

1-1963

## Eminent Domain: Its Possible Effect on the Condominium

Harold R. Collins

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_law\\_journal](https://repository.uchastings.edu/hastings_law_journal)



Part of the [Law Commons](#)

---

### Recommended Citation

Harold R. Collins, *Eminent Domain: Its Possible Effect on the Condominium*, 14 HASTINGS L.J. 327 (1963).

Available at: [https://repository.uchastings.edu/hastings\\_law\\_journal/vol14/iss3/14](https://repository.uchastings.edu/hastings_law_journal/vol14/iss3/14)

This Comment is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

## EMINENT DOMAIN: ITS POSSIBLE EFFECT ON THE CONDOMINIUM

By HAROLD R. COLLINS\*

WITH the coming of a new type of subdivision, known as the condominium,<sup>1</sup> it is safe to assume that new legal problems will be close behind. It is the purpose of this comment to bring out some of the problems that will be peculiar to the condominium when it becomes the subject of an eminent domain proceeding.

A condominium is a multi-family dwelling in which each unit may be owned in fee.<sup>2</sup> The most workable plan to date is where the tenant-owner has a fee simple determinable to the air space of his unit, confined to the inner wall surface, along with an undivided interest in common to the common parts such as the building and grounds.<sup>3</sup> Most deeds provide that on destruction of the building, and a vote by a certain number of the tenant-owners not to rebuild but to sell, the fee to the air-space determines and the tenants hold the land in common.<sup>4</sup>

Eminent domain has been held to be that right of the people or the sovereign state to take private property for the public use.<sup>5</sup> This right is subject, however, to the just payment of compensation for the property taken or damaged.<sup>6</sup> California, because of its tremendous "population explosion,"<sup>7</sup> has become one of the leading states in the construction of freeways and the widening of streets to meet the new demands on its roads.<sup>8</sup> It has been necessary that this construction take place in existing residential neighborhoods, and this has caused

---

\* Member, Second Year class.

<sup>1</sup> Borgwardt, *The Condominium*, 36 CAL. S. BAR J. 603 (1961).

<sup>2</sup> Comment, *Community Apartments: Condominium or Stock Cooperative?*, 50 CALIF. L. REV. 299, 300 (1962).

<sup>3</sup> Panel Discussion, "How We Closed the Sale on Our First Condominium," Condominium Conference, *Condominium Abecedarium* (1961).

<sup>4</sup> See Grant Deed, the Green Hill Company, *Condominium Abecedarium* (1961).

<sup>5</sup> *Gilmar v. Lime Point*, 18 Cal. 229, 250 (1861); see, e.g., CAL. CODE CIV. PROC. § 1237; *Shasta Power Co. v. Walker*, 149 Fed. 568 (9th Cir. 1906).

<sup>6</sup> CAL. CONST. art. I, § 14; see, e.g., *Bauer v. County of Ventura*, 45 Cal. 2d 276, 289 P.2d 1 (1955).

<sup>7</sup> See WOOD & HELLER, *CALIFORNIA GOING, GOING . . .* 7-8 (1962).

<sup>8</sup> Comment, 34 So. CAL. L. REV. 319 (1961).

eminent domain to become a growing concern for the California courts.<sup>9</sup> Therefore, with the growth of condominiums in the state, it is not unlikely that we shall have a condominium project fall under eminent domain proceedings.

Eminent domain can affect a condominium in three ways: (1) complete taking, (2) partial taking with severance damages and (3) consequential damages.

