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By NORMAN E. MATTEONI*

Introduction

APPELLATE courts often intersperse their opinions with signs informing the careful researcher of the direction in which the court is going. Those same signs, however, may give no indication of what course was charted through preceding cases. Such unclear judicial leads can often create confusion, especially where the preceding cases reached a different result on very similar facts. In 1965, the First District Court of Appeal, in *People v. Silveira*,[1] just so muddied the waters by distinguishing, with little comment, a 1934 California Supreme Court decision[2] that seemed to preclude the result reached by the lower appellate court. In so doing, the district court of appeal injected a virus of uncertainty into California's law of eminent domain.[3]

An earlier theory, adopted by the California Supreme Court in *Los Angeles v. Allen*,[4] was that in eminent domain controversies the take must be valued as part of the larger parcel. The court there ruled that the only question that the witnesses were authorized to answer was: "What is the value of this parcel of land, as it lies before us, being part of an undivided tract under single ownership?"[5] However, in the *Silveira* case, the district court of appeal affirmed a trial court's instruction to the jury that where the condemnor is taking only a part of the landowner's property, the jury must decide whether the part acquired has greater value considered as a separate parcel or as a portion of the larger tract from which it is to be taken, and must then determine their award according to the appraisal method that produces the highest value.

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1 236 Cal. App. 2d 604, 46 Cal. Rptr. 260 (1965).

2 Los Angeles v. Allen, 1 Cal. 2d 572, 36 P.2d 611 (1934).

3 People v. Silveira, 236 Cal. App. 2d 604, 618, 46 Cal. Rptr. 260, 271 (1965).

4 1 Cal. 2d 572, 36 P.2d 611 (1934).

5 *Id.* at 575, 36 P.2d at 612.

Any attempt to reconcile the *Silveira* instruction with the supreme court determination in *Allen* would seem to breach the principle of *stare decisis*. The attorneys for the State Division of Highways, therefore, made *Allen* their sharpest weapon for overturning the trial court on this instruction. But Presiding Justice Sullivan, writing for the court in *Silveira;* neatly avoided the reconciliation. He sustained the trial court's instruction by distinguishing the *Allen* decision as "just and proper under the particular facts of that case."[6]

By approving of *Allen* but not following it, *Silveira* implies that there is an exception to its own rule of law. The failure to discuss the matter adequately, however, makes it uncertain which case is the exception. The apparent conflict between *Allen* and *Silveira* is of critical importance to condemnees whose lands possess various "zones of value," the most valuable of which lies within the area under condemnation. The *Silveira* instruction gives assurance that the more valuable area will not be averaged in with the remaining land that does not carry so high a value. While this is a proper result under the facts of *Silveira*, the holding of the District Court of Appeal is unsatisfactory authority for other partial taking cases. The decision fails to anticipate the possibility of "re-creating" the higher zone upon the remainder. The undetermined issue seems to be whether such a recreated zone constitutes a special benefit that can only be offset against severance damages,[7] or whether compensation for the partial take should ignore consideration of any higher zone of value when that zone is immediately reestablished on the remainder.

The purpose of this article, therefore, is to explore the California rule of valuation that should be applied where, after condemnation, the condemnee possesses in the remainder a zone of value equivalent to that in the property taken by the condemnor. Since the focus of this article will be on the *Allen* and *Silveira* cases, the starting point is, of course, an analysis of the facts of those decisions.

Preliminary Review of Allen and Silveira

In *Allen*, the City of Los Angeles was acquiring land for the widening of Santa Monica Boulevard. The subject property, comprising 38.6 acres, fronted Santa Monica Boulevard to a maximum depth of 2000 feet. Immediately adjacent to Santa Monica Boulevard, to a depth of 107 feet, the apparent use of the property was commercial.[8] The court-appointed appraisers found that the value

[6] People v. Silveira, 236 Cal. App. 2d 604, 618, 46 Cal. Rptr. 260, 271 (1965).

[7] CAL. CODE CIV. PROC. § 1248(3).

[8] The property owner introduced evidence, without objection, that the adjacent strip had a marketable value for use as city lots. Los Angeles v. Allen, 1 Cal. 2d 572, 576, 36 P.2d 611, 613 (1934).

for this strip of land was $1.64 per square foot, while the rear portion of the property was given a value of 25¢ per square foot. The city's acquisition was across the entire frontage to a depth of approximately 33.5 feet. (See Diagram, Appendix "B").

