

EMINENT DOMAIN—SEVERANCE DAMAGES—PHYSICAL CONTIGUITY MUST BE PRESENT BEFORE DAMAGES CAN ACCRUE TO PORTION OF LAND NOT TAKEN IN CONDEMNATION PROCEEDINGS, EVEN THOUGH TWO OTHERWISE SEPARATE PARCELS ARE USED AS A SINGLE UNIT.

Robert Wolfe built a medical office building in a congested area of downtown Los Angeles. When off-street parking facilities became insufficient for his tenants' needs, he acquired a private parking lot which was proximate to, but not contiguous with, his office building.

When the city subsequently condemned the private parking lot for use as a public parking lot, the trial court disallowed severance damages for anticipated loss of income from the office building. The court of appeals affirmed, stating that "the rule that severance damages can only be predicated on a showing of unity of title, unity of use and contiguity is well established in California and has been consistently applied."<sup>1</sup> While unity of title and unity of use were both present, the court held that contiguity was lacking since the condemned parcel was separated from the office building by some two hundred and fifty feet of land in which Wolfe had no ownership interest.

A strongly dissenting opinion argued that contiguity is only ordinarily required and that the court is free to award severance damages in those instances where there are "occasional sets of peculiar circumstances which should deserve exception from the basic standard."<sup>2</sup>

The writer submits that the appellate court correctly interpreted and applied the law as it now stands, and that the ambiguity in many of the cases cited by the dissent is a result of judicial dissatisfaction with the law rather than the result of an attempt to liberalize it. Furthermore, the dissent does not explain when an exception should be made, but bases his argument on a showing that the courts have never precluded the possibility of an exception.

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1. *City of Los Angeles v. Wolfe*, 16 Cal. App. 3d 989, 991, 94 Cal. Rptr. 441 (1971).

2. 16 Cal. App. 3d at 993, 94 Cal. Rptr. at 443.

The actual situation appears to be that any liberalization in the California courts away from a strict requirement of physical contiguity has occurred in dicta rather than in practice, since any court which seriously considered the possibility of an exception to the contiguity requirement would almost certainly have given some indication of when it should be applied. It is more plausible to suggest that any vagueness concerning the necessity of contiguity for the award of severance damages only disguises what has been in reality a consistently hard-handed application of the law, coupled with an intellectual reluctance to sanction in theory a hardship which is meted out in practice.

Since section 1248 of the California Code of Civil Procedure does little more than authorize the award of severance damages,<sup>3</sup> judicial interpretation has preceded in the absence of any legislative guidelines. The landmark case in this area is *City of Oakland v. Pacific Coast Lumber and Mill Co.*,<sup>4</sup> where the city condemned a leasehold interest in waterfront property which was separated by a highway from the condemnee's privately owned property on which he operated a mill. In denying an award of severance damages for the mill property, the court held that contiguity was essential for such an award and that the alleged damages were in reality business damages for which there was no compensation in California.<sup>5</sup>

The first acknowledgment that an exception might be made did not occur until over thirty years later in *People v. Ocean Shore Railroad Co.*<sup>6</sup> There, in dictum, the Supreme Court said:

There may be a right to an award of severance damages in some cases where the property, though not physically contiguous, is being devoted to an existing unity of use. . . . But such damages are ordinarily limited to contiguous property, and the mere fact that there is a possible or prospective use of properties as a unit . . . will not justify the allowance of severance damages.<sup>7</sup>

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3. 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, shall be ascertained and assessed. CAL. CODE CIV. PRO. § 1248(2) (West 1955).

4. 171 Cal. 392, 153 P. 705 (1915).

5. *Id.* at 398, 153 P. at 707.

6. 32 Cal. 2d 406, 196 P.2d 570 (1948).

7. *Id.* at 423, 196 P.2d at 581.

While this statement has been repeated frequently,<sup>8</sup> it has never been followed, except in one federal case where the court, erroneously anticipating developments in the California law, awarded severance damages for noncontiguous parcels where the unity of use test was satisfied.<sup>9</sup>

Although the importance of the unity of use test was emphasized by *People ex rel. Dept. of Public Works v. Thompson*,<sup>10</sup> the vitality of the contiguity requirement was not eroded. Central to the issue of whether severance damages would be awarded was a determination of who held the underlying fee in a road which bisected the condemnee's property but across which there was relatively free access. The court decided that the state had only an easement, and that due to the fact that the owner's access to the condemned portion was not severely limited by the easement, severance damages were proper. The court also held that mere *nondiversity* of use was sufficient to satisfy the unity of use test.

The importance of more clearly defined guidelines is apparent when the *Thompson* case is contrasted with *People ex rel. Dept. of Public Works v. Fair*.<sup>11</sup> Once again, the condemnee's property was separated by a road, but in this instance, the court concluded that since the ownership of the fee was in the state, and that since, unlike the situation in *Thompson*, the owners' access to the condemned property had been severely limited by the highway, severance damages were not allowable. Therefore, the question was not presented as to whether severance damages would have been proper where the condemnee had retained the underlying fee but had restricted access, or where the state held the entire fee but the condemnee still had unrestricted access. The latter situation was present in *Oakland*, but it is clear that in that case the condemnee's access to its leasehold interest was of no importance to the court.

