

Most Injurious Use - Ways to Use It, Abuse It, and What the Courts Are Saying About It

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The Condemnation Context

- ▶ Article 1, Section 19 of the California Constitution requires payment of “just compensation” for property that is “taken or damaged for public use”
- ▶ However, the Constitution does not further define or describe what constitutes just compensation

The Condemnation Context

- ▶ So – we must look to the California Code of Civil Procedure and case law to implement the constitutional mandate
 - ▶ Compensation must be paid for the part taken; the measure is the fair market value (§1263.310 – 1263.330)
 - ▶ If there's a larger parcel, compensation must also be paid for “injury to the remainder” (commonly called “damages”), which is damages less benefits (§1263.410)

The Project as Proposed

- ▶ Damage to the remainder can be caused by either or both of:
 - ▶ The severance of the remainder from the part taken
 - ▶ The construction and use of the project “***in the manner proposed by the plaintiff***” whether or not the damage is caused by a portion of the project located on the part taken.” (§ 1263.420)
- ▶ “Compensation for injury to the remainder ***shall be based on the project as proposed.***” (§ 1263.450)

The Project as Proposed

- ▶ Where do the parties look to understand what's the project as proposed?
 - ▶ Resolution of necessity
 - ▶ Only indicates the purpose/public use and defines the parts taken
 - ▶ Does not include drawings of the project
 - ▶ Delineates what the project is (by extension, everything else is **not** the project)

The Project as Proposed

- ▶ Where else?
 - ▶ Approved construction plans? (As one court phrased it, the key to defining the public project is, “[a]n accurate, stable and finite project description.” (*Burbank-Glendale-Pasadena Airport Auth. v. Hensler* (1991) 233 Cal.App.3d 577))
 - ▶ The problem, however, is that a substantial majority of the time, the final/approved project construction plans are not completed at the time of the:
 - ▶ Precondemnation offer
 - ▶ Resolution of Necessity hearing; and/or even,
 - ▶ Trial

The Project as Proposed

- ▶ What's the relevant project design?
- ▶ Damages based on present and proposed improvements are fixed “once and for all” at trial. (*People v. Silveria* (1965) 236 Cal.App.2d 604.)
 - ▶ Project design as of a settlement based on an initial offer?
 - ▶ Project design as of the date of value?
 - ▶ Project design as of the date of a post-complaint settlement?
 - ▶ Project design as of the date of trial? Or,
 - ▶ Project design as of the date of acquisition, whenever that might be?

The Project as Proposed

- ▶ What about design/build projects?
 - ▶ “Normal” project: the project is nearly fully designed, then acquisitions, then bid and build
 - ▶ Design/build: low-level design, then acquisition, then design and build
- ▶ Where does owner look five years later to understand whether the agency actually built the project in the manner proposed?

Most Injurious Use

- ▶ Source/relevance of the “most injurious use” doctrine?
 - ▶ One bite at the apple doctrine – the owner gets paid once and only once, so the owner must get paid for all “reasonably foreseeable” impacts of the taking
 - ▶ Not in CA code – case law will be discussed later
 - ▶ “most injurious use of the property reasonably possible”
 - ▶ “We hold that in determining a landowner's entitlement to severance damages, the fact finder henceforth shall consider competent evidence relevant to **any conditions caused by the project that affect the remainder property's fair market value, insofar as such evidence is neither conjectural nor speculative**” (LAMTA v. Continental Development)

Most Injurious Use

- ▶ Most injurious use doctrine applies on two levels:
 - ▶ Interpretation of rights acquired (*SD County v. Bressi*)
 - ▶ Impacts of the construction of the project in the manner proposed
- ▶ Mr. or Ms. Appraiser – are you a lawyer? An engineer?