The condemnee contended that since the land being taken had been valued at $1.64 per square foot, he was entitled to an award based on this valuation. The trial court, however, made its award on the basis of 32¢ per square foot, which was the weighted average of the two zones of value.[9]

In *Silveira*, the State Division of Highways sought a strip of land that fronted U.S. Highway 101, and varied in depth from 30 feet at the southerly end to 850 feet at the northerly end. The 9.304 acre parcel included four access openings to the freeway, which the landowners held as easements appurtenant to their lands.[10] The 260 acre tract from which the strip was being taken ran easterly to a set of railroad tracks and was cut at the northwesterly corner by Miller Creek. (See Diagram, Appendix "A").

The landowners offered valuation evidence based upon division of the property into various zones of value, one of these being a 21-acre parcel that had a highest and best use of subdivision into multiple and single family residences. Further, a highway commercial strip, fronting Highway 101 to a depth of 200 feet, could be extended from Miller Creek to the southerly boundary of the property; this, of course, being dependent upon the access openings that were being acquired. Immediately behind the ribbon of highway commercial frontage, a buffer strip of multiple family residences could be established. Finally, the balance of the property was adaptable to single family residences. The take for the widening of Highway 101 cut across the assumed commercial property and the potential subdivision of multiple and single family residences north of Miller Creek. However, the State's witnesses contended that the take did not include a highway commercial strip; rather they argued the entire property

[9] The use of a weighted average formula was quite confusing and offers a point of attack to those who argue that *Silveira* has in fact emasculated *Allen*. However, the decision on appeal was rendered at the insistence of an unhappy property owner, and the California Supreme Court chose to reject the appellant's prayer for a valuation of $1.64 per square foot rather than justify the trial court's use of the weighted average formula.

[10] One of the questions raised in *Silveira* was whether the subject property actually did have access to the public highway on which the land fronted. The court ruled that where the condemnee had unrestricted easements of access to the freeway at four fixed locations, it was reasonable to expect that any necessary consent of the California Highway Commission to the connection of a public road with the freeway at the particular openings would in all probability be obtainable, but for the State's plan to make Highway 101 a limited access freeway.

would develop as a planned community subdivision. The trial court instructed the jury that it could value the take either as a separate and distinct parcel, or as a part of the entire tract. The jury, given this choice, returned a verdict reflecting highway commercial values.

On appeal, the factual variances between these two cases provided the basis for their distinguishment. In *Allen*, the property owner appealed from the lower court judgment upon the ground that the amount of the award was not in conformity with section 10 of the Street Opening Act of 1903[11], which required the court to ascertain "[t]he value of each parcel of property sought to be condemned."[12] The appellant's objective was to obtain an award that reflected the strip's potential for commercial development. The supreme court, however, indicated that the appellant had not shown that lots 107 feet deep could not be subdivided and sold from the parcel *after*, as well as before, severance merely by recategorizing a sufficient portion of the remaining property along Santa Monica Boulevard after the take. "No showing is made that *any natural barrier or obstacle exists to shorten the depth available for city lots after the severance.*"[13] The decision further declared that the referees, by valuing the property taken as a part of the whole, did not charge against the owner the special benefit of an increase in value from the improved Santa Monica Boulevard. "The line between the two portions of the tract was arbitrarily chosen. This was a purely mental operation, used by the witnesses for the purpose of analysis of their problem."[14]

In *Silveira*, the State was not merely acquiring frontage land, but was also acquiring the property owner's easements for access, which were located on the frontage strip. These easements, which contributed substantially to the value of the strip, could not have been replaced upon the remainder of the property owner's land after condemnation. The closing of these access openings by acquisition did not constitute "the natural barrier or obstacle" that *Allen* discussed, but it did prevent the utilization of the remainder's depth for highway commercial use after the take. Thus, the condemnee in *Silveira* was losing an incident of ownership that was unique to the land being taken, whereas in *Allen* the condemnee had the same kind of frontage after condemnation as he had before it. This important factual distinction should have deterred the State in *Silveira* from relying so heavily upon the language of *Allen*.

