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RESTORATION COSTS AS AN ALTERNATIVE MEASURE OF SEVERANCE DAMAGES IN EMINENT DOMAIN PROCEEDINGS

When a portion of a landowner's real property is taken in condemnation proceedings,¹ the landowner, by state and federal constitution, is guaranteed "just compensation" for his loss.² In determining "just compensation" in cases of partial taking, the California courts have resorted to a "value plus damages" evaluation.³ An award determined by the application of this method includes compensation for (1) the fair market value of the property taken,⁴ and (2) the decline in

¹ For there to be a partial taking, the original piece of property (consisting of the part condemned and the part remaining) must have been in unity of use and ownership and the parts must have been contiguous. *People ex rel. Department of Pub. Works v. Dickinson*, 230 Cal. App. 2d 932, 41 Cal. Rptr. 427 (1964). *But see United States v. Honolulu Plantation Co.*, 182 F.2d 172, 178 (9th Cir.), *cert. denied*, 340 U.S. 820 (1950).

² U.S. CONST. amend. V: "[N]or shall private property be taken for public use, without just compensation." *E.g.*, CAL. CONST. art. I, § 14: "Private property shall not be taken or damaged for public use without just compensation. . . ." Only in New Hampshire and North Carolina is there no express constitutional requirement of just compensation. However, these constitutions have been interpreted to require it. *Opinion of the Justices*, 66 N.H. 629, 33 A. 1076 (1891); *Mount Washington Rd. Co.*, 35 N.H. 134, 141-42 (1857); *Staton v. Norfolk & C.R.R.*, 111 N.C. 278, 16 S.E. 181 (1892); see Comment, *Eminent Domain Valuation in an Age of Redevelopment: Incidental Damages*, 67 YALE L.J. 61 n.1 (1957).

³ *E.g.*, *Riverside v. Kraft*, 203 Cal. App. 2d 300, 21 Cal. Rptr. 425 (1962). See generally CAL. CODE CIV. PROC. § 1248(1). "Value plus damages" is one of three methods for determining the whole award of compensation. For an explanation of the three methods, see generally 4 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 14.23 (rev. 3d ed. 1962) [hereinafter cited as NICHOLS]; 1 L. ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* §§ 49-51 (2d ed. 1953) [hereinafter cited as ORGEL]; G. SCHMUTZ & E. RAMS, *CONDEMNATION APPRAISAL HANDBOOK* 96-100 (1963) [hereinafter cited as SCHMUTZ & RAMS].

⁴ *Sacramento S.R.R. v. Heilbron*, 156 Cal. 408, 104 P. 979 (1909). *Heilbron* defined *market value* as the highest price which the property would bring on the open market with a reasonable time allowed to find a purchaser who has knowledge of all the uses and purposes for which the property is suited. *Id.* at 409, 104 P. at 980. Today the *fair market value standard* is virtually the universal method of determining just compensation. See, *e.g.*, *Cole Inv. Co. v. United States*, 258 F.2d 203 (9th Cir. 1957); *United States v. 11,360 Acres of Land*, 62 F. Supp. 968, 969 (N.D. Cal. 1945); *People v. Thompson*, 43 Cal. 2d 13, 27, 271 P.2d 507, 515 (1954); *Board of Trustees v. B.J. Service, Inc.*, 75 N.M. 459, 406 P.2d 171 (1965). *But cf. In re Condemnation of Lands*, 250 F. 314, 315 (E.D. Ark. 1918); Note, *Compensation for a Partial Taking of Property: Balancing Factors in Eminent Domain*, 72 YALE L.J. 392, 394-95 (1962).

fair market value of any remaining property due to the severance of the condemned portion.⁵

This second item of compensation, "severance damages,"⁶ ideally should include reimbursement for incidental damages to the landowner. One such incidental damage, which is often ignored when determining the loss in the fair market value of the retained portion, is the cost of restoration, *i.e.*, that cost necessarily incurred by the landowner in restoring his remaining land to a condition similar to that prior to the condemnation.⁷ In some situations, the cost of restoration, and *not* the decline in the "fair market value," should be the measure for severance damages. It shall be the objective of this note to examine those situations in which restoration costs have been considered by the California courts in measuring severance damages, and to discuss the validity, if any, of such measurement.

