

2/28/69

## Memorandum 69-42

Subject: Study 36 - Condemnation Law and Procedure (Excess Condemnation)

The Commission has not considered this topic heretofore.

Literally reams have been written on "excess" (meaning various things) condemnation. A book (Cushman, Excess Condemnation, 1928) led to adoption of Section 14-1/2 of Article I of the California Constitution and enactment of Sections 190-196 of the Government Code. The subject is usually the occasion for intellectual exercises as to "public use," "public necessity," judicial review of administrative action, the justness of compensation, and other matters. Admittedly, all these things, and others, are involved. The Rodoni decision (attached), for example, is an excellent capsule of California eminent domain law.

However, the staff's purpose in raising the subject is much more limited. The Rodoni decision illustrates the fact that, although eminent domain law divides into three neat parts (the power, the procedure, and the compensation), these matters will not stay separated. The problem in Rodoni is not the seemingly infinite elasticity of the doctrine of "public use," or the rather cavalier way in which the Legislature bestows its authorizations to condemn. Rather, its money.

Efforts in all states to effect a revision and codification of formal judicial condemnation procedure and the rules of compensation are in great danger of proving ineffectual because they do not take into account the real--and pecuniary--effects of such "confrontations" between condemners and condemnees as that illustrated by Rodoni. In the main, the law revisers may be correct in regarding the Legislature's authorization to condemn as simply a matter of legislative "druthers" (e.g., whether cities should take property to provide public golf courses). But as to a considerable range

of the subject, legislatures are going to have to learn that they throw out the baby with the bath water by the way in which they exercise, and authorize exercise, of the power.

The attached study summarizes the three recognized types of "excess" condemnation (protective, remnant, and recoupment) and concludes with a rough draft of a proposed statute. The suggested solution is probably objectionable because local officials advise us that Section 1266 of the Code of Civil Procedure (severance damages "equal to" market value) is totally ineffectual. Presumably, the phrase "substantially equal to" would not help much. Also, Public Works and other holders of a power similar to Streets and Highways Code Section 104.1 probably are not prepared to concede that the power is limited to cases in which damages "substantially equal" market value.

Also, there appears to be no need to generalize the power of "protective" condemnation. Section 14-1/2 of Article I of the Constitution appears to have been seldom, if ever, invoked. Currently, takings of property to "protect" public works would seem to be indistinguishable from takings for the works themselves. We probably should recommend that the Constitution Revision Commission drop Section 14-1/2, and amend Government Code Sections 190-196 accordingly.

As to "recoupment" condemnation, statutes do not authorize it (except to the extent of disposing of the remnant, as in Rodoni). It presumably is not constitutional, and therefore the less said about it the better.

This leaves two partially indistinguishable problems: (1) how to deal with the "physical" remnant (small, odd-sized parcels, and so on) and (2) how or whether to deal with the "financial" remnant, as in Rodoni? Physical

remnants appear not to be of much concern. Condemnors seem simply to take them or owners express no interest in retaining them. Perhaps we should draft a provision applicable to all fee takings by selecting such adjectives as "small," "unusable," and so on.

The "financial" remnant (if there is, as ought to be, such a thing) cannot be dealt with so easily. If the Rodoni practice is good for Public Works and Water Resources, presumably it ought to be good for all fee takers whose takings are "engineering oriented." This would include over 100 types of local entities. Perhaps we should simply codify the precise holding (and language) in Rodoni and extend it to all public entities.

If, however, Rodoni needs taming, the only solution that occurs to the staff is to use an arbitrary percentage figure. In other words, the value of the "remnant" in the "before condition" must be determined; the value of that parcel in the "after condition" would be determined (Code Civ. Proc. § 1248(2)); if the latter figure were less than, say, 50% of the former, the taker could take the whole at its option.

As to the particular problem of "landlocking" the Commission tried to be helpful in its tentative recommendation on "byroads" by authorizing takings to provide access.

If we can solidify our thinking on the Rodoni question, there is one consolation to the effort. There are several "technique-of-the-taking" problems (e.g., fee v. easement, "substitute" takings, and so forth) that should prove susceptible to analogous solution.