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[11] Cal. Stats. 1903, ch. 268, § 10.

[12] CAL. STREETS & H'WAYS CODE § 4206(2). This statute is similar to the more general eminent domain provision in CAL. CODE CIV. PROC. § 1248(1).

[13] Los Angeles v. Allen, 1 Cal. 2d 572, 576, 36 P.2d 611, 613 (1934) (emphasis added).

[14] *Id.* at 575, 36 P.2d at 612.

The State, however, ignoring the factual dissimilarity of *Allen*, argued for an oversimplification of the principle of law postulated in that case, and hammered on the point that the part taken must be valued as a part of the entire tract, since a separate valuation would result in the inclusion of severance damages in the award for the part taken. This approach invited a facile response from the court—*Allen* was not applicable because it was distinguishable. It was distinguishable because "the condemnee is that case [*Allen*] claimed no severance damages, [as] the portion of the property not taken . . . had the same value after the severance."[15]

Unfortunately, this emphasis upon the issue of severance damages as the point of distinction between *Allen* and *Silveira* obscured the true determinative issue. Justice Sullivan did, however, at least suggest the correct approach for distinguishing *Allen* with the following language:

> The court [in *Allen*] therefore properly rejected the condemnee's claim on appeal that the part taken should have been valued at the higher per square foot rule of $1.64, since this would leave the condemnee in possession of more than it had originally . . . .[16]

The supreme court itself, in *Allen*, had said the same thing by assuming that the value of Allen's entire tract before the taking, computed at 32¢ per square foot, would be $500,000. It was reasoned, therefore, that the damages actually awarded, $8,614, plus the value of the acreage retained, $491,386, left the property owner whole. The court pointed out that if the property owner received $1.64 instead of 32¢ per square foot for the take, "it would have the value of the retained portion, or $491,386, plus $43,952, which would leave it in possession of $35,338 more than it had originally."[17]

Since it is clear that, in each decision, the court was attempting to prevent unjust enrichment to either party as a result of the partial take, the point of distinction should not be severance damages but, rather, whether or not the zone of value of such a partial take could be replaced. To allow the property owner compensation for a zone of value that can be restored on the remainder would leave him with more than he had originally. If it can be replaced, then the secondary question is whether it can be replaced in kind, as was the case in *Allen*. If the replacement is less desirable, the decrease in value between the original and the substitute should be awarded as severance damages. With this general approach in mind, it is now appropriate to turn to a more detailed discussion of the valuation procedure to be followed where a zone of value that is peculiar to the take before condemnation

[15] People v. Silveira, 236 Cal. App. 2d 604, 618, 46 Cal. Rptr. 260, 271 (1965).

[16] *Id.*

[17] Los Angeles v. Allen, 1 Cal. 2d 572, 576-77, 36 P.2d 611, 613 (1934).

is recreated on the remainder after condemnation.

Replacement of the Higher Zone of Value

To argue that a reestablished higher zone of value is a special benefit, which can only be offset against severance damages, takes the statutory working of Code of Civil Procedure section 1248(3) too literally. That provision directs the trier of fact to determine "how much the portion not sought to be condemned . . . will be benefited, if at all, by the construction of the improvement proposed by the [condemnor]."[18] The language used envisions an increase in the value of the remaining property that can only come from the public project. An obvious example is a newly created access to a public street, where none had existed before.[19] But when a public improvement, such as a street widening, allows duplication of the previously existing greater zone of value on the remainder, the classification of this duplicated zone of value as a special benefit is certainly questionable. It seems crucial, therefore, to determine whether the project creates a new zone of value or merely replaces what was already present on the property as a whole before condemnation.

This distinction is not intended to espouse the fictional transposition of the take from the frontage to the rear of the affected parcel. Rather, it requires that what is contained in the frontage take be scrutinized most carefully to determine whether the higher zone of value exists only because of the strip's juxtaposition to a major street.

For example, a condemnor may acquire a portion of a large undeveloped parcel of land located at a corner intersection for purposes of widening and improving one of the cross streets. If the property's corner has the potential of a service station site, while the balance of the property has development capability of a less valuable commercial use, the question may be whether or not compensation for the take demands inclusion of the higher zone of value. But, where the public project does not prevent or interfere with the reestablishment of the service station on the lands then located at the corner of the realigned intersection, any approach directing the trier of fact to include within the value of the take the value of a potential service station site would leave the property owner in a better financial position than before condemnation.

