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BENEFITS AND JUST COMPENSATION IN CALIFORNIA

It often happens that when real property is *partially* taken in condemnation the remaining property is enhanced in fair market value by the construction of the public improvement. In proper situations, both the California¹ and the federal courts² allow this enhancement to the remaining land to be offset against the compensation otherwise awarded the landowner. In California, this is effected by assigning monetary values to (1) the property taken, called the *take*, (2) the damages inflicted on the remaining property due to the taking itself, called *severance damages*, and (3) the *benefits* received by the remaining property resulting from the construction of the improvement. "Just compensation" is determined by offsetting the benefits against the severance damages and then adding the value of the take.³

By contrast, in the federal courts, "just compensation" is the difference between the fair market value of the *entire property* before the taking and the fair market value of the *remaining property* after the construction of the improvement. Benefits are not given separate consideration in this federal "before and after" formula but are reflected in the award to the extent that they affect the fair market value of the remaining property.⁴ This note will compare the Cali-

¹ See, e.g., *Beveridge v. Lewis*, 137 Cal. 619, 70 P. 1083 (1902).

² See, e.g., *Bauman v. Ross*, 167 U.S. 548 (1897).

³ CAL. CODE CIV. PROC. § 1248: "The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceeding, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned . . .
2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned . . .
3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiffs. If the benefit shall be equal to the damages assessed under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken. If the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value. If the benefit shall be greater than the damages so assessed, the owner of the parcel shall be allowed no compensation except the value of the portion taken, but the benefit shall in no event be deducted from the value of the portion taken;

7. As far as practicable, compensation must be assessed for each source of damage separately."

⁴ *Aaronson v. United States*, 79 F.2d 139 (D.C. Cir. 1935). The federal statute is 33 U.S.C. § 595 (1964): "In all cases where private property shall

ifornia rule and its deficiencies with the federal rule, and will propose that the federal rule be adopted in California.

The California View

Early Position

California's initial position on the law of benefits was stated in 1866 by the California Supreme Court in *San Francisco, Alameda and Stockton Railroad v. Caldwell*.⁵ The court held that "benefit or advantage" to the remaining land resulting from the construction of a public project could be offset against the damages inflicted upon the landowner by the condemner.⁶ The court stated that

[w]hen the land of which he is deprived is a part only of a tract, such compensation may be ascertained by determining the value of the whole tract without the improvement and the portion remaining after the work is constructed. The difference is the true compensation to which the party is entitled.⁷

This rule announced by the California court is the "before and after" rule used in the federal courts today.⁸ *Caldwell* was extended seven years later in *California Pacific Railroad Company v. Armstrong*,⁹ where the court allowed the consideration of all possible future enhancement in property value, however remote, that the public improvement might bring to the landowner's remaining land.¹⁰

With railroads the principal users of the power of condemnation in California during the 1870's, speculative computation of benefits under the rule of *Armstrong* and *Caldwell*¹¹ all but eliminated money as a medium of compensation. These benefits consisted of potential increases in population, ease of transportation, or hypothesized increases in land values that the railroad was someday to bring to the landowner's remaining land.¹² Such "payments" in offsetting specu-

be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, where a part only of any such parcel, lot, or tract of land shall be taken, the jury or other tribunal awarding the just compensation or assessing the damages to the owner, whether for the value of the part taken or for any injury to the part not taken, shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement, and shall render their award or verdict accordingly."

⁵ 31 Cal. 368 (1866).

⁶ *Id.* at 373-74.

⁷ *Id.* at 376.

⁸ See note 3 *supra*.

⁹ 46 Cal. 85 (1873).

¹⁰ *Id.* at 91.

¹¹ L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN 41-44 (2d ed. 1953); YAGER, *Just Compensation*, RIGHT OF WAY, Dec. 1964, at 22.

¹² See *Beveridge v. Lewis*, 137 Cal. 619, 70 P. 1083 (1902), where these practices are discussed.

lative benefits, rather than in cash, caused a reaction that resulted in an amendment to the California Constitution in 1879.¹³ This amendment excluded any consideration of benefits in computing compensation to be paid by "corporations" for land that they acquired by condemnation.

The Present California Rule

Because the 1879 amendment applied only to corporations, railroads were left with a "loophole." By having a "disinterested" individual exercise the power of condemnation, then later buying the condemned property from this private party, the railroads were able to continue "paying" for property by offsetting overvalued speculative benefits rather than in cash.¹⁴

To close this "loophole," the California Supreme Court, in *Beveridge v. Lewis*,¹⁵ held that only those benefits classified as "special" could be offset.¹⁶ This rule, the court said, applied to both corporations and individuals.¹⁷

Benefits are said to be of two kinds, *general* and *special*. *General benefits* consist in an increase in the value of land common to the community generally, from advantages which will accrue to the community from the improvement. . . . They are conjectural and incapable of estimation. They may never be realized, and in such case the property-owner has not been compensated save by the sanguine promise of the promoter.

