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LAND ACQUISITION
MEMORANDUM 202

202-1 EXCESS CONDEMNATION WARRANTED WHERE INITIAL TAKING LANDLOCKS
REMAINDER DESPITE DISPROPORTIONATE SIZE OF THE REMNANT. People v.
Superior Court of Merced County, 436 P.2d 342 (Cal. Sup. Ct. 1968).

The Department of Public Works brought this mandamus proceeding to compel the Superior Court to vacate a judgment dismissing a portion of a condemnation action. The Department had condemned 0.65 acre for highway purposes and had sought to take the remaining 54 acres of the property as excess condemnation for public use. The 0.65 acre was taken along the frontage of the property and had the effect of landlocking the parcel among surrounding properties. The highway taking plus the remnant created, in the Department's view, the likelihood that actual plus severance damages might exceed the cost of taking the whole property. Consequently, the remnant landlocked portion (54 acres) was also condemned. The trial court dismissed the proceeding as to the 54 acres on the grounds that it did not constitute a public use. In part, the trial court so concluded because of the admission by the Department that it would attempt to sell the property constituting the remnant once the highway improvement was completed.

The Supreme Court, speaking through Chief Justice Traynor, concluded that the Department had acted properly in condemning the remnant property and thereby issued the requested mandate to the Superior Court. The court reasoned that the disproportion in size was not a controlling factor in determining whether the excess condemnation was justified. Such a taking is justified whenever the remaining portion is so diminished in size or value that the severance damages exceed the actual cost of taking the remaining fee. In the instant case, the remaining portion, while large in size, was landlocked by the taking and consequently of little value. Thus, while it is abundantly evident that the 54 acres could not be considered a physical remnant of the 0.65 acre, there is no reason why the landlocked parcel could not be considered an economic remnant of the valuable frontage parcel taken for highway purposes.

In support of this conclusion, Chief Justice Traynor examined the authorization for such condemnations contained in Sec. 104.1 of the California Streets and Highways Code. According to that section, whenever "the remainder is left in such shape or condition as to be of little value to its owner," the

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State may condemn that remainder. Such takings are not governed by the footage limitations of other authorizations concerning highways and therefore may exceed that depth necessary for right-of-way and other purposes.

Further, the court rejected condemnees argument that 54 acres could not possibly be a remnant of 0.65 acres and therefore Sec. 104.1, referring as it does to "remainders," could have no application to the instant situation. Noting that the entire purpose of remnant takings is to protect the fisc from paying more in separate damages than the whole property is worth, the court concluded that remnants need not be of negligible physical size so long as the adverse financial impact was present. Here, the landlocking of the 54 acres effectively destroyed all economic value of the land and created the necessary remnant. The court observed that, "There is no reason to restrict this theory (remnant taking) to the taking of parcels negligible in size and refuse to apply it to parcels negligible in value."

As to the issue of intended later resale by the State, the court, while not commenting directly, did note that a remnant taking finds its public purpose in protection of the fisc and need not, therefore, demonstrate an intended public use of the land. If there is danger of excess damages, the land may be taken even though it is unnecessary for any project or construction and will subsequently be resold by the State.

Justices Mosk and Peters registered a strong dissent. Characterizing the facts as "an illustration of the voracious appetite of acquisitive government," the dissent challenged the majority's interpretation of both the facts and the law of the instant case.

Objecting to the factual classification of the landlocked property as being "of little value," the dissent maintained that such value is measured "to the owner." Here the owner quite clearly did not consider the remnant worthless and was strongly resisting its appropriations. Further, if being landlocked is the majority's criterion for value, it failed to recognize that such a condition can be cured by an easement or by annexation of or to adjoining property. The dissent also noted that in California's ascendant real estate market hardly any 54-acre plot could be of "little value."

Nor was the dissent satisfied that economic benefit to the State, especially the recoupment of expenditures through resale of the property, constituted an adequate public purpose for this taking. If the land is of "little value," then it will be of little resale value to the State as well. This being so there is no economic benefit or recoupment. But if, on the other hand, the State can resale the land, then it quite obviously is not the financial remnant described by the majority. In either case, the standard of Sec. 104.1 was not met to the satisfaction of the dissenting Justices.

As a final point, the dissent reflected on the danger of permitting such large-scale remnant condemnation. Observing that such authority could serve as a potent weapon against landowners who challenge tendered condemnation awards. In the opinion of the dissent, the instant case "evokes apprehension that Big Brother may have taken over 16 years before 1984."

The case constitutes an expansion of the doctrine of remnant condemnation no matter how narrowly it is read. The size of the remnant is not particularly novel, but the ratio to the public use property and the avowed intention of the State agency to speculate in resale are certainly unique factors. The leading case, cited by both the majority and the dissent, is Tennessee Valley Authority v. Welch, 327 U.S. 546 (1945), which involved an excess condemnation of 6,000 acres for the TVA project. While this case clearly indicated that no absolute size limit could be placed on remnants, it had the limiting factors of a much larger initial taking, a special authorization for large-scale remnant taking, and a dedication of the remnant to public use in the form of recreational facilities. In the instant case, the fact that the remnant is 83 times the size of the initial taking should not create particular problems if the majority's analysis of the value factor is accurate. The dissent, however, raises grave doubts that the remnant actually is "negligible in value." While the majority seemed satisfied that it was, future courts might consider the possibility of some sort of equity of redemption in a remnant, equal to the award, should the property, in fact, prove to have a market. This would prevent any administrative attempts at condemnation profiteering while still securing the fisc.

202-2 CONDEMNEE IS NOT ENTITLED TO BENEFIT FROM INCREASED LAND VALUES OCCASIONED BY THE CONDEMNATION PROJECT, BUT MAY BENEFIT FROM INCREASED VALUES CAUSED BY CITY'S LAND PURCHASING THROUGH PRIVATE CORPORATION. City of Houston v. Barshop, 431 S.W.2d 914 (Tex. Ct. Civ. App. 1968).

Sometime prior to November of 1957, the city of Houston privately resolved to construct an airport to service the city. Pursuant to this decision, a group of private citizens, operating through a private corporation, sought to acquire airport land with the intention of conveying this property to the city. Almost half the necessary property was obtained in this fashion. In April of 1960, defendant Barshop purchased 52.66 acres of land for \$90,000, a \$20,000 increase in the land's value from the preceding year. In October of 1960, an ordinance was passed authorizing an offer of \$63,192 for the Barshop property as an alternative to condemnation proceedings. In October of 1961, the master plan for the airport was adopted, including the Barshop property. In June of 1963, the first offer to purchase was made by the city, and one year later the land was ultimately taken, a deposit of \$80,000 being made by the city as compensation. In the subsequent trial of the issues, the jury found the value of the property as of the date of the taking (July 1964) to be \$168,152. The city appealed.

It was the contention of the city on appeal that the trial court erred in permitting the jury to consider the increase in value to Barshop's property occasioned by the construction of the airport facility. The trial court had permitted testimony which presumed that the property was adjacent to the airport. This, the city claimed, erroneously permitted Barshop to benefit from the very subject of his condemnation.