The lines defining these before and after condemnation sites are arbitrarily chosen. Since the pre-condemnation site can be recreated on the remaining land at the new intersection, the entire property

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[18] CAL. CODE CIV. PROC. § 1248(3).

[19] Los Angeles County v. Marblehead Land Co., 95 Cal. App. 602, 273 P. 131 (1928).

has the same potential it always possessed. The physical elements necessary to develop a service station site are the quadrant of area formed by the intersecting streets, together with suitable access to that area. Whether or not all the land needed for the street widening comes from one side of the street or the other, or both, should be irrelevant so long as sufficient area remains to carve out a service station site.[20]

When *Silveira* declared that the highest price definition of fair market value required the jury to select from the two valuation methods the one producing the higher value, the situation of simply replacing the zone of value in terms of its relation to the widened street was not considered. Moreover, if the State in *Silveira* had simply widened Highway 101 *without* acquiring access there would have been no "taking" of the commercial highway frontage. That zone of value could have been replaced on the 251 acres untouched by the acquisition. However, the multiple and single family subdivision of the 21 acres divided from the other lands by Miller Creek still may have required treatment as a separate parcel, were it shown that it was not possible to replace this zone on the remainder because of the natural barrier of Miller Creek.

Application of the Rule Against Averaging

In its prayer for reversal in *Silveira*,[21] the Division of Highways' attorneys sought additional support from an earlier opinion, *People v. Neider*.[22] In 1961, the First District's Division One sustained the ruling of a Marin County Superior Court, which had refused to instruct its jury:

> If you find from the evidence the strips of land taken by the State in the two cases before you are of higher or greater value considered as strips of commercially zoned land along the highway than they would be considered merely as average parts of the entire area . . . then it would be your duty to value them at their higher or greater value.[23]

This case, as did *Silveira*, involved the widening of Highway 101

[20] However, if the take in this hypothetical example were to run through the corner zone of value of a service station site in a diagonal manner that altered the former 90° corner intersection, the property owner may not receive back exactly what was taken. The question then to be asked is whether the after condition oblique corner is adaptable to a service station site. An affirmative answer produces a second question whether the new site has at least the equivalent value of the former location. If the after site is not as desirable, and consequently less valuable, then the difference must be measured in severance damages.

[21] *See* Opening Brief for Appellant at 32, People v. Silveira, 236 Cal. App. 2d 604, 46 Cal. Rptr. 260 (1965).

[22] 195 Cal. App. 2d 582, 16 Cal. Rptr. 58 (1961).

[23] *Id.* at 589-90 n.5, 16 Cal. Rptr. at 63 n.5.

with the accompanying construction of a chain link fence that cut off the formerly existing access to the roadway. And again, the property owner's expert witnesses testified that the area immediately fronting the old highway was adapatable to "highway commercial" use, while the rear portion of the property was believed suitable for a less valuable development, in this case as a shopping center. The appraisers for the condemnor felt that a shopping center was the best use for the entire property.

The appellate court in *Neider* upheld the trial court's refusal of the proffered instruction, reasoning that such an instruction directed the jury to adopt the theories of the property owner's witnesses. That is, under the proffered instruction, the jury was only required to determine the obvious in the case—whether "highway commercial" was worth more than "shopping center" property at that location—but not asked to decide whether the higher zone of value actually existed. The trial court, consequently, advised the jury to consider the economic feasibility of any particular use and, further, to determine whether "the frontage portion of the land is of exactly the average value per square foot of the whole parcel."[24]

The latter statement is a recognition of the law of *People v. Loop*[25] that witnesses are not required to value a partial take as "an *average* part of the whole." To value the take "as a part of the whole" simply means "that in assessing the value of the part taken the trier of fact is to consider the value of such part arising from its availability for use in conjunction with the part not taken."[26] Whether or not each square foot of a parcel has the same value as each and every other square foot is a question of fact. Certainly a portion of the property may be of a distinctly different quality from the rest.