Respectfully submitted,

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STUDY RELATING TO EXCESS CONDEMNATION

EXCESS CONDEMNATION: GOVERNMENTAL

ECONOMY OR VORACIOUS APPETITE?

by

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Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

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EXCESS CONDEMNATION: GOVERNMENTAL ECONOMY

OR VORACIOUS APPETITE?

Condemnors often find it necessary or useful, in taking land for public projects, to condemn property for purposes other than physical occupation by the proposed improvement.<sup>1</sup> For example, a highway authority may wish to take land adjoining the right of way for resale to private interests on condition that no use be made of the property which will interfere with the safety, utility or beauty of the highway.<sup>2</sup> Or, where only a portion of a parcel is needed for the highway, the condemnor may want to take the entire parcel to avoid leaving remnants of such size, shape, or condition as to be essentially useless for private purposes, or to avoid the payment of severance damages.<sup>3</sup> Finally, the highway authority may simply wish to condemn adjacent property for resale at a profit to reduce the cost of the highway project to the public.<sup>4</sup>

The powers of various public authorities in California to engage in such "excess condemnation" have accumulated over the years in piecemeal fashion, without overall uniformity or consistency with the holdings of the California courts on constitutional questions. This article deals with the statutes, constitutional provisions, and decisions that govern excess condemnation in California, and proposes a number of changes in the laws to make these condemnation powers more uniform and rational.

## I. General Limitations on Excess Condemnation

### A. The Scope of Excess Condemnation

It is not easy to define with precision what the California courts include within the term "excess condemnation." The term has most often been used by commentators to refer generally to the taking of property not "physically necessary" for a public improvement.<sup>5</sup> However, California courts are expressly prohibited from inquiring into the necessity of the manner or extent of improvements undertaken by any of the major public authorities with eminent domain powers.<sup>6</sup> In People ex rel. Dep't of Pub. Works v. Lagiss,<sup>7</sup> for example, the Court of Appeal refused to consider an owner's contention that the condemnor had taken more land than was actually necessary for the construction of a state highway, holding that the issue of necessity was "not justiciable" and that the only permissible inquiry was "whether such property was acquired by the condemnor with the intent of not putting it to a public use."<sup>8</sup>

It would appear, therefore, that the term "excess condemnation" is used by California courts to refer only to the taking of land which the condemnor intends to use for purposes other than physical occupation by the improvement itself. In this sense, excess condemnation does not include takings for future public use<sup>9</sup> or the resale of property originally taken for physical use in the improvement but later found to be unnecessary for that purpose.<sup>10</sup>

At least one California commentator has defined excess condemnation in a more limited and precise sense to refer only to the taking of property for the purpose of resale to private persons, with or without restrictions<sup>11</sup> as to its subsequent use. This distinction has analytical merit since it sets out an objective and relatively precise means of identifying the cases of greatest public concern--where the condemnor is most tempted to take

large unneeded parcels purely for speculative purposes. Nonetheless, for the sake of convenience, this article uses the term in the more general and descriptive sense employed by the courts.

Courts and commentators have generally recognized three types of excess condemnation authority, depending upon the situation of the land and the purpose of the condemnor: (1) protective, (2) remnant, and (3) recoupment. In protective condemnation, the condemnor acts to protect the utility, safety, and beauty of an improvement by taking adjacent land, often for resale to private persons on condition that future owners refrain from injurious uses of the property.<sup>12</sup> In remnant condemnation, the condemnor needs only a portion of a parcel for an improvement, but takes the entire parcel to avoid leaving a useless remnant or the payment of severance damages.<sup>13</sup> In recoupment condemnation, the condemnor takes land benefited by the proposed improvement to recoup the value of such benefits through resale to private persons.<sup>14</sup>

Legislation authorizing the first two types of excess condemnation is common in this country, but recoupment condemnation is infrequently authorized by statute or permitted by the courts.<sup>15</sup> California follows this general trend, authorizing various condemnors to exercise certain varieties of protective<sup>16</sup> and remnant<sup>17</sup> condemnation but not recoupment.<sup>18</sup> These California provisions will be analyzed in detail after a brief consideration of the general limitations on exercises of excess condemnation powers.

