necessarily occur. The court would then be mandatorily required to have preliminary trials and make determinations within a very limited period and without any reasonable opportunity to plan or control its calendar for such trials.

I also am aware of the fact that under proposed section 421 the issue may be more a matter of economics than of law. If so, the preliminary trial might involve the testimony of engineers, architects and contractors as well as appraisers if costs are to be ascertained to determine economic feasibility. It might be that in some cases there would be some advantage in having the preliminary trial close to the compensation trial. In most cases that would not be so. Either way, the court should be fully advised before setting the case for trial for either purpose.

Please call or write if you have any questions.

Very truly yours,

Richard Barry

RB:jd

Memorandum 71-5

EXHIBIT XIX

THOMAS J. BLANCHARD
CHIEF DEPUTY CITY ATTORNEY

THOMAS A. TOOMEY, JR.
ASSISTANT CHIEF DEPUTY

DEPUTY CITY ATTORNEYS

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ROBERT A. KENEALEY
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EDWARD J. ROTHMAN
JOHN J. DOHERTY
MILTON H. MARES
WILLIAM A. BARRETT
JOHN S. KENNY
JOHN C. STEIN
A. BALFOUR CHINN, JR.
KENNETH J. HARRINGTON
ROGER W. HACKLEY
BURK E. DELVENTHAL

PAUL B. HOLM
ADMINISTRATIVE ASSISTANT

November 23, 1970

John H. DeMoully, Esq.
Executive Secretary of the
California Law Revision Commission
School Board
Stanford University
Stanford, California 94305

Re: COMMITTEE ON GOVERNMENTAL LIABILITY & CONDEMNATION

Dear Mr. DeMoully:

I am pleased to enclose herewith for you, at the suggestion of Stephen W. Hackett, Chairman of the State Bar Committee on Governmental Liability & Condemnation, a copy of the minutes of our recently held meeting of the Northern Section.

Sincerely yours,

NORMAN SANFORD WOLFF
Secretary Pro Tem.

NSW:rm
Enc.

cc: Stephen W. Hackett, Esq.
County Counsel
County of Napa
814 Brown Street
Napa, California 94558

COMMITTEE ON GOVERNMENTAL LIABILITY AND CONDEMNATION

MINUTES FOR MEETING OF OCTOBER 24, 1970

NORTHERN SECTION

A meeting of the above committee was held at 10:20 a.m., October 24, 1970, at the office of The Legal Division of the Department of Public Works of the State of California at 369 Pine Street, San Francisco, California.

MEMBERS PRESENT: Stephen W. Hackett, Chairman, Robert E. Nisbet, John B. Reilley, Willard A. Shank, John H. Tallett, and Norman S. Wolff.

ABSENT: Robert F. Carlson and Grace M. Wallis.

The meeting was called to order, and Chairman Hackett distributed to all the members present a partial resume' of the 1970 legislation that dealt with the subject matter of eminent domain and announced that he would obtain for all members an up-to-date working draft of the Comprehensive Statute for Eminent Domain which is presently being studied by the Law Revision Commission.

In order to more intelligently review this draft of the "Comprehensive Statute for Eminent Domain," the Chairman divided the northern section into study groups and made assignments of the various divisions of the proposed statute, with the idea that the respective study groups would report back to a general section meeting concerning their respective assignments. The assignments made were as follows:

Divisions 1, 2, and 3	-	Chairman Hackett
Division 4	-	Nisbet and Reilley
Divisions 5, 6, and 7	-	Carlson and Shank
Division 8	-	Tallett and Wolff

In view of the fact that there was some uncertainty as to what were our duties and responsibilities in connection with the

study of this proposed statute, it was agreed that the Chairman would seek a directive from the State Bar as (1) a guide as to what was desired of our committee in connection with this comprehensive statute and (2) the relationship and duties of our committee with respect to both the State Bar and the Law Revision Commission.

In outlining his general thoughts with respect to committee meetings, the Chairman announced that he only planned to have section meetings when and as needed, and that in addition thereto he anticipated holding two joint meetings of the Northern and Southern Sections, one around the period of January or February and the other May or June of 1971.

Attention was then directed to the California Law Revision Commission's tentative recommendation relating to "excess condemnation - physical and financial remnants" (#36.40 revised 7/29/70). In a general discussion which ensued, the following observations were made with respect thereto:

1. Sections 420; 421

Section 420 speaks in terms of "acquired" whereas Section 421 speaks in terms of "taken": Neither of these terms are defined in the definition portion of the proposed comprehensive code.