Theory of Incidental Damage⁸

Though costs of restoration are only one small part of the judicial concept of incidental damages, it is necessary to set forth some of the background and theory of this concept in order to understand the courts' refractory adherence to the fair market value standard.⁹ Starting with the 1893 Supreme Court decision in *Monongahela Navigation Company v. United States*,¹⁰ both the federal¹¹ and the state¹² courts have consistently held that the constitutional guarantee of just compensation applies only to the taking of tangible property interests. The particular use of the property is considered to affect only the owner's personal interests. The injury suffered due to the prevention or hinderance of a particular use is not a taking of a tangible interest in property, and, therefore, is a noncompensable incidental damage.¹³ Thus, it will be noticed that just compensation, according to its early

⁵ *E.g.*, *People v. Thompson*, 43 Cal. 2d 13, 271 P.2d 507 (1954); *see* 4 NICHOLS § 14.1[2].

⁶ CAL. CODE CIV. PROC. § 1248(2): ". . . the damages which will accrue to the portion [of the property] not sought to be condemned, by reason of its severance from the portion sought to be condemned . . ."

⁷ *Riverside v. Kraft*, 203 Cal. App. 2d 300, 21 Cal. Rptr. 425 (1962).

⁸ A leading writer has said that the term incidental damage is one of convenience rather than logic which encompasses those damages not compensable. 1 ORGEL § 66, at 305. For a full discussion of the various damages placed in this category, *see id.* §§ 66-80.

⁹ Cases cited note 4 *supra*.

¹⁰ 148 U.S. 312 (1893).

¹¹ *E.g.*, *United States v. Building Known as 651 Brannan Street*, 55 F. Supp. 667, 670 (N.D. Cal. 1944).

¹² *E.g.*, *State H'way Comm'n v. Burk*, 200 Ore. 211, 244-45, 265 P.2d 783, 799 (1954).

¹³ *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); *United States v. Building Known as 651 Brannan Street*, 55 F. Supp. 667, 670 (N.D. Cal. 1944); *State H'way Comm'n v. Burk*, 200 Ore. 211, 244-45, 265 P.2d 783, 799 (1954).

interpretation, is for the injury to the property, not to the owner.¹⁴

State courts have concurred in this interpretation of just compensation¹⁵ and have relegated costs of restoration to the category of incidental damages,¹⁶ as well as such items as loss of goodwill,¹⁷ loss of profits,¹⁸ moving expenses,¹⁹ prevention of a projected use,²⁰ and circuity of travel.²¹ As Mr. Justice Frankfurter has stated:

In view . . . of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as a part of the burden of common citizenship.²²

Two reasons may be given for the holding in *Monongahela* that only tangible property interests are protected by the "just compensation" limitation. The first is historical; the decision came at a time when there were few eminent domain proceedings, and there was an abundance of unimproved land. Also, society was relatively undeveloped when compared with that of today.²³ As a result of these factors, incidental damages were seldom encountered by the courts, and the law developed without providing a remedy for them.²⁴

Judicial practicality is the second reason for the *Monongahela* holding.²⁵ To allow incidental damages would lead to an entirely subjective measure of damages which would restrict the power of eminent domain.²⁶ Obviously in eminent domain proceedings the needs

¹⁴ *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893). *Accord*, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). *But see* *Case v. State H'way Comm'n*, 156 Kan. 163, 165-66, 131 P.2d 696, 698-99 (1942); *Grand River Dam Authority v. Gray*, 192 Okla. 547, 549, 138 P.2d 100, 103 (1943). *See also* *Heimann v. Los Angeles*, 30 Cal. 2d 746, 755, 185 P.2d 597, 602-03 (1947); *Ray v. State H'way Comm'n*, 196 Kan. 13, 19, 410 P.2d 278, 283, *cert. denied*, 385 U.S. 820 (1966) (loss of traffic flow is non-compensable).

¹⁵ *E.g.*, *Wray v. Knoxville, L.F. & J.R.R.*, 113 Tenn. 544, 83 S.W. 471 (1904).

¹⁶ *Evans v. Wheeler*, 209 Tenn. 40, 348 S.W.2d 500 (1961).

¹⁷ *Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 P. 705 (1915). *See also* 1 ORGEL § 75, at 325-26 n.43, citing many cases to the effect that loss of good will is noncompensable.

¹⁸ *Los Angeles v. Klinker*, 219 Cal. 198, 25 P.2d 826 (1933); 1 ORGEL § 72.

¹⁹ *Central Pac. R.R. v. Pearson*, 35 Cal. 247 (1865); 1 ORGEL §§ 68-69.

²⁰ *Daly City v. Smith*, 110 Cal. App. 2d 524, 243 P.2d 46 (1952).

