

Memorandum 72-74

Subject: Study 36.26 - Condemnation (Acquisition, Removal, and Relocation of Structures and Related Problems)

At the October meeting, the Commission discussed the problem presented when a structure is located partly on land being acquired for public use and partly on land not being acquired. The matter was referred back to the staff for further study and preparation of a staff proposal, with particular attention to the conditions under which the structure could be acquired, the right of the owner to challenge or agree to the removal and, finally, relocation of structures for the owner.

The problem of building remnants was originally called to the Commission's attention by the City of Los Angeles. See portion of letter attached as Exhibit I (pink). For a California provision dealing with building remnant condemnation, see Exhibit II (yellow). For a North Carolina statute dealing with the same sort of problem, see Exhibit III (green).

The staff's proposal is attached as Exhibit IV (gold). Most of the provisions set out in Exhibit IV have previously been approved but they have been reorganized and are included so that the new provisions will appear in context.

Acquisition of Entire Structure With Owner's Consent

The Commission previously has approved a provision authorizing the acquisition of all or part of a remainder by any means expressly consented to by the owner. This provision, previously Section 1240.410, has been renumbered and is continued as Section 1240.150 (page 2 of Exhibit IV). We have drafted a comparable provision authorizing the acquisition with consent of the owner of an entire structure. This provision is set out as Section 1240.160 (pages 4-5 of Exhibit IV).

Condemnation of Entire Structure

We have revised the article on excess condemnation to include a provision authorizing taking of an entire structure. The new provision is Section 1240.420 (pages 10-11 of Exhibit IV). This provision does not authorize the condemnor to condemn the structure to relocate it because otherwise the provision could be used for recoupment. Note that the resolution of necessity is not conclusive on necessity. If objection is made to the taking of the entire structure, the condemnor must prove that the taking is authorized by Section 1240.420. See Section 1240.430 (pages 12-13 of Exhibit IV).

Performance of Work to Reduce Compensation to Owner

We have generalized from former Section 970 of the Streets and Highways Code (attached as Exhibit V--blue) to permit the public entity to relocate a structure for the owner and to do other work for the owner as an offset against compensation. The new provision (page 16 of Exhibit IV) permits the public entity to do work on the owner's property to mitigate the adverse effects of the project. This should often be economical and desirable because the work can be accomplished by the same contractor and at the same time as work on the public project is accomplished. We believe the provision is highly desirable and recommend its inclusion in the compensation chapter of the comprehensive statute.

Respectfully submitted,

Bruce Donald
Counsel

EXHIBIT I

The California Law Revision
Commission

Page 3

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 72-74

EXHIBIT II

Los Angeles County Flood Control Act

Sec. 7. Section 16 $\frac{1}{2}$ is hereby added to said act, to read:

Sec. 16 $\frac{1}{2}$. Whenever a part only of a house or other structure must be taken or removed in order to use the land on which such structure is situated for flood control or water conservation purposes and the severance of such portion of the structure from the whole structure would cause a substantial damage to the structure, the Board of Supervisors of the Los Angeles County Flood Control District may condemn or otherwise acquire the entire house or structure and thereafter sell or otherwise cause the said structure to be removed from the portion of the land so required for a public use.

EXHIBIT III

CH. 739-740

SESSION LAWS—1967

H. B. 216

CHAPTER 740

AN ACT TO AUTHORIZE THE CITY OF CHARLOTTE TO ACQUIRE
AN ENTIRE STRUCTURE WHEN IT IS SEVERED BY STREET
RIGHT OF WAY.

The General Assembly of North Carolina do enact:

Section 1. Where the proposed right of way of a street or highway necessitates the taking of a portion of a building or structure, the City of Charlotte may acquire, by condemnation or purchase, the entire building or structure, together with the right to enter upon the surrounding land for the purpose of removing the building or structure. Provided, the City must make a determination based upon an affidavit of an independent real estate appraiser that the partial taking will substantially destroy the economic value or utility of the building or structure and a determination either

(1) that an economy in the expenditure of public funds will be promoted thereby; or

(2) that it is not feasible to cut off a portion of the building without destroying the entire building; or

(3) that the convenience, safety or improvement of the street or highway will be promoted thereby;

Provided, further, nothing herein contained shall be deemed to give the City authority to condemn the underlying fee of the portion of any building or structure which lies outside the right of way of any existing or proposed public road, street or highway.

