

TEMPORARY SEVERANCE DAMAGES

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STOP CALLING IT “TEMPORARY SEVERANCE DAMAGE”

- IT IS NOT “SEVERANCE” DAMAGE.
- THE DAMAGE IS NOT “TEMPORARY.”

EMINENT DOMAIN LAW CCP § 1263.420

Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following:

- (a) The **severance** of the remainder from the part taken.
- (b) The **construction** and use **of the project** for which the property is taken **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.

“TEMPORARY” INJURY IS GENERALLY NOT COMPENSABLE

- **Rule:** Temporary interference with right of access resulting from actual construction of public improvements is generally non-compensable. (People v. Ayon (1960) 54 Cal.2d 217, 230)
- **Reason:** “It would unduly hinder and delay or even prevent the construction of public improvements to hold compensable every item of inconvenience or interference attendant upon the ownership of private real property because of the presence of machinery, materials, and supplies necessary for the public work which have been placed on streets adjacent to the improvement.” (Ayon, at p. 228, citing Heimann v. City of Los Angeles (1947) 30 Cal.2d 746, 755.)

PERMANENT DAMAGE CAUSED BY TEMPORARY INTERFERENCE MAY BE COMPENSABLE

- “[D]amages resulting from **unnecessary and substantial temporary interference** with the property owner's rights in the property may be compensable.” (People v Ayon (1960) 54 Cal.2d 217, 228.)
- “But such damages cannot be recovered until they have occurred. They may never occur. Until they have occurred such damages are purely speculative....” (Id. at p. 229.)

BALANCE TWO COMPETING POLICIES

- Test of compensability is whether condemnee is obligated to bear more than his “**proper share**” of the burden of the public improvement. (House v. Los Angeles County Flood Dist. (1944) 25 Cal.2d 384, 397, conc. opn. of Traynor, J.)
- “. . . compensation too liberally allowed will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost.” (Bacich v. Bd. Of Control (1943) 23 Cal.2d 343, 350.)

CALL IT

“DAMAGE TO REMAINDER DURING CONSTRUCTION”

- CACI Jury Instruction 3511B
- Approved by Judicial Council May 2017
- Source: CCP § 1263.420, subd. (b)

CACI 35 I I B USE INSTRUCTION

“Use this instruction if the owner claims that he or she suffered an economic loss on the property not taken during construction of the project, for example because of decreased business due to access being made more difficult.”

2 CACI 3511B

Judicial Council of California Civil Jury Instructions (CACI) > Series 3500 EMINENT DOMAIN

3511B Damage to Remainder During Construction (Code Civ. Proc., § 1263.420(b))

The [name of condemnor] has taken only a part of [name of property owner]’s property. [Name of property owner] claims that [he/she/it] suffered damage to the remaining property during construction of the project for which the property was taken. This loss was because of [specify reasons alleged for damage due to construction, e.g., reduced business because construction made access to owner’s business more difficult].

If you determine that [name of property owner] suffered damage to [his/her/its] remaining property during construction, you must determine the amount of this damage and include it in determining just compensation.

REMAINDER MUST SUFFER **ACTUAL** HARM

- Remainder must suffer **actual** harm during construction. (Campus Crusade)
- Harm cannot be hypothetical. (I.e., not based on hypothetical H&B use.) (Fisher)
- Harm cannot be speculative. (I.e., not based on speculative use.) (Richards, Campus Crusade)
- Must harm remainder property, not business. (I.e., lost rent, not lost profit.)

JUDGE OR JURY?

- Impairment of access to remainder during construction - Court must first determine whether impairment is substantial before opinion of value goes to jury. (Livermore v. Baca (2012) 205 Cal.App.4th 1460.)
- All other claims of damage to remainder during construction go directly to jury. (Id.)

HOW DID WE GET LOST?

ORANGE COUNTY FLOOD CONTROL DIST. v. SUNNY CREST DAIRY, INC.
(1978) 77 CAL.APP.3d 742.

- Sunny Crest’s valuation expert used the phrase “temporary severance damage” to describe a 2 year loss of fair rental value of the remainder burdened by a 2 year TCE.
- Court of Appeal: “We turn to the district's attack upon the award of ‘temporary severance damage,’ which Sunny Crest **more fittingly characterizes on appeal as damages for ‘temporary taking.’**” (Id. at p. 760.)

TIMING OF CONSTRUCTION: THE APPRAISAL DILEMMA

- “While the general rule is that, in condemnation actions, the damages should be fixed once and for all at the time of the main trial, that rule is not inflexible. A condemnation award is based on the assumption that the improvement will be carried out as proposed.” (People v. Ayon (1960) 54 Cal.2d 217, 229.)
- “When the condemnation action is tried **before** the improvement is constructed, and substantial although temporary interference with the property owner's rights of possession or access occurs during construction, the property owner may maintain a subsequent action for such **damage occurring during construction.**“ (People v. Ayon (1960) 54 Cal.2d 217, 229.)

CALTRANS ROW MANUAL 7.09.03.00

NON-COMPENSABLE DAMAGES

“C. Temporary damages to the use and occupancy of property reasonably incident to construction requirements.

Unnecessary and substantial interference may be compensable. The appraiser should confer with HQ R/W Appraisal Branch and Legal to assist in the determination of damage compensability.”

CONCLUSION

DAMAGE TO REMAINDER DURING CONSTRUCTION AND PRIOR TO TRIAL

- Actual and substantial (not theoretical or speculative) interference with remainder property interest.
- Interference occurs during construction, i.e., temporary.
- Damage caused by temporary interference is permanent.
- Subjective inquiry into Owner's **actual damage** – not objective standard.
- Interference with access: Judge, as gatekeeper, must first determine whether interference is “substantial and unreasonable.” If yes, amount of damage goes to Jury.
- Non-access interferences: Issue goes directly to Jury.

CONCLUSION

DAMAGE TO REMAINDER DURING CONSTRUCTION AND AFTER TRIAL

- If construction is not complete at time of trial, claim for damage to remainder during construction should be reserved until construction complete. (See People v. Ayon, supra, at p. 229.)

PRACTICE POINTER FOR CONDEMNOR

- Manage risk on the front end.
- Understand whether Bid and Contract documents limit Contractor's ability to impair access to businesses, require dust control, etc.
- If interference with business activity is inevitable, consider discussing mitigation measures with Owner.
- Limit duration of Temporary Construction Easements.

PRACTICE POINTER FOR APPRAISER

- Investigate construction time schedule.
- Understand potential impacts to Owner during construction.
- If project is not complete at time of report, consider adding disclosure:

Assumption and Limiting Condition: This appraisal estimates compensation through the date of this report only based upon the project as proposed. No attempt has been made to estimate damages to the remainder occurring during the course of construction or after the date of this report.

PRACTICE POINTER FOR OWNER'S ATTORNEY

- Use discovery to investigate project construction timeline.
- If construction is not complete at time of trial: Seek stipulation, or introduce evidence of the proposed construction schedule and make record that Owner is not seeking compensation for any damages that may occur during construction but after the date of trial. Such claim will be by separate action if and when such damage occurs.

THE END!