²¹ *Radinsky v. Denver*, 159 Colo. 134, 410 P.2d 644 (1966); *Ray v. State H'way Comm'n*, 196 Kan. 13, 410 P.2d 278, *cert. denied*, 385 U.S. 820 (1966).

²² *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

²³ *See* Comment, *Eminent Domain Valuation in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957).

²⁴ *Id.* at 65.

²⁵ Incidental damages are arbitrary and speculative and for this reason the courts will not compensate for them. *See* 1 ORGEL §§ 69-70, 77.

²⁶ *See* Comment, *Eminent Domain—Temporary Taking—Just Compensation for Altering of Premises*, 33 N.Y.U.L. Rev. 882, 888 (1958).

of society and the overriding power of sovereignty prevail, so that equitable remedies are not available to resolve the problem of subjective damages.²⁷ Having no equitable remedy and no proper measure in law, the Court found incidental damages noncompensable by adhering to the fair market value standard.²⁸

For these reasons the Court decided that incidental damages are not compensable. And, by so deciding, the Court also established the decline of the fair market value as the standard measure of just compensation in partial taking cases.

Cost of Restoration as Incidental Damage

Suppose that X is putting his land to its best use as a quarry when condemnation proceedings are commenced to bisect his land with a highway. Suppose further that X wants to continue his quarry operation after completion of the highway, but to do so requires reconstruction of a conveyor system at a cost of \$5,000. In the condemnation proceedings, evidence of this restoration cost, which is X's actual damage, will be inadmissible because it represents incidental damage. X's just compensation will be based on the loss in the fair market value of the retained property. This decline in market value will be proved by showing changes in the rental value²⁹ or through some other form of proof³⁰ equally inappropriate for reflecting X's true loss due to the condemnation.

²⁷ *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 531 (1848): "In every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the *eminent domain* of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise."

²⁸ Cf. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326-30 (1893). See also *United States v. 257.654 Acres of Land*, 72 F. Supp. 903, 914 (D. Hawaii 1947).

²⁹ *People ex rel. Department of Pub. Works v. Flintkote Co.*, 264 A.C.A. 115, 70 Cal. Rptr. 27 (1968).

³⁰ Other methods used to determine market value are: Market Sales Analysis, Market Rate-of-Return Analysis, Market Cost-Production Analysis, Indeterminate Market Analysis, and the Ellwood Analysis utilizing the Ellwood Tables. These methods of determining market value are treated in detail in SCHMUTZ & RAMS, *supra* note 3, at 27 *et seq.* For an enlightened decision where fair market value is discarded where the result would be unfair, see *Housing Authority v. Savannah Iron & Wire Works, Inc.*, 91 Ga. App. 881, 886, 87 S.E.2d 671, 676 (1955): "In determining just and adequate compensation, under the constitutional provision, market value and actual

In effect, the refusal to use costs of restoration as the measure of severance damages in this case has prevented X from continuing to enjoy the highest use of his land, unless he himself is willing to spend \$5,000. Of course, X could avoid this expense by leasing one part of his land to another quarrier, but this too would seem to involve a financial penalty. The courts have made it clear, however, that "[a]ny increase in the personal difficulties of a landowner . . . by reason of the taking, apart from [a decrease in] the market value, is not a proper test of damages"³¹ In this hypothetical case, therefore, X would suffer a substantial but noncompensable loss due to "personal difficulties."

Not only would this result be inequitable, it would be in direct conflict with the judicial interpretation of the intent of the eminent domain clause of the California Constitution, as explained in *Los Angeles v. Harper*:³²

The clear intention of the constitutional provision is that the owner of property taken under the power of eminent domain shall be made whole for his loss and shall be recompensed in an amount of money equal to the *actual* loss which he has suffered by reason of such condemnation. It does not contemplate that such an owner may make a profit over and above the detriment, expressed in dollars and cents, that he has sustained.³³

Notice should be taken of the *dual* protection afforded by the *Harper* interpretation. On the one hand, the landowner is protected against actual loss, even to the extent of his costs of restoration.³⁴ On the other, the state is protected against landowners' profiting from condemnation proceedings.³⁵ However, when theory is put into

value will ordinarily be synonymous. If they are not, that value which will give 'just and adequate compensation' is the one to be sought by the jury in rendering its verdict."