Special benefits are such as result from the mere construction of the improvement, and are peculiar to the land in question. . . .¹⁸

The court's intent in drawing this dichotomy clearly was to allow consideration only of those benefits that would produce a present, real and estimable increase in the fair market value of the remaining land.¹⁹ In essence, the court correlated the rule of benefits to the

¹³ CAL. CONST. art. I, § 14 (1879) provides: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, and no right of way . . . shall be appropriated to the use of *any corporation* . . . other than municipal until full compensation therefor be first made in money or ascertained and paid into Court for the owner, *irrespective of any benefits* from any improvement proposed by such corporation (Emphasis added).

¹⁴ See *Beveridge v. Lewis*, 137 Cal. 619, 70 P. 1083 (1902).

¹⁵ 137 Cal. 619, 70 P. 1083 (1902).

¹⁶ *Id.* at 623-24, 70 P. at 1085-86.

¹⁷ *Id.* at 622-23, 70 P. at 1084-85.

¹⁸ *Id.* at 623-24, 70 P. at 1085-86 (emphasis added).

¹⁹ Today all but a few jurisdictions draw this distinction. The reason given is fairness to the landowner. For discussions see 2 J. LEWIS, LAW OF EMINENT DOMAIN § 693 (3d ed. 1909); 3 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 8.6205 (rev. 3d ed. 1965); L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 65 (2d ed. 1953). Furthermore, the situations which have been held to create special benefits are similar under both the California and federal rules. Compare *Bauman v. Ross*, 167 U.S. 548 (1897), with *Beveridge v. Lewis*, 137 Cal. 619, 70 P. 1083 (1902). See also *United States v. Crance*,

rule of damages that prevents consideration of future and speculative injury.²⁰

Having properly eliminated the consideration of speculative benefits, the court then unnecessarily limited the offsetting of special benefits to severance damage.²¹ The reason the court excluded the offsetting of benefits against the value of the take was its fear that juries would still award inadequate compensation to the condemnee.²² It is questionable today, however, whether juries favor the condemnor—if they ever did—and since benefits in California *are* an appropriate element in computing compensation,²³ it is illogical to limit the consideration and effect to only one segment of the total damage.²⁴ Nonetheless, *Beveridge* is the law in California today.

A Critical Look at the California Rule

Double Compensation

The California rule unjustifiably favors the landowner by allowing double compensation when the special benefits exceed severance damages. This double compensation results from breaking the total damage caused by the condemnation into two elements—damage for the take and severance damages—and by then offsetting the benefits only against the severance damages. This means that the owner receives non-monetary advantage if special benefits exceed severance damages, in addition to full monetary compensation for the take.²⁵ Since the benefits and the compensation for the take overlap in this situation, the landowner receives double compensation. By comparison, under the federal rule the benefits are offset against *all* damage, thereby eliminating any double compensation.²⁶

To illustrate, suppose that a highway is constructed across the

341 F.2d 161 (8th Cir. 1965); *Aaronson v. United States*, 79 F.2d 139 (D.C. Cir. 1935); *United States v. 1,000 Acres of Land*, 162 F. Supp. 219 (E.D. La. 1958); 1 J. BONBRIGHT, VALUATION OF PROPERTY 410 (1937).

²⁰ See generally 3 T. SEDGWICK, MEASURE OF DAMAGES 2298 *passim* (9th ed. 1912).

²¹ *Beveridge v. Lewis*, 137 Cal. 619, 626, 70 P. 1083, 1086 (1902).

²² 3 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 8.6206(1) (rev. 3d ed. 1965).

²³ CAL. CODE CIV. PROC. § 1248; see note 2 *supra* for text of section 1248.

²⁴ See generally 1 J. BONBRIGHT, VALUATION OF PROPERTY 422 (1937); 1 W. ELLIOTT, LAW OF ROADS AND STREETS § 274 (4th ed. 1926); 2 J. LEWIS, LAW OF EMINENT DOMAIN § 693 (3d ed. 1909); 3 P. NICHOLS, THE LAW OF EMINENT DOMAIN §§ 8.6-.6206 (rev. 3d ed. 1965); L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 65 (2d ed. 1953); 3 T. SEDGWICK, MEASURE OF DAMAGES 2293 (9th ed. 1912).

