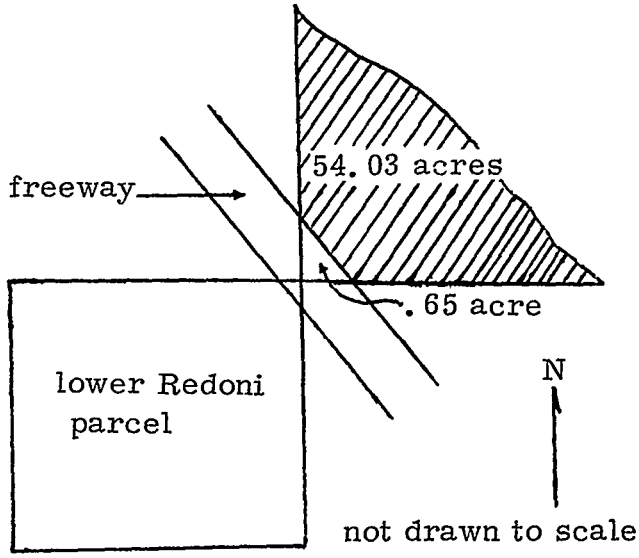
RECENT CASES

EMINENT DOMAIN—TAKING IN EXCESS CONDEMNATION PROCEEDING HELD CONSTITUTIONAL IF SUCH TAKING WAS JUSTIFIED TO AVOID EXCESSIVE OR CONSEQUENTIAL DAMAGES. *People ex rel. Dept. Pub. Wks. v. Superior Court* (Cal. 1968)

The Rodonis owned two parcels of farm land. The northeast corner of the lower rectangular section touched the southwest corner of the 54.03 acre upper triangular parcel. The Department of Public Works built a freeway across the adjoining corners, taking a tip from each parcel totalling .65 acres of the Rodoni land. The Department also took the county road which provided access to the north parcel, thus landlocking the northern parcel.



Pursuant to section 104.1 of the Streets and Highways Code,[1] the Department sought to condemn not only the .65 acres but the entire 54.03 acres of the northern parcel. This resulted in the Rodonis' receiving the value of the land exclusive of

1. CAL. STS. & H'WAYS CODE § 104.1 (West 1956) provides:
Wherever a part of a parcel of land is to be taken for state highway purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for state highway purposes.

severance damages. In the award of severance damages, the landowner not only receives the fair market value of the property being taken but also the appraised damage to the part not being taken.[2] The Department alleged that the taking and resale of the 54.03 acres would reduce the cost of the freeway. The trial court held for the Rodonis, stating that to "allow the taking of any land not physically necessary for the freeway would be a taking for other than the public use and that if section 104.1 were construed to allow such a taking it would be unconstitutional."[3]

The Department petitioned for a writ of mandate compelling the superior court to proceed with the action to condemn the 54.03 acres, or in the alternative, a writ of prohibition forbidding the court from enforcing its interlocutory judgment.[4] Following a denial by the District Court of Appeals,[5] the California Supreme Court granted a writ of mandate. *Held*: the taking of the 54.03

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2. 4 NICHOLS, THE LAW OF EMINENT DOMAIN § 14.21 (rev. 3d ed. 1962). Severance damages may be strictly considered as the loss in value of the remainder due to its separation from the whole. *Partial Taking—Severance Damages and Just Compensation*, 34 S. CAL. L. REV. 319, at 324 (1961). *See also* 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 4 (2d ed. 1953). CAL. CIV. PRO. CODE § 1248 (West Supp. 1967) provides that:

> The court . . . must hear such legal testimony as may be offered by any of the parties to the proceeding, and thereupon must ascertain and assess:
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> 1. . . . .
>
> 2. Severance damages
>
> 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, and the construction of the improvement in the manner proposed by the plaintiff;

See e.g., People v. Loop, 127 Cal. App. 2d 786, 274 P.2d 885 (1954). In an eminent domain proceeding, the state sought to take a triangular parcel on a corner of defendant's rectangular property for highway purposes. Defendant landowner's expert witnesses testified that the market value of the two lots (viewed as a unit) was $156,000. The value of the part remaining after the taking was $111,100, and the value of the part taken was $32,000. Therefore, one witness testified, severance damages were $12,900. *Id.* at 789-93, 274 P.2d at 889-92.