Provided, further, that where an entire structure is condemned under this Section and the owner is or may be prohibited or prevented from rebuilding the type of structure condemned because of zoning, building or other restrictions, or where the remaining land after condemnation cannot be used by the owner for the purposes for which the land was zoned prior to condemnation, such facts shall be competent and considered in determining the damages to which the said owner shall be entitled to receive on account of said taking.

EXHIBIT IV

Article 2. Rights Included in Grant of Eminent Domain Authority

§ 1240.110. Right to acquire any necessary right or interest in any type
of property

(previously approved)

§ 1240.120. Right to acquire property to make effective the principal use

(previously approved)

§ 1240.130. Joint exercise of condemnation power pursuant to Joint Powers
Agreements Act

(previously approved)

§ 1240.140. Acquisition by gift, purchase, lease, or other means

(previously approved)

Note. The following section has previously been approved as Section 1240.410. The section is renumbered as Section 1240.150 and the phrase "(including eminent domain)" has been added in the last portion of the section to make clear the Commission's intent.

§ 1240.150. Acquisition of all or portion of remainder with owner's consent

1240.150. 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 (including eminent domain) expressly consented to by the owner.

Comment. Section 1240.150 provides a broad authorization for public entities to acquire remainders of property by a voluntary transaction or a condemnation proceeding initiated with the consent of the owner. Cf. former Code Civ. Proc. § 1266.1 (cities and counties may acquire excess property by purchase or gift). Compare Section 1240.410 et seq., and the Comments to those sections relating to the condemnation of remnants.

The language of Section 1240.150 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. 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 remainder would have little value to its owner (rather than little market value or value to another owner). Compare Dep't of

§ 1240.150

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).

It should be noted that, where a partial taking would leave an "uneconomic remnant," the condemnor must offer to acquire the remnant. Govt. Code § 7267.7.

§ 1240.160. Acquisition of structure with owner's consent

1240.160. Whenever property is to be acquired by a public entity for public use and a structure is located partly on the property to be acquired and partly on other property, the public entity may acquire the entire structure, including the right to enter and remove or relocate the structure, by any means (including eminent domain) expressly consented to by the owner.

Comment. Where property is needed for public use and a structure is located partly on the property to be acquired and partly on other property, Section 1240.160 permits the public entity to acquire the entire structure by agreement with the owner or by a condemnation proceeding initiated with the consent of the owner. Section 1240.160 is similar to Section 1240.150 (voluntary acquisition of all or a portion of a remainder), but under Section 1240.160 the public entity acquires the structure only and the land not needed for the public use is not acquired.

Where a structure is located partly on property needed for a public use and partly on other property, there are a number of alternatives available to the parties which may be less costly or more convenient than taking only part of the structure and paying severance damages on this basis. In some cases, severance may so destroy a structure that total demolition in one operation is the only economically or practically feasible alternative. Pursuant to Section 1240.160, the parties may agree that the public entity will acquire the entire structure and remove it, leaving the property owner with the remainder in a cleared condition. Section 1240.160 also permits the parties to agree that the public entity will purchase the structure to

§ 1240.160

relocate it. For other possibilities, see Section 0000.000 (condemnor may relocate structure for owner); Section 1240.150 (public entity may acquire the entire remainder, including both the structure and the land); Section 1240.410 (excess condemnation); Section 1240.420 (public entity ~~may~~ acquire by eminent domain the whole structure and remove--but not relocate--the structure). See also the Comments to the cited sections.

Article 5. Excess Condemnation

§ 1240.410. Condemnation of remnants

1240.410. (a) As used in this section, "remnant" means a remainder or portion thereof that will be left in such size, shape, or condition as to be of little market value.

(b) Whenever the acquisition by a public entity by eminent domain of part of a larger parcel of property will leave a remnant, the public entity may exercise the power of eminent domain to acquire the remnant in accordance with this article.

(c) A remnant may not be acquired under this section if the defendant proves that the public entity has a reasonable, practicable, and economically sound means to avoid or substantially reduce the damages that cause the remnant to be a remnant.

