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Memorandum 2000-40

Offset of Benefits in Partial Taking in Eminent Domain

BACKGROUND

Continental Development Corporation owns a 4-acre piece of property on which it is erecting an office building. A condemning agency, the Los Angeles Metropolitan Transit Authority, seeks to acquire a five-foot wide easement along one edge of Continental's property for an elevated rail transit project (the "Green Line").

That project also includes a new transit station (the "Douglas Street station") located about 1/3 mile away from Continental's property. There are more than 500 other parcels of property located within 1/3 mile of the transit station, of which seven are being condemned for the transit project. The evidence indicates that office buildings within walking distance of a transit station typically enjoy 11 percent lower vacancy rates and 20 percent higher rents than more remote comparable properties. The enhanced value of Continental's remaining property due to its proximity to the transit station is estimated to be in the vicinity of $4 million.

The jury awards compensation for the taking of the easement on Continental's property in the amount of approximately $100,000. The jury also finds about $1 million worth of damages to Continental's remaining property, probably representing design changes to its office building required for noise mitigation and compensation for visual blight of the elevated rail line on Continental's property.

Is it right to award Continental $1.1 million in damages ($100,000 compensation for the part taken and $1 million for damages to the remainder) if the condemnor can prove that, despite those damages, the net value of the remainder will increase by $4 million as a result of the project? The California Supreme Court, reversing case law controlling since 1902, concludes that the general benefits to be conferred by the project may be offset against the damage to the remainder. *Los Angeles County Metropolitan Transit Authority v. Continental*

Development, 16 Cal. 4th 634, 66 Cal. Rptr. 630, 941 P.2d 809 (1997). The court states that "compensation for taking or damage to property must be just to the public as well as to the landowner." 16 Cal. 4th at 716.

The decision draws dissents from Justices Kennard and Baxter because "the existing rule limiting the reduction of a landowner's damages to only the amount of special benefits is fairer than the majority's holding and because it is a workable rule that has withstood the test of time." 16 Cal. 4th at 723.

This memorandum reviews the law and underlying policy considerations involved in this issue. The memorandum concludes that the Commission should leave the law to continued case law development, although it may wish to consider codification of the principle that in assessing damages and benefits, special as well as general damages must be taken into account.

WHAT'S AT STAKE

This is not just a technical question of line-drawing between "special" and "general" benefits. It goes to the heart of the just compensation clause of the Constitution — what it means to make whole a person whose property is forcibly taken for public use, and the appropriate distribution of the benefits and burdens of a public project. In particular, should compensation for the property owner be viewed in the abstract, or should it be viewed in the equitable context of the benefits and burdens imposed on neighboring properties that are not directly involved in the condemnation proceeding but are affected by the public project? What does it mean to say that a property owner should not be required to bear more than a "proper share" of the burden of a public project? To what extent is it important that the public may have other means available to recoup its costs from the generally benefited public, through taxation or special assessments?

The court in *Continental Development* summarizes the policy dilemma thus:

> In examining this question, we are forced to confront an obdurate fact: Applying existing rules, to distribute the cost of this project across the community with perfect equality is impossible. If Continental is subjected to setoff of general benefits resulting from proximity to the Douglas Street station, one might say it pays more than its proper share of the cost of this transit project because it loses an expectation of gain that other property owners, from whom no land is taken, are allowed to keep. If, on the other hand, Continental is permitted both to recover severance damages and to retain the general enhancement in the value of its property, one

> could with equal validity say it thereby pays less than its proper share of the project cost vis-a-vis those property owners from whom no property is taken, and who cannot recover damages for the diminution in the value of their property resulting from the operation of the transit line, when those effects are not sufficiently deleterious to support an action in inverse condemnation or nuisance. The law has no mechanism by which to ensure an absolutely fair distribution of costs and benefits across the entire community. We must instead search for the rule of greatest relative fairness, or least unfairness.
> 16 Cal. 4th at 716.

The academic literature is strangely silent on these core philosophical issues. There are a few articles from the 1960's and 1970's examining the policies informing this area of law but nothing since, even in light of *Continental Development*. The opinions in that case, however, including the majority and two strong dissents, are remarkable in their review of the history and public policies at issue here. We will refer to these opinions throughout this memorandum.

DAMAGES AND BENEFITS

California Statutes

Under eminent domain law, a person whose property is taken for public use is entitled to compensation not only for the fair market value of the property taken, but also for damage to the remainder if the part taken is part of a larger parcel. The amount of compensation for damage to the remainder may be offset by the amount of benefit to the remainder. See Code Civ. Proc. § 1263.410:

> 1263.410. (a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder.
>
> (b) Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no compensation shall be awarded under this article. If the amount of the benefit to the remainder exceeds the amount of damage to the remainder, such excess shall be deducted from the compensation provided in Section 1263.510, if any, but shall not be deducted from

> the compensation required to be awarded for the property taken or from the other compensation required by this chapter.

The damage to the remainder for which the property owner may be entitled to compensation includes both "severance" damage (such as might result from leaving an undersized, mis-shapen, or landlocked remnant) and damage caused by construction and use of the project for which the property was taken (such as might result from traffic noise and fumes). See Code Civ. Proc. § 1263.420:

> 1263.420. Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following:
>
> (a) The severance of the remainder from the part taken.
>
> (b) The construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken.

The benefit to the remainder that may be offset against damage might include such factors as increased commercial value resulting from location at a newly-created freeway interchange. See Code Civ. Proc. § 1263.430:

> 1263.430. Benefit to the remainder is the benefit, if any, caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the benefit is caused by a portion of the project located on the part taken.

Historically, in California and many other jurisdictions, the only benefits that may be offset against severance damages are those "special" to the remainder and not those "general" to property in the community. See, e.g., *Beveridge v. Lewis*, 137 Cal. 619, 70 P. 1083 (1902). The *Continental Development* case thus represents a significant departure for California law.

Law Revision Commission Comment

Both the majority and dissenting opinions in *Continental Development* cite the Law Revision Commission's Comment on this point as supporting authority for their positions. That Comment states, in relevant part:

> Section 1263.430 codifies prior law by defining the benefit to the remainder that may be offset against damage to the remainder in an eminent domain proceeding. See former Section 1248(3). Section 1263.430 does not abrogate any court-developed rules relating to the offset of benefits nor does it impair the ability of the courts to continue to develop the law in this area. See *Beveridge v. Lewis*, 137

Cal. 619, 70 P. 1083 (1902) (only "special" benefits may be offset); *People v. Giumarra Farms, Inc.*, 22 Cal. App. 3d 98, 99 Cal. Rptr. 272 (1971) (increased traffic a special benefit); but see *People v. Ayon*, 54 Cal. 2d 217, 352 P. 2d 519, 5 Cal. Rptr. 151 (1960) (increased or decreased traffic not a proper item of damage).

The majority's take is, "The Legislature thus has recognized this court's continuing power, within the bounds set by relevant constitutional and statutory language, to develop the law pertaining to offsets just as the court developed the *Beveridge* rule almost a century ago." 16 Cal. 4th at 710.

Justice Kennard's dissent observes that, "Although the Legislature may not have prohibited the result the majority reaches today, given the statement in the legislative history that '[s]ection 1263.430 does not ... impair the ability of the courts to continue to develop the law in this area' (Cal. Law Rev. Com. com., 19A West's Ann. Code Civ. Proc., *supra*, foll. § 1263.430, p. 82), it seems likely the Legislature presumed that the development of this area of the law would continue within a framework that preserved the distinction between special and general benefits, not that that framework would be abandoned." 16 Cal. 4th at 729.