The very fact that the court in *Fair* noted restricted access as a factor to be considered indicates the increasing importance of the unity of use test. The court in *Fair* purportedly reverted to the strict interpretation set out in the *Oakland* case,<sup>12</sup> but it is ap-

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8. See, e.g., *People ex rel. Dept. of Public Works v. Thompson*, 43 Cal. 2d 13, 271 P.2d 507 (1954); *People ex rel. Dept. of Public Works v. Nyrin*, 256 Cal. App. 2d 288, 63 Cal. Rptr. 905 (1967); *People ex rel. Dept. of Public Works v. Dickinson*, 230 Cal. App. 2d 932, 41 Cal. Rptr. 427 (1964).

9. *City of Stockton v. Miles and Sons, Inc.*, 165 F. Supp. 554 (N.D. Cal. 1958).

10. 43 Cal. 2d 13, 271 P.2d 507 (1954).

11. 229 Cal. App. 2d 801, 40 Cal. Rptr. 644 (1964).

12. *Id.* at 804, 40 Cal. Rptr. at 646.

parent that it felt constrained not only to apply the purely formal contiguity test, but also to test the underlying reality of the situation by asking whether the owners in fact had access to all the parts of their property.

In *People ex rel. Dept. of Public Works v. Dickinson*,<sup>13</sup> a partnership sought severance damages for two parcels five hundred feet apart but connected by an easement. The court, after noting the qualification of "ordinary" on the contiguity requirement,<sup>14</sup> stated that the parcels could not be considered to be connected by the easement which, since there was no description of it, may have been in gross.<sup>15</sup> However, after that tentative advance, the court quickly retracted to a more ambiguous position.

We do not mean to say that if the easement had been shown to be appurtenant, conjunction would have been effective; we merely point out that its quality was not stated. . . .

. . . The two parcels are not to be considered one merely because of unity of use and such physical connection as is provided by the private roadway. There is neither unity of ownership or contiguity of the parcels.<sup>16</sup>

It should be sufficient to question the necessity of any discussion of the nature of the easement at all if it would be in any event inadequate to meet the contiguity requirement.

After denying any allowance for severance damages, the court added that since "[T]he adaptability of the owner's land for the highest and best use may be taken into consideration in fixing value. . . ."<sup>17</sup> the owners were not precluded from showing that the value of the two parcels increased when they were used in connection with each other. In other words, though severance damages would not be awarded for any diminution in value of the parcel not taken, the court might have been willing to increase the award of damages for the condemned parcel if its "highest and best use" were in conjunction with the parcel not taken.

The convoluted approach of the *Dickinson* court suggests that severance damages for non-contiguous parcels may indeed be awarded, as long as any increase in value because of unity of use

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13. 230 Cal. App. 2d 932, 41 Cal. Rptr. 427 (1964).

14. *Id.* at 934, 41 Cal. Rptr. at 429.

15. *Id.* at 936, 41 Cal. Rptr. at 430.

16. *Id.*

17. *Id.*

can be tacked onto the condemned parcel rather than measured in terms of the decrease in value of the remaining property.

Viewed from this context, the situation becomes closely analogous to the damages a property owner may be awarded in an action for inverse condemnation. While the appellant in *Wolfe* filed a cross-complaint in inverse condemnation, the court considered that this issue merged with the issue of severance damages.<sup>18</sup> If the court were correct, it is difficult to understand why such a separate criteria should be applied to issues which are similar enough to be merged.

In *City of Los Angeles v. Geiger*<sup>19</sup> the court explained the proper considerations in an action for inverse condemnation.

While the recovery of damages is not limited to instances of actual invasion of the land itself, yet damages can be justified only by evidence of direct physical disturbance of *an existing right*, either public or private, which the owner possesses in connection with his property and which gives an additional value to it and by evidence that through such disturbance he has sustained a special damage with respect to his property or to a right appurtenant thereto different from or in excess of that suffered by the public in general.<sup>20</sup>

While it seems clear that the conversion of Wolfe's parking lot from private to public use disturbed an existing right which he had, his claim is further strengthened by the fact that his acquisition of the parking lot brought his building into conformity with a zoning ordinance amended after the building was completed. Since the existence of the zoning ordinance presumably would have prevented Wolfe from later putting the lot to a use other than parking, the connection between the lot and the building should be considered more than a mere business convenience, but as part of the nature of the property itself. In *People v. S & E Homebuilders, Inc.*,<sup>21</sup> it was noted that "legal restrictions such as zoning ordinances" were to be taken into account in determining the highest and best use to which land could be put.<sup>22</sup> Since the "highest and best use" of Wolfe's parking lot was solely in connection with his office building, the business is legally joined with the property value in such a way as to make one inseparable from the other.