3. People *ex rel.* Dept. Pub. Wks. v. Superior Court, 68 Cal. 2d 206, 209-10, 436 P.2d 342, 344, 65 Cal. Rptr. 342, 344 (1968).

4. Under CAL. CIV. PRO. CODE § 1104 (West Supp. 1968), an alternative writ of prohibition must order the directed party to either desist or refrain from further proceedings in the specified action until a subsequent order of the issuing court, and then to show cause to that court why the directed party should not be absolutely restrained from further proceedings.

5. People *ex rel.* Dept. Pub. Wks. v. Superior Court, 56 Cal. Rptr. 173, 178 (1967), *vacated*, People *ex rel.* Dept. Pub. Wks. v. Superior Court, 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

acre parcel was constitutional as long as the trial court found that the taking was justified to avoid excessive or consequential damages. *People ex rel. Dept. Pub. Wks. v. Superior Court*, 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968) [hereinafter referred to as the *Rodoni* case].

When a condemnor seeks to condemn more than is actually needed for an improvement or use, the courts have justified the excess taking upon one of three theories.[6] The "remnant" theory has been employed in cases involving small, odd-shaped fragments of land which remain after an eminent domain proceeding. These remnants normally occur in areas where the land is divided into small parcels, each owned by a separate individual. The construction of a street may leave parts of each landowner's land still within his control. These separate fragments are valueless to the condemnee. Under these circumstances, the condemnor has been allowed to take the entire parcel and either use or sell the fragment. Compared to the insignificant value and size of such remnants the cost of litigation over the question of damages may be inordinately high and can be avoided by the taking of the remnants. It has been stated that "if the owner insists upon keeping what is left of his land, grave constitutional difficulties would be encountered if it was attempted to compel him to part with it."[7]

A second theory, "recoupment," has been employed to justify the taking of excess property which is not essential to the intended improvement, but which has increased in value due to the improvement. The condemnor may sell the excess at a higher price, thus recouping part of the cost of construction of the improvement.[8] This "recoupment" theory has encountered great

6. 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 7.5122 (rev. 3d ed. 1963); *see also* Annot., 6 A.L.R.3d 297, 301 (1966).

7. 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 7.5122 [1] (rev. 3d ed. 1963). New Jersey has a statute similar to California's Streets and Highways Code § 104.1 allowing a taking even though the fragment "is not needed for the right-of-way proper but only if the portion outside the normal right-of-way is landlocked or is so situated that the cost of acquisition to the State will be practically equivalent to the total value of the whole parcel of land . . . ." N.J. STAT. ANN. § 27: 7A-4.1 (1966). In State *ex rel.* State Highway Commissioner v. Buck, 226 A.2d 840 (N.J. 1967), an eminent domain proceeding took an 80' by 574.13' borderline strip abutting another portion of land which was taken but uncontested. The value of both parcels was $46,000, while the value of the uncontested parcel was $45,000. This taking was held to be in the public interest. *Id.* at 841-42.

8. 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 7.5122 [3] (rev. 3d ed. 1963).

resistance and gained little acceptance[9] due to charges that such a taking of private property would be intended for a non-public use, and therefore would be unconstitutional.[10]

The "protective" theory has justified the excess taking of

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9. *Id. See e.g.*, City of Cincinnatti v. Vester, 33 F.2d 242 (1929), where the city sought under Article XVIII, § 10 (1912) of the Ohio Constitution to condemn the Vester lot which was not contiguous to the intended 25 foot highway strip. The city stated that the "increase in value of the properties in question which may accrue by reason of the improvement contemplated . . .' will pay in part the very heavy expense to which the City will be put in effecting the improvement.'" 281 U.S. 439, 443-44 (1930). The Circuit Court of Appeals held that such a taking was not for a public use and disapproved the recoupment theory, stating that if the city's purpose was as it contended, i.e., "that property may be taken for the purpose of selling it at a profit and paying for the improvement, it is clearly invalid." 33 F.2d at 245. While affirming the Circuit Court's decision, the United States Supreme Court held that the city's proceedings for excess condemnation were not in conformance with pertinent state law, and specifically refused to pass upon the recoupment theory. 281 U.S. at 449 (1930). *Accord, Opinion of the Justices*, 204 Mass. 607, 91 N.E. 405 (1910), where the legislature wished to lay out a street and condemn any excess land reasonably necessary with the aim of reselling or leasing the excess lands to private individuals. Restrictive covenants would be placed upon any sales with the avowed purpose of building up Boston's foreign commerce. The Massachusetts Supreme Court concluded that "[i]t is plain that a use of the property to obtain the possible income or profit that might enure to the city from the ownership and control of it would not be a public use . . . . Such proceedings are entirely outside the functions of a State or of any subdivision of a State." *Id.* at 610, 91 N.E. at 407.