DEVELOPMENT OF THE LAW IN CALIFORNIA

The development of the law in California relating to offset of benefits is traced in some detail in *Continental Development*, from which the following discussion is drawn.

Until 1902 General Benefits May Be Offset

Just compensation for severance damages has been defined in different ways during different periods in California history. The original formula for calculating just compensation in the case of a partial taking was articulated in the context of condemnation by a private railroad company. The Legislature had authorized private railroad companies to exercise the power of eminent domain, taking the view that in providing a means of transportation to isolated areas of the state, the railroads performed a public service. *Railroad Act of 1861*, 1861 Cal. Stat. ch. 30, In *S. F., A. & S.R.R. Co. v. Caldwell* , 31 Cal. 367 (1866), a private railroad company condemned several tracts of land for the construction of a railroad. As prescribed by the *Railroad Act*, commissioners were appointed to take evidence and assess the compensation to be paid for the lands. The railroad

company took exception to the assessment, arguing the commissioners erroneously failed to consider the benefits or advantages accruing to the landowners by reason of the construction of the railroad, despite the *Railroad Act*'s express directive to do so. The lower courts denied relief, and the railroad company appealed to the Supreme Court.

The *Railroad Act* directed that the value of any benefits accruing to the landowner's remaining property, as a result of the railway, be set off in full or partial satisfaction of the compensation owing for the property taken. The *Railroad Act*, in permitting setoff of benefits against both compensation owing for the property taken and severance damages, thus employed a variation of the standard currently operative in federal condemnation law. The federal law of eminent domain provides for setoff of "special and direct" benefits against both severance damages and compensation for the taking. See *United States v. River Rouge Imp Co.*, 269 U.S. 411, 46 S.Ct. 144, 70 L.Ed. 339 (1926); *Bauman v. Ross*, 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270 (1897).

The central question in *Caldwell* was whether this provision unconstitutionally denied landowners just compensation. The *Caldwell* court observed:

> The opinions of jurists on this subject are found, on examination, to be widely diverse from each other. On the one side it has been maintained that compensation to the extent of the value of the land taken must be made in all cases, without any deduction on account of any benefit or advantage which may accrue to other property of the owner, by reason of the public improvement for which the property is taken. [Citations.]
>
> In support of this view it is argued that the enhancement of the value of other property of the owner of the land proposed to be condemned to public use, which may be of the parcel of that taken, is merely the measure of such owner's share in the general good produced by the public improvement; and why, it is asked, is not the owner in such case justly entitled to the increase in the value of the property thus fortuitously occasioned, without paying for it? His share in the benefits resulting may be larger than falls to the lot of others owning property in the same vicinity, and it may not be so large, and yet he alone is made to contribute to the improvement by a deduction from the compensation which is awarded him by sovereign behest as a pure matter of right, though others whose property may adjoin the public work are equally with himself benefited by it. On the other side it is maintained that the public is only dealing with those whose property is necessarily taken for

> public use, and that if the property of such persons immediately connected with that taken, but which remains unappropriated, is enhanced in value by reason of the improvement then, thereby the owners receive a just compensation for the lands taken to the extent of such enhancement, and if thereby fully compensated they cannot in justice ask for anything more. [Citations.]
>
> The weight of authority appears to be in favor of allowing benefits and advantages to be considered in ascertaining what is a just compensation to be awarded in such cases, and it seems to us that the reasons in support of this view of the subject are unanswerable.
>
> Just compensation requires a full indemnity and nothing more. When the value of the benefit is ascertained there can be no valid reason assigned against estimating it as a part of the compensation rendered for the particular property taken, as all the Constitution secures in such cases is a just compensation, which is all that the owner of property taken for public use can justly demand. *Caldwell*, supra, 31 Cal. at pp. 373-374.

The California Supreme Court revisited the setoff issue in *California Pacific Railroad Co. v. Armstrong*, 46 Cal. 85 (1873). In *Armstrong*, the railroad company condemned a tract of land and obtained a court order for possession pending determination of just compensation. After construction of the railway, the commissioners estimated the value of the condemned land prior to the taking at $403.50, and the value of the landowner's severance damages and general benefits each at $1,112.50. The landowner objected to the commissioners' setoff against his severance damages of the enhanced value to the remainder land resulting from construction of the railway, arguing the enhancement was shared in common with other contiguous lands and therefore should not be set off. (Id. at pp. 89-90.)

The *Armstrong* court rejected the argument that only special benefits should be set off against severance damages:

> "[T]here is no valid reason for this distinction. The theory of the statute is, that the land owner shall receive a fair, just compensation for the damage he suffers, and if that portion of his tract which is not taken will be enhanced in value by the construction of a railroad, his damages will be diminished to the extent of the enhancement, and hence the statute contemplates that by deducting this benefit from the damages, the sum which remains will constitute a 'just compensation' in the sense of the Constitution. This was the view of the question announced in the case of the *San*

> *Francisco, Alameda, and Stockton Railroad Company v. Caldwell*, 31 Cal. 367, which is decisive of this point."
> *Armstrong*, supra, 46 Cal. at p. 91.

The decisions in *Caldwell*, and *Armstrong* thus endorse the principle that just compensation consists in no more and no less than making the landowner whole for the loss sustained as a result of the taking. That is, the landowner is to be "put in as good position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U.S. 369, 373, 63 S.Ct. 276, 279, 87 L.Ed. 336 (1943). "He must be made whole but is not entitled to more." *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236 (1934); see also *Costa Mesa Union Sch. Dist. v. Security First Nat. Bk.*, 254 Cal. App. 2d 4, 10, 62 Cal. Rptr. 113 (1967).

Between 1902 and 1997 General Benefits May Not Be Offset

Some years later, in *Beveridge v. Lewis*, 137 Cal. 619, 70 P. 1083 (1902), the California Supreme Court construed former Code of Civil Procedure Section 1248, relating to setoff, in light of the then-existing just compensation clause, former Article I, Section 14, of the California Constitution, which had been enacted in 1879, after the decisions in *Armstrong* and *Caldwell*. In so doing, the *Beveridge* court introduced into California decisional law for the first time the distinction between different types of benefits to remainder property. The court stated: "Benefits are said to be of two kinds, general and special. General benefits consist in an increase in the value of land common to the community generally, from advantages which will accrue to the community from the improvement.... Special benefits are such as result from the mere construction of the improvement, and are peculiar to the land in question." (Id. at pp. 623-624, 70 P. 1083.) Only special benefits, the court concluded, may be set off against severance damages. (Id. at p. 624, 70 P. 1083.) Later cases have reiterated the distinction. See, e.g., *Pierpont Inn, Inc. v. State of California*, 70 Cal. 2d 282, 74 Cal. Rptr. 521, 449 P.2d 737 (1969).

Former Section 1248, like present Section 1263.410, authorized a setoff of "benefits," without limitation, in all cases in which property is taken for a public use. In contrast to the statutory provision, former Article I, Section 14 of the California Constitution provided:

> Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into

> court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law.

Article I, Section 14 was added to the Constitution in reaction to the private railroad companies' speculative computation of benefits. See Note, *Benefits and Just Compensation*, 20 Hastings L.J. 764 (1969). As noted above, the *Railroad Act* had invested private railroad companies with the power of eminent domain, inasmuch as providing a means of transportation to isolated areas of the state was viewed as a public service. At the same time, however, the railroad companies were operated for private gain. To minimize the cost of obtaining rights of way, railroad companies frequently would take a portion of a landowner's tract and, under the before-and-after rule of *Caldwell*, would deem the benefit to the remainder property to exceed the fair value of the part taken, and thus would offer no monetary compensation for the taking. As the majority opinion in *Beveridge* describes this practice:

> Prior to the adoption of the present constitution the supreme court had decided, in a case where it was found that there were no special benefits, but only general benefits as I have defined them, that such benefits could be set off against damages, and that by this rule the owner was fully compensated. (*California Pac. R.R. Co. v. Armstrong*, 46 Cal. 85.) By section 14, involved here, I believe the people intended to overrule this case and other like decisions, so far as applicable to private railroad corporations."
> *Beveridge*, supra, 137 Cal. at p. 624, 70 P. 1083.