### ***Complete Taking***

When the state or a corporation working under state authority takes the whole of a condominium project under condemnation proceedings the law is clear on the subject and, except for a few minor technical points, few problems should arise. When the state initiates condemnation proceedings, it is required to give notice of the proceedings to all persons having a property interest in the property concerned.<sup>10</sup> This would require the state to give notice to all the tenants as co-tenants in the common area of the condominium and to each individual tenant as owner in fee of his air space. On the issuance of the summons any of the co-tenants could appear and represent the whole condominium in order to show why the property described in the summons should not be condemned.<sup>11</sup> Any person who claims any title or interest to the property to be condemned, whether legal or equitable, may make an appearance in a condemnation suit.<sup>12</sup> This includes the proprietary interest of the lienholder or mortgagee who has a right to have that interest considered and determined in the condemnation proceeding.<sup>13</sup>

### ***Measure of Compensation***

In California, a jury determines the amount of compensation to be awarded and all other questions are left to the court to decide.<sup>14</sup> Compensation is measured by the fair market value.<sup>15</sup> This is the highest price the property could bring on the open market with a

<sup>9</sup> *Id.* at 319, n. 1.

<sup>10</sup> *E.g.*, Curran v. Shattuck, 24 Cal. 427, 433 (1864).

<sup>11</sup> CAL. CODE CIV. PROC. § 1245.

<sup>12</sup> CAL. CODE CIV. PROC. §§ 1245.3, 1246; *e.g.*, Harrington v. Superior Court, 194 Cal. 185, 228 Pac. 15 (1924); Stratford Irr. Dist. v. Empire Water Co., 44 Cal. App. 2d 61, 111 P.2d 957 (1941).

<sup>13</sup> Thibodo v. United States, 187 F.2d 249, 256 (9th Cir. 1951); see CAL. CODE CIV. PROC. § 1246.1.

<sup>14</sup> People v. Russell, 48 Cal. 2d 189, 195, 309 P.2d 10, 14 (1957).

<sup>15</sup> Sacramento Southern R.R. v. Heilbron, 156 Cal. 408, 414, 104 Pac. 979, 982 (1909); People v. Al. G. Smith Co., 86 Cal. App. 2d 308, 194 P.2d 750 (1948); see CAL. CODE CIV. PROC. § 1249.

reasonable time to sell it.<sup>16</sup> It would seem that the co-tenants would have a choice of two methods of having their property assessed. It is provided by statute that each parcel of property be separately assessed.<sup>17</sup> Technically, each unit in a condominium that is owned in fee is a smaller parcel of property that was created from a larger parcel through subdivision of the air space above the land.<sup>18</sup> It has also been held that, if integrated use of the several parcels to be condemned is the most reasonable and best use of the parcels, they may be considered together in fixing the market value of the property concerned.<sup>19</sup> It is almost unquestionable that the court would find that the most valuable and most reasonable use of a condominium unit parcel is in an integrated manner. If the co-tenants elected to have each unit assessed on an individual basis the compensation that they would receive for the undivided area (such as the outside structure of the building, the common areas, and the grounds) would automatically be reduced. The reason for this is that under separate assessment each unit would be a permanent easement upon the land and, when taken together with all of the other units, the easements would be of such substantial value that the common parts would have a substantially smaller market value while so burdened.<sup>20</sup> In most cases the co-tenants will probably desire to have their parcels assessed as an integrated unitary use of property. However, there are good reasons for having separate assessment. If the condominium has been present for a number of years before condemnation proceedings are started some units are very likely to have a greater value than their interests as shown under the original deed because of fixed improvements made in the unit over the years.

### *Severance Damages*

As previously stated, the majority of eminent domain proceedings today deal with the taking of private property for the construction of new freeways and the widening of existing streets.<sup>21</sup> Most often this results in only a partial taking of a person's property rather than the

---

<sup>16</sup> *E.g.*, *City of Oakland v. Pacific Coast Lbr. & Mill Co.*, 171 Cal. 392, 399, 153 Pac. 705, 707 (1915); *Joint Highway Dist. No. 9 v. Ocean Shore R.R.*, 128 Cal. App. 743, 18 P.2d 413 (1933).

<sup>17</sup> CAL. CODE CIV. PROC. § 1248 (1), (2).

<sup>18</sup> See notes 1, 3 *supra*. Subdividing creates smaller parcels from a larger whole. *Morris v. Reclamation Dist. No. 108*, 17 Cal. 2d 43, 52, 109 P.2d 1, 7 (1941).