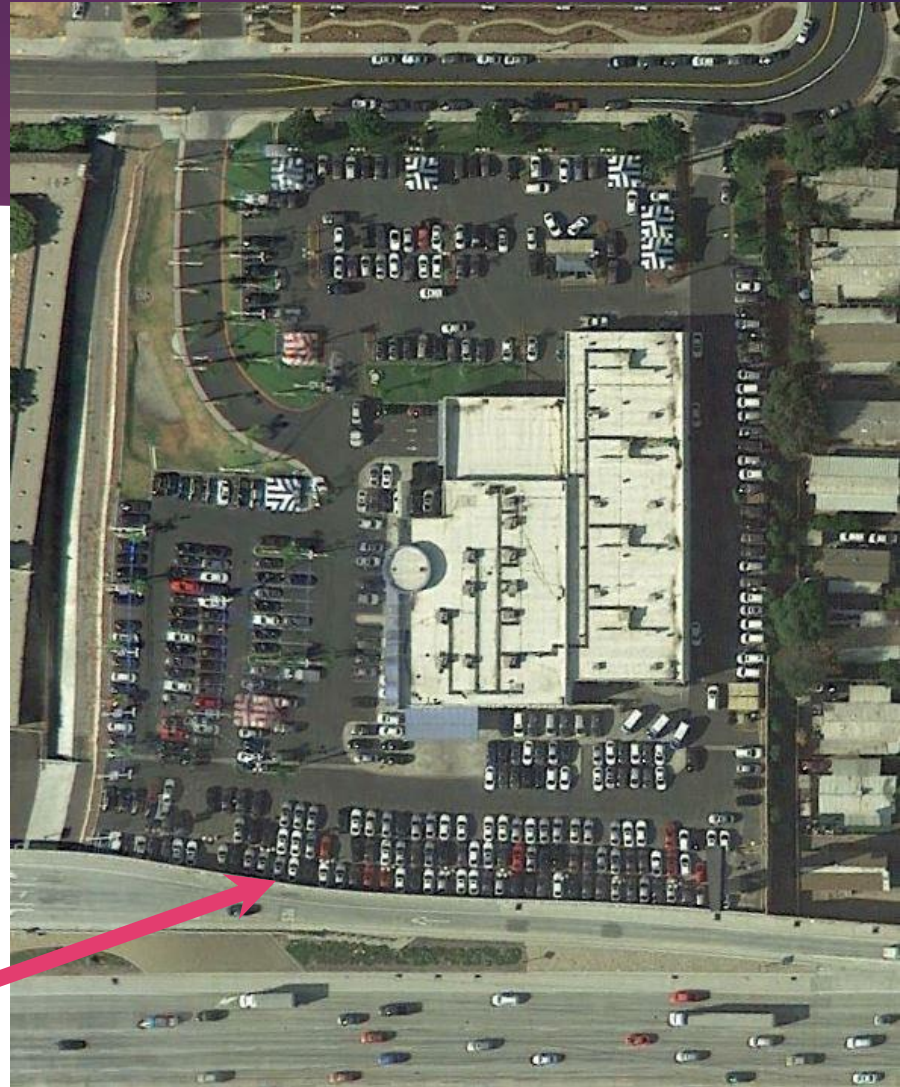
Most Injurious Use

- ▶ Damages that were “reasonably foreseeable” based on the project as proposed are non-recoverable in a subsequent action
- ▶ This is because, under the law, when part of an owner's real property is acquired, the owner is **presumed to have been fully compensated** by the initial award or payment for "reasonably foreseeable" severance damages due to construction, maintenance, or operation of the public project (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 265.)