Examination of the constitutional debates of 1878 generally confirms that, as relevant here, the framers' intent with respect to former Article I, Section 14 of the California Constitution was to preclude private railroad companies both from taking land without first compensating the owner and from setting off from the damages owed any benefits to the remainder. See Cal. Const., former Art. I, 14; 1 *Debates & Proceedings Cal. Const. Convention* (1878-1879) p. 346 *et seq.* Delegate James M. Dudley of Solano, who offered the amendment that, as revised, was adopted as former Article I, section 14, successfully moved for inclusion of the phrase "other than municipal" after the word "corporation" so as to exempt municipalities from the provision, thereby allaying the concern of other delegates

that, as originally drafted, the amendment would have unduly hindered the development of county roads, town streets, and other government-sponsored public works. *Debates & Proceedings*, supra, pp. 347, 349.)

Between the time *Beveridge* was decided and the *Continental Development* case, the Supreme Court did not attempt to clarify the rule it announced. The difficulty of the distinction drawn in *Beveridge* between general and special benefits has been widely remarked. See, e.g., *People ex rel. Dept. of Pub. Wks. v. Giumarra Farms, Inc.*, 22 Cal. App. 3d 98, 99 Cal. Rptr. 272 (1971):

> The enunciation of the [*Beveridge*] rule has proven somewhat easier than its application.... The application of the *Beveridge* principle has not been uniform and it has been criticized as causing 'confusion.' (See Gleaves, *Special Benefits in Eminent Domain, Phantom of the Opera* (1965) 40 State Bar J. 245, 249.)[] Nor has there been uniformity of opinion in other jurisdictions as to what constitutes benefits chargeable against the landowner in a condemnation action. 'Upon this subject there is a great diversity of opinion and more rules, different from and inconsistent with each other, have been laid down than upon any other point in the law of eminent domain.' (3 Nichols on Eminent Domain 57.)
> 22 Cal. App. 3d at 104.

See also *State ex rel. State Highway Com'n v. Gatson*, 617 S.W. 2d 80, 82 (Mo. Ct. App. 1981) ["It has been said that trained legal minds have difficulty in distinguishing between the two types of benefits."]; *State ex rel. State Highway Com'n v. Koziatek*, 639 S.W. 2d 86, 88 (Mo. Ct. App. 1982) ["[T]he distinction between special benefits and general benefits is shadowy at best."].)

Since 1997 General Benefits May Be Offset

In *Continental Development*, the California Supreme Court abandoned the special/general benefit distinction of *Beveridge*, and held that neither constitutional nor statutory law precludes general benefits from being offset against damages to the remainder. The court concluded that *Beveridge* was wrongly decided, and the better rule is that all benefits should be offset against damages to the remainder.

The court's reasoning is first, the distinction between special and general benefits is not clear, the published cases yield inconsistent results, and the effort to make the distinction promotes litigation. Second, because the assessment of damages to the remainder is not limited to special damages but takes into account general damages as well, it is proper that offsetting benefits be both

general as well as special. Third, compensation must be just to the taxpayers as well as to the property owner, and a rule permitting setoff of general as well as special benefits minimizes the cost of public projects, both in terms of compensation awarded and in transactional costs (due to the new rule's greater clarity and certainty). "On balance, and acknowledging that Continental's position is not without some force, we overrule *Beveridge*, supra, 137 Cal. 619, 70 P. 1083, to the extent it holds that only 'special' benefits may be offset against severance damages. We hold that in determining a landowner's entitlement to severance damages, the factfinder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value, insofar as such evidence is neither conjectural nor speculative." 16 Cal. 4th at 718, 66 Cal. Rptr. 2d at 645.

Two dissenting opinions (Kennard and Baxter) argue there is no good reason to depart from stare decisis after a century of settled law, that offsetting general benefits places the property owner in a worse position than neighboring property owners who are not assessed for general benefits received from the project, and that it is the almost universally accepted majority rule among jurisdictions in the United States that only special benefits may be offset, because that rule is more equitable, and that the endeavor to calculate general benefits is speculative and will cause an unfair result when the hoped-for general benefits do not materialize. "When a parcel of property is severed by a government taking, any damages to the remainder are part of the injury the landowner suffers. To refuse to compensate the landowner for those damages by offsetting against them the general benefits that all in the vicinity of the project receive unfairly forces the landowner to pay for benefits that others receive for free. Limiting offsets only to special benefits more equitably distributes among the entire community the benefits and burdens of the project." 16 Cal. 4th at 735-6, 66 Cal. Rptr. 2d at 657.

THE LAW IN OTHER JURISDICTIONS

Overview

The following summary of the law in other jurisdictions is drawn from *Nichols on Eminent Domain* § 8A.03:

When a portion of a tract is taken by eminent domain for a use which is beneficial to the remainder of the tract, the question arises whether such benefit can be considered in determining the amount of compensation due the

landowner, and, if so, to what extent. A great diversity of opinion exists among the various jurisdictions regarding the issue. However, most jurisdictions agree that only "special" benefits may be offset against severance damages and neither special benefits nor general benefits may be offset against the part taken.

The rationale for this view is the constitutional requirement for the payment of just compensation which has generally been interpreted to mean fair and adequate monetary compensation for land actually taken regardless of any benefits to the remainder. To offset benefits against the part taken would discriminate unfairly against the condemnee because a neighboring owner whose land was not condemned would get the benefits of the public improvement while the condemnee would not only have some of his land taken, but would be forced to pay for his benefits by receiving a reduced sum or potentially no compensation for his property taken. Likewise, to charge the owner for general benefits to his remainder, which he and his neighbors equally enjoy, would unfairly discriminate against the condemnee on the sole basis that a portion of his land was taken while his neighbors' property was not.

The majority of jurisdictions do not permit general benefits to offset damages because the citizen whose property is taken cannot be compelled to bear more than the cost of the public improvement and general benefits resulting therefrom than is borne by other property owners whose property is not taken. Thus special benefits have been narrowly conceived in order to avoid the unfairness of making one person pay in land for that which another receives free.

> Despite the varying rules among the federal and state jurisdictions, it has been almost universally accepted that only special benefits may be deducted from damages to the remainder. The vast majority of states follow this rule, with some refinements regarding what benefits constitute "special" benefits and exceptions in some circumstances for the classification of condemning authority or the type of public project involved.
> *Nichols on Eminent Domain* § 8A.05.

The reality, however, is not so one-sided as Nichols paints it. While the "majority" rule may be that only special benefits are offset against damages to the remainder, there are quite a few jurisdictions that apply dramatically different rules; in fact, the majority rule is more like a "plurality".

In one of the few scholarly treatments of this matter, Professors Haar and Hering observe that ordinarily "competing rules can be adequately described and classified by the majority-minority rule dichotomy, so beloved of hornbook

writers. By contrast, in this area the rules require at least five pigeon holes. The present classification of rules, based on special versus general benefits and on value of property taken versus damage to property remaining after a partial taking, is as adequate today as when it was devised shortly before the turn of the century." Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 Cal. L. Rev. 833, 869-70 (1963).