If a distinction is intended, then both terms should be defined.

The consensus of the northern section is that a distinction is not necessary, at least in the context of sections 420 - 422.

2. Section 421(a)

Here, the terms "larger parcel" and "entire parcel" are not used synonymously. It was felt, therefore, that these terms should be defined in the legislation itself and one should not be required to refer to a "comment" note to ascertain the specific difference in meaning of these terms. Likewise, there is need for specificity in defining such terms as "part of a larger parcel", "remainder," and "portion of the remainder." The "definition" portion of proposed Code would seem the logical place for the definitions of such "words of art."

3. Section 421(c)

It was suggested that in lieu of setting up a new procedure (or a motion at least 20 days prior to the date set for trial) to determine the propriety of the excess taking, that use be made of the existing pretrial procedure instead.

It was felt that there might be some ambiguity in this same subsection. The first sentence says that if the condemnee desires to contest the taking, he shall specifically raise the issue in his answer. Thereafter, it would appear that he need not raise the issue in the answer if he makes a timely motion. Further, is this issue to be determined by the Court in advance of trial only where a motion is made, but not necessarily so where it is raised in the answer? This would seem to follow from the last sentence

of this subsection. It is recommended that if the "motion" procedure is to be adopted (as contrasted with the resolution of this issue during the pretrial conference process) that the final sentence in section 421(c) be modified by striking "If the condemnee does not specifically raise the issue in his answer, or" and leaving the sentence "If a motion to have this issue heard is not timely made, the right to contest the taking under this section shall be deemed waived."

4. Section 421(d)

It was suggested that if the Court's determination should be in favor of the condemnor, there should also be a prohibition to any reference being made as to what the condemnee unsuccessfully sought to do.

5. Section 421(e)

It was suggested that this issue be determined as under subsection (c) by modifying the first sentence as follows:

> "(e) The Court shall not permit a taking under this section if the condemnee proves as part of the proceedings identified in subsection (c) hereof that the public entity..."

This would avoid any suggestion that this process could be raised by the condemnee for the first time during the trial itself.

6. Section 422

It was suggested that this section is a bit ambiguous and could stand some clarification, particularly as to what is actually intended with reference to the use of these funds.

For example, is it intended that the funds derived from the disposition of such property shall be made available only for the acquisition of other property for the same public work or improvement? If such is the intent, why so restrict the public entity; why not leave it up to the legislative body to determine after the disposition of the excess lands, whether to put such funds into a "general account" or to re-appropriate them for further acquisitions? It was recommended that no restriction be imposed on the permitted use of such funds.

There being no further business to come before the committee, it was agreed that the next meeting of the Northern Section would be held in the evening at the office of Jack Reilley, 2130 Adeline Street, Oakland, on Wednesday, January 6, 1971, at 7:30 p.m.

The meeting adjourned at 1:00 p.m.

NORMAN SANFORD WOLFF, Secretary Pro Tem.

EXHIBIT XX

COMMITTEE ON GOVERNMENTAL LIABILITY AND CONDEMNATION
CALIFORNIA STATE BAR ASSOCIATION, SOUTHERN SECTION
MINUTES FOR MEETING OF JANUARY 9, 1971

A meeting of the above Committee was held at 9 a.m., January 9, 1971 at the offices of Hill, Farrer & Burrill, 445 So. Figueroa Street, Los Angeles, California.

Members present:

John N. McLaurin, Chairman
Thomas G. Baggot, Jr.
Thomas M. Dankert
John J. Endicott
Richard L. Franck
William L. Gordon
George C. Hadley
Carl K. Newton
Paul E. Overton
Roger M. Sullivan

Member absent:

Jerrold A. Fadem

Further consideration was given by the Committee to the tentative recommendation of the Law Revision Commission concerning excess condemnation. Drafts of the proposed revision of Section 421 of the comprehensive statute were considered by the Committee together with a draft of comments thereto which were prepared by the subcommittee of John Endicott, Jerrold Fadem, and Richard Franck.

It was suggested that subdivision (d) of Section 421 in the tentative draft be modified in the first line by substituting the word "larger" for "entire." The use of the term "larger parcel" seemed more consistent with the understanding of the members of the Committee of said term as used in cases. It was further suggested that subdivision (d) be modified by inserting a period after the phrase in parentheses at line 4 and adding the following additional sentence:

> "In the event the excess parcel is smaller than the remainder, the value as well as the amount of damage and benefit to the excess parcel shall also be determined by the jury."