While the *Neider* instruction went too far because it forced the jury to accept the property owner's theory of the case, the redraft of this instruction, used successfully in *Silveira*, removed the emphasis on the property owner's position by stating its law in a more theoretical form. No longer was the jury asked to decide whether the condemned property had greater value if considered as zoned highway commercial rather than as an average part of the larger parcel. Instead, the alternative of considering the value of the take as a separate parcel or as a part of the whole was presented. The distinction seems to be a matter of semantics. What was a directive in *Neider* became a suggestion in *Silveira*, which the jury was then required to translate into a factual context before rendering its verdict. Nevertheless, the *Silveira* instruction was approved by the court without a backward

[24] *Id.* at 590, 16 Cal. Rptr. at 63.
[25] 127 Cal. App. 2d 786, 274 P.2d 885 (1954).
[26] *Id.* at 798, 274 P.2d at 894.

glance to its 1961 pronouncement.

The Reestablishment Guideline: A Reconciliation of Allen and Silveira

There is no quarrel with the result reached in *Silveira*. But the decision failed to anticipate future cases in which the line between *Allen* and *Silveira* may be difficult to ascertain. From this perspective the instruction is too broad to be applied to any but the particular facts presented in *Silveira*. The case did not carry the logic found therein to its conclusion.

Silveira comments that "[t]he requirement that the part taken must be valued as a part of the whole and not as if it stood alone has been imposed because ordinarily this relationship gives the part . . . a greater value."[27] Although the opinion further states that this rule has been applied in order to protect the condemnee, the corresponding duty owed to the condemnor cannot be ignored. The constitutional requirement of "just compensation" is not only for the benefit of the party whose property is taken for public use, but also for the public that must pay for such property.[28] The unqualified *Silveira* instruction, if used in the service station site hypothetical mentioned above, would permit the condemnee to receive compensation representing a zone of value for a higher use, which he still has after the taking. Thus the condemnee is in a better position financially than before the condemnation.

Allen, if carried to its extreme, likewise presents a problem. The *Silveira* court could not accept what was asserted by the State to be the underlying principle of that prior case. In its closing brief, the State had argued that "where a portion of a larger parcel is condemned, it is unreasonable, as a matter of law, to predicate the value of the part taken upon a theory that such is a separate parcel."[29]

The correct statement of the law as found in both cases should be this: Where, after condemnation of a partial take, the remaining property does not have the same potential division into zones of value as the property possessed before condemnation, a determination must be made whether the part taken has a greater value considered as a separate and distinct parcel disconnected from the remainder, or whether the part taken has a greater value considered as a portion of the entire tract. The landowner is entitled to the highest value. As a corollary to this principle it follows that if the total property after

[27] People v. Silveira, 236 Cal. App. 2d 604, 619, 46 Cal. Rptr. 260, 272 (1965).

[28] People v. Pera, 190 Cal. App. 2d 497, 499, 12 Cal. Rptr. 129, 130 (1961).

[29] Closing Brief for Appellant at 28, People v. Silveira, 236 Cal. App. 2d 604, 46 Cal. Rptr. 260 (1965).

the taking has the same potential division into zones of value as it had before condemnation, the part taken must be valued as a part of the whole. The key question is whether or not the higher zone of value can be *reestablished* on the remainder.

The *Silveira* instruction can be further reworked to have a more universal application. Again, considering the service station site example, the following instruction could be given:

> During the course of this trial, there has been conflicting testimony indicating variously: 1) The property under condemnation possessed a zone of value representing a service station site in the before condition, and there is no such zone of value in the after condition; 2) The property did not possess a zone of value representing a service station site in either the before or after condition; and 3) If the property had a service station zone of value in the before condition, that zone of value is unchanged by the proposed public improvement, and the property still possesses a service station zone of value in the after condition on the realigned intersection. You must consider these alternatives as follows:
>
> If you determine that the property under condemnation possessed a zone of value representing a service station site in the before condition, and that there is no reestablishment of that site on the property in its after condition, then it is proper to award as compensation for that zone of the take the fair market value of a service station site.
>
> But, if you determine either that there was no service station site on the property in its before condition, or that, if there was one before, that such a site can be reestablished on the property in its after condition at the realigned intersection, then it is not proper to assign a value of a service station site to that portion of the take so indicated. Rather, that portion of the property must be considered as a part of the whole and must be valued according to the highest and best use determined to apply thereto.