Categorization

The following list over-simplifies things because some jurisdictions (such as California) are in flux, others have a split of authority, and some have different rules depending on the type of condemnor and type of project. Moreover, the authorities that have attempted to categorize the jurisdictions (such as Nichols, ALR, ALI-ABA, etc.) are inconsistent with each other and are often somewhat dated. Roughly speaking, however:

Offset both general and special benefits against damage to remainder. California now becomes one of nine states to allow offset of general as well as special benefits against damage to the remainder (but not against compensation for the part taken). The other states are Illinois, Michigan, New Mexico, New York, North Carolina, South Carolina, Virginia, West Virginia.

Offset special benefits against both damage to remainder and compensation for part taken. This is known as the "federal" rule. Twelve jurisdictions allow special benefits to be offset not only against damages to the remainder, but against compensation for the part taken as well. Besides federal law, this is also the law in Arkansas, Delaware, District of Columbia, Hawaii, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, Washington.

Offset both general and special benefits against both damage to remainder and compensation for part taken. This is the classical "before and after" rule — the value of the condemnee's property is assessed before the taking and after the taking, and compensation is awarded only to the extent the "after" value is lower than the "before" value. This approach is currently followed in six states — Connecticut, Georgia, Illinois, Louisiana, Maryland, New Jersey.

No offset. Two states — Iowa and Mississippi — allow no offset for benefits of any kind.

Offset only special benefits against damage to remainder. The remaining 21 states generally follow the "majority" rule.

Remarking on the diversity among the states on this issue, Professors Haar and Hering observe:

> Even the law, with its vaunted tolerance of differences among reasonable men, might well ponder the absence of a consensus among opinions. The explanation seems to be that although all were striving to reach the just result, one that would be fair to all affected by it, the means — the treatment of benefits — was not and is not adequate to the task. Whatever variant is adopted, some individual or group gets favored treatment relative to another. If reformulation of the rule governing offsets is to be the sole tool, something less than perfect justice must be accepted as inevitable. Realistically, the law can only aspire to minimize the inequity and to place its burden on a rational basis.
> Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 Cal. L. Rev. 833, 874-5 (1963)

Double Taxation?

The standard argument against offsetting general benefits against damage to the remainder is that it is a form of double taxation. The property owner, like the rest of the public, pays taxes that fund public projects for which there is a public benefit. To reduce the payment owed to a property owner whose property is taken or damaged for public use on the ground that the property owner receives a general benefit from the project taxes the property owner twice. The property owner pays for the benefits of the project once through taxes, like the public generally, and then is charged for the general benefits of the project again in the eminent domain proceeding. This appears to impose on the property owner more than a proper share of the cost of the public project.

One commentator in 1965 thought it inconceivable that California could ever require that general benefits be offset, due to the double taxation concern. "Vote-conscious legislators might well hesitate to embrace such a proposal which, if it were to be adopted, would immediately be suspect on a constitutional basis." Gleaves, *Special Benefits in Eminent Domain, Phantom of the Opera*, 40 State Bar J. 245, 256 (1965).

Double Compensation?

On the other hand, why should the public should pay anything — it has enhanced the value of the owner's remaining property, and is now being asked

to pay for the privilege. The owner could be viewed as receiving double compensation — compensation for damage to the remainder as well as compensation by way of a more valuable remainder.

Is it right that Continental could receive a $4 million benefit and still be entitled to collect $1 million in damages to the benefited property? Another way of looking at it might be that Continental's property would have increased in value by $5 million due to the public project, were it not for the $1 million worth of noise and visual blight associated with the project; so the public must cough up $1 million in order that the property owner receive the full $5 million value of its windfall from the public project.

Put in this way, there would appear to be a strong case for the "before and after" approach to compensation in partial takings. You value the condemnee's property before the taking and after the taking and award the property owner any resulting loss in value. Why, then, has the before and after approach fallen out of general favor as a means to determine compensation in a partial taking?

Benefits Speculative

A major reason that the before and after approach has been generally abandoned is that the valuation of property in its after condition is speculative. It is difficult enough to value property with any degree of accuracy under known conditions. But to arrive at an accurate valuation based on benefits to be received from a project that is not yet built and operating takes the valuation process into fantasyland.

As recited above in the history of the development of the law on this issue in California, railroad companies in the nineteenth century frequently would take a portion of a landowner's tract and under the before-and-after rule would deem the benefit to the remainder property to exceed the fair value of the part taken; thus they would offer no monetary compensation for the taking. However, in many cases the hoped for benefits never materialized. This prompted a general reaction against the before and after rule in California and other jurisdictions.

The speculative nature of general benefits of a project is not limited to nineteenth century railroad takings. There are many instances of public projects that are abandoned, or not completed as planned, or not operated as planned. They never generate the benefits for which the property owner would have been assessed. Therefore it is arguably improper to deduct from the property owner's compensation general benefits of the project for which the property is taken.

The majority in *Continental Development* has two responses to this concern:

(1) All we are trying to do when we value property is to arrive at a fair determination of the price a willing buyer and seller would agree to today. That price may be based on the prospects for a public project affecting the value of the property, discounting it for (or taking into account) the possibility that the public project may not be completed as planned or may not generate all its hoped-for benefits. The property owner should be able to turn around and sell the property for that price on the open market, if the property owner is concerned that the planned benefits may never occur. Should the property owner elect to hold the property, and in the long run the hoped-for values are not achieved, that is the property owner's decision. The condemnor should not be charged with it. See also Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 Cal. L. Rev. 833, 874 (1963) ("It may be admitted that the anticipated benefits may prove to be ephemeral. But this possibility is merely one of the elements in the market value calculus.")

(2) The property owner may in some circumstances be able to get recompense from the public entity via another eminent domain proceeding. This point may be somewhat illusory, however. Apart from the significant practical disincentives involved in this remedy, there are also legal hurdles. Take the recent case of *Leonard v. People ex rel. Department of Transportation* , 62 Cal. App. 4th 1296, 73 Cal. Rptr. 2d 328 (1998). In 1959 the Leonards suffered a partial taking of their property for a freeway, with an off-ramp located adjacent to the remainder. In the eminent domain proceeding the damages to the remainder were offset by $20,000 worth of special benefits conferred by the off-ramp. The owners subsequently built a hotel and conference center at the interchange. In 1986 the state closed the off-ramp and relocated it some distance away. The owners sued to recover the value of the special benefit for which they had previously been charged. The Court of Appeal denied the right to recovery. The court recognized the principle stated in *Continental Development* that recompense may be available, but went on to note that this principle does not "elevate every benefit used as an offset to a proprietary right which, if later lost, would constitute a compensable taking." 62 Cal. App. 4th at 1301. The test is whether the lost benefit is a proprietary right that would have been compensable in the first instance; "if, as in this case, the benefit which is lost is not compensable under condemnation law, the fact that it was in an earlier case deemed an offsetting benefit cannot

render it compensable." 62 Cal. App. 4th at 1302. The Supreme Court denied a hearing.

Special Benefits More Certain

Because of abuses in offsetting speculative benefits against the compensation due a property owner, the law in California and many other jurisdictions for years limited those that may be offset to "special" benefits. The concept of a special benefit is that it is a benefit of the project that directly and uniquely affects the property at issue, as opposed to the general benefits of the project to the community at large.

> Benefits are said to be of two kinds, general and special. General benefits consist in an increase in the value of the land common to the community generally, from advantages which will accrue to the community from the improvement. [Citation.] They are conjectural and incapable of estimation. They may never be realized, and in such case the property-owner has not been compensated save by the sanguine promise of the promoter. Special benefits, by contrast, are such as result from the mere construction of the improvement" or, in other words, reasonably certain to result from the construction of the work, and are peculiar to the land in question. *Beveridge*, 137 Cal. at 623-624.