<sup>19</sup> *People v. Ocean Shore R.R.*, 32 Cal. 2d 406, 423, 196 P.2d 570, 582 (1948), 6 A.L.R.2d 1179 (1949).

<sup>20</sup> *Los Angeles v. Los Angeles Pac. Co.*, 31 Cal. App. 100, 119, 159 Pac. 992, 999 (1916).

<sup>21</sup> See Comment, 34 So. CAL. L. REV. 319 (1961).

whole of the property, thus creating severance damages.<sup>22</sup> Article I, section 14, of the California State Constitution provides that "Private property shall not be taken or damaged for public use without just compensation. . . ."<sup>23</sup> It is also provided in the California Code of Civil Procedure that the owner of land which is partially taken is entitled to severance damages.<sup>24</sup>

It is in the area of only partial taking of a condominium project that the court will find its greatest problems. The general rule for computing severance damages is to take the difference between the market value of the whole parcel of land before the partial taking and the market value of the remaining part of the parcel after condemnation.<sup>25</sup> This brings up the question: what is the whole parcel? Generally an owner cannot receive compensation for severance damages for injury to separate and independent parcels.<sup>26</sup> This means that where the partial taking is confined to a part of the condominium that is held in common by the co-tenants, the whole parcel would be the common area of the condominium and would not include the individually owned units, as these are separate smaller parcels of land within the larger parcel.<sup>27</sup> It naturally follows that if the whole parcel does *not* include the independently owned units the market value of the whole parcel to be assessed is greatly reduced.<sup>28</sup> But in *People v. Thompson* the court held, stating as a general rule:<sup>29</sup>

In determining what constitutes a separate and independent parcel of land, when the property is actually used and occupied, unity of use is the principal test and . . . it is not considered a separate and independent parcel merely because it was . . . separated by an imaginary line. . . .

As it is hard to conceive of a more unified use of technically separate parcels of land than the condominium, it is certain that the condominium will come within this rule. It is only right that the co-tenants in a condominium should have their severance damages in this respect by the same rule as if the whole parcel were owned by one person.

---

<sup>22</sup> 1 ORCEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, 225 (2d ed. 1953). See generally §§ 47-65.

<sup>23</sup> *E.g.*, *Eachus v. City of Los Angeles*, 130 Cal. 492, 495, 62 Pac. 829, 830 (1900).

<sup>24</sup> CAL. CODE CIV. PROC. § 1248 (2); *County Sanitation Dist. No. 2 v. Averill*, 8 Cal. App. 2d 556, 47 P.2d 786 (1935).

<sup>25</sup> *People v. Ricciardi*, 23 Cal. 2d 390, 401, 144 P.2d 799, 805 (1943).

<sup>26</sup> *People v. Ocean Shore R.R.*, 32 Cal. 2d 406, 423, 196 P.2d 570, 582 (1948).

<sup>27</sup> See note 18 *supra*.

<sup>28</sup> 1 ORCEL, *op. cit. supra* note 22, § 107.

<sup>29</sup> 43 Cal. 2d 13, 23, 271 P.2d 507, 512 (1954); Annot. 6 A.L.R.2d 1197, 1201 (1949).

The damages are no less to the owner of a condominium than the same damages are to the owner of an apartment building.

### *Interests in Compensation*

The next logical question is: who gets compensated, and for what, when there has been a partial taking of a building<sup>30</sup> in a condominium project?<sup>31</sup> Also, where do the interests in the common parts lie after the partial taking of a building? The law in California as regards partial taking of a building with lease-hold interests in the building has been criticized as not being clear.<sup>32</sup> And it is certain that the problems that will surround the partial taking of a condominium will be no less easy to dispose of. If the partial taking of the building left a part of an individual tenant's unit standing, it is clear that both the unit owner and all of the co-tenants, as owners of the outer parts of the building, would be entitled to severance damages.<sup>33</sup> That the measure of the damages will be the reduction of the market value of the property is certain.<sup>34</sup> But how much, and to whom, are not so certain. The co-tenants as owners of the common area will be reimbursed for the cost of rebuilding the wall over that part of the building not condemned.<sup>35</sup> The co-tenants should receive the market value of the property taken, not including the units that might also be taken.<sup>36</sup> The unit owner should receive the difference in the market value of his unit less his interest in the common areas.<sup>37</sup> This would seem to work a hardship on the unit owner whose unit was taken to such an extent that it can no longer be used to live in, as his ability to sell his interest in the common area would be very poor if he had no unit to