This type of instruction avoids giving the jury the limited choice between consideration of the take as a separate parcel of property and as a part of the whole. The main concern is to offer unweighted alternatives on a factual rather than a theoretical basis. Certainly, if the higher zone of value is acquired, the jury is to fix compensation accordingly. But the instruction suggested allows the jury, having found that the take includes a higher zone of value, to determine whether that zone of value can be reestablished in kind upon the remainder. A strict interpretation of the *Silveira* instruction that the take may always be considered as a separate parcel of property would permit no such determination. The reconciliation of *Silveira* to *Allen*, however, makes that factual analysis essential. The major foreseeable difficulty presented by the instruction is its offering of a complex question to a jury that already may be suffering fatigue from balancing the conflicting theories and values of the several real estate appraisers called to testify.

Some states, such as Pennsylvania,[30] have enacted the "total before and after" test of value rather than California's[31] separate assessment of (1) value of the parcel taken, (2) severance damages to the remaining land, and (3) special benefits to the remaining lands. The "total before and after" test avoids the above complexity of deciding whether a recreated zone of value on the remainder is a special benefit. Still, the Pennsylvania approach requires the jury to reach the question, assuming there are various zones of value, whether or not the higher zone of value is lost to the acquisition or can be reestablished on the remainder. Since the jury is to weigh the issue of value, it must be guided through a troublesome instruction by a court that explicitly states the alternatives.

In conclusion, the First District Court of Appeal may well have known its destination in *Silveira*. However, its failure to chart a clear path around *Allen* makes it difficult for those that follow to interpret the seemingly conflicting guidelines of each decision. This article has attempted to provide, through a reconciliation of the two cases, the criterion for doing so.

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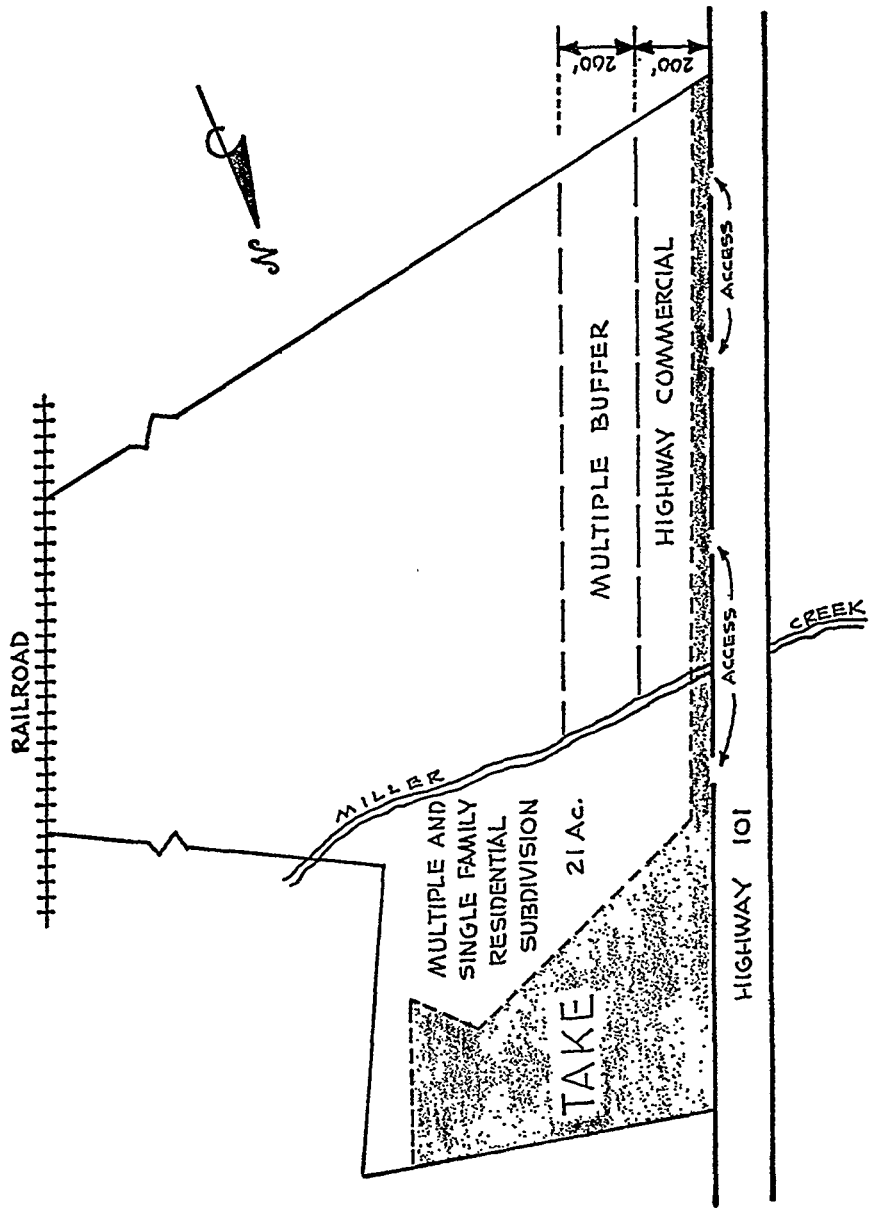
[30] PA. STAT. ANN. tit. 26, § 1-602 (1964): "Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property interest remaining immediately after such condemnation and as affected thereby . . . ."