But the special versus general distinction is imprecise and generates litigation. In his 1965 article, Milnor Gleaves reviewed a cross-section of representative California special benefit cases covering a 35-year period and concluded that, if nothing else, the scope of confusion concerning the issue had widened and "the individual practitioner may well conclude that the only good special benefit decision is a final one, decided in favor of his own client." Gleaves, *Special Benefits in Eminent Domain, Phantom of the Opera*, 40 State Bar J. 245, 249 (1965). He observed that the absence of a workable formula by which special benefit could be distinguished from general "has resulted in something less than *stare decisis* in the appellate courts." 40 State Bar J. at 253. He remarked, interestingly:

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

40 State Bar J. at 255 [citation omitted].

See also Connor, *Valuation of Partial Takings in Condemnation: A Need for Legislative Review*, 2 Pac. L.J. 116 (1971).

The difficulty of determining whether a particular benefit is special or general, and the resulting inconsistency among published decisions on the subject, is also elaborated in the *Continental Development* opinion. This is one of the major reasons for the court's decision to adopt a rule that does not attempt to distinguish between general and special benefits.

Justice Kennard's dissent in *Continental Development* addresses this concern with the argument that property valuation is not an exact science and that however fact-bound and imprecise the rules may seem, their legitimacy should turn on their effectiveness in practice, not on their theoretical elegance. "The special benefit rule, while it does not turn every determination of whether a particular type of benefit counts as an offset into a rule of law that does not vary with the surrounding circumstances, has proven itself a workable rule that produces substantial justice." 16 Cal. 4th 731. She also argues that the special benefit rule is not too uncertain or inconsistent to guide adjudication. "The rule's long history belies that assertion. Courts both in California and elsewhere have been able to coherently apply the distinction between special and general benefits." 16 Cal. 4th at 732.

Offset of Special Benefits More Difficult to Calculate

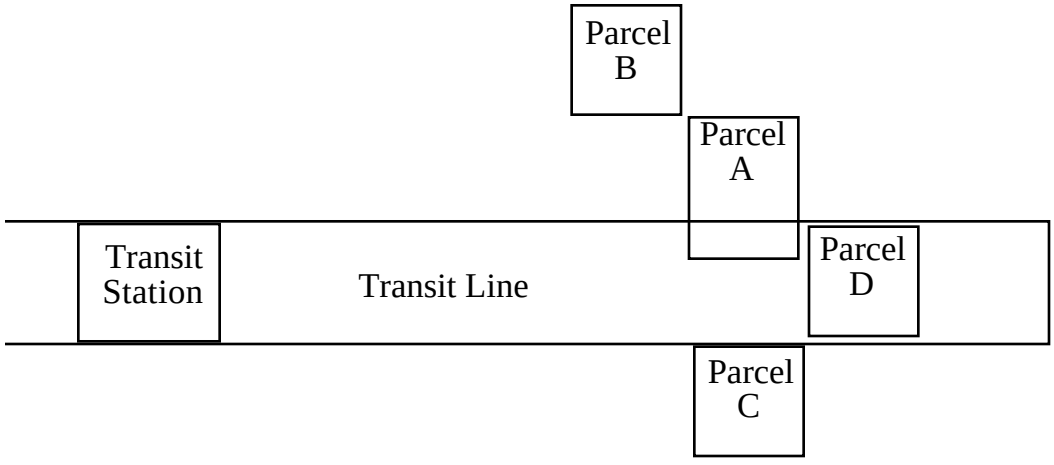
Even if it were possible to readily and consistently distinguish between general and special benefits, there is a question whether it is possible to accurately discriminate between them in determining their relative impact on the value of the remainder. The court in *Continental Development* asserts that "transaction costs would be reduced due to the new rule's greater clarity and certainty." 16 Cal. 4th at 716. In determining a property owner's entitlement to severance damages, under a general benefits regime the factfinder would be able to consider competent evidence relevant to any conditions caused by the project that affect the remainder's fair market value (insofar as that evidence is neither conjectural nor speculative). Cf. Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 Cal. L. Rev. 833, 873 (1963) ("Neither the uncertainties nor the difficulties of assessment are significantly greater than those encountered in estimating the market value of property taken or damaged, or the value of 'special' benefits.")

Justice Kennard's dissent argues that it will not necessarily be easier to calculate general and special benefits together than it is to calculate special benefits alone. General benefits, being more diffuse geographically, also may be less capable of quantification in a definite amount. It is one thing to say that a freeway interchange may bring some general benefit to all the properties in the large area served by the surface streets connecting with the interchange; it is quite another thing to attempt to quantify that benefit. Because special benefits are more specific to one or a limited number of properties and usually arise from a more direct relationship between the property benefited and the project, they are in general more easily quantifiable. Additionally, general benefits may not immediately accrue, further increasing the difficulty of quantifying them. And if the geographic scope of general benefits is completely arbitrary and indeterminate, abandoning the distinction between special and general benefits will do nothing to solve the problem of determining the scope of the general benefits to be offset against the damages to the remainder. "Thus, the simplification promised by the majority's new rule is illusory." 16 Cal. 4th at 734.

Fairness to the Property Owner

A fundamental concern is whether it is unfair to a property owner to offset general benefits against damage to the owner's remaining property. The intractable nature of the argument may be illustrated by comparing the circumstances of Continental's property with those of other properties in the community.

For the sake of illustrating the various considerations, let us take four parcels on a transit line in near proximity to a transit station.



In this example, the situation of Parcel A is comparable to that in *Continental Development* — it is partially taken for the transit line. The remainder receives benefits as a result of being located in the vicinity of the transit station as well as damages as a result of being located on the transit line. Parcels B, C, and D are similar in size to the remainder left after the partial taking of Parcel A, but are so situated that:

• Parcel B is not taken at all. It receives the same benefits but none of the damages that the remainder of Parcel A receives.

• Parcel C is not taken at all. It receives the same benefits and the same damages that the remainder of Parcel A receives.

• Parcel D is taken in toto and receives none of the benefits or damages that the remainder of Parcel A receives.

Let us assume that all comparably situated parcels receive the same amount of benefit from being located in the vicinity of the transit station — $5 million per parcel — and that those actually located on the transit line are damaged to the extent of $1 million. Comparing the relative positions of the property owners as a result of this project, it appears that:

(1) Parcel B is in the best position. Its value is enhanced by $5 million without any offsetting damages.

(2) Parcel C and the remainder of Parcel A and are in the next best position. Their values are enhanced by $5 million but damaged by $1 million, leaving them with a net gain of $4 million.

(3) Parcel D is in the worst position. Its value is calculated in the eminent domain proceeding without regard to any impact of the project for which it is taken. The owner receives as compensation none of value increase the three other parcels receive. If the owner wishes to take the compensation awarded and replace the property taken with comparable property in the vicinity, the owner will be unable to do so; an additional $4 to $5 million will be required, depending on the location of the parcel in relation to the transit line.

The owner of Parcel A acknowledges that as a result of the project, the net value of the remainder is enhanced. But the total amount of enhancement is $4 million (due to the $1 million proximity damages), whereas Parcel B, which is similarly situated, receives the full $5 million of benefit. Parcel A therefore argues that it should be entitled to damages in the amount of $1 million, which will put it on equal footing with Parcel B. Equal protection demands it.