²⁵ *Contra Costa County Water Dist. v. Zuckerman Const. Co.*, 240 Cal. App. 2d 908, 50 Cal. Rptr. 224 (1966); *People ex rel. Department of Pub. Works v. Hurd*, 205 Cal. App. 2d 16, 23 Cal. Rptr. 67 (1962).

²⁶ *United States v. River Rouge Improvement Co.*, 269 U.S. 411 (1926); *United States v. Fort Smith River Dev. Corp.*, 349 F.2d 522 (8th Cir. 1965).

landowner's property, dividing the parcel and taking one-half of its physical area. Before condemnation, the highest and best use of this land was for grazing livestock. After the highway is completed, however, the value of the remaining parcel is enhanced because portions may be leased as service station sites.²⁷ Assume that severance damages are estimated at \$1,000, while special benefits are estimated to be \$15,000. If the fair market value of the land before the taking were \$10,000, the following results would occur under the two different rules.

In California, the landowner would be entitled to a total of \$5,000, *i.e.*, the value of the take (\$5,000) *plus* the value of the severance damage when offset against the value of the special benefits (\$1,000 - \$15,000, or zero). Under the federal rule, since the fair market value of the land before the project was \$10,000 and the fair market value of the remaining land is \$24,000, the landowner would receive no money, but he would own land worth more after the project than be-

²⁷ For other examples where the California courts have found special benefits, see *Contra Costa County Water Dist. v. Zuckerman Const. Co.*, 240 Cal. App. 2d 908, 50 Cal. Rptr. 224 (1966) (use of underground pipelines built by the condemnor); *People ex rel. Department of Pub. Works v. Anderson*, 236 Cal. App. 2d 683, 46 Cal. Rptr. 377 (1965) (use of frontage roads); *People ex rel. Department of Pub. Works v. Los Angeles*, 220 Cal. App. 2d 345, 33 Cal. Rptr. 797 (1963) (additional land from street abandonment caused by the project); *People ex rel. Department of Pub. Works v. Edgar*, 219 Cal. App. 2d 381, 32 Cal. Rptr. 892 (1963) (potential commercial sites along a freeway due to construction of an overpass); *People ex rel. Department of Pub. Works v. Hurd*, 205 Cal. App. 2d 16, 23 Cal. Rptr. 67 (1962) (possible zoning change due to construction of the project); *Hayward v. Unger*, 194 Cal. App. 2d 516, 15 Cal. Rptr. 301 (1961) (an increased flow of traffic past a business due to street widening by the condemnor); *People v. Thomas*, 108 Cal. App. 2d 832, 239 P.2d 914 (1952) (fencing the condemnee's remaining land after highway improvement); *People v. Al. G. Smith, Co.*, 86 Cal. App. 2d 308, 194 P.2d 750 (1948) (an increase in the highest and best use of the land due to the project); *Los Angeles County v. Marblehead Land Co.*, 95 Cal. App. 602, 273 P. 131 (1928) (improved access to highway).

For examples held to constitute only general benefits, see *Pierpont Inn, Inc. v. State*, 261 A.C.A. 854, 68 Cal. Rptr. 320 (1968) (construction of an off-ramp in the vicinity of a motel); *Dunbar v. Humboldt Bay Mun. Water Dist.*, 254 Cal. App. 2d 480, 62 Cal. Rptr. 240 (1967) (increased swimming, fishing, and fordability of a stream due to construction of a state dam); *People ex rel. Department of Pub. Works v. Lipari*, 213 Cal. App. 2d 485, 28 Cal. Rptr. 808 (1963) (right to be viewed from a newly constructed freeway). The reasoning in *Lipari* is, perhaps, the most bizarre in the California cases on special benefits. Especially noteworthy is the theory that since the purpose of freeways is to transport the population rapidly, this negates any special benefit in the abutting property which might arise from being seen from the highway. One wonders, if this is so, why restaurants, motels and service stations purchase such property and why highway billboards are placed there. *People v. McReynolds*, 31 Cal. App. 2d 219, 87 P.2d 734 (1939) (realigning a highway on the condemnee's land).

fore.²⁸ The landowner suffers no loss under either the California or federal rule, but in California the condemnee receives *more* than he has lost. This is not "just" compensation. As the United States Supreme Court has stated:

The *just* compensation required by the Constitution to be made to the owner is to be *measured* by the *loss* caused to him by the appropriation. He is entitled to receive the *value* of what he has been deprived of, and no more. To award him less would be unjust to him; to *award him more* would be *unjust to the public*.²⁹

The Court then summed up the theory of double compensation as follows:

[I]t is neither just in itself, nor required by the Constitution, that the owner should be entitled both to receive the full value of the part taken . . . and to retain the increase in value of the [remaining land].³⁰

"Unjust" Compensation

The power of eminent domain is inherent in sovereignty and is "absolute and unlimited."³¹ It is unnecessary, therefore, to have a constitutional provision authorizing the sovereign to take private property for the public good, with or without compensation.³² Constitutional provisions on eminent domain merely limit the use of this absolute power in order to balance a countervailing interest.³³

The limitation found in both the United States Constitution and the California Constitution is that private property shall not be taken without "just compensation."³⁴ This vague provision obviously requires judicial interpretation. *Just* compensation, as interpreted by the United States Supreme Court, "means a compensation that would be just in regard to the *public* as well as in regard to the *individual*."³⁵ The California cases echo this sentiment that the constitutional limitation is to "balance the equities" of the state and the individual.³⁶

²⁸ *E.g.*, United States v. River Rouge Improvement Co., 269 U.S. 411 (1926); Bauman v. Ross, 167 U.S. 548 (1897); United States v. 2477.79 Acres of Land, 259 F.2d 23 (5th Cir. 1958); Aaronson v. United States, 79 F.2d 139 (D.C. Cir. 1935).

²⁹ Bauman v. Ross, 167 U.S. 548, 574 (1897) (emphasis added).

³⁰ *Id.* at 575.

³¹ 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.3 (rev. 3d ed. 1964).

³² *Id.*

³³ *Id.*

³⁴ U.S. CONST. amend. V provides: "[N]or shall private property be taken for public use, without just compensation." This is made obligatory on the states by the fourteenth amendment. See McCoy v. Union E.R.R., 247 U.S. 354, 365-66 (1918). CAL. CONST. art. 1, § 14 provides: "Private property shall not be taken or damaged for public use without just compensation. . . ."

³⁵ Bauman v. Ross, 167 U.S. 548, 570 (1897), quoting Chesapeake & O. Canal Co. v. Key, 5 Fed. Cas. 563, (No. 2,649) (C.C.D.C. 1829). (Emphasis added).

³⁶ People *ex rel.* Department of Pub. Works v. Symons, 54 Cal. 2d 855,

Clearly, where the landowner suffers no loss in value, a rule that forces the condemner to pay double compensation upsets this "balance" and violates the policy of the constitutional provisions.³⁷

Although it has never been directly raised as an issue in a California case,³⁸ some public condemners have taken the position that the constitution establishes not only the minimum requirements of the amount of the landowner's recovery, but the maximum requirements of the amount of the state's payments.³⁹ Any statute requiring excess compensation would, by this analysis, be "unjust" to the state and, therefore, violate the policy of the constitution.

Both equitably and constitutionally the special benefits that exceed severance damage should be offset against compensation for the take. If this were done in California, the total cost of each project would be reduced,⁴⁰ producing a financial surplus that is not now available. This surplus could then be used to create more projects. With the attendant general benefit that each new project produces, the landowner would benefit *along with the general public*, albeit not as dramatically as he profits under the present system.

Inconsistency

In computing compensation where water rights are taken, section 1248.4 of the Code of Civil Procedure⁴¹ allows the offsetting of benefits against the total damage incurred. Section 1248 of the Code of Civil Procedure delineates the California rule limiting the offsetting of

861, 357 P.2d 451, 455, 9 Cal. Rptr. 363, 367 (1960); *Bacich v. Board of Control*, 23 Cal. 2d 343, 350-51, 144 P.2d 818, 823 (1943).

³⁷ Yager, *Just Compensation*, RIGHT OF WAY, Dec. 1964, at 21-22.

³⁸ Yager, *Just Compensation*, RIGHT OF WAY, Dec. 1964, at 21. *But see* *Contra Costa County Water Dist. v. Zuckerman Const. Co.*, 240 Cal. App. 2d 908, 50 Cal. Rptr. 224 (1966); *People ex rel. Department of Pub. Works v. Fair*, 229 Cal. App. 2d 801, 808, 40 Cal. Rptr. 644, 649 (1964) (the court said there were "very interesting constitutional questions regarding the interpretation of Code of Civil Procedure section 1248.4").

³⁹ *See generally* *Contra Costa County Water Dist. v. Zuckerman Const. Co.*, 240 Cal. App. 2d 908, 50 Cal. Rptr. 224 (1966); *People ex rel. Department of Pub. Works v. Fair*, 229 Cal. App. 2d 801, 40 Cal. Rptr. 644 (1964).

⁴⁰ *See generally* Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 CALIF. L. REV. 833 (1963).