10. *See* U.S. CONST. amends. V, XIV § 1; CAL. CONST. art. 1, § 14. A distinction has been made where the excess property may be sold when such excess is no longer needed for the intended improvement. The Massachusetts Supreme Court, in the same year as *Opinion of the Justices*, 204 Mass. 607, 91 N.E. 405, held that a statute allowing a transit commission to take a fee interest and to later sell, remove or lease the buildings when they were no longer needed in order to construct a tunnel, was constitutional. The court stated in City of Boston v. Talbot, 206 Mass. 82, 91 N.E. 1014 (1910) that:

> If the construction of the tunnel . . . would necessarily have a directly injurious effect upon land outside of the limits of the tunnel, so as to subject the city to a substantial claim for damages on that account, it might be reasonable and proper for the commission to take the land in fee and pay for it, and then, when the work was ended, to dispose of that part which was no longer needed.
>
> The Legislature well might provide for a taking of land and a construction of the work with a reasonable regard to economy, and a taking in fee of adjacent land likely to be seriously injured in the progress of the work might be more economical than a taking only of that which would be needed permanently.

Id. at 89, 91 N.E. at 1016. In view of what the same justices previously said, *supra* note 9, this is a perplexing analysis and has been distinguished as a taking necessary during the course of a public work. 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 7.223 [1] (rev. 3d ed. 1963). On the other hand, there is some recognition that the recoupment theory can be more liberally construed. *See* Bond v. Baltimore, 116 Md. 683, 82 A. 978 (1911); and Nelson, *An Expanded Use of Excess Condemnation*, 21 U. PITT. L. REV. 60 (1959).

land adjoining a particular public improvement in order to assure that the area surrounding the improvement presents a desirable appearance.[11] Under this theory, which has found legislative and judicial acceptance in California[12] and other jurisdictions,[13] the condemnor may either retain the excess land or sell it, attaching to the sale any restrictions that could perpetuate the "protective" aspect of the land.[14]

The court in the instant case used the remnant theory as a basis for its decision. Mr. Chief Justice Traynor, writing for the majority, stated that while the parcel of 54 landlocked acres was not a physical remnant, it qualified as a "financial" remnant.[15] It was a financial remnant because the severance damages suffered by the 54 acres as a landlocked parcel might equal its value.[16] The justification for such an inordinately large taking of excess property was that there "is no reason to restrict this theory [remnant] to the taking of parcels negligible in size and refuse to apply it to parcels negligible in value."[17] The Rodonis claimed

11. This often not only preserves the improvement, but also has the effect of contributing to highway safety, drainage and appearance. *See e.g.*, People *ex rel.* Dept. Pub. Wks. v. Lagiss, 223 Cal. App. 2d 23, 40, 35 Cal. Rptr. 554, 565 (1963); Annot., 6 A.L.R.3d 297, 314 (1966).

12. CAL. STS. & H'WAYS CODE § 104.3 (West 1956) provides:

> The department may condemn real property or any interest therein for reservations in and about and along and leading to any state highway or other public work or improvement constructed or to be constructed by the department and may, after the establishment, laying out and completion of such improvement, convey out any such real property or interest therein thus acquired and not necessary for such improvement with reservations concerning the future use and occupation of such real property or interest therein, so as to protect such public work and improvement and its environs and to preserve the view, appearance, light, air and usefulness of such public work; provided . . . that when parcels which lie only partially within such limit of 150 feet are taken, only such portions may be condemned which do not exceed 200 feet from said closest boundary.