It was also suggested that the next sentence be modified to read:

> "Such jury determinations shall serve as the basis for the court to make the determination required to be made in subparagraph (c)."

Pursuant to a motion and a second that the foregoing changes be made in the tentative draft of subdivision (d) of Section 421, the modification was approved by the following vote:

Ayes: 9

Noes: 0

Abstentions: 1

The Committee next considered the comments on Section 421 as proposed by the subcommittee. It was suggested that a new sentence be inserted on page 3 on the next to the last line prior to the sentence commencing "The minority felt ..." as follows:

"The majority concurred in the comments proposed by the Law Revision Commission on Section 421 (e)."

There was a motion and a second that the balance of the comments proposed by the subcommittee be approved and that the modification set forth above be made. The motion passed on the following vote:

Ayes: 9.

Noes: 0

Abstentions: 1

To summarize the Committee's action on the Law Revision Commission proposed comprehensive statutes on excess condemnation, the Committee did the following:

1. Section 420 - Approved as drafted
   Comments to Section 420 - Approved as drafted

2. Section 421 - Proposed a revised draft
   Comments to Section 421 - Proposed a revised draft

3. Section 422 - Approved as drafted
   Comments to Section 422 - Approved as drafted

Copies of the Committee's recommended revision of proposed comprehensive statute Section 421 together with the Committee's proposed revision of comments to the comprehensive statute Section 421 are attached to these minutes and incorporated as a part thereof.

A two-member minority of the Committee was opposed to the entire proposed statute regarding excess condemnation.

The Committee next considered the Law Revision Commission letter of October 26, 1970 to members of the Committee

regarding insurance coverage for inverse condemnation. It was noted by several members of the Committee that said letter had not been received by them notwithstanding their being listed on the letter as having received carbon copies. The Law Revision Commission letter of October 26, 1970 recommended amendment of the Government Code to grant authority to public agencies to insure against potential liability for inverse condemnation. It was moved and seconded that the Law Revision Commission recommendation contained in the letter of October 26, 1970 and attachments be approved by the Committee. The motion passed by the following vote:

Ayes: 10

Noes: 0

Abstentions: 0

The subject matter next for consideration by the Committee, the "right to take," was referred to Committee members for further study in order to commence discussion of the entire division at the next meeting. The next meeting is scheduled for February 20, 1971 subject to change on notice by the Chairman if it conflicts with a Law Revision Commission meeting.

The meeting was adjourned at 11:15 a.m.

Respectfully submitted,

Carl K. Newton, Secretary

STATE BAR CONDEMNATION COMMITTEE (SOUTHERN SECTION) COMMENTS RE REVISING COMPREHENSIVE STATUTE SECTION 421

(1) As the statute is presently framed, the validity and merits of an excess taking would be determined by the judge in a proceeding prior to trial which, in effect, would be an unnecessary duplication of evidence later to be produced at trial. The Committee suggestion that the determination be made after the verdict not only avoids this duplication but also eliminates the several other undesirable potentials set forth in these comments. If the validity and merits of the excess taking were to be determined by a judge in a proceeding prior to trial he would necessarily have to receive evidence from both sides regarding the value of the entire parcel in the before condition, the value of the part taken, and the amount of severance damage and special benefits accruing to the remainder. If he then ruled in favor of the condemnee all this evidence would then have to be again presented at trial before the jury; if he ruled in favor of the condemner, at least all of the evidence regarding the value of the entire parcel would again have to be presented to the jury.

(2) The Committee feels that having the issue of the excess condemnation determined after the jury verdict will result in having the determination made by the court after all uncertainties as to values and damages have been resolved. This will also necessarily eliminate the possibility of a

later verdict being inconsistent with the trial judge's prior ruling on the issue of the necessity for the excess taking; e.g., a prior ruling by the court could find that the condemnee will suffer damages which are not "substantially equivalent to the amount that would be required to be paid for the entire parcel," only to have the later jury verdict establish that the damages are "substantially equivalent."

(3) Having the issue determined after the jury verdict will eliminate the possibility of the parties adopting inconsistent positions for the two different hearings; e.g., having the issue of excess condemnation determined prior to trial presents the temptation of the condemner at the prior hearing contending that there are substantial damages and seeking an entire taking and, if it lost on the ruling, contending at the trial that the damages are much lower. The condemnee would be presented with the temptation of the reverse position, i.e., urging at the prior hearing that damages were not substantial, whereas if the ruling was lost, making the contention at trial that damages were substantial. Either party could present such wholly inconsistent positions merely by presenting different witnesses at the two hearings. The suggested revision of Section 421 by the Committee will eliminate these possibilities.