³¹ *People ex rel. Department of Pub. Works v. Lundy*, 238 Cal. App. 2d 354, 359, 47 Cal. Rptr. 694, 697 (1965); see *People ex rel. Department of Pub. Works v. Flintkote*, 264 A.C.A. 115, 70 Cal. Rptr. 27 (1968); *La Mesa v. Tweed & Gambrell Planing Mill*, 146 Cal. App. 2d 762, 304 P.2d 803 (1956); *Daly City v. Smith*, 110 Cal. App. 2d 524, 243 P.2d 46 (1952); *Los Angeles County v. Signal Realty Co.*, 86 Cal. App. 704, 261 P. 536 (1927).

³² 139 Cal. App. 331, 33 P.2d 1029 (1934).

³³ *Id.* at 334, 33 P.2d at 1030 (emphasis added). See also Note, *Compensation for a Partial Taking of Property: Balancing Factors in Eminent Domain*, 72 YALE L.J. 392, 401 (1962).

³⁴ *Los Angeles v. Harper*, 139 Cal. App. 331, 334, 33 P.2d 1029, 1030 (1934); *Santa Clara County v. Curtner*, 245 Cal. App. 2d 730, 743-44, 54 Cal. Rptr. 257, 265 (1966); *People ex rel. Department of Pub. Works v. Hayward Bldg. Materials Co.*, 213 Cal. App. 2d 457, 465-67, 28 Cal. Rptr. 782, 787-88 (1963); *Riverside v. Kraft*, 203 Cal. App. 2d 300, 303, 21 Cal. Rptr. 425, 427-28 (1962).

³⁵ *Los Angeles v. Harper*, 139 Cal. App. 331, 334, 33 P.2d 1029, 1030 (1934); see *People ex rel. Department of Pub. Works v. Hayward Bldg. Materials Co.*, 213 Cal. App. 2d 456, 28 Cal. Rptr. 782 (1963). See also 1 ORGEL § 7, at 39; CAL. CODE CIV. PROC. § 1248(3): "[I]f the benefit shall be equal to the damages assessed under subdivision 2 [severance damages], the owner of the parcel shall be allowed no compensation except the value of the portion taken.

practice through the means of the fair market value standard, a vast area of incidental damages due to "personal difficulties" is excluded from compensation.

Why Costs of Restoration Should Be Compensable

Disregarding arguments for the complete rejection of the fair market value standard and for the compensability of all incidental damages,³⁶ there are clear and cogent reasons why costs of restoration should be compensable. First, the reasons for denying compensation for incidental damages are not applicable to costs of restoration. Secondly, compensation would promote the public policy favoring the free use and enjoyment of land.

Monongahela Rationale Invalid

Historical development was the initial reason given for the refusal to recognize incidental damages.³⁷ With due regard for the place of precedent in the law, conditions arising from the complexities of modern society appear to make old rules inappropriate for today's needs.³⁸ As was noted in the hypothetical example above,³⁹ the fair market value standard may well be inappropriate in the situation where the sole severance damages are the costs of restoration. Just compensation could not be provided, and, as the courts have made clear:

[T]he rules for determining value of land taken by condemnation cannot, from the nature of the case, be inflexible. In each case just compensation is the goal; and where a rigid application of even a settled rule will produce injustice it must be departed from, so far as made necessary by the circumstances of the case.⁴⁰

Since just compensation is equally the goal in determining severance damages, it is logical to apply this same rule where costs of restoration are the only damages incurred. Historical development and precedent,

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."

³⁶ A change in the law to allow compensability for *all* incidental damage would probably have to be made by the legislature. See CAL. EVIDENCE CODE § 822(e): "[T]he following matter is inadmissible as evidence and is not a proper basis for an opinion as to the value of property: . . . The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury."

³⁷ See text accompanying notes 38-40 *supra*.

³⁸ B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921): "Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all."

³⁹ See text accompanying notes 29-33 *supra*.

⁴⁰ *People ex rel. Department of Pub. Works v. Auburn Ski Club*, 241 Cal. App. 2d 781, 786, 50 Cal. Rptr. 859, 862-63 (1966), quoting *Napa Union High School Dist. v. Lewis*, 158 Cal. App. 2d 69, 73, 322 P.2d 39, 41 (1958).

then, are very weak support for use of the fair market value standard in this situation.