#### B. Authority for Excess Condemnation

The power of eminent domain is generally said to be inherent in the sovereignty of the states, and no express authorization in the federal or

state constitutions is necessary to empower a state legislature to invest state agencies with such powers of condemnation as it sees fit.<sup>19</sup> Accordingly, language in the California constitution authorizing one type of excess condemnation does not prohibit or restrict the exercise of any other type by public condemnors.<sup>20</sup>

It has often been stated that proper statutory authorization is necessary for the exercise of eminent domain powers by public authorities, and that substantive due process is violated by public takings in the absence of such authority.<sup>21</sup> It is not clear whether condemnors with general eminent domain powers may engage in excess takings for public purposes without specific statutory authority therefor, but in practice, condemnors with any substantial need for excess condemnation authority are governed and limited by statute.<sup>22</sup> Furthermore, where the validity of an excess taking is challenged, the condemnor's position is much stronger where the legislature has explicitly declared that the excess taking is for a legitimate public purpose.<sup>23</sup> In such cases, the courts are usually reluctant to dispute the legislature's findings, and ordinarily confine themselves to determining whether the particular project of the condemnor serves the purpose which the legislature intended. It is prudent, therefore, to make separate statutory provision in all cases for the excess condemnation authority of agencies with eminent domain power.

### C. The "Public Use" Requirement

Both the federal<sup>24</sup> and the California<sup>25</sup> constitutions implicitly restrict the power of eminent domain to the taking or damaging of property for a "public use." Early decisions interpreting such provisions took a highly restrictive view of the eminent domain power, and held that no taking could be for a public use unless the property condemned was actually to be

used by some significant portion of the public.<sup>26</sup> However, as the need for governmental involvement in private activities began to expand, many courts began to accept as "public" any use which substantially contributed to the general utility and facilitated the achievement of public purposes, even though private interests might incidentally benefit from the process.<sup>27</sup>

In California, where public construction and development has been of particular importance in the exploitation of natural resources and the growth of urban centers, the courts have adhered to this broader view.<sup>28</sup> The California courts have come to include as a "public use" any utilization of the property "that concerns the whole community or promotes the general interest in its relation to any legitimate object of government."<sup>29</sup> Therefore, California condemns may take property to facilitate its use by private persons in a manner more conducive to the general welfare, so long as private gain is only incidental to the main public purpose, and the public is protected by controls or restrictions on private use.<sup>30</sup> For example, land may be taken to provide services to the public even though private interests are to use the land and benefit thereby.<sup>31</sup> Furthermore, the condemnor may realize income from unrelated private uses where they are consistent with the intended public use<sup>32</sup> or where the land is not immediately to be used by the public.<sup>33</sup>

Some courts have gone even further in broadening the scope of permissible takings where the condemnation of a particular piece of property is "incidental to" and "necessary for" the completion of an improvement, and where the condemnor has no reasonable alternative means of achieving its legitimate purposes, even though the property itself is not literally to be "used" for any but private benefit. This doctrine has most frequently

been employed in "substitute condemnation"--the taking of property for transfer as compensation to other landowners whose property is needed for the condemnor's improvement.<sup>34</sup> Although California courts have not yet dealt with the validity of such substitute condemnation statutes,<sup>35</sup> the Court of Appeal implicitly utilized the "incident-to" rationale in Redevelopment Agency v. Hayes,<sup>36</sup> holding valid the taking of property in an urban renewal project for clearance and return to private owners, subject to restrictions protecting the public. There, the court appeared to accept the proposition that the beneficial effect of the taking rather than the actual use of the property after the taking might justify condemnation.<sup>37</sup> It would seem, therefore, that the "incident-to" theory will be applied in California where a taking is substantially necessary for the accomplishment of the public objectives served by a project, given a lack of reasonable alternatives available to the condemnor.

One important practical difference between the "incident-to" rationale and previous theories of public use should be stressed. In California, the condemnation resolutions of all of the major condemnors are conclusive on the issue of the "necessity" for the taking proposed.<sup>38</sup> Therefore, once the courts have determined that such a taking is for a public use, they are precluded from further inquiry into the necessity for the improvement, the extent of the taking, or the manner of its design and construction.<sup>39</sup> However, to the extent that the "incident-to" theory depends upon some evaluation of the relative necessity of the taking as a means of accomplishing the condemnor's objectives, there would seem to be much greater scope for judicial scrutiny into the propriety of the condemnor's decision to take.