(4) Determining the validity of the excess condemnation after the verdict will not increase the burden of either party inasmuch as the value of the larger parcel in its

before condition would have to be determined whether the issue was resolved by a separate proceeding before trial or after the verdict was in. The only additional factor in making the finding after verdict would be a special finding by the jury on the value of the larger parcel.

(5) The Committee also feels that subdivision (b) should contain the language requiring that the condemner specifically plead that it seeks an excess taking and include in the complaint a description of the excess parcel. The reason for this addition is that the bulk of the practitioners will be unaware of the significance of the whole excess taking problem and if the complaint says that it is an excess taking, there is a heightened likelihood that they will be moved to look into the problem so that they can properly advise their client. In addition, a description of the excess parcel sought is essential in cases where it is less than the total remaining ownership of the condemnee.

(6) The Committee also felt that the term "entire parcel" in the proposed statute should be changed to "larger parcel." The reason for this is that the term "larger parcel" has been defined and employed in a large body of case law throughout the years (the cases use the term "larger parcel" when referring to a parcel which includes both the part sought to be taken and that portion of the condemnee's remainder to which severance damages and special benefits may be claimed). Injecting the new term

"entire parcel" would not only result in confusion but could also unnecessarily becloud cases on which both the bench and bar have relied for years.

(7) It should be noted that the Committee disagreed within itself on the advisability of retaining subsection (e) as a part of the statute. The vote on a motion to eliminate it entirely was: Yes, 3; No, 5; Abstentions, 2. The majority concurred in the comments proposed by the Law Revision Commission on Section 421 (e). The minority felt that subsection (e) was undesirable for the following reasons:

a) it opens the door to evidence which amounts to second guessing of the design engineer;

b) a "reasonable, practicable and economically sound means of avoiding or substantially reducing the damages" on the property subject to the case being tried, may also be one that merely shifts the damages to the other nearby properties, i.e., as in flood control and drainage facilities;

c) it could result in an extensive battle of expert witnesses presented by both sides, after which the court would have to resolve conflicting expert opinions on such technical matters as engineering, drainage hydrology and the economics of various types of construction in addition to the relative values of other properties.

STATE BAR CONDEMNATION COMMITTEE (SOUTHERN SECTION)
RECOMMENDED REVISION OF PROPOSED COMPREHENSIVE
STATUTE SECTION 421

Section 421. Condemnation of Physical or Financial Remnants

421. (a) Whenever a part of a larger parcel of property is to be taken by a public entity through condemnation proceedings and the damage to the remainder, or a portion of the remainder, will require the entity to pay in compensation an amount substantially equivalent to the amount that would be required to be paid for the part taken and said remainder or portion thereof, then for purposes of this section said remainder or portion thereof shall be termed the excess parcel, and the entity may take such excess parcel in accordance with this section.

(b) The resolution, ordinance, or declaration authorizing the taking of an excess parcel under this section and the complaint filed pursuant to such authority shall specifically declare an intention that the condemner seeks an excess taking pursuant to this section and include a description of the excess parcel. It shall be presumed from the adoption of the resolution, ordinance, or declaration that the taking of the excess parcel is justified under this section. This presumption is a presumption affecting the burden of producing evidence.

(c) If the condemnee desires to contest the taking under this section, he shall raise the issue in his answer. Upon conclusion of the trial the court shall determine whether the excess parcel may be taken under this section. If the condemnee does not raise the issue in his answer, the right to contest the

taking under this section shall be deemed waived.

(d) The jury shall determine the value of the larger parcel (in the before condition) as well as the value of the part taken and the amount of damage and benefit to the remainder (in the after condition). In the event the excess parcel is smaller than the remainder, the value as well as the amount of damage and benefit to the excess parcel shall also be determined by the jury. Such jury determinations shall serve as the basis for the court to make the determination required to be made in subparagraph (c). If the court's determination is in favor of the condemnee, the taking of the excess parcel shall be deleted from the proceeding.

(e) The court shall not permit a taking under this section if the condemnee waives severance damages or proves that the public entity has a reasonable, practicable and economically sound means of avoiding or substantially reducing the damages that might cause the taking of the excess parcel to be justified under subdivision (a). No such proof shall be offered by the condemnee until the time of the post-trial proceedings mentioned in subparagraph (c).

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