Of course the condemnor can respond that Parcel A and C are also similarly situated. Parcel C receives only $4 million enhancement, and gets nothing for the damage it is subjected to. Why should the remainder of Parcel A receive the benefit of an added $1 million just through the happenstance that part of Parcel A is taken in a condemnation proceeding? If we are striving for perfect equality among owners why should not Parcel C, rather than Parcel B, be the measuring standard? In fact, as we shall see, Parcel A is actually better off than Parcel C because Parcel A will be compensated for damages caused by the project as a result of the partial taking whereas Parcel C will recover nothing for the same damages. Moreover, Parcel A is far better off than Parcel D, since Parcel A is benefited to the extent of $4 million and Parcel D not at all, so Parcel A should not be heard to complain.

All these arguments are discussed and dealt with in *Continental Development*, though in more abstract and legalistic terms. But the basic endeavor is the same — an effort to sort out the equities and determine what is fair in these circumstances.

Just Compensation

The endeavor to equalize the situations of all properties neighboring a public project, at least through the mechanism of eminent domain compensation, appears futile. A more appropriate focus of inquiry may be to ensure that a property owner whose property is taken receives "just compensation", not in comparison to neighboring properties, but in the sense that the owner is made whole.

The court in *Continental Development* quotes at length from a United States Supreme Court opinion addressing this issue:

> The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall not be deprived of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation. There is no guarantee that he shall derive a positive pecuniary advantage from a public work whenever a neighbor does. It is almost universally held that in arriving at the amount of damage to property not taken allowance should be made for peculiar and individual benefits conferred upon it--compensation to the owner in that form is permissible. And we are unable to say that he suffers deprivation of any fundamental right when a State goes one step further and permits consideration of actual benefits--enhancement in market value--flowing directly from a public work, although all in the

> neighborhood receive like advantages. In such case the owner really loses nothing which he had before; and it may be said, with reason, there has been no real injury.
> *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 365-366, 38 S.Ct. 504, 62 L.Ed. 1156 (1918)

This point is also made by Professors Haar and Hering:

> [F]ear that adjacent properties might be treated disparately has also played a role in the tendency to disregard benefits in computing condemnation awards. If two properties received exactly the same benefit, but only one suffered a taking, that one would pay for the benefit, while his neighbor enjoyed the same benefit free. But, as one court has pointed out, if a property owner is receiving full value for what he is giving up, there is no reason why he should be heard to complain that someone else is getting a greater gain or paying less than fair value.
> 51 Cal. L. Rev. at 874 (footnotes omitted)

Fairness to the Public

One of the seminal cases in this area — *Bauman v. Ross*, 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270 (1897) — includes in its analysis of the issue the concept that compensation must be just to the public as well as to the property owner. "The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public." 167 U.S. at 574.

This concept is elaborated in Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 Cal. L. Rev. 833, 869-70 (1963). The authors of that study note that the debate here is over who should benefit from the surplus value created by a public improvement. They conclude that the law should aim to recoup the surplus value for the public rather than for private property owners — property owners have no better claim to it than the general public.

The court in *Continental Development* explicitly bases its holding on this argument. "One general principle relevant to this determination is that taxpayers should not be required to pay more than reasonably necessary for public works projects. Stated another way, compensation for taking or damage to property must be just to the public as well as to the landowner. [Citation.] A rule permitting setoff against severance damages of all reasonably certain and

nonspeculative benefits minimizes the cost of public works projects in two respects: Certain offsets would be permitted that presently are disallowed, and transaction costs would be reduced due to the new rule's greater clarity and certainty." 16 Cal. 4th at 716.

Compensability of Damage

Much of the debate in the *Continental Development* opinions comes down to the question whether Parcel C could obtain compensation from the transit district for the $1 million damage caused by the transit line's proximity to it. If Parcel C could be made "whole" so that it realizes the full extent of the $5 million value enhancement, then the equal protection argument for Parcel A recovering the full amount of its $1 million of severance damage would be irrefutable.

The court in *Continental Development* argues that Parcel C could recover in an inverse condemnation or nuisance action only special damages resulting from the project.

> The recovery of neighboring landowners in an inverse condemnation or nuisance action, in contrast, requires more than a showing that the value of the property has diminished as a result of the project: Such landowners must establish that the consequences of the project are "not far removed" from a direct physical intrusion or amount to a nuisance [citations], or that the project results in actual physical injury to the property, as opposed to mere diminution in its enjoyment [citations].
> 16 Cal. 4th at 713-714.

In *Continental Development*, the types of damage suffered by Parcel C and the remainder of Parcel A do not approach the level of a nuisance or an intrusion or actual physical damage. "Those of Continental's neighbors from whom no property is taken therefore do not necessarily share Continental's right to recover for any and all diminution in the value of their property caused by the Green Line's noise and visual impact." 16 Cal. 4th at 714.

The court argues that the remainder of Parcel A is in fact better off than Parcel C, since the Parcel A is entitled to any diminution in value caused by the project, even if the damage would not otherwise be compensable by way of inverse condemnation or nuisance. In other words, the remainder of Parcel A is entitled to compensation for general as well as special damages. By virtue of the fact that part of Parcel A is taken for the project, the remainder gets compensated for

damages that Parcel C, which is only indirectly touched by the project, would not be entitled to be compensated for.

By parity of reasoning, since all damages — general as well as special — may be awarded, all benefits — general as well as special — should be offset. "We hold that in determining a landowner's entitlement to severance damages, the factfinder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value, insofar as such evidence is neither conjectural nor speculative." 16 Cal. 4th at 718.

Justice Kennard's dissent disagrees with this analysis. She argues that under the law, remainder of Parcel A does not recover for general damages, only for special damages. "Because only special and not general damages are compensable, only special and not general benefits should be deducted." 16 Cal. 4th at 734.

In a 30-page paper submitted to the Commission titled "Upsetting the Balance: Analysis of *Los Angeles Metropolitan Transportation Authority v. Continental Development Corporation*" (June 14, 1998), Brian T. Stuart of Sacramento likewise argues that the court has mistakenly analyzed the applicable law — in a severance damage case only special damages are compensable, whereas in an inverse condemnation case any diminution in value of the property is compensable.

Regardless of the accuracy of the court's analysis of existing law, doesn't the holding in *Continental Development* establish current law, at least as to compensability of severance damages? The court, by holding that the factfinder must consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value, surely establishes a clear rule *both* for determination of damages and offset of benefits.

The court's comments on compensability of damages by way of inverse condemnation or nuisance by neighboring properties are dictum but will undoubtedly affect the development of the law in that area even if it has not accurately characterized the existing state of the law. A recent case (opinion by Kolkey, J.) cites *Continental Development* in holding that a neighboring property owner has no cause of action in inverse condemnation or nuisance for visual blight caused by a 130-foot cellular telephone transmission tower — "The California Supreme Court has stated that burden on neighboring property is sufficiently direct and substantial if the neighboring landowner can establish that

the consequences of the intangible intrusion are 'not far removed' from a direct physical intrusion." *Oliver v. AT&T Wireless Serv.*, 90 Cal. Rptr. 2d 491, 497 (1999).

Taxation and Special Assessment

A number of equalizing measures might be taken to put all the properties in the vicinity on the same footing. To some extent this is accomplished over time through the property taxation system. However, reassessment occurs through a slow and incremental process under current law, and in any event the equalization of property values to a perfect equitable balance would never occur.

An assessment district could be created, and the parcels assessed for the relative benefit they receive from the project. Although that might be the fairest treatment in theory, it is not the way most projects are done. We must still fashion rules to deal fairly with the equities in cases where the project is not being accomplished through an assessment district.