In excess condemnation, the condemnor often intends that private persons will use the property after it is taken and is aware that these persons normally will benefit from that use. As in the case of other takings, however, this does not by itself render the condemnor's actions invalid. Rather, in accordance with the present thinking of California courts on the general problem of public use, it would seem that excess condemnation is valid where the public will derive such a benefit from the private use, or from the taking itself, that the private benefit can be regarded as "merely incidental."<sup>40</sup>

With this general background, the three individual types of excess condemnation will be examined, and change in California law governing each type proposed.

## II. Protective Condemnation

Governmental agencies wishing to protect the safety, utility and beauty of their improvements from deleterious conditions and uses of surrounding property, often take the adjoining land, sometimes to develop it or to correct any harmful conditions and resell it to private persons on condition that future owners refrain from injurious uses.<sup>41</sup> Several constitutional and statutory provisions authorize California condemnors to engage in excess condemnation of this type. Some set no limit on the amount of property that the condemnor may take. Typical of this variety are provisions for condemnation to protect the scenic value of certain highways,<sup>42</sup> and the safety of aircraft entering or leaving airports.<sup>43</sup> Others restrict takings to land within a certain distance of the improvement. Section 14 1/2 of Article I of the California Constitution imposes a 200-foot limit on protective condemnation for memorial grounds, streets, squares, and parkways.<sup>44</sup> This limitation is followed in statutes implementing Section 14 1/2.<sup>45</sup> Similarly, protective condemnation for state dams and water facilities is limited to lands within 600 feet.<sup>46</sup>

It seems fairly clear that excess takings for the primary purpose of protecting the safety, utility, or beauty of a public improvement would be treated as being for a "public use" by the California courts. Such takings have uniformly been upheld where consistent with any specific constitutional or statutory limitations.<sup>47</sup> The reason for this uniform acceptance is apparent: the public derives a clear and immediate benefit from the use of the land by the condemnor itself, or by private persons in accordance with the restrictions imposed by the condemnor.

Section 14 1/2 of Article I of the California Constitution, the source of most of the statutory limitations on the amount of excess land that may be taken for protective purposes, was adopted in 1928, apparently in the belief that no excess condemnation powers could be granted without specific constitutional authority.<sup>48</sup> That view has since been expressly rejected by the California courts on several occasions.<sup>49</sup> There is, therefore, no need for constitutional authorizations like Section 14 1/2 which impose excessive rigidity on the Legislature in its ordering of the powers of condemnors. Accordingly, Section 14 1/2 can and should be repealed.

Furthermore, present statutory authorizations for protective condemnation<sup>50</sup> should be replaced by a single uniform provision explicitly granting each condemning agency the authority to take land to protect the agency's improvements and their environs and to preserve their view, appearance, light, air, and usefulness. Where the condemnor intends to retain the excess land, the financial burden of condemning and paying for large stretches of land without expectation of resale should sufficiently restrict ambitious condemnors.

However, there may be a real need to restrict the discretion of the major condemnors in the protective taking of excess land for the purpose of resale. In many cases, for example, condemnors may be tempted to take large amounts of land in the neighborhood of highways for scenic protection, or in the general vicinity of water and flood control projects for physical protection, where there is in fact little need for extensive condemnation, where public purposes might readily be served by less drastic measures,<sup>51</sup> and where the condemnor's primary interest in taking the land may be to

enrich the public treasury by resale at a profit. Absent statutory restrictions, the courts would probably be unable to exercise any effective control over such protective excess takings.<sup>52</sup>

Nevertheless, absolute limitations on the amount of land that a condemnor may take are unnecessarily arbitrary and restrictive. There may be many instances, for example, in which a highway or flood control authority would legitimately need to protect its projects from uses and conditions on land lying beyond any reasonable uniform distance limitation, and yet find uneconomical the taking and retention of all such property. In such cases, the condemnor should be able to condemn the land for resale, subject to appropriate protective conditions.