See also People *ex rel.* Dept. Pub. Wks. v. Lagiss, 223 Cal. App. 2d 23, 35 Cal. Rptr. 554 (1963), where the Department successfully condemned all of defendant's land although only a portion was necessary for completion of the highway. Any excess land not necessary for the highway would be conveyed with such reservations as to protect the highway, its view, appearance, and usefulness.

13. MO. CONST. art. 1, § 27; N.J. CONST. art 4, § 6, ¶ 2; OHIO CONST. art. XVIII, § 10.

14. In Clendaniel v. Conrad, 26 Del. (3 Boyce) 549, 83 A. 1036 (1912), a Delaware law which authorized boulevard corporations to take land, in addition to that needed for the boulevard right-of-way, for the proper construction and security of the boulevard was held valid as applied to a strip 200 feet wide for a 30 foot right-of-way.

15. 68 Cal. 2d at 212-13, 436 P.2d at 346, 65 Cal. Rptr. at 346.

16. 68 Cal. 2d at 213, 436 P.2d at 346, 65 Cal. Rptr. at 346.

17. *Id.*

that the reasonable market value of their three parcels was $41,000.[18] The department stated that it would be necessary to build a 14-foot underpass at a cost of $50,000 in order to connect the two parcels. Since the Rodonis' farm equipment had axle widths of 16 feet, there would be an additional cost of $5,000 to $10,000 to construct an underpass 16 feet in width.[19] Therefore, it would cost the Department less to pay the fair market value and to take the remnant than to pay the damages suffered by the Rodonis.

Other California cases which have considered the problem of excess condemnation have allowed it under certain circumstances. In *People v. Thomas*,[20] twenty-three acres of land were taken under section 103 of the Streets and Highways Code for the completion of a limited access freeway. However, the taking of another two acres was justified under section 104.1 of the same code.[21] No contention was made as to the necessity or public interest in what was clearly an excess condemnation, but the taking could have been justified by the remnant theory since the two-acre parcel was small and irregular in shape. In *Thomas*, two out of twenty-five acres were taken under section 104.1 while in *Rodoni* 54 out of 54.65 acres, over eighty times that necessary for the proposed freeway, were taken and justified under the "remnant" theory.

Disagreeing with the interpretation given to the remnant theory, Justice Mosk, in dissent, stated that it would be understandable to have a taking of 54 acres with a residue of .65

18. Petitioner's Brief for Writ of Mandate, Prohibition or Other Appropriate Remedy at 3, 21, People *ex rel.* Dept. Pub. Wks. v. Superior Court, 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

19. *Id.*

20. 108 Cal. App. 2d 832, 239 P.2d 914 (1952).

21. *Id.* at 836, 239 P.2d at 917. In another case involving § 104.1, the state took 65.8 acres of land under that section although a "comparatively small portion" was required for the freeway construction. While the parcel was mountainside property which had value to the owners as a snow skiing and recreational area, they did not contest the taking of the whole. Rather, the case dealt with proof of value and courtroom misconduct. People *ex rel.* Dept. Pub. Wks. v. Auburn Ski Club, 241 Cal. App. 2d 781, 50 Cal. Rptr. 859 (1966); *See also* Kern Co. High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919), where an original taking of a lot 80 feet by 344 feet was amended to 100 feet by 344 feet since the 20 foot difference was "comparatively worthless." If the excess was not taken, the effect would be to "require the plaintiff to pay practically the value of the entire one hundred feet of land belonging to the defendants, while . . . it could acquire only 80 feet thereof." *Id.* at 16, 179 P. at 185.