---

<sup>30</sup> *City of Pasadena v. Porter*, 201 Cal. 381, 257 Pac. 526 (1927) (8.3 ft. from front of bldg.); *County of Los Angeles v. Signal R. Co.*, 86 Cal. App. 704, 261 Pac. 536 (1927); *Gluck v. Mayor, etc. of City of Baltimore*, 81 Md. 315, 32 Atl. 515 (1895); *City of Cincinnati v. Smythe*, 27 Ohio App. 70, 11 N.E.2d 274 (1937).

<sup>31</sup> It is more likely that a partial taking will occur to a low level condominium such as the one at Lot 1 Block 18 of the survey map of East San Rafael, Calif., rather than the high rise style being built by the Greenhill Company in San Francisco, Calif.

<sup>32</sup> *Dunlap & Keith, Landlord and Tenant and Severance Damages in Street Widening Cases*, 18 CALIF. L. REV. 31 (1929).

<sup>33</sup> CAL. CODE CIV. PROC. § 1248 (2); *cf. City of Pasadena v. Porter*, 201 Cal. 381, 257 Pac. 526 (1927).

<sup>34</sup> *People v. Ricciardi*, 23 Cal. 2d 290, 401, 144 P.2d 799, 805 (1943).

<sup>35</sup> It is assumed in this discussion that the partial taking destroys a lesser amount of the building than would allow the co-tenants to vote for sale. See *Borgwardt, supra* note 1, at 605.

<sup>36</sup> *City of Los Angeles v. Los Angeles Pacific Co.*, 31 Cal. App. 100, 119, 159 Pac. 992, 999 (1916).

<sup>37</sup> To compensate the unit owner for the common area taken would require the state to pay twice for the property.

sell with it. Therefore, the unit owner should have the reduction of the marketability of his interest in the common area assessed as part of his damages.<sup>38</sup>

### *Need for Reformation of Declaration*

The individual unit owner who has had his unit reduced in size and value, or completely taken, nevertheless has the liability of payment of management expenses.<sup>39</sup> The owners are required to pay these expenses in monthly installments, the amount of which is proportionate to their interests as set up in their declaration.<sup>40</sup> This means that the unit owner who has lost all or part of his unit will be required to pay management expenses on a proportionate interest that he no longer enjoys. The California Supreme Court in *City of Pasadena v. Porter*,<sup>41</sup> considering how to compensate for the rent due on a leasehold that was no longer valuable because of eminent domain proceedings, has held that it did not have the power to reform or revise a lease or to determine how the covenant to pay rent should be affected, nor could either party compel a re-adjustment. On this reasoning, the court affirmed the trial court's decision to award to the lessee the difference between the amount of rent as stated in the lease and the rental value of the premises after condemnation in one lump sum for the complete term. From this amount the lessee was to take a percentage each month to pay the portion of the rent which consisted of the excess value the lessee no longer received.<sup>42</sup>

There are several, obvious reasons why this rule should not apply to condominiums. The unit is probably owned in fee simple and technically this ownership would last forever.<sup>43</sup> It would therefore be prohibitive, if not impossible, to compute the amount that is the difference between the unit interest that is cited in the declaration and the interest the owner would have after condemnation. This alone would make it financially impossible for the state partially to condemn a condominium — a result which the courts have, to this date, refused to allow.<sup>44</sup> It would seem, then, that the court will be forced to reform

---

<sup>38</sup> This could be considered as severance damages to the unit owners' common area in the condominium. *Cf.* CAL. CODE CIV. PROC. § 1248 (2); County Sanitation Dist. No. 2 v. Averill, 8 Cal. App. 2d 556, 47 P.2d 786 (1935).