In place of fixed distance limitations, therefore, it would be preferable to allow judicial inquiry into the necessity for all protective takings for the purpose of resale. This would enable landowners to place in issue the need for excess protective condemnation in the manner and extent proposed and the adequacy of less drastic and costly alternative means of accomplishing the same public purpose. However, the condemnor's resolution should stand as prima facie evidence of necessity in each of these aspects, and objecting landowners should bear the burden of pleading and proving the existence of less onerous alternatives. Alternatively, excess condemnation within a fixed distance of the improvement could retain the conclusive presumption of necessity, and only takings in excess of such limits be subjected to judicial examinations of necessity.

Once the courts are empowered to examine the necessity of excess protective takings for resale, a single uniform provision for all agencies becomes practical. Obviously, the need for extensive protective condemnation

by the Department of Public Works in highway construction, for example, is much greater than that of an individual school district. However, all types of agencies can operate and be supervised by the courts under the same basic standard of necessity. Individual limitations on the protective powers of each condemnor would no longer be needed.

### III. Remnant Condemnation

The construction of a public improvement often requires the condemnation of only part of parcels along the perimeter of the project. This is particularly true where the location and physical extent of the improvement are determined by engineering and functional considerations, as in the case of highways, water projects, and the like. In some cases, the condemnation of only the parts actually required would leave fragments of such small size, irregular shape, impaired condition, or inaccessibility as to be virtually useless to private interests and of little or no value to ~~their~~ owners. In these cases, it may be perfectly sensible for the condemnor to take such remnants and, where possible, to consolidate or develop them so that they may be resold to private persons in useable condition.<sup>53</sup>

In California, a number of statutes authorize the taking of an entire parcel where only part is needed for an improvement. Typically, these statutes vary from agency to agency, often with little or no apparent reason for the differences.<sup>54</sup> Two basic types of statutory provisions are discernable, however: (1) those depending upon the quantum of damage to the remainder and (2) those depending on the actual or potential liability of the condemnor to pay compensation to the owner. Provisions of the first type, for example, allow the taking of the entire parcel where any remnant is "to be left in such shape or condition as to be of little value to its owner"<sup>55</sup> or where "the construction of the proposed public improvement thereon will interfere with reasonable access to the remainder, or will otherwise cause substantial damage to the remainder . . . ."<sup>56</sup> Typical of the second type are provisions permitting the taking of the entire parcel where the taking of part "would leave the remainder thereof in such size or shape or condition as to require such condemnor to pay in compensation for the taking of such part an amount

equal to the fair and reasonable value of the whole parcel,"<sup>57</sup> or where the partial taking would "give rise to claims or litigation concerning severance or other damage . . . ."<sup>58</sup> Often, the statutory authority of particular condemnors will consist of a combination of more than one of these provisions.<sup>59</sup>

These two types of provisions are, of course, closely related since the measure of compensation to the owner is roughly designed to correspond to the damage to his parcel. For example, an owner who is left with a remainder so heavily damaged as to be of no value in its severed condition must be compensated by the condemnor for the market value of the entire parcel.<sup>60</sup> There may, however, be important differences since some elements of actual damage to property are noncompensable,<sup>61</sup> and some benefits rendered by the improvement are not legally cognizable.<sup>62</sup>

Remnant takings have been upheld by the courts in some circumstances as valid takings for a public use.<sup>63</sup> Basically, the courts have relied on two rationales: First, that the condemnation is necessary to return the property to productive private use, and second, that the condemnation is necessary to minimize the cost of the improvement to the condemnor.

#### A. Restoring the Remnant to Productive Use

The result of a series of partial takings along a highway improvement would often be a string of unsightly and useless strips and wedges. These might lie unused and unproductive for long periods of time. In many cases, the only feasible method of restoring these fragments to productive use is through condemnation and consolidation by the condemnor. The obvious need for such takings in the development of streets in congested areas caused the courts in California<sup>64</sup> and elsewhere<sup>65</sup> to hold these takings valid from an early date. The courts justified these takings on the grounds that the use of the remnants taken would be sufficiently "public" because of the

benefit to the community from the removal of unsightly fragments along the public improvement,<sup>66</sup> the facilitation of business growth and expansion along the route which the improvement was often primarily designed to encourage,<sup>67</sup> and the generation of tax revenues by the productive use of the fragments after consolidation.<sup>68</sup> Since the actual use of the parcels after condemnation has therefore been held sufficiently public, there would be no need to justify the taking of such physical remnants as a necessary incident to some other valid taking.<sup>69</sup>