acres, but not the other way around.[22] While both opinions note that the purpose of the taking was not for a public use, but for a reduction of the cost of the freeway by selling the portion not needed for freeway purposes,[23] the dissent regards this as tantamount to the disapproved recoupment theory.[24] This is so because such a taking, admittedly for a non-public use, as here, with the intent to resell to private parties, represents an application of the recoupment theory. The recoupment theory in this instance may be inapplicable since the value of the excess was not enhanced by the improvement.[25] However, as Justice Mosk points out, if the "land is truly of little value, the state will obtain little return by way of sale,"[26] thereby defeating the express purpose of the Department. In section 104.1, the criterion for a taking is that the "remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage." The court implies that the value to be considered is to be determined by the state, mentioning that "its value as a landlocked parcel is such that severance damages might equal its value."[27] While this view does not state through which party's eyes the value is to be determined, section 104.1 explicitly makes the criterion the value with respect to the owner.[28] The remnant theory also intimates that the value of such parcels is to be measured from the property owner's point of view.[29]

The most crucial determination in *Rodoni* was what constituted a "public use." Any taking of private property which is intended for a non-public use would run afoul of constitutional provisions.[30] The majority stated that while the 54.03 acres were

22. 68 Cal. 2d at 218, 436 P.2d at 350, 65 Cal. Rptr. at 350.

23. *Id.* at 209, 216, 436 P.2d at 344, 349, 65 Cal. Rptr. at 344, 349.

24. *Id.* at 218-19, 436 P.2d at 350, 65 Cal. Rptr. at 350.

25. *Id.* at 214 & n.7, 436 P.2d at 347 & n.7, 65 Cal. Rptr. at 347 & n.7.

26. *Id.* at 219, 436 P.2d at 350, 65 Cal. Rptr. at 350.

27. *Id.* at 213, 436 P.2d at 346, 65 Cal. Rptr. at 346.

28. CAL. STS. & H'WAYS CODE § 104.1 (West 1956); *accord,* People v. Lagiss, 160 Cal. App. 2d 28, 324 P.2d 926 (1958), in which the court stated that "If at the trial the state invokes section 104.1 as justification for the taking of the 'excess' portion, it will need to show that such portion of defendant's parcel is 'of little value to' him or that leaving title thereto in him will 'give rise to claims or litigation concerning severance or other damage.' (citation omitted) Perhaps it would have to prove both." *Id.* at 35, 324 P.2d at 931.

29. 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 7.5122 [1] (rev. 3d ed. 1963).

30. U.S. CONST. amends. V, XIV, § 1; CAL. CONST. art. 1, § 14; 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 7.5122 [1] (rev. 3d ed. 1963).

admittedly unnecessary for the physical construction of the improvement, "the question of public use turns on a determination of whether the taking is justified to avoid excessive severance or consequential damages."[31] Such a holding requires a broad definition of "public use." In the broad definition which California has adopted,[32] "public use" is equated with "public advantage," or "benefit," i.e.,

> . . . anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns . . . manifestly contributes to the general welfare and the prosperity of the whole community, and, [gives] the constitution a broad and comprehensive interpretation.[33]

Therefore, any prevention of fiscal loss to the state by avoiding payment of severance damages where they are equal to the property's value would be a benefit to the state and its citizens. While the determination as to whether a proposed use is a constitutionally permitted public use is a judicial one,[34] the trend has been towards a more liberal interpretation of these findings.[35]

The stricter view is to interpret "use" as synonymous with "employment." Any taking must have been intended to provide the public with the expected use. After condemnation, both

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31. 68 Cal. 2d at 216, 436 P.2d at 348, 65 Cal. Rptr. at 348.

32. In City of Menlo Park v. Artino, 151 Cal. App. 2d 261, 311 P.2d 135 (1957), the court said that "public use" within the meaning of section 14 of the California Constitution is a " 'use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government.' (Bauer v. County of Ventura, 45 Cal.2d 276 at page 284 [289 P.2d 1]." *Id.* at 269, 311 P.2d at 141; *accord,* Univ. of So. California v. Robbins, 1 Cal. App. 2d 523, 37 P.2d 163, *cert. denied,* 295 U.S. 738 (1934).

33. 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 7.2 [2] (rev. 3d ed. 1963).

34. Linggi v. Garovotti, 45 Cal. 2d 20, 24, 286 P.2d 15, 18 (1955); People v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959).