Case Study

Acquisition of a wall footing easement

Retaining wall



Case Study

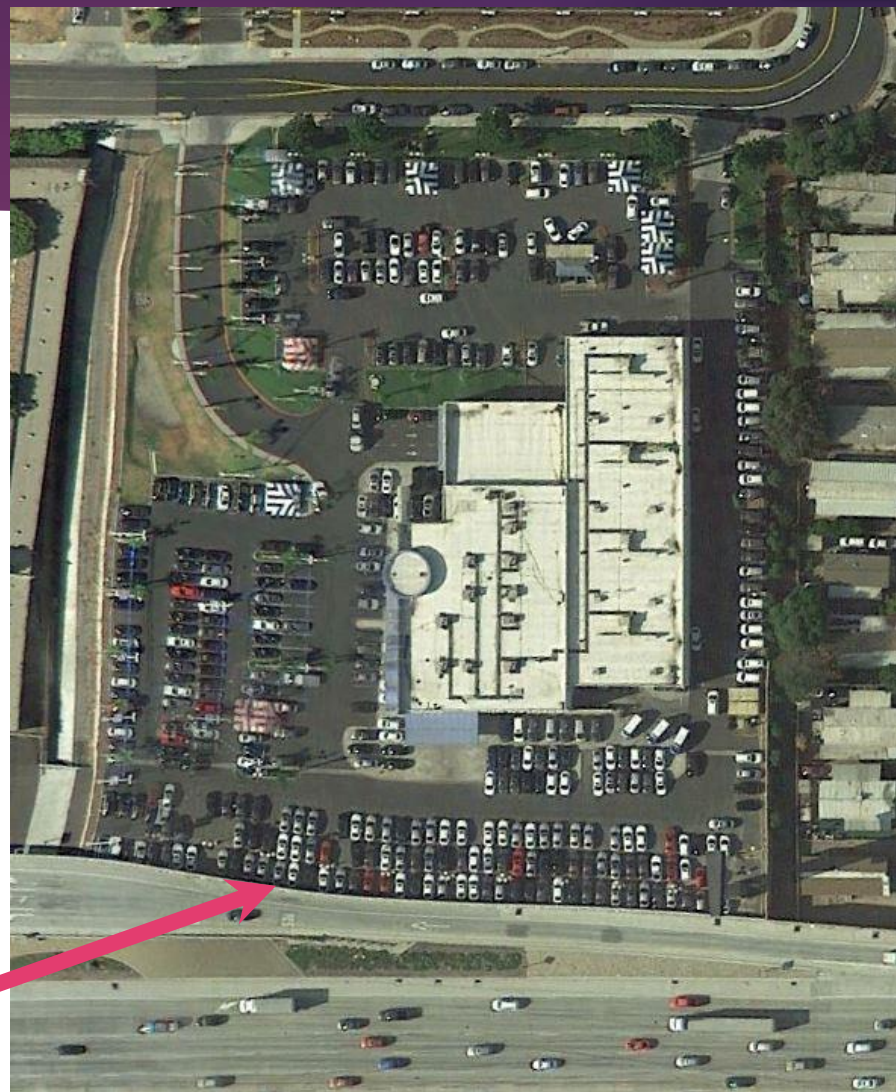
- Let's look at the easement language:

"Permanent Wall Footing Easement" grants to [REDACTED], including its successors and assigns, a permanent easement to construct, maintain, operate repair, alter, replace, and remove footings, under, along and across the easement area, together with all necessary and convenient means of ingress and egress to and from the easement area or strip or parcel of land, for the purpose of constructing, reconstructing, maintaining, operating, repairing, renewing, or enlarging in any manner the footings together with any and all of the purposes hereinbefore mentioned.

Case Study

What's the impact of the access rights acquired with the easement?

Retaining wall



Case Law – *Schultz* (1954)

- ▶ Part take in fee to convert a highway to a freeway
 - ▶ All abutter's rights acquired, but property would have access when freeway constructed
 - ▶ Owner claims that until the new highway is completed, the land will be landlocked
 - ▶ State engineer testified at trial about plans that will provide for the interim access, which is made part of the judgment
- ▶ Issue: what do you do with severance damage and the date of value, when this plan didn't exist as of the date of value?

Case Law – *Schultz* (1954)

- ▶ Court held:
 - ▶ Doesn't matter - use the date of value, but take into this plan account, even though the plan was developed after the date of value
 - ▶ Damages are then to be fixed based on those plans. If the State later varies from those plans and the property suffers a diminution in value, the property owner can bring a subsequent action.
- ▶ TAKE AWAY: Project plans don't have to be completed or exist as of the date of value to be taken into account in assessing severance damages and the plans don't even have to be "official" or "approved" as long as the court finds the plans to be consistent with the intent of the RON AND are made part of the judgment.