[31] CAL. CODE CIV. PROC. § 1248.

APPENDIX A



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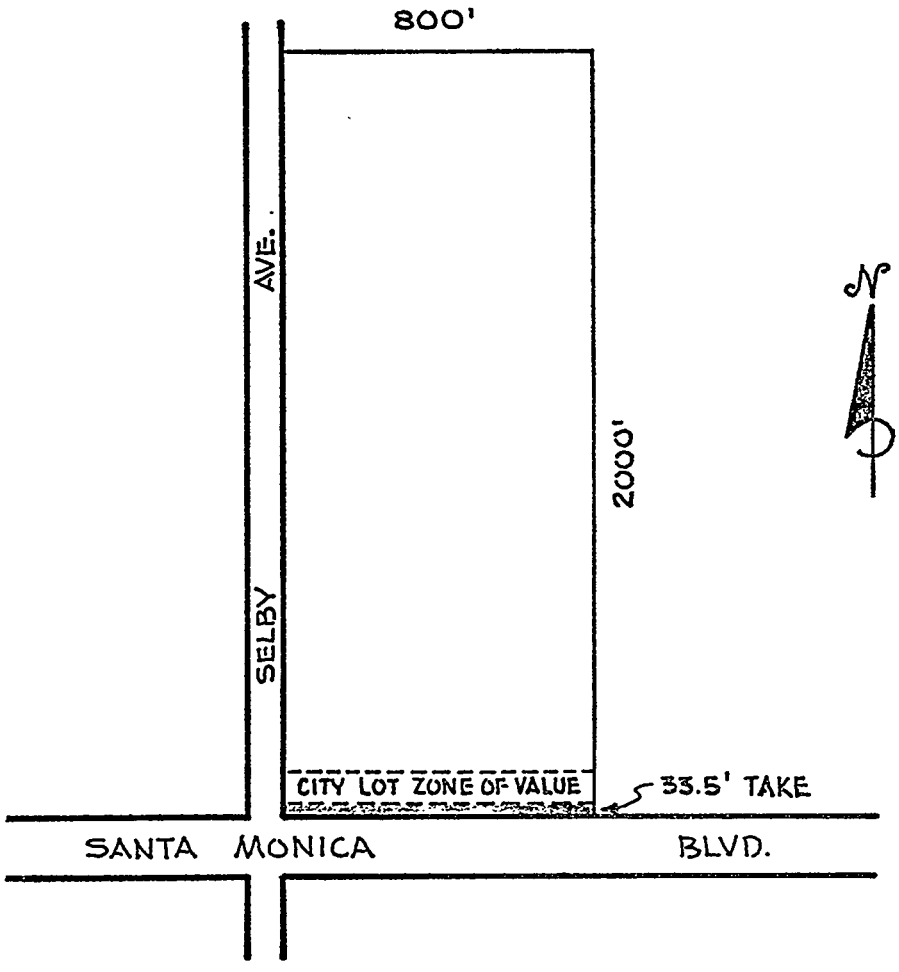
APPENDIX B



Los Angeles v. Allen