A second argument that is used to deny compensation for damages is the unavailability of an objective method of calculating this type of damage.⁴¹ The invalidity of this argument, when applied to costs of restoration, is readily apparent. Cost of restoration is always referable to an observable and previously existing condition, whether it be a conveyor system, a stream, shrubbery or whatever.⁴²

Furthermore, as an alternative standard, costs of restoration are much more reliable than the completely subjective "intrinsic value" or "value to the owner" standard which is used when there is no market value at all.⁴³ In fact, the cost of restoration standard is probably more objective than the fair market value standard itself, which, of necessity in the case of a "forced sale,"⁴⁴ is based on highly speculative considerations.⁴⁵ Therefore, in light of the objective nature of the cost of restoration standard and the relative subjectivity of the fair market value standard, an argument that costs of restoration should not be used as a measure of damage because they are "subjective" has little force.

Compensation for Costs of Restoration Is Good Public Policy

Awarding compensation for costs of restoration would promote

⁴¹ *E.g.*, *Arnerich v. Almaden Vineyards Corp.*, 52 Cal. App. 2d 265, 272, 126 P.2d 121, 124-25 (1942).

⁴² *E.g.*, *United States v. Flood Bldg.*, 157 F. Supp. 438 (W.D. Cal. 1957) (replacing walls); *Hemmerling v. Tomlev, Inc.*, 67 Cal. 2d 572, 432 P.2d 697, 63 Cal. Rptr. 1 (1967) (loss of well); *People ex rel. Department of Pub. Works v. Flintkote Co.*, 264 A.C.A. 115, 70 Cal. Rptr. 27 (1968) (conveyor); *Riverside v. Kraft*, 203 Cal. App. 2d 300, 21 Cal. Rptr. 425 (1962) (shrubbery moved).

⁴³ *People v. Ocean Shore R.R.*, 32 Cal. 2d 406, 427-28, 196 P.2d 570, 584 (1948); *Los Angeles v. Klinker*, 219 Cal. 198, 211-12, 25 P.2d 826, 832 (1933) (dictum); see *Idaho-Western Ry. v. Columbia Conference*, 20 Idaho 568, 119 P. 60 (1911) (college); *Illinois Light & Power Co. v. Bedard*, 343 Ill. 618, 175 N.E. 851 (1931) (utility); *Chicago v. Farwell*, 286 Ill. 415, 121 N.E. 795 (1918); *Sanitary Dist. v. Pittsburg, F.W. & C. Ry.*, 216 Ill. 575, 584, 75 N.E. 248, 252 (1905) (railroad terminal) ("The property being devoted to a special and particular use, the general market value of other property [is] not a criterion for ascertaining compensation, although it might throw some light on the actual value.").

⁴⁴ See BLACK'S LAW DICTIONARY 616 (4th ed. 1951), where the eminent domain proceeding is characterized as a forced sale: "[When the landowner's] property is taken under the power of eminent domain, he is compelled to surrender to the public something above and beyond his due proportion for the public benefit. The matter is special. It is in the nature of a compulsory sale to the state."

⁴⁵ See *United States v. Miller*, 317 U.S. 369, 375 (1943): "The application of this concept [fair market value] involves, at best, a guess by informed persons."

the public policy favoring the free use and enjoyment of land.⁴⁶ In the hypothetical, X was effectively penalized \$5,000 because he chose to use his property personally rather than rent it. This is in direct contradiction of the above stated public policy. Such a *penalty*—whether intended or not—cannot avoid having a substantial and coercive effect on the property owner's use of his land. If costs of restoration were allowed as compensation, however, the owner would be free of this coercive influence.

In addition, compensation for costs of restoration may enhance the public policy in favor of the highest and best use and development of land.⁴⁷ Again, the hypothetical is illustrative. X had been using his land to its "highest" extent as a quarry prior to the taking. Subsequent thereto, he desired to continue such use. An award including his costs of restoration would not only aid the resumption of the "highest" use, but would encourage it.⁴⁸

Recent California Cases Dealing with Costs of Restoration

As was noted earlier, the award of just compensation has a double aspect: (1) it should cover the landowner's losses, and (2) it should

⁴⁶ With regard to the public policy favoring free use and enjoyment of land, see W. PROSSER, *LAW OF TORTS* 358 (3d ed. 1964): "[The landowner] has a privilege to make use of the land for his own benefit, and according to his own desires, which is an integral part of our whole system of private property; but it has been said many times by the courts that this privilege is qualified by a due regard for the interests of others who may be affected by it."

⁴⁷ As to the public policy favoring the highest use of land, see W. BURBY, *REAL PROPERTY* 39 (3d ed. 1965) (waste); L. SIMES, *FUTURE INTERESTS* 254 (2d ed. 1966) (rule against perpetuities): "The subject matter of the trust may become what the economist calls 'frozen assets'. This would seem to be socially undesirable, if it is to continue for too long a time."