Political Considerations

When the Law Revision Commission rewrote the California eminent domain law in 1975, it carefully sidestepped the issue whether the offset of general benefits should be allowed or whether the offset should be limited to special benefits. On this point the Commission's recommendation stated simply, "The Commission recommends no change in the basic rules relating to compensation for injury to the remainder in the case of a partial taking." *The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1651 (1974). Code of Civil Procedure Sections 1263.410-1263.430 simply provide that damages to the remainder are offset by benefits, without attempting to define the benefits that may be offset. The Commission's Comment to Section 1263.430 leaves the issue to case law:

> Section 1263.430 codifies prior law by defining the benefit to the remainder that may be offset against damage to the remainder in an eminent domain proceeding. See former Section 1248(3). Section 1263.430 does not abrogate any court-developed rules relating to the offset of benefits nor does it impair the ability of the courts to continue to develop the law in this area. See *Beveridge v. Lewis*, 137 Cal. 619, 70 P. 1083 (1902) (only "special" benefits may be offset); *People v. Giumarra Farms, Inc.*, 22 Cal. App. 3d 98, 99 Cal. Rptr. 272 (1971) (increased traffic a special benefit); but see *People v. Ayon*, 54 Cal. 2d 217, 352 P. 2d 519, 5 Cal. Rptr. 151 (1960) (increased or decreased traffic not a proper item of damage).

The Commission took a neutral approach because this promised to be an explosive issue in the Legislature. The outcome of the debate would be determined on a political and economic basis. The Commission concluded that it would be better to leave the matter to case law development than to inject this issue into the effort to achieve comprehensive eminent domain law reform. The Commission Minutes for June 1972 state that "the reason for the retention of existing law is that here has been no general consensus of the practitioners in the field that a change would be beneficial. Also, the area is one where the rules are better left to judicial development rather than to statutory statement."

The staff's assessment is that nothing has changed in this respect during the past 25 years. After the *Continental Development* decision was announced, legislation was immediately introduced to overturn it. Senate Bill No. 1388 (Knight) was introduced in 1998 to add the following provision to Section 1263.410:

> Special benefits to the remainder, but not general benefits, shall be deducted from the compensation for injury to the remainder. "General benefits" means those shared by all properties in the locale of the project for which the property was taken. "Special benefits" are those not shared by all properties in the locality, but which inure directly and peculiarly to the remainder.

This bill was supported in the Legislature by the California Business Properties Association, the California Farm Bureau Federation, the California Water Association, and numerous individuals. It was opposed by the League of California Cities, the California Redevelopment Association, and numerous cities and individuals.

The Senate Judiciary Committee staff analysis of the bill was hostile to the bill raising the questions: (1) Would this bill create a windfall in compensation for property owners? (2) Would this bill defeat the "fairness" factor encompassed within the concept of just compensation? (3) Would this bill reinstate an unworkable definition? (The staff analysis answers "yes" on all counts.)

The bill was killed in its first committee hearing on a straight party line vote, all Republicans voting for it and all Democrats either voting against it or abstaining.

Various Options

What are the available options for addressing these issues? There are five different approaches that have currency in the United States, listed above. None of these approaches is completely satisfactory or provides perfect equity. The only approach that would appear to do that would be a system of assessments for the purpose of equalizing damages and benefits among properties. Although such an approach may be attractive as a purely theoretical matter, the staff believes that it would be foolhardy for the Commission to consider such a scheme. Its magnitude and monumental complexity would be overwhelming, as would be the political opposition to it.

Of the five approaches used in various jurisdictions in the United States, this memorandum has focused on the two in most recent use in California — (1) the *Beveridge* rule (offset only special benefits against severance damage) and (2) the *Continental Development* rule (offset general as well as special benefits against severance damage). A third approach — (3) no offset of any benefits — has not been seriously advocated for California. The remaining approaches are (4) the federal rule (offset special benefits against compensation for the part taken as well as severance damage) and (5) the before and after rule (offset general as well as special benefits against compensation for the part taken as well as severance damage). These have both been urged by academic articles written in the 1960's.

Critique of Federal Rule

The federal rule has been advocated for California in Gleaves, *Special Benefits in Eminent Domain, Phantom of the Opera*, 40 State Bar J. 245 (1965), and in Note, *Benefits and Just Compensation in California*, 20 Hast. L.J. 764 (1969). The main argument in favor of this approach is that it is logical — the public confers a significant benefit on the remainder, and should not also have to pay for the part taken where the benefit exceeds the value of the part taken plus any damages to the remainder.

> It is therefore conversely argued in the matter of special benefit that if such an owner will receive a substantial *special* benefit to the remainder of his property because of the proposed public project, the general public should receive credit for it in the final reckoning, and the owner should not receive a windfall of value by having such credit limited only to the item of severance damage. The

> argument has merit in both logic and equity, and there is an ample body of experience in the Federal courts for the application of such a procedure. It should have the support of all points of view in bringing the law in this field more in line with the practicalities of our modern society.
> 40 State Bar J. at 257 [footnote omitted].

A logical extension of this argument is that, if the benefit is great enough, the property owner should pay the government for the taking, rather than vice versa. (This could be done through special assessment proceedings.) "To date, however, it has never been held that an owner owed the government anything back, where the special benefit exceeded both the severance and the value of the remainder." 40 State Bar J. at 247.

The main argument against the federal approach is that the benefits to be conferred by the project are speculative, whereas the taking of the owner's property is real. Whatever else happens it should be an irreducible minimum that the property owner is compensated for the actual physical taking of the property.

Critique of Before and After Rule

The before and after rule bases compensation for the part taken and damage to the remainder on a comparison of the value of the property before the taking with the value of the remainder in light of all damages and benefits conferred by the public project. If there is a net loss, that is the amount of compensation awarded. If there is a net gain, there is no compensation (or, in its purest form, the property owner compensates the condemnor).

This approach is used in six states, and has been advocated for California, as well as for acquisitions nationwide in which federal funds are involved (e.g., highway construction). Connor, *Valuation of Partial Takings in Condemnation: A Need for Legislative Review*, 2 Pac. L.J. 116 (1971); Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 Cal. L. Rev. 833 (1963). It should be noted that the *Connor* article is by a state Department of Public Works attorney, and the *Haar & Herring* article by academics under a federal contract.

The rationale is that the public generally creates a significant benefit by its projects, and it should reap that benefit. This will enable the public to better defray the costs of the project in order to compensate the few who are damaged by the project rather than the many who are benefited by it. The fact that those whose property is not taken may realize greater benefits from the project than

those whose property is taken is not critical — you can never perfectly equalize all the benefits of a public project in any event. So long as the property owner is in a better financial position after the taking than before, the just compensation clause, and its underlying policy, are satisfied. Moreover, the before and after rule avoids the complexities of separately valuing damages and benefits.

The arguments against the federal rule apply with even greater force to the before and after test. The anticipated benefits and damages of a public project are speculative. It is one thing to deny compensation for damage to the remainder on the basis that the benefits of the project will enhance its value. It is quite another to deny any compensation for an actual physical taking of property. If the rationale of the before and after rule is carried to its logical conclusion, it would be proper to deny compensation even for a total taking if the owner happens to own property elsewhere that is benefited by the project. The just compensation clause would not countenance that, so why should it be permissible to deny compensation due to the fortuity that the property taken is part of a larger parcel instead of two smaller ones?

Staff Analysis

The staff agrees with the Supreme Court's statement that complete equality among all parties is not possible to achieve with existing legal mechanisms. Whether the owner of property partially taken by eminent is worse off or better off than neighboring properties depends on which properties you compare.

The staff likewise agrees with the court that, if we cannot equalize the circumstances of all parties, we can at least try to ensure that a person whose property is taken is not unduly injured in the compensation process. The rule announced by the court in *Continental Development* — all nonconjectural and nonspeculative evidence of both damage and benefit to the remainder should be considered — appears to us to be inherently fair. And in fact, if we look at the circumstances of this particular case, we see that despite the $1 million of damages to Continental's property, there was a $4 million increase in value, which Continental could have cashed out on sale of the property.

