

Memorandum 74-58

Subject: Study 36.300 - Condemnation Law and Procedure (Entry for Location, Survey, and Tests)

Attached is a staff recommended revision of Sections 1245.010-1245.070 of the comprehensive eminent domain law. The revisions adopt language used in the Uniform Eminent Domain Code. The significant revisions are as follows:

(1) Section 1245.020 is deleted as well as Section 816 of the Government Code (Section 816 is set out on page 302 of the Tentative Recommendation Relating to the Eminent Domain Law). The substance of the deleted provisions is restated in the first sentence of Section 1245.060 of the revised draft. No change in substance is made by this revision.

(2) The Uniform Code standard as to when the owner can recover his attorney's fees and other litigation expenses is substituted for the more general standard stated in the second sentence of Section 1245.070 (as set out in the Commission's printed report).

Respectfully submitted,

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Executive Secretary

CHAPTER 4. PRECONDEMNATION ACTIVITIES

Article 1. Preliminary Location, Survey, and Tests

§ 1245.010. Right to make examinations and tests

1245.010. Subject to requirements of this article, any person authorized to acquire property for a particular use by eminent domain may enter upon property to make studies, surveys, examinations, tests, soundings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use.

photographs,

borings, samplings,

Comment. Section 1245.010 continues without substantive change the provisions of subdivision (b) of former Section 1242.

No time limitation upon entry is prescribed. Although appraisal and suitability studies generally precede the commencement of the eminent domain proceeding, Section 1245.010 does not preclude such studies after the proceeding to acquire the property has been commenced.

~~§ 1245.020. Liability for damages~~

~~1245.020. (a) The liability, if any, of a public entity for damages to property that arise from the entry and activities mentioned in Section 1245.010 is determined by Section 816 of the Government Code.~~

~~(b) Any person, other than a public entity, authorized to acquire property for a particular use by eminent domain is liable for damages to property that arise from the entry and activities mentioned in Section 1245.010 to the same extent that a public entity is liable for such damages under Section 816 of the Government Code.~~

~~Comment. Section 1245.020 continues without substantive change the provisions of subdivisions (c) and (d) of former Section 1242.~~

Note: Section 1245.020 is to be omitted. Section 816 of the Government Code is to be repealed and its substance codified in subdivision (a) (first sentence) of Section 1245.060 infra.

§ 1245.040. Consent or court order required in certain cases

1245.040. In any case in which the entry and activities mentioned in Section 1245.010 will subject the person having the power of eminent domain to liability under Section 1245.040, before making such entry and undertaking such activities, the person shall secure:

(a) The written consent of the owner to enter upon his property and to undertake such activities; or

(b) An order for entry from the superior court in accordance with Section 1245.040. /3

6/ 2/ ~~Comment. Except as noted in the Comment to Section 1245.040, Sections 1245.040-1245.070 continue without substantive change, the provisions of former Section 1242.5.~~ /6

with a few minor changes

3/ § 1245.040. Court order permitting entry; deposit of probable compensation

3/ 1245.040. (a) The person seeking to enter upon the property may petition the court for an order permitting the entry and shall give such prior notice to the owner of the property as the court determines is appropriate under the circumstances of the particular case.

(b) Upon such petition and after such notice has been given, the court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for ~~the actual damage~~ to the property and interference with its possession and use.

physical injury

(c) After such determination, the court may issue its order permitting the entry. The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit with the court the probable amount of compensation.

Comment. See the Comment to Section 1245.040. /2

~~§ 1245.050. Modification of court order~~

~~1245.050. At any time after an order has been made pursuant to Section 1245.040, either party may, upon noticed motion, request the court to determine whether the nature and scope of the activities reasonably necessary to accomplish the purpose of the entry should be modified or whether the amount deposited is the probable amount of compensation that will be awarded. If the court determines that the nature and scope of the activities to be undertaken or the amount of the deposit should be modified, the court shall make its order prescribing the necessary changes.~~

~~Comment. See the Comment to Section 1245.040.~~

§ 1245.040. Modification of order

1245.040. (a) The court, after notice and hearing, may modify any of the provisions of an order made under Section 1245.030.

(b) If a deposit is required or if the amount required to be deposited is increased by an order of modification, the court shall specify the time within which the required amount must be deposited and may direct that any further entry or that specified activities under the order as modified be stayed until the required deposit has been made.

Comment. Section 1245.040 is the same in substance as Section 304 of the Uniform Eminent Domain Code.

Following an initial entry and survey, the person who entered may decide that more extensive exploratory studies of the subject property should be made including, perhaps, substantial excavations, soil tests, or cutting of trees. If the newly conceived activities were not authorized by the original court order obtained under Section 1245.030, a modification of its terms may be granted under Section 1245.040, including an initial or increased deposit.

To ensure the effectiveness of the deposit requirement, a stay of proceedings may be imposed under subdivision (b) until the deposit is made. The stay, however, is not automatic but is discretionary with the court in light of the circumstances. For example, if the person who entered is of undoubted solvency, or if the damages likely to accrue prior to the date upon which the newly required or additional deposit is to be made are amply covered by the amount of the original deposit less accrued damages, an order denying an interim stay of suitability studies might be appropriate. Another factor that could be considered in this connection might be the incurring of unnecessary expense by the person who entered if crews and equipment used in current work-in-progress, as part of the activities authorized under the original order, were suddenly required to be withdrawn by a stay order.

In some circumstances, a modification order may properly decrease the amount of the required deposit; in such an event, the court (pursuant to Section 1245.050) can order that the excess be disbursed at once to the person who made the deposit.