<sup>39</sup> Grant Deed, *op. cit. supra* note 4; Comment, 50 CALIF. L. REV. 299, 308 (1962).

<sup>40</sup> *Ibid.*

<sup>41</sup> *City of Pasadena v. Porter*, 201 Cal. 381, 257 Pac. 526 (1927).

<sup>42</sup> *Ibid.* See also Dunlap & Keith, *supra* note 32.

<sup>43</sup> BLACK, LAW DICTIONARY 741 (4th ed. 1951).

<sup>44</sup> *E.g.*, *People ex rel. v. Symons*, 54 Cal. 2d 855, 861, 9 Cal. Rptr. 363, 357, 357 P.2d 451, 455 (1960).

the declaration as to each affected unit's requirement to pay management expenses.<sup>45</sup> If the court cannot, it is submitted that it should be enabled to do so by appropriate legislation.

Another problem that will confront the court in a partial taking of a condominium is this: what happens to that interest in the common areas that was conjoined to those units that the state has taken? Do they go to the condemning agency or do they remain with the tenant owner who has lost his unit? It is doubtful that the interest in the common area would go to the state as eminent domain creates a new title and extinguishes all previous rights.<sup>46</sup> We are then left with the situation of having part of the common area of a condominium owned by a person who no longer owns a unit in the condominium. If a number of these non-unit owners of the common area were created, it can easily be imagined that they could cause a hardship on the remaining unit owners. No longer owning a unit in the condominium they are not likely to vote in favor of needed improvements or the assessments to manage the project. This could swiftly cause the condominium to deteriorate.<sup>47</sup> And as to the likelihood that non-unit owners would create such a situation, we need only remember that their interests would again become valuable only on the decision of a certain majority of the owners to sell the building instead of to restore it.<sup>48</sup> It has been suggested that to keep this possibility from happening, the condominium can reserve a lien with a power of sale on each owner's interest to secure his payment of assessments.<sup>49</sup> However, this would work only after the assessment itself had been voted in. Also, as the marketability of the non-unit owner's interest would be slight, the unit owners would be forced to buy the interest in order to protect themselves. In the long run, it might well be worth it to do this.

It would seem, then, that it would be better for all concerned if the court would compensate the owner who has lost his unit for his interest in the common areas and reform the deed, excluding him from the condominium altogether. Or, if the owner wished, instead of granting compensation the court could reform the declaration by lowering his interest (that can be assessed for management expenses) and reduce

---

<sup>45</sup> Cf. 1 ORGEL, *op. cit. supra* note 22, §§ 121, 125. The author discusses proportionate reduction of leasehold interests, and collects the cases.

<sup>46</sup> A. W. Duckett & Co. v. United States, 266 U.S. 149, 151 (1924); cf. Arechiga v. Housing Authority, 159 Cal. App. 2d 657, 324 P.2d 973 (1958).

<sup>47</sup> Comment, 50 CALIF. L. REV. 299 (1962).

<sup>48</sup> Borgwardt, *supra* note 1, at 609.

<sup>49</sup> Comment, *Community Apartments: Condominium or Stock Cooperative?*, 50 CALIF. L. REV. 299, 310 (1962).

his right to vote in the affairs of the condominium.<sup>50</sup> Neither one of these remedies may be completely satisfactory, but it cannot be denied that there will be a need for special judicial procedures in this area.

