

#36.40

1/5/73

First Supplement to Memorandum 73-7

Subject: Study 36.40 - Condemnation (Taking of Remainder of Structure)

Section 1240.420, set out in Exhibit I of Memorandum 73-7, deals with condemnation of the remainder of a structure.

Attached (Exhibit I) is a letter from our consultant, Mr. Kanner, concerning this section. It would appear that the section as proposed by the staff is satisfactory with the possible exception that it does not authorize a taking where the leaving of the portion of the structure on the remainder would result in a dangerous condition creating a risk of injury. The staff suggests you read the consultant's letter and determine the revisions, if any, that should be made in Section 1240.420.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

1st surp. Memo 73-7

EXHIBIT I

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January 2, 1973

California Law Revision Commission
School of Law
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Re: Proposed \$1240.420
Condemnation of
Remainder of Structure

Gentlemen:

This letter provides you with the comments you requested, on the problems arising where a remainder of a structure is sought to be taken.

Typically, a taking cutting into existing structures occurs in street widenings. The structures in such cases often consist of older commercial buildings which are put to use as businesses. This gives rise to a potential for abuse. The condemnors on occasion use the threat of condemnation of the remaining structure as a coercive settlement device.

Often, an owner can shore up the remainder structure and restore his building's facade, thereby remaining in business throughout the construction. In contrast, if the entire building is taken, he is put out of business and suffers a host of uncompensated business losses. Thus, he may be economically compelled in some cases to settle for inadequate "conventional" compensation, in order to keep his business from being destroyed. Some condemnors do not hesitate to press this coercive tactic to the hilt.

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Another potential for coercion arises where in the "after" condition the remainder lot is incapable of containing both a new building and the parking area required under current ordinances. In other words, if the owner is not permitted to retain the remainder of the building he may find himself in the position of being unable to rebuild.

Additionally, there are problems from the condemnor's point of view. First, a taking for the purpose of removing the remainder structure is a temporary taking. And in temporary takings the condemnor is required to pay compensation for certain items not compensable in a permanent taking (i.e., moving expenses: U.S. v. General Motors (1944) 323 U.S. 373).

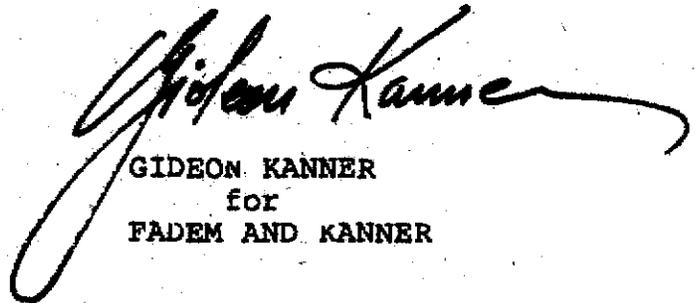
Moreover - although not discussed in California published appellate opinions - there is a substantial body of law to the effect that in a temporary taking, the owner is entitled to compensation not only for the period of time during which the condemnor has possession of the property, but also during the time which elapses after possession is returned to the owner, while the owner restores the property to use. See U.S. v. 37.15 Acres etc. (1948) 77 F. Supp. 798, 802-803; U.S. v. One Parcel of Land etc. (1955) 131 F. Supp. 443, 446; U.S. v. 765.56 Acres etc. (1958) 164 F. Supp. 942, 947; U.S. v. Certain Parcels etc. (1945) 63 F. Supp. 175, 188. This is the prevailing view: Nichols on Eminent Domain, Vol. 4, §12.5, pp. 12-559, 12-560 (Rev. 3d Ed. 1971).

In summary, the unrestrained ability of condemnors to take remainder structures gives rise to problems. First, it can subject owners to coercive and inadequate settlements. Second, it can subject condemnors to payment of higher-than-expected compensation.

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I suggest that the solution is to leave the option of whether the remainder structure is to be taken with the owner in the first instance (see Government Code §7267.7). To guard against abuses the condemnor should be permitted to take the remaining structure only upon a clear showing that (a) the remainder would be unsafe; or (b) that the total compensation payable to the owner if only a part of the structure is taken, would be the same or greater than if the entire structure is taken (Cf. CCP §1266). Additionally, such takings should be forbidden where the owner makes a showing of coercive tactics on the part of the condemnor (see People v. Superior Court (1968) 68 Cal 2d 206, 210, 213-214).

Very truly yours,



GIDEON KANNER
for
FADEM AND KANNER

GK/ce