Comment. Section 1240.410 states the test to be applied by the court in determining whether a remainder or portion thereof is a remnant that may be taken by eminent domain. 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 (1955). 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).

The test is essentially that stated in Dep't of Public Works v. Superior Court, supra, except that the confusing concept of "excessive" damages is not

used. A remnant may be taken if it would be left in "such size, shape, or condition as to be of little market value." The "of little market value" concept is a flexible one; whether the remnant may be taken is to be determined in light of the circumstances of the particular case. Thus, the remnant may have relatively little market value if, for example, it is totally "landlocked" and no physical solution is practical, or is reduced beneath minimum zoning size and there is no reasonable probability of a zoning change, or is of significant value to only one or few persons (such as adjoining landowners), or is--or as a result of the project will become--landlocked and has primarily a speculative value dependent upon access being provided when adjacent land is developed and the time when the adjacent land will be developed is a matter of speculation. See, e.g., Dep't of Public Works v. Superior Court, supra; State v. Buck, 226 A.2d 840 (N.J. 1968). The test is the objective one of marketability and market value generally of the remainder. Compare Section 1240.150 (purchase of remnants).

On the other hand, 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 and value after severance. See, e.g., La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 762, 304 P.2d 803 (1956); State Highway Comm'n v. Chapman, 446 P.2d 709 (Mont. 1968). Likewise, Section 1240.410 does not authorize a taking of a remnant (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 public 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 project. See Dep't of Public Works v. Superior Court, *supra*.

A remnant may be a portion of a remainder where the taking affecting a parcel leaves more than one piece (e.g., the severance of a ranch by a highway so as to leave pieces on both sides of the highway). In certain cases, only one piece might be a remnant. Artificially contrived "zones" of damage or benefit sometimes used in appraisers' analyses are not to be deemed separate pieces for remnant elimination purposes.

Subdivision (c) permits the condemnee to contest a taking under Section 1240.410 upon the ground 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. 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 (c) prevents acquisition of the remainder. Clearly, in almost every case, some physical solution would be possible. Subdivision (c), however, requires that the solution also be "reasonable, practicable, and economically sound." To be "economically sound," the proposed physical solution, at a minimum, reduces 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 should be less than 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."

Section 1240.410 supersedes Section 1255 of the Code of Civil Procedure, Sections 100130.5 and 102241 of the Public Utilities Code, Sections 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 provisions of uncodified special district acts.

§ 1240.420. Condemnation of remainder of structure

1240.420. Whenever property is to be acquired by a public entity for public use and a structure is located partly on the property to be acquired and partly on other property, the public entity may exercise the power of eminent domain to acquire the entire structure, including the right to enter and remove the structure, if to do so is likely to reduce the amount of compensation otherwise payable to the owner by an amount not less than the cost of the acquisition and removal. Nothing in this section authorizes a public entity to acquire a structure for the purpose of relocating the structure.

Comment. Section 1240.420 states the test to be applied by the court in determining whether an entire structure may be taken by eminent domain even though a portion of the structure is located on land not needed for public use. Section 1240.420 is similar to Section 1240.410 (condemnation of remnants) but under Section 1240.420 the public entity acquires the structure only and the land not needed for the public use is not acquired.

The authority granted by Section 1240.420 is restricted to the case where the removal of the structure is likely to reduce the compensation otherwise payable by an amount not less than the cost of the acquisition and removal. This limitation precludes the taking of a remainder of a structure that is a benefit rather than a detriment to the remainder.

To prevent abuse of the authority granted, Section 1240.420 excludes any right to condemn and relocate the structure and then sell or lease it. Acquisition of the structure for the purpose of relocation is permitted under Section 1240.160 with the owner's consent. Likewise, the public entity is authorized by Section 0000.000 to relocate the structure for the owner with his consent. Nothing in Section 1240.420 precludes relocation of a structure situated entirely on land being acquired for public use. Nor does Section 1240.420 prevent the public entity salvaging any saleable material during the removal of a structure and selling it, but any amount so recovered should not be considered in making the calculation whether the cost of acquisition and removal is likely to exceed the amount by which the compensation otherwise payable is reduced.

Section 1240.420 supersedes Section 16-3/4 of the Los Angeles County Flood Control Act.