Case Law – *Silveira* (1965)

- ▶ State acquiring part take for a freeway, including all four points of access the property had to the freeway.
 - ▶ The State's plans showed no access points to the freeway, and the pleadings and pre-trial conference order stated that all access to the property was being acquired.
 - ▶ State tried to present evidence at trial of the possibility of an access point in the future.
 - ▶ Court refused to admit that evidence, because a “condemnation award must once and for all fix the damages, present and prospective, that will accrue reasonably from the construction of the improvement and in this connection must consider the most injurious use of the property reasonably possible.”

Case Law – *Silveira* (1965)

- ▶ TAKE AWAY: Assess damages based on what is reasonably possible, NOT on conjecture or remote or speculative possibilities.
- ▶ At the same time, the government can't mitigate the damages its taking and project is causing with conjecture or speculative future fixes.
- ▶ It appears that the difference between *Silveira* and *Schultz* was that the plan or the “fix” was just speculative testimony in *Silveira*, it wasn't being made part of the judgment as in *Schultz*.

Case Law – *Ellena* (1977)

- ▶ Carries forward the concept of reasonably foreseeable and probable damages to the subsequent action referenced in *Schultz*. Once damages have been awarded, as specified, owner cannot bring a subsequent claim for damages if they were the “reasonably foreseeable consequences of the construction and maintenance of the project.”
- ▶ However, if there is a variation, modification, or omission with respect to those, the subsequent action is not barred.

Case Law – *Ellena* (1977)

- ▶ TAKE AWAY FOR ATTORNEYS: Clear documentation of what the Project and plans are, in either the judgment or settlement documents, protects both parties.
- ▶ TAKE AWAY FOR APPRAISERS; Must assess all reasonably foreseeable damages from the taking and Project “as proposed.” Don’t just assume that any questions or vagaries will be resolved in favor of the property owner. If nothing else, your appraisal could force the agency to be more specific and fill in gaps.

Questions for the Lawyers

- ▶ What about “limiting” language in a construction contract - does that “trump” the language of an easement?
- ▶ Is the construction contract language part of the “project as proposed”?

Most Injurious Use

- ▶ After receiving payment, the property owner cannot institute a further action for subsequent damage to the remainder property if the harm was reasonably foreseeable at the time of payment. (*Cox v. State* (1970) 3 Cal.App.301.)
- ▶ The property owner will be prohibited from recovering by inverse condemnation later damages to the remainder ***that could reasonably be expected to result from the necessary and ordinary use of the public project.***

Most Injurious Use

- ▶ Significance of Rule - Case Law Illustration:
 - ▶ Court denied inverse liability when a project allegedly caused extensive flooding damage over a year after the condemnation action was settled because the Court determined that the property owner has actual and constructive knowledge of the project plans in existence at the time of the judgment. (*Ellena v. State* (1977) 69 Cal.App.3d 245.)

Most Injurious Use

- ▶ “By entering into a lease permitting the county to use the property for a sanitary fill, plaintiffs consented to such damage to the property as could be reasonably anticipated from the natural and ordinary operation of the sanitary fill, but ***they are not precluded or estopped to claim damage which neither they, the county, nor any other reasonable person, would have anticipated.*** (Reinking v. County of Orange (1970) 9 Cal.App.3d 1024)

Most Injurious Use

- ▶ Significance of Rule - Case Law Illustration:
 - ▶ Whereas, in another almost similar matter, the court held that the property owners were not estopped in a later action for damages from similar flooding problems. (*Mehl v. People* (1975) 13 Cal.3d 710.)
 - ▶ The critical difference between the two cases: In the latter case, the plans for the drainage facility were **nonexistent** when the owners conveyed the property to the State for freeway purposes.

More Questions for the Lawyers

- ▶ What about cases that are settled at the offer stage with little detail on project configuration?
- ▶ How is the project configuration documented in a settlement agreement?

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