35. Nelson, *An Expanded Use of Excess Condemnation,* 21 U. PITT. L. REV. 60 (1959), wherein the author cited various Supreme Court cases (*inter alia,* Berman v. Parker, 348 U.S. 26 [1954], upholding urban redevelopment; United States *ex rel.* TVA v. Welch, 327 U.S. 546 [1946]) for the proposition that the heretofore disapproved recoupment theory may now be allowed due to a liberal judicial interpretation of "public use." With a more liberal view, excess condemnation would be allowed for financial savings purposes. However, the author further stipulates that "[w]hen the excess condemnation is solely for economic purposes, the burden should be upon the government to show that, due to the relation of the public improvement to the excess land, the exercise of power resulted in a definite financial savings to the public." *Id.* at 70; *see also* 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 7.2 [2] (rev. 3d ed. 1963).

public or quasi-public agencies must use the land for some direct service to the public.[36] However, any speculative resale of property to private purchasers is not a public use.[37] The dissent would substitute "use" for "excessive damages" as the proper test in excess condemnation cases:

> *the question of public use or purpose turns on a factual determination of what the public agency proposes to do with the property after acquisition.*[38]

Rodoni has added a new dimension of "financial benefit" to the remnant theory. It is not clear who is to be "benefited" by the application of this new financial remnant approach. If the theory is to be applied in all cases by the Department of Public Works in order to obtain favorable or reasonable land settlements it may be regarded as coercive by property owners. If the purpose of the financial remnant theory is to benefit the public under a broader definition of "public use," i.e., less expensive freeway construction, then such a theory has great validity. The standard under which the theory has been enlarged is rather ill-defined—the Department may take only to avoid excessive severance or consequential damages.[39] In the *Rodoni* case, the court decided that since the value of the 54.03 acre landlocked parcel is such that "severance damages might equal its value,"[40] the taking of the whole was justified. Moreover, the application of section 104.1 seems to have been limited to situations *only* where severance damages *might* equal the value of the landlocked parcel. In such a situation, the Department of Public Works is confronted by a perplexing problem: if it alleges that the severance damages are equal to the fair market value of the parcel, and the court disagrees, then the value which is argued will remain as the Department's determination of the

36. 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 7.2 [1] (rev. 3d ed. 1963), 26 AM. JUR. 2d EMINENT DOMAIN § 27 (1966).

37. *See* 68 Cal. 2d at 216, 436 P.2d at 349, 65 Cal. Rptr. at 349; *see also* note 42 *infra*. Justice Mosk noted that the state's right-of-way agent, in interpreting § 104.1, testified that it was his opinion that " 'the state would have a right to take as much as one thousand acres of private property, even though it was not for a public use.' " *Id.* at 220, 436 P.2d at 351, 65 Cal. Rptr. at 351. This new financial remnant theory based upon a fear of excessive damages may be considered lacking in definitive standards and possibly violative of due process. *Id.*

38. 68 Cal. 2d at 221, 436 P.2d at 352, 65 Cal. Rptr. at 352.

39. *Id.* at 210, 436 P.2d at 344-45, 65 Cal. Rptr. at 344-45.

40. *Id.* at 213, 436 P.2d at 346, 65 Cal. Rptr. at 346.

value of severance damages to the landlocked parcel. The landowner is similarly faced with a dilemma: if he decides to allege low severance damages to refute the Department's arguments he may be bound to a low assessment of severance damages. Hopefully, subsequent court decisions will make this guideline clearer. Until such time, the property owner may be concerned that if a project is being planned near his land the whole of his property may be taken in the name of economy.

It is arguable, however, that if the individual landowner receives fair value for his land he has no cause to complain. What is at issue between the Department and the landowner is severance damages. Naturally, the Department would prefer either to completely eliminate them or pay as little as possible. The following hypothetical will demonstrate the problem. A landowner's rectangular parcel is valued at $100,000; one-tenth of the property, with a fair market value of $10,000, is to be taken for an intended freeway. Assume that the damages which will accrue to the remaining nine-tenths is one-half of $90,000, or $45,000. Thus, the landowner, under normal eminent domain proceedings, receives damages not only for the part taken, but also for severance damages. The total for both taking and damages is $55,000. Disregarding any future uses the landowner may make of his property that would tend to enhance its value, it may be argued in some instances (where the property has been undervalued) that the landowner should not derive a benefit, or windfall, from the eminent domain proceeding. The landowner is being paid the fair market value of his property and has no real standing to demand additional sums under severance damages. Nevertheless, severance damages are provided by the legislature and it is within their realm to change the statute if necessary.[41] Thus, the landowner who is successful in proving severance damages receives the value of his damages, the value of the lost property, and also retains what is not taken.