In both inverse condemnation and severance damages cases, the distinction between non-compensable business losses and actual

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18. 16 Cal. App. 3d at 992, 94 Cal. Rptr. at 443.

19. 94 Cal. App. 2d 180, 210 P.2d 717 (1949).

20. *Id.* at 189, 190, 210 P.2d 723.

21. 142 Cal. App. 2d 105, 298 P.2d 53 (1956).

22. *Id.* at 108, 298 P.2d 55.

property damage is frequently at issue. For example, the court in *Oakland* considered the condemnee's damages to be business damages, from which one can only conclude that non-contiguity was the distinguishing criterion. However, in inverse condemnation cases the court views the nature of the injury itself,<sup>23</sup> rather than applying a ritualistic formula which bears little relation to the reality of the situation. Yet in both instances the court purports to be concerned with the same issue: has substantive damage to property occurred?

One compelling reason for judicial reluctance to take a broader more realistic view of the whole issue of severance damages is the fear, justifiable or not, that public works projects would be limited by increases in condemnation awards.<sup>24</sup> The *Oakland* standards apply to a clearly defined and relatively narrow set of circumstances, and have the legal rarity of both ease of comprehension as well as ease of application if strictly construed. The sometimes difficult distinction between severance damages and business losses is completely avoided once physical contiguity is established and the unity of use test is satisfied. However, if unity of use were the primary test, it is clear that many losses which now go uncompensated in California as business losses would qualify for compensation as severance damages. It is also clear that unity of use is a far more complicated test than physical contiguity and that some increase in litigation would probably result. On the other hand, other states, and the federal court, which have considered this problem, do not completely reject the contiguity requirement

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23. [I]f . . . the court decides that the interest affected by the improvement which results in a diminution in the value of the land is of sufficient importance to require the payment of compensation under the eminent domain clause of the Constitution, it is not necessary to consider the improvement as a "damaging" of the land; since the interest is recognized as entitled to the protection of the law, it becomes a property right included in the term "private property" within the meaning of article I, section 14 of the State Constitution. *Bacich v. Board of Control of California*, 23 Cal. 2d 343, 360, 144 P.2d 818, 828 (1943).

24. [T]he policy underlying the eminent domain provision of the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements. . . . On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial improvement because of the greatly increased cost. *Id.* at 350, 144 P.2d 823.

as having an effect on the award of severance damages.<sup>25</sup> The contiguity requirement is relevant to the question of whether there is true unity of use, but it does not assume the primary role given it by the California courts.

While the ultimate burden on the taxpayer is an important factor, it should not excuse an arbitrary law which has little relationship to the ultimate goal of just compensation.

While the law as it now stands is unchanged from the time the *Oakland* case was decided, the continually unfulfilled promise of the exception remains to divert attention from the inequities which must result from the use of an arbitrary standard. This has led to such tortured reasoning and underlying contradiction as that found in the *Thompson* case, where the court, while it acknowledged that the reality of the situation justified consideration of the condemned land as part of a larger parcel, nevertheless felt compelled to go into a lengthy determination of who held the fee ownership in the roadway crossing the condemnee's property.

The *Oakland* court argued that if the contiguity requirement were relegated to a secondary position, severance damages might be awarded for parcels of land located in different parts of the country, but united by a common use.<sup>26</sup> The court failed to consider the converse situation of equal absurdity: the denial of severance damages for tracts of land separated by a few inches.

It is strongly suggested that the unity of use test should replace the contiguity requirement in ultimate importance, since it provides for a realistic appraisal of whether damage to property has actually occurred. While the dissenting opinion in *Wolfe* essentially appears to be that the court should be given reasonable latitude to use common sense and discretion whenever a situation arises where an overly rigid application of the law would be patently unjust, this in itself indicates the necessity for an entire reevaluation of the law, since it is unlikely that one exception would not follow another.

It is here that the existence of the zoning ordinance in the *Wolfe* case may prove to be undesirable, since the court might be able to find that the contiguity requirement is satisfied if there is a legal

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25. See, e.g., *Baetjer v. United States*, 143 F.2d 391 (1st Cir. 1944); *City of Stockton v. Miles and Sons, Inc.*, 165 F. Supp. 554 (N.D. Cal. 1958); *Ives v. Kansas Turnpike Authority*, 184 Kan. 134, 334 P.2d 399 (1959); *Barnes v. North Carolina State Highway Commission*, 250 N.C. 378, 109 S.E.2d 219 (1959).

26. 171 Cal. 392, 153 P. 705 (1915).

unity between two otherwise physically distinct tracts. This would be unfortunate since it would create an exception as rigid as the rule.

Although any major reform may have to come from the legislature, the court should take this opportunity to re-define the law so that substantive damages to property are not overlooked merely because they have occurred in the wrong form.

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