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§ 1245.060. Management of amount deposited

(a) Unless sooner disbursed by court order,

shall be retained on deposit

~~1245.060. The court shall retain the amount deposited under this article for a period of six months following the termination of the entry. The period of retention may be extended by the court for good cause.~~

(b) The amount deposited ~~Such amount~~ shall be deposited in the Condemnation Deposits Fund in the State Treasury or, upon written request of the plaintiff filed with the deposit, in the county treasury. If deposited in the State Treasury, the deposit ~~and~~ shall be held, invested, deposited, and disbursed in accordance with Article 10 (commencing with Section 16429.1) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code.

Comment. See the Comment to Section 1245.050.

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§ 1245.070. Recovery of damages and expenses

~~1245.070. (a) The owner is entitled to recover from the person who entered his property the amount necessary to compensate the owner for any damage which arises out of the entry and for his court costs in the proceeding under this article. In the interests of justice, the court may award the owner, in addition to his court costs, reasonable attorney's fees in an amount fixed by the court.~~

~~(b) Where a deposit has been made pursuant to this article, the owner may, upon noticed motion made within six months following the termination of the entry, request the court to determine the amount he is entitled to recover under this section. Thereupon, the court shall determine such amount and award it to the owner and the money on deposit shall be available for the payment of such amount.~~

~~(c) Nothing in this section affects the availability of any other remedy the owner may have for the damaging of his property.~~

~~Comment. Section 1245.070 continues without substantive change the provisions of subdivision (e) of former Section 1242.5 except that Section 1245.070 permits the award of reasonable attorney's fees only in the interests of justice—e.g., where the person who entered or sought to enter acted arbitrarily and without any reasonable justification—whereas former Section 1242.5 contained no such limitation on the award of reasonable attorney's fees.~~

§ 1245.060. Recovery of damages, costs, and expenses

1245.060. (a) The person who entered upon the property is liable for physical injury to, and for substantial interference with possession or use of, property caused by his entry and activities upon the property. This liability may be enforced in a civil action, or by application to the court in the circumstances provided by subdivision (c), whether or not the person asserting such liability has presented a claim in compliance with Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code.

(b) In an action or proceeding for recovery of damages under this section, the prevailing claimant shall be awarded his costs. In addition, reasonable attorney's fees and other litigation expenses incurred in the proceedings under this article shall be awarded if the court finds that any of the following occurred:

(1) The person entered the property unlawfully.

(2) The person entered the property lawfully but thereafter engaged in activities upon the property that were abusive or lacking in due regard for the interests of the owner or occupant.

(3) The person failed substantially to comply with the terms of an order made under Section 1245.030 or 1245.040.

(c) If funds are on deposit under this article, the owner or other person entitled to damages under subdivision (a) may apply to the court for an award of the amount he is entitled to recover. The court shall determine the amount and award it to the person entitled thereto and shall order that its payment be made out of the money on deposit. If the amount on deposit is insufficient to pay the full amount, the court shall enter judgment against the person who entered upon the property for the unpaid portion.

(d) Nothing in this section affects the availability of any other remedy the owner may have for the damaging of his property.

Comment. Section 1245.060 is the same in substance as Section 305 of the Uniform Eminent Domain Code.

Subdivision (a) provides the substantive basis for the condemnor's liability for damages arising out of entries for suitability studies. Damages required by this section are not dependent upon the existence of a court order under Section 1245.020; liability also exists where a lawful entry is made under Section 1245.010 without judicial assistance as well as where the entry is unlawful. No claim need be filed against the state or a local public entity under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code. Cf. Code Civ. Proc. § 426.701.

The general criteria of damages under subdivision (a), as reflected in the terms "physical injury" and "substantial interference," require a common sense interpretation. See, e.g., Onorato Bros. v. Massachusetts Turnpike Authority, 336 Mass. 54, 142 N.E.2d 389 (1957); Wood v. Mississippi Power Co., 245 Miss. 103, 146 So.2d 546 (1962). See, e.g., Cal. Govt. Code § 816; Kans. Stat. Ann. § 68-2005 (1964); Pa. Stat. Ann., tit. 26, § 1-409 (Supp. 1969). The term "physical," for example, is intended to preclude recovery of merely nominal or "constructive" damages not based on tangible harm to property. Similarly, the term "substantial interference" excludes liability for minimal annoyances or interferences that do not seriously impinge upon or impair possession and use of the property. See Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986 (1923). The standard of liability stated in subdivision (a) continues the substance of subdivisions (c) and (d) of former Section 1242.

It is important to note that, if an eminent domain proceeding eventually is filed to take the property, or a portion of it, the damages mentioned in

subdivision (a) may be recovered only by a cross-complaint in the eminent domain proceeding. See Code Civ. Proc. § 426.070 and Comment thereto.

Subdivision (b) requires the court to award costs to the prevailing claimant in an action or proceeding for damages under this section. In addition, this subdivision requires an award of litigation expenses incurred in any proceedings previously held under Section 1245.020 or 1245.050 if the condemnor entered unlawfully, abused the right of lawful entry, or violated the terms of an order permitting entry. The prospect of such an award constitutes an inducement to condemnors to adhere to the requirements of this article.

"Litigation expenses" include not only a reasonable attorney's fee but also any appraisal and engineering fees necessarily incurred by the claimant.

Under subdivision (e) of former Section 1242.5, reasonable attorney's fees--but not other litigation expenses--were required to be awarded in any case where the owner recovered a judgment.

Subdivision (c) provides a simple and expeditious method, in lieu of a civil action, for adjudication of a claim for damages and expenses where a deposit has been made and the funds deposited have not been disbursed. Similar provision was made in subdivision (e) of former Section 1242.5.

Subdivision (d), which is not included in the Uniform Code section, continues the last sentence of former Section 1242.5.