The condemnation of excess physical remnants of little or no value in their severed condition is clearly authorized by each of the provisions found in the California statutes noted above, whether of the damage-to-the-remainder type<sup>70</sup> or the amount-of-compensation type.<sup>71</sup> Takings of this sort rarely cause the courts much difficulty. However, none of the California remnant-condemnation statutes are limited to parcels of small size. All apply, in addition, to partial takings that cause the requisite quantum of damage or necessitate the requisite amount of compensation even though the remainder is of appreciable size.

This situation usually arises where large remainders are cut off from reasonable access by highway or water projects and rendered economically useless in their landlocked or waterlocked state. The problem has been of particular importance in the last two decades in California with the massive construction of limited-access freeways.<sup>72</sup>

Traditionally, the courts have been reluctant to allow the excess taking of nonphysical remnants.<sup>73</sup> Even some judges<sup>74</sup> and commentators<sup>75</sup> today appear to regard minute size as a necessary prerequisite to a valid remnant condemnation. However, if action by the condemnor were necessary to return landlocked remainders to productive private use, there would seem

to be no real reason to distinguish between remainders solely on the basis of size. Indeed, the return of large remainders to productive use would be of much greater benefit to the public in terms of the revenue generated, the economic benefit to the community, and the elimination of unsightly parcels along the right of way.

However, it would appear in California that condemnation for resale would not be necessary to remedy such deprivations of access. In cases in other jurisdictions, private persons have been allowed to acquire property of adjoining landowners for the construction of access roads to landlocked parcels<sup>76</sup> although California courts apparently have not yet recognized this power as being a general right of property owners.<sup>77</sup>

Furthermore, it would appear that the condemnation of property by a public agency to provide access to a parcel landlocked by its own project<sup>78</sup> would be a valid taking for a public use, and proposals have been made to make statutory authority for such takings explicit and uniform.<sup>79</sup> So clarified, this power of a condemnor to remedy deprivations of access caused by its own improvements would eliminate any justification for such nonphysical remnant takings solely as a means of returning the property to productive private use. Where the condemnor deems the construction of new access to a landlocked parcel impractical or uneconomical, this is tantamount to a conclusion that return to productive private use simply is not worth the allocation of resources under the circumstances. Therefore,<sup>80</sup> although the taking of nonphysical remnants has been upheld on other grounds,<sup>81</sup> apparently no California court has done so under this theory.

B. Minimizing the Cost of the Improvement to the Condemnor

Traditionally, California courts have been reluctant to permit the taking of remnants of appreciable size under any theory. In the recent <sup>82</sup> Rodoni case, however, the Supreme Court held such a taking valid solely as a means of reducing the cost of the improvement to the condemnor. The Department of Public Works condemned 0.65 acres of a parcel which exceeded 54 acres in size for the construction of a freeway through farmland in Madera County. In doing so, however, the Department had to cut across the only access road to the parcel, rendering it landlocked and presumably of little economic value. Fearing that it would have to pay severance damages for the remainder equal to its original market value, the Department sought to condemn the 54-acre remainder under Section 104.1 of the Streets and Highways Code. That section authorizes the taking of an entire parcel in the course of state highway construction whenever "the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage . . . ."

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According to the majority opinion of Chief Justice Traynor:

Although a parcel of 54 landlocked acres is not a physical remnant, it is a financial remnant; its value as a landlocked parcel is such that severance damages might equal its value . . . . There is no reason to restrict . . . [remnant takings to] parcels negligible in size and to refuse to apply it to parcels negligible in value.

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

Under these circumstances excess condemnation is constitutional.

Evidently neither the court nor the Department of Public Works sought to justify the taking of the remainder as a "public use" on the theory that the actual use of the remnant intended by the condemnor would be of sub-

stantial benefit to the public. Rather, it was the beneficial effect of the taking itself, as a means of reducing the condemnor's ultimate costs for the project, that justified condemnation and rendered any private benefit from the use of the land "merely incidental." The court's decision is, therefore, essentially another application of the modern "incident-to" rationale used by the courts in urban renewal and substitute condemnation cases to validate takings incidentally necessary for the accomplishment of public purposes served by some other valid taking for a public use.