⁴⁸ The courts have said that particular use of the property is not a proper consideration in the determination of compensation in eminent domain proceedings. *E.g.*, *People v. La Macchia*, 41 Cal. 2d 738, 754, 264 P.2d 15, 26 (1953); *Santa Ana v. Harlin*, 99 Cal. 538, 544, 34 P. 224, 227 (1893); *Stockton & Copperopolis R.R. v. Galgiani*, 49 Cal. 139 (1874); *Santa Clara County v. Curtner*, 245 Cal. App. 2d 730, 743, 54 Cal. Rptr. 257, 265 (1966). However, *highest use* of the property can properly be considered under the fair market value standard. *E.g.*, *Maricopa County v. Paysnoe*, 83 Ariz. 236, 239, 319 P.2d 995, 997 (1957); *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 534, 28 P. 681, 683 (1891); *San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 64, 25 P. 977, 980 (1891); *Stockton v. Ellingwood*, 96 Cal. App. 708, 723, 275 P. 228, 235 (1929). See also SCHMUTZ & RAMS, *supra* note 3 at 95: "In the preparation of an estimate of the severance damage that follows from the taking of a portion of a larger parcel, the first conclusion to be formed is, 'What is the highest, best and most profitable use to which the property can be put?' This conclusion is the indispensable first step, for the reason that the severance damage may be great in the case of one use of the property and none whatever in another use, even though the physical characteristics are the same."

insure the condemnor against payment of excessive awards.⁴⁹ The proper aim of the courts should be to strike a balance between these objectives.⁵⁰ The three recent California cases in which costs of restoration were at issue are illustrative of the proper striking of this balance.

*Riverside v. Kraft*⁵¹

This case involved a partial taking in a residential district for the widening of a street. Expert witnesses for the condemnee and condemnor based their appraisals of loss on market value. However, one of the elements the appraisers included in determining fair market value was the cost of relocating shrubbery and other improvements on the land not taken. On appeal by the condemnor, the court held this to be a proper procedure, stating that "[i]n no case did the opinion of any expert allocate to the cost of moving any greater dignity than one of the several reasons or evidence used to corroborate the sum total of the final opinion on fair market value."⁵²

This case represents the present limit to the use of costs of restoration in determining severance damages. Such costs may not be used as an independent basis for compensation⁵³ but are admissible only as an evidentiary fact tending to show a decline in fair market value, *i.e.*, if they

reasonably may be relied upon by an expert in forming an opinion as to the value of property and [are evidence] which a willing purchaser and a willing seller, dealing with each other in the open market and with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available, would take into consideration in determining the price at which to purchase and sell the property or property interest . . .⁵⁴

⁴⁹ See text accompanying notes 32-35 *supra*.

⁵⁰ *Sacramento & San Joaquin Drainage Dist. v. Reed*, 215 Cal. App. 2d 60, 69, 29 Cal. Rptr. 847, 853 (1963).

⁵¹ 203 Cal. App. 2d 300, 21 Cal. Rptr. 425 (1962).

⁵² *Id.* at 304, 21 Cal. Rptr. at 428: "All courts recognize that the reasons given by an expert may be of utmost importance in weighing the value of the opinion given. All of the varying circumstances and elements which a reasonable person would consider in arriving at the final test of difference in fair market value, including items which fairly afford a test of the accuracy of the reasons given by the expert appraisers in arriving at their ultimate conclusions of value, are properly subject of evidentiary proof. Only in this way can the trial court intelligently test the value or weight of the experts' opinion on the ultimate difference in fair market value."

⁵³ *Id.* *People ex rel. Department of Pub. Works v. Hayward Bldg. Materials Co.*, 213 Cal. App. 2d 457, 28 Cal. Rptr. 782 (1963).