⁴¹ CAL. CODE CIV. PROC. § 1248(4) provides: "If the property sought to be condemned be water or the use of water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property." (Emphasis added).

special benefits to severance damage in the condemnation of land.⁴² There is no justification for a distinction between compensation for water rights and compensation for land. In both situations the owner must be given just compensation for his loss.⁴³ In both cases there is loss due to the taking, damage to the remaining rights because of such taking, and some benefit to be offset.⁴⁴ It is inconsistent to limit the offsetting of benefits to severance damages in the taking of one form of property right, but to allow the offsetting of benefits against *all* damage in the taking of another form of property right. Although all the leading commentators⁴⁵ have pointed out the logical inconsistency of limiting the benefits to severance damage, California continues this rule where there is a partial taking of land.

Simplicity

The federal rule is simpler to apply and to understand than the California rule. Under the California rule the jury must separately value the part taken, the severance damage and the benefit.⁴⁶ This process obscures the real issue—whether the owner has suffered any loss of value—and is an artificial and inadequate method of arriving at the true loss. In a partial taking situation, the portion taken by the condemnor is normally never sold because there is no true market for a 50x10' frontage along a road, or for an irrigation canal right-of-way. The valuation of the portion taken, therefore, is a fiction.⁴⁷ A separate measurement of severance damage also complicates the process of ascertaining the owner's compensable loss. Severance damage is the loss in value that the remaining land suffers in *comparison* with the pre-condemnation value of that land as a part of the whole tract.⁴⁸ Here, too, the jury must attempt to compare values that, due to the absence of any market or base for such comparative damage, are never accurately established.

The federal rule avoids such inaccuracies by placing a value upon the total land prior to the taking, and upon the remainder of the land after the taking. These are real, not artificial, values since such parcels could be sold and do, therefore, have true market values. It is the value of the remaining land that includes the factor of special benefit, for the special benefit will create a present, real and estimable increase in the fair market value of this remaining land. Without having to fragment the elements of damage into artificial units,

⁴² See note 2 *supra*.

⁴³ See *Collier v. Merced Irr. Dist.*, 213 Cal. 554, 2 P.2d 790 (1931); *Crum v. Mount Shasta Power Corp.*, 117 Cal. App. 586, 4 P.2d 564 (1931).

⁴⁴ *Collier v. Merced Irr. Dist.*, 213 Cal. 554, 2 P.2d 790 (1931); *Crum v. Mount Shasta Power Corp.*, 117 Cal. App. 586, 4 P.2d 564 (1931).

⁴⁵ See note 23 *supra*.

⁴⁶ See note 2 *supra*. See also *People ex rel. Department of Pub. Works v. Anderson*, 236 Cal. App. 2d 683, 695-96, 46 Cal. Rptr. 377, 386 (1965).

⁴⁷ See *Commonwealth v. Sherrod*, 367 S.W.2d 844, 852-53 (Ky. 1963).

⁴⁸ See *United States v. Miller*, 317 U.S. 369, 376 (1943).

the jury, by comparing the before and after values, can quickly and simply determine the extent of the real loss to the owner from the condemnation.⁴⁹

Summary

In a partial taking by condemnation, the "just" compensation limitation requires that any special benefit to the remaining land be offset against *all* damage inflicted by the condemner. However, in California, this is not done. Instead, the determination of just compensation is complicated by fragmenting the total damage into two elements.⁵⁰ In land acquisitions, the offsetting of benefits is then illogically limited to severance damage. The result is that in those situations where benefits exceed severance damage, the landowner receives an inequitable and unconstitutional double compensation.

By contrast, the simpler federal rule properly offsets both damage and benefit by comparing the values of the land before and after the condemnation. Where the after value—which includes the value of special benefits as measured by fair market value—is equal to or greater than the before value, no monetary compensation is awarded the landowner. California, while initially holding the federal view,⁵¹ overreacted in favor of the landowner.⁵² It must return to the federal rule if its law of benefits is to conform with logic, equity and constitutional policy.

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⁴⁹ See generally *Bauman v. Ross*, 167 U.S. 548 (1897); *United States v. 2477.79 Acres of Land*, 259 F.2d 23 (5th Cir. 1958); L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 65 (2d ed. 1953); Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 CALIF. L. REV. 833, 868 (1963).

⁵⁰ CAL. CODE CIV. PROC. § 1248.

⁵¹ *San Francisco, A. & S. R.R. v. Caldwell*, 31 Cal. 368 (1866).

⁵² *Beveridge v. Lewis*, 137 Cal. 619, 70 P. 1083 (1902).

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