The property owner, Justice Mosk in dissent,<sup>85</sup> and commentators<sup>86</sup> have objected strenuously that such excess takings cannot minimize the condemnor's ultimate costs in the absence of unexpected favorable changes in the market value of the remainder at some future time. This objection requires consideration of the theoretical measure of compensation in partial-taking cases, and the actual relationship between jury verdicts in these cases and the trend of market values of such remainders.

According to Section 1248 of the California Code of Civil Procedure, the trier of fact in partial-taking cases must separately assess: (1) the value of the portion of the parcel to be condemned, (2) the damages accruing to the remainder by reason of its severance and the construction of the proposed improvement, and (3) the benefit to the remainder occasioned by the construction of the improvement. The condemnee is entitled to the value of the portion taken plus any excess of severance damages to the remainder over benefits conferred.<sup>87</sup> On the other hand, should the condemnor take the entire parcel, the condemnee would be entitled to the fair market value<sup>88</sup> of the entire parcel at the time of condemnation.

The condemnor may prefer in practice to take the entire parcel for a number of reasons. To begin with, the process of appraising, negotiating, and, if necessary, litigating the elements of damage in partial-taking cases

will normally prove considerably more difficult and costly than the simpler matter of determining and paying the fair market value of the entire parcel. However, the court in Rodoni<sup>89</sup> explicitly denied that this saving of cost and trouble could by itself justify the taking of the remainder. This<sup>90</sup> would, according to Chief Justice Traynor,

nullify the constitutional guarantee of just compensation . . . by permitting the state to threaten excess condemnation, not because it was economically sound, but to coerce condemnees into accepting whatever value the state offered for the property actually taken or waiving severance or consequential damages to avoid an excess taking.

Furthermore, the condemnor would have virtually unlimited remnant condemnation power under such a rule, regardless of the value or size of the remainder, since it is always more difficult and costly to determine compensation in partial-taking cases.

However, the condemnor may also find it economically advantageous to take an entire parcel where the remainder will be benefited as well as damaged by the proposed improvement. "General benefits," benefits accruing to a large number of similarly situated owners in the vicinity, may not be offset against damages in determining compensation; only "special benefits"<sup>91</sup> peculiar to the condemnee may be considered. Furthermore, even special benefits may be offset only against damages to the remainder; compensation for the value of the parcel taken<sup>92</sup> may never be reduced. As a result, the owner may realize a significant windfall and yet retain the remainder, while the condemnor may be required to pay up to the full market value of the entire parcel while retaining only part.

The majority in Rodoni carefully disclaimed the proposition that a condemnor might take a remainder solely to recoup benefits generated by the improvement.<sup>93</sup> However, the California rules on compensation for partial

takings may not only prevent the condemnor from recovering benefits rendered, but may also require the condemnor to pay substantial sums to an owner who has, in fact, been enriched by the construction of the improvement or retains property whose value has already been paid by the condemnor. The court carefully distinguished the avoidance of such windfall payments from pure recoupment, and found such avoidance a valid basis for remnant condemnation. <sup>94</sup>

Furthermore, as a number of commentators have noted, <sup>95</sup> the California method of determining compensation for partial takings can be quite confusing and complex to a trier of fact, <sup>96</sup> and may require bare intuitive speculation as to the use and value of the individual parts of the owner's parcel with little objective basis for the result. In some cases, the courts themselves have doubted the feasibility of complying with these rules in an objective and consistent manner. <sup>97</sup> As a result, condemnors have often complained that juries tend to reach verdicts unnecessarily generous to owners in partial-taking cases, and substantially out of line with the real economic detriment suffered by condemnees. <sup>98</sup> Recent studies in freeway construction projects seem generally to indicate that owners of remainders along the right of way tend to profit from these improvements on a scale inconsistent with the amounts of compensation they receive at the time of condemnation. <sup>99</sup>