### *Consequential Damages*

Another area of eminent domain that is likely to create new problems is that of consequential damages. It has long been held in California that "the property which an abutting owner has in the street in front of his land is the right of access and of light and air and for an infringement of these rights he is entitled to compensation. . . ."<sup>51</sup> But this right is limited in that the injury to the abutter must be greater than that suffered by the general public.<sup>52</sup> It is also generally held that non-abutting owners have no property interest in a street that would entitle them to damages.<sup>53</sup> Again, the measure of damages is the reduction of the market value of the property.<sup>54</sup> In a case in which the reconstruction of a street, or the building of a freeway, restricts the right of access of a condominium, the owners have a right to compensation.<sup>55</sup> This compensation would be paid to the unit owners as owners in common of the undivided areas. There are two good reasons for this result. The first is that it is the land, which is owned in common, that abuts the street.<sup>56</sup> Therefore, it is only this land that meets the requirement that, to be eligible for compensation for access, the property must abut the street.<sup>57</sup> And secondly, as the access is equally lost to all the unit owners, it is only just that all of them receive compensation in accordance with their interests in the property.

However, when the damage to the condominium is not only that of access to the property, but also the taking of light, air, and view,<sup>58</sup> a different result should be reached. It is most likely that any obstruction to the light, air, and view of a condominium will affect some unit owners and not others. It would seem, then, that only those units

---

<sup>50</sup> See note 45 *supra*.

<sup>51</sup> *Brown v. Bd. of Supervisors*, 124 Cal. 274, 280, 57 Pac. 82, 83 (1899); *accord*, *Bacich v. Board of Control*, 23 Cal. 2d 343, 144 P.2d 818 (1943).

<sup>52</sup> *E.g.*, *Reardon v. San Francisco*, 66 Cal. 492, 206, 6 Pac. 317, 326 (1885).

<sup>53</sup> *Symons v. City and County of San Francisco*, 115 Cal. 555, 557, 42 Pac. 913, 914 (1897); *Annot.* 49 A.L.R. 333 (1927); *cf.* *Schnider v. California*, 38 Cal. 2d 439, 241 P.2d 1 (1952).

<sup>54</sup> *People v. A. L. G. Smith Co.*, 86 Cal. App. 2d 308, 311, 194 P.2d 750, 753 (1948).

<sup>55</sup> *Holloway v. Purcell*, 35 Cal. 2d 220, 230, 217 P.2d 665, 671 (1950), *cert. denied* 340 U.S. 883 (1950).

<sup>56</sup> Panel Discussion, "How We Closed the Sale on Our First Condominium," *Condominium Conference, Condominium Abecedarium* (1961).

<sup>57</sup> See notes 51 and 53 *supra*.

<sup>58</sup> *People v. Ricciardi*, 23 Cal. 2d 390, 404, 144 P.2d 799, 806 (1943).

that are facing the obstruction would have a loss of market value because of the obstruction. Of course there would also be resulting loss to the land held in common, but this loss would probably be nominal only.

If only those unit owners facing the obstruction are damaged can they bring an action for their loss? As the law stands now in California it would seem not, for the individual unit parcels of property do not abut the obstruction.<sup>59</sup> If nothing else, the outside of the building which is owned in common would stand between the obstruction and the individual unit.<sup>60</sup> It appears, therefore, that we are left with the situation of having a property owner sustaining damages to his property over and above that suffered by the public in general and without receiving adequate compensation for the loss of rights. The better view would be to allow those unit owners who have been damaged by the obstruction to receive compensation for the reduction in market value of their units.<sup>61</sup> Also, the co-tenants should be allowed to recover compensation for the loss to the common area, but rather than to allow the market value of the common area to be valued as a complete fee it should be assessed as a fee with substantial permanent easement.<sup>62</sup> This would result in a fair apportionment of the compensation award and still not cost the state any more than if the property had been owned in fee by one person.

---

<sup>59</sup> See note 53 *supra*.

<sup>60</sup> Panel Discussion, note 56 *supra*.

<sup>61</sup> The court has allowed the leaseholder as well as the fee holder abutter's rights in the appropriate case. *Kishlar v. Southern Pacific R.R.*, 134 Cal. 636, 66 Pac. 848 (1901). It would seem not too far a step to allow the unit owner this right.

<sup>62</sup> *City of Los Angeles v. Los Angeles Pac. Co.*, 31 Cal. App. 100, 119, 159 Pac. 992, 999 (1916).