⁵⁴ CAL. EVIDENCE CODE § 814. See also *id.* § 820; 2 ORGEL § 190; 5 NICHOLS § 23.2: "Inasmuch as the measure of damages is the decrease in market value of the land, and the trained judgment of the market in determining value would take into consideration the possibility of restoring the damaged property as far as possible to the same relative position in which it stood before the taking if the cost of such restoration would be less than the increase

*People ex rel. Department of Public Works v. Hayward Building Materials Company*⁵⁵

In this partial taking for highway purposes, the condemnee contended that his expenses in placing on his remaining land improvements similar to those on the condemned land should have been included as severance damages.⁵⁶ The court rejected the contention, reasoning that this would have permitted the condemnee to profit from the taking. The condemnor had already paid the fair market value of the improvements and this had been included in the compensation for the land taken. Any further payment for the improvements would have resulted in a double recovery.⁵⁷ The court said:

Much of the problem in the case results from a tendency in appellant's [condemnee's] arguments to equate the 'approaches' of expert witnesses with the rule of measure of damages in severance matters. As we have pointed out, the two are distinct. Appellant seeks to engraft on the settled rule of severance damages an additional provision for the recovery of costs of restoration.⁵⁸

*People ex rel. Department of Public Works v. Flintkote Company*⁵⁹

This case is quite similar to the hypothetical raised earlier. In *Flintkote* the state divided the condemnee's quarry by constructing a highway through it. The condemnee asserted that the cost of restoring the conveyor system connecting the two portions of his land was the proper measure of his severance damages, independent of any loss in fair market value of the remaining land.

The court rejected this contention and held that loss in fair market value—which in this case was based on an appraiser's evaluation of prior and subsequent rental values⁶⁰—was the proper measure of

in market value which it would bring to the land, the condemnor is entitled to the adoption of the criterion of damage which produces the smaller result."

⁵⁵ 213 Cal. App. 2d 457, 28 Cal. Rptr. 782 (1963).

⁵⁶ An analogous situation is found in *Wray v. Knoxville, L.F. & J.R.R.*, 113 Tenn. 544, 551, 82 S.W. 471, 473 (1904). In that case the court said: "It will be noted that just compensation for property taken is provided by the constitution. Incidental benefits and damages are creatures of statute, and are in addition to the compensation provided by the constitution and separate from it."

⁵⁷ *Accord*, *United States ex rel. TVA v. Indian Creek Marble Co.*, 40 F. Supp. 811, 819 (E.D. Tenn. 1941): "If the state rule is to be so taken, then the inevitable result would be that the landowner would twice receive incidental damages, either in cash compensation or partly in cash and partly in incidental benefits. That type of so-called compensation is and must be grounded upon a statutory provision setting up an artificial measure based upon neither justice nor the settled conception of the meaning of the word 'compensation'."

⁵⁸ *People ex rel. Department of Pub. Works v. Hayward Bldg. Materials Co.*, 213 Cal. App. 2d 457, 469, 28 Cal. Rptr. 782, 789 (1963).

⁵⁹ 264 A.C.A. 115, 70 Cal. Rptr. 27 (1968).

⁶⁰ See generally CAL. EVIDENCE CODE § 819; SCHMUTZ & RAMS, *supra* note 3, at 42 for an explanation of the Market Rate of Return Analysis which is the method used to determine fair market value in this case.

severance damage. The final determination was that no severance damages should be awarded because the condemnee had been negotiating to rent the severed land to another quarrier and the highway had resulted in no loss in fair market value to the land for rental purposes.⁶¹ In *Flintkote*, therefore, the condemnee was prevented, and rightly so, from profiting from the condemnation.

All three of the above cases reached an equitable result under their individual fact situations. The holdings in all three cases also were consistent with the judicially construed intent of the eminent domain clause of the California Constitution.⁶² The balance between compensation of the landowner and prevention of overpayment by the state was maintained.

Protection of the State v. Protection of the Individual

Undoubtedly the utility of the fair market value standard in achieving a proper balance between the individual and the state is one of the reasons for the courts' adherence to it. One author, stressing the elasticity of this standard, has commented:

"The law" as embodied in the cases has by no means invariably held to market value and . . . what the law has generally adapted is a single form of words rather than a single standard of value.⁶³

However, not all authors have stressed the *balancing* of interests between the individual and the state. For example, it has been suggested by one author that this standard should be maintained, as opposed to costs of restoration, simply because the courts would thereby be better able to protect the state coffers from indiscriminate expenditure.⁶⁴

Paradoxically, the ordinary elasticity of the fair market value standard can lead the courts to rely upon it even when it does not result in a balancing of interests. As was seen in the hypothetical, the balance is lost when the costs of restoration do occur and are not reflected in the fair market value paid for the land taken, nor in the evaluation of the decline in market value of the land retained. In

⁶¹ See also *Evans v. Wheeler*, 209 Tenn. 40, 348 S.W.2d 500 (1961); Note, *Compensation for a Partial Taking of Property: Balancing Factors in Eminent Domain*, 72 YALE L.J. 392 (1962).