There is a concern that the benefits Continental is charged with may not accrue. The court argues in that case Continental would have a cause of action to recover the amount previously offset. The staff questions the efficacy of this remedy; it does not seem like a good idea to predicate basic property protections on a right to sue the government. This is difficult for the ordinary person, bad for

the judicial system, and generally undesirable as a matter of public policy. Rights of this sort ought to be self-enforcing.

Of course, the possibility that the anticipated benefits may never occur should be taken into account as a factor in their valuation, and they should be discounted accordingly. Moreover, if the determination of fair market value predicated on the discounted possibility of future benefits is accurate, the owner should be able to realize that value on disposition of the property and, if the benefits actually occur as projected, may make a profit on the discount.

The staff also has a concern with attempting to legislate in this area with only one fact situation — *Continental Development* — clearly in mind. Any rule that we lay down for that case may not seem as fair in different circumstances. This would argue for continuing to leave the matter to case law development, which is inherently more flexible than legislation.

All in all, the staff thinks the *Continental Development* decision is as fair a resolution of this matter as any, that the concept of continued case law development is still advisable, and that in any event, based on recent experience, legislation that would overturn the decision is not enactable.

This conclusion is not much different from the staff's evaluation in 1972. At that time the Commission had under consideration statutory adoption of the same rule eventually adopted in *Continental Development*. We conceived of the rule then as a compromise between existing California law and the before and after test:

> Because it is a compromise, it is certain to please neither condemnors nor condemnees. It is more complicated, and the procedure is more complex, than a straight before-and-after test. Yet the compromise proposal does have the merits of being a little simpler to administer than the present rule and of affording a more equitable measure of compensation. It appears to be basically fair as between the opposing parties.
> CLRC Staff *Memorandum 72-27* at p. 25 (March 20, 1972)

Possible Legislation

The staff's recommendation is that this matter be left to continued case law development. Nonetheless, there is at least one aspect of this topic that could stand legislative clarification, if the Commission is so inclined. The court in *Continental Development* concludes that offsetting both general and special benefits against compensation for damage to the remainder is fair, since

compensation for damage to the remainder includes both general and special damages. "A rule permitting offset of all reasonably certain, immediate and nonspeculative benefits has the virtue of treating benefits and severance damages evenhandedly." 16 Cal. 4th at 717.

However, the availability of compensation for special damages under the law is challenged in the dissent:

> The premise of the majority's argument is erroneous, for the damages that a landowner may recover are more limited than the majority acknowledges. A landowner may not recover for damages to the remainder that are "general to all property owners in the neighborhood, and not special to [the landowner]." (*City of Berkeley v. Von Adelung* (1963) 214 Cal.App.2d 791, 793, 29 Cal.Rptr. 802; accord, *People v. Gianni* (1933) 130 Cal.App. 584, 588-589, 20 P.2d 87.) The examples of compensable damages listed by this court in *Pierpont Inn, Inc. v. State of California, supra*, 70 Cal.2d 282, 295, 74 Cal.Rptr. 521, 449 P.2d 737, and repeated by the majority are ones that typically will arise out of some direct and unique relationship (often the relationship of contiguity) between the remainder of the severed property and the project and will not be shared generally by all properties in the vicinity served by the project: deprivation of access, impairment of light and air, impairment of view, invasion of privacy. Because only special and not general damages are compensable, only special and not general benefits should be deductible.
> 16 Cal.. 4th at 734

But regardless of what preexisting law may have decreed, doesn't the court's decision operate as a direct holding, superseding prior law? The staff thinks the case must be read to supersede preexisting law on the point.

Norm Matteoni notes that earlier cases have stated the proposition that general detriments from the public project imposed on nearby properties are not compensable. But, he says, *Continental Development*, "premised its holding that general benefits are admissible to reduce damages on the acknowledgment that general damages are recoverable." Matteoni, *Severance Damages*, in 1 Condemnation Practice in California § 5.8 at 196 (Cal. Cont. Ed. Bar, June 1999). He goes on to elaborate that *Continental Development* is more than a benefits case:

> It also affects damages. Because the majority views the right of recovery in a direct taking to include general damages, the rule of *Eachus v. Los Angeles Consol. Elec. Rwy.* (1894) 103 C 614, 37 P 750, requiring that damages flow directly to the property in question, may be affected. The *Eachus* case, however, is not discussed in the

opinion. See § 8.5. The majority in *Los Angeles County Metro. Transp. Auth. v. Continental Dev. Corp.* apparently considered project effects on view, light, and noise as general damages. 16 C4th at 712, 717. Reconciling *Eachus* and *Continental Dev.*, although other nearby properties share the negative and positive effects of the public improvement, there must be a direct and measurable effect on the value of the remainder.

The staff reads the case the same way. But given the uncertainty that has been created, the holding of *Continental Development* might be codified — "We hold that in determining a landowner's entitlement to severance damages, the factfinder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value, insofar as such evidence is neither conjectural not speculative." 16 Cal. 4th at 718.

Code Civ. Proc. § 1263.420 (amended). Damage to remainder

1263.420. Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following:

(a) The severance of the remainder from the part taken.

(b) The construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken and whether or not the damage is special to the remainder or general to the community, to the extent the damage affects the remainder's fair market value and is neither conjectural nor speculative.

Comment. Section 1263.420 is amended to codify the rule in *Los Angeles County Metropolitan Transit Authority v. Continental Development*, 16 Cal. 4th 634, 718, 66 Cal. Rptr. 630, 941 P.2d 809 (1997) ("We hold that in determining a landowner's entitlement to severance damages, the factfinder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value, insofar as such evidence is neither conjectural not speculative."). See also Section 1263.430 (benefit to remainder).

Code Civ. Proc. § 1263.430 (amended). Benefit to remainder

1263.430. Benefit to the remainder is the benefit, if any, caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the benefit is caused by a portion of the project located on the part taken and whether or not the benefit is special to the remainder or general to the community, to the extent the benefit affects the

remainder's fair market value and is neither conjectural nor speculative.

Comment. Section 1263.430 is amended to codify the rule in *Los Angeles County Metropolitan Transit Authority v. Continental Development*, 16 Cal. 4th 634, 718, 66 Cal. Rptr. 630, 941 P.2d 809 (1997) ("We hold that in determining a landowner's entitlement to severance damages, the factfinder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value, insofar as such evidence is neither conjectural not speculative."). See also Section 1263.420 (damage to remainder).

The advantage of this type of legislation is that it clarifies the effect of the *Continental Development* case, which at present appears to be a source of confusion. It ensures that the law is even-handed — if general as well as special benefits are to be offset against severance damages, they ought to be offset against general as well as special damages. The case is predicated on this tradeoff, and it ought to be reinforced.

The disadvantage of this type of legislation is that it stifles development of the law. It may be appropriate for the courts to further refine this holding in light of variant fact situations that may come before it. The rule that is codified may prove to be unjust in some situations. For example, it seems only fair that if general benefits are to be offset against damage to the remainder, then all damage to the remainder, general as well as special, should be taken into consideration. But if there are no benefits to the remainder being assessed, should severance damages awarded to the property owner include general as well as special damages? We have not thought through the policy arguments on this point, and we could well end up in a different place on the issue. The flexibility of continued case law development may be appropriate here.

On balance the staff favors noncodification. We think the parties and the courts will be able to figure out and properly apply the rule announced in *Continental Development* without the assistance of the Legislature. But we also think it would not be unreasonable to take the position that codification would be helpful.

Respectfully submitted,

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Executive Secretary