§ 1240.430. Resolution of necessity and complaint

1240.430. When property is sought to be acquired pursuant to Section 1240.410 or 1240.420, the resolution of necessity and the complaint filed pursuant to such resolution shall specifically refer to such section. It shall be presumed from the adoption of the resolution that the taking of the property is authorized under the section to which reference is made. This presumption is a presumption affecting the burden of producing evidence.

Comment. Section 1240.430 requires a specific reference in both the resolution and the complaint to the section that is 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, 274 Cal. App.2d 217, 79 Cal. Rptr. 175 (1969). A resolution that refers to Section 1240.410 or 1240.420 gives rise to a presumption that the taking is authorized under that section. Thus, in the absence of a contest of that issue, Section 1240.430 permits a finding and judgment that the "excess" property may be taken. However, the presumption is specified to be one affecting the burden of producing evidence (See Evid. Code §§ 603, 604) rather than one affecting the burden of proof (see Evid. Code §§ 605, 606). Accordingly, the burden of proving the facts that bring the case within Section 1240.410 or 1240.430 is left with the plaintiff (i.e., the condemnor). See People v. Van Garden, 226 Cal. App.2d 634, 38 Cal. Rptr.

§ 1240.430.

265 (1964); People v. O'Connell Bros., 204, Cal. App. 34, 21 Cal. Rptr. 890 (1962). In this respect, Section 1240.430 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 County of Los Angeles v. Anthony, 224 Cal. App.2d 103, 36 Cal. Rptr. 308 (1964)) or administrative (see County of San Mateo v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960)) determination or declaration as to "public use."

As to the time and manner of raising the issue whether a taking is authorized under Section 1240.410 or 1240.420, see Section 1260.000.

§ 1240.440. Abandonment

1240.440. Nothing in this article affects (a) the privilege of the public entity to abandon the proceeding or abandon the proceeding as to particular property or (b) the consequences of any such abandonment.

Comment. Section 1240.440 makes clear that the procedure provided by this article has no bearing upon the privilege to abandon or the consequences of abandonment. Section 1240.440 makes no change in existing law. See former Section 1255a and People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967).

§ 1240.450. Disposal of acquired remnants

1240.450. A public entity may sell, lease, exchange, or otherwise dispose of property taken under this article 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 1240.450 authorizes the entity to dispose of property acquired under Sections 1240.410 and 1240.420.

Section to be included in compensation chapter

§ . Performance of work to reduce compensation to owner

_____. Whenever a part of a larger parcel of property is to be acquired by a public entity for public use, the public entity may agree with the owner of the property to be acquired to:

(a) Carry out any work on the property acquired or on property immediately adjacent to it, including any structure located on such property, if the performance of such work is likely to reduce the amount of compensation otherwise payable to the owner by an amount not less than the cost of the work.

(b) Relocate for the owner any structure situated wholly or partly on the part to be acquired if such relocation is likely to reduce the amount of compensation otherwise payable to the owner by an amount not less than the cost of such relocation.

Comment. Section _____ is generalized from former Section 970 of the Streets and Highways Code, which was limited to certain types of work in connection with an acquisition for opening or widening a county highway.

The test as to when such work or relocation can be carried out is the same as in Section 1240.420.

The phrase "any work" is used without qualification so as to have the broadest possible meaning. It would include any physical or structural operation whatsoever. Thus, it would cover such things as screening off roads or canals or soundproofing buildings adjacent to highways as well as constructing rights of way, fences, driveways, sidewalks, retaining walls and drainage or utility connections, all of which latter operations were specifically listed in former Section 970.

EXHIBIT V

STREETS AND HIGHWAYS CODE SECTION 970

§ 970. Work to reduce compensation for diminution of value of land not taken

In connection with the acquisition of land for the opening or widening of a county highway the county may agree with the owner of the property to construct, reconstruct or install immediately adjacent to the right-of-way, fences, driveways, sidewalks, retaining walls, and drainage or utility connections, if the performance of such work will reduce the amount of damages which would otherwise be payable to the property owner as compensation for the diminution in value of that portion of said owner's property not being acquired for the opening or widening of the county highway.

The cost of the work so performed shall not exceed the estimated amount of the damages otherwise payable to the property owner and shall be deemed work incident to the improvement of the county highway and a proper charge against the funds of the county.