⁶² *Los Angeles v. Harper*, 139 Cal. App. 331, 334, 33 P.2d 1029, 1030 (1934).

⁶³ 1 J. BONBRIGHT, VALUATION OF PROPERTY 413 (1937). See also 4 NICHOLS § 14.24, at 556-57: "[T]he impracticability of attempting to enumerate all the possible elements of damage to remaining land that may be recovered is illustrated by a case involving the taking of land for a railroad in which it was held that the tendency of gophers or squirrels to propagate on a railroad location may be considered as an element of damage to the remaining land, so far as it affects market value. . . ."

⁶⁴ Palmore, *Damages Recoverable in a Partial Taking*, in [1968] INSTITUTE ON EMINENT DOMAIN 55, 67 (the commentator emphasizes the prevention of double recovery of damages).

such instances, the courts do not deny the existence of damage, they simply deny its compensability under the fair market value standard by classifying the damage as incidental.⁶⁵

The net effect of such treatment is to afford greater protection to the state than is offered to the individual. This effect is anomalous since the provisions for just compensation in the various state constitutions⁶⁶ are modelled after the just compensation provisions of the fifth amendment.⁶⁷ Further, the fifth amendment is a part of the Bill of Rights: that part of the Constitution specifically designed to protect the rights of the individual against the imposition of government!⁶⁸

Conclusion

This note has recognized the consideration of costs of restoration as supporting evidence to be employed in a determination of the loss in fair market value in a partial taking. It has also attempted to show that in certain situations costs of restoration should be compensable without regard to the fair market value standard. While the use of the fair market value standard, when costs of restoration have been asserted, was seen to be justifiable in that it prevented double compensation and profiteering, the hypothetical situation illustrates the fallacy of a complete ban on compensation for incidental damages of this type.

In California neither the constitution⁶⁹ nor the Code of Civil Procedure⁷⁰ requires that damages be ascertained by the fair market

⁶⁵ See, e.g., *United States v. 257.654 Acres of Land*, 72 F. Supp. 903, 914 (D. Hawaii 1947): "There can be no doubt that by these thirteen piecemeal takings . . . the Company has suffered a fatal blow. . . ."

"But this, it must be remembered, is an action at law confined under Fifth Amendment to rigid rules requiring the Government to pay just compensation only for what it takes. Equitable principles, no matter how well founded, are rendered inoperative in a condemnation proceeding."

⁶⁶ Either by express provision or by implication, all of the states provide in their constitutions for just compensation in eminent domain proceedings. See note 2 *supra*.

⁶⁷ U.S. CONST. amend. V.

⁶⁸ Concerning the protection accorded the individual by the eminent domain clause of the fifth amendment, see Comment, *Eminent Domain Valuation in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 67-68 & n.31 (1957), quoting D. BREWER, PROTECTION TO PRIVATE PROPERTY FROM PUBLIC ATTACK 21 (Yale Law Library Pam. No. 42 1891): "There remains to the individual a sacred and indestructible right of compensation. If, for the public interests and at the public demands, he sacrifices his time, his labor or his property, or any value therein, he has a right to demand and must receive at the hands of the public compensation therefor." Interestingly, Mr. Justice Brewer later delivered the opinion in *Monongahela*.

⁶⁹ See CAL. CONST. art. I, § 14.

⁷⁰ See CAL. CODE CIV. PROC. § 1248(2); *Los Angeles v. Tower*, 90 Cal. App. 2d 869, 872, 204 P.2d 395, 397 (1949): "Except for the guarantee of a jury

value standard. While both require "just compensation," neither one specifies a procedure for *measuring* such compensation. As to severance damages, the Code simply requires that assessment shall be made of "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 . . ."⁷¹ The path is clear for the courts to decide, at their discretion, what would be the best method of computing these damages.

It is submitted that the fair market value standard, by reason of its flexibility and general fairness, should continue to be the basic standard for measuring severance damages in California. Costs of restoration, however, should be recognized as a valid substitute when loss in fair market value does not result in just compensation to the condemnee. The balance between protection for the landowner and protection for the state then could be effected by judicial supervision or legislative preconditioning of such an award on the actual incurrance of such restoration costs. The landowner would thereby be compensated for damage to his property and, at the same time, would be prevented from benefiting by the condemnation. In this way the objective of just compensation could be more equitably met and more fully carried out in California.

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trial, section 14 [of the California Constitution] does not purport to specify the procedure by which the amount of the owner's compensation is to be determined."

⁷¹ CAL. CODE CIV. PROC. § 1248(2).

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