In any case, it is clear from the majority opinion in Rodoni that remnant condemnation will be held valid to reduce the condemnor's ultimate project costs wherever there is a substantial risk that severance damages to a severed parcel would be equal to its value, and in any other case where the "economic benefit to the state [is] clear." <sup>100</sup> Certain of the remnant condemnation provisions in California statutes appear to transcend this standard, usually where authority to take depends only on a mere assertion of severance damage claims <sup>101</sup> or on a mere showing of "substantial" damage

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to the remainder. Other provisions appear clearly to fall within this  
standard, as where the condemnor may take only remainders of little or no  
value to the owner<sup>103</sup> or in such damaged condition as to require payment<sup>104</sup>  
of compensation equal to the value of the entire parcel.

To achieve uniformity and consistency with the Supreme Court's holding,  
all present remnant condemnation provisions should be replaced by a single  
provision governing all condemnors, which would authorize the taking of any  
remainder left by severance in such size, shape, or condition as to raise  
a substantial risk that the condemnor may be required to pay severance  
damages substantially equal to the value of the remainder at the time of  
the condemnation. Such a provision would limit condemnors to remnant takings  
of clear economic benefit to the condemnor and to those that are reasonably  
necessary "incidents" to the project. The provision would authorize the  
taking of physical remnants, as traditionally allowed, and "financial" rem-  
nants, as permitted in Rodoni. Finally, it would ensure that condemnees'  
genuine losses are compensated, while eliminating windfalls to which they  
have no legitimate claim.

#### IV. Recoupment Condemnation

The construction of public improvements is often of great benefit to owners of land in the immediate vicinity, particularly where the improvement remedies undesirable, natural, or artificial conditions or opens up new means of access to the area. Condemnors may seek to tap this pool of external economics by taking benefited parcels and reselling them at a profit to private persons.<sup>105</sup> American courts have generally invalidated such takings as being for no public use;<sup>106</sup> the actual use of the parcels taken would be of primary benefit to the private purchasers alone under the traditional view of the public use doctrine. Furthermore, the taking itself could not be regarded as a necessary incident to the construction of the improvement, since the value of the benefits could be recouped by such less drastic measures as special assessments, and since the former owners could equally well have exploited for the general welfare the added economic potential generated by the improvement.

As noted earlier, the California courts have rejected condemnation for the sole purpose of recoupment,<sup>107</sup> and California statutes do not authorize recoupment condemnation.<sup>108</sup> No change in this regard is warranted. However, it should be emphasized that a condemnor is not prohibited from recouping benefits generated by its project where excess land is taken as a valid exercise of protective or remnant condemnation powers.<sup>109</sup> In such cases, the resulting private benefit can be regarded as merely incidental to the public purposes which justified the action as a protective or remnant taking.

## V. Conclusion

The changes suggested in this article can be accomplished by the repeal of all present California statutory and constitutional provisions dealing with protective<sup>110</sup> and remnant takings,<sup>111</sup> and the enactment of a single provision, in Title 7 (Section 1237 et. seq.) of Part 3 of the Code of Civil Procedure or other appropriate place,<sup>112</sup> along the following general lines:

### Section 12 . Excess Condemnation.

§ 12 . (a) Any agency, entity, or person authorized to acquire land for public use may acquire additional land by gift, purchase, or condemnation, and may convey such land subject to appropriate conditions or covenants regarding its future use and occupation, where acquisition of such additional land is necessary:

(1) To protect a public work or improvement and its environs, and to preserve its view, appearance, light, air, and usefulness; or

(2) To reduce the cost to the condemnor of making or constructing a public work or improvement where only a portion of a parcel of land is to be occupied by the work or improvement and the remainder of the parcel is to be left in such size, shape, or condition as to raise a substantial risk that the condemnor may be required to pay severance or other damages substantially equal to the value of the remainder.

(b) Where such additional land is condemned under the first paragraph of subdivision (a) for the purpose of resale, the ordinance, resolution, or declaration authorizing such condemnation shall be only prima facie evidence of the necessity of the extent and manner of the taking of the additional land.

The result of these changes would be to provide condemnors with an adequate choice of measures to accomplish their legitimate purposes, and, at the same time, to protect landowners from excessive and arbitrary condemnations that serve no public need.