41. It would seem that under the fifth amendment of the Constitution that compensation is allowed only for property taken. However, an exception has been made by all federal and state courts when there is only a partial taking. "This is a situation where a denial of compensation for the resulting severance damages would so shock the conscience of the courts, that they hold that payment for 'damages to the remainder' must be made . . . . In these cases compensation for the property taken must include compensation for 'damages to the remainder.' " 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 4 at 18 (2d ed. 1953); *see also* 4 NICHOLS, THE LAW OF EMINENT DOMAIN § 14.1[3] at 497-98 (rev. 3d ed. 1962).

However, if the state wishes to avoid severance damages it may do so under *Rodoni*. It is important to note that the court feared excessive severance damages. It determined that economic savings to the state should be equated with "public use"; however, if the landowner can prove that the state *in fact* saves absolutely nothing by taking the whole (as opposed to taking part and paying severance damages) then there is no economic saving, no finding of public use, and no justification for that taking.

In the above hypothetical, if the state decided to take under section 104.1 in order to avoid "excess" severance damages, it would pay the landowner $100,000 and take the whole parcel. At this point the state would have the one-tenth it needs for construction and the remaining nine-tenths for which it paid $90,000. The state may either retain and use the nine-tenths or sell it to defray cost of the freeway. If the nine-tenths are retained, the additional property has cost $90,000 extra; no savings would be realized since severance damages in the hypothetical were determined to be only $45,000. Therefore, instead of spending $45,000 for damages the state must pay $90,000. On the other hand, if the nine-tenths are sold, the state will have to take into account the fact that the nine-tenths has been damaged due to the taking of the one-tenth. Now that the parcel is severed and the remainder has been damaged, theoretically it is worth only $45,000. When the state gains $45,000 from resale, it has expended a total of $55,000. Thus, under both approaches to the hypothetical the state pays *exactly* the same amount and saves nothing. In fact, under the latter example, additional expenses would be incurred due to the increased litigation. It seems that Chief Justice Traynor has limited the scope of such an economic taking. This is so because the state may not sell the remnant to private individuals for more than they determined that it was worth—the value of the whole less the part taken less the damages avoided. To attempt to sell the remnant for more than it cost to the state would be tantamount to land speculation, which is clearly unconstitutional.[42]

42. In a well-known eminent domain case, the City of Cincinnatti, acting pursuant to a constitutional provision allowing excess condemnation and the subsequent sale of that excess with restrictions placed upon it, unsuccessfully tried to acquire excess property for a widening of a street. The court, speaking of the statute, said "[i]f it means . . .

When it is apparent that there is no economic benefit derived from the taking of the whole, it becomes a question of policy whether the individual or the state should have the remainder. The state may argue that the payment of the whole allows it to take the whole. The landowner may argue that since such a taking is of no real economic benefit to the state, with no resulting public use, he should be allowed to retain his property and receive severance damages. Whichever way this dispute is resolved, it seems that *Rodoni* has allowed the state great leeway in the determination of its future condemnation proceedings.[43]

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that the property may be taken for the purpose of selling it at a profit and paying for the improvement, it is clearly invalid. . . . [and] violates the due process clause of the Constitution." City of Cincinnatti v. Vester, 33 F.2d 242, 245 (6th Cir. 1929), *aff'd on other grounds*, 281 U.S. 439, 449 (1930); *accord*, Opinion of the Justices, 204 Mass. 607, 91 N.E. 405 (1910).

43. After the Supreme Court allowed the writ of mandate to issue ordering the trial court to proceed with the *Rodoni* trial, the action was settled out of court. The Rodonis settled for $36,000 and retained title to the 54.03 acre parcel. This sum represents the amount paid for the .65 acre parcel, together with severance damages. Letter from L. M. Linneman of Linneman, Burgess, Telles & Van Atta, to Mr. Phil DeMassa, March 27, 1969, on file in University of San Diego Law Review office.