

## Memorandum 2017-14

**Eminent Domain: Pre-Condemnation Activities  
Codification of *Property Reserve, Inc. v. Superior Court***

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As noted in Memorandum 2016-53,<sup>1</sup> a recent decision of the California Supreme Court, *Property Reserve Inc. v. Superior Court*,<sup>2</sup> identified a constitutional deficiency in a provision of the Eminent Domain Law that governs pre-condemnation activity. Rather than invalidate the defective statute, the Court “reformed” it to cure the constitutional deficiency.

The statute at issue, Code of Civil Procedure Section 1245.060, was enacted on the Commission’s recommendation.<sup>3</sup> The statute provides a procedure for compensation of a property owner if pre-condemnation evaluation activities damage the property or substantially interfere with its use.

This memorandum, which was prepared by Commission extern Elisa Shieh of U.C. Davis School of Law, discusses whether Section 1245.060 should be revised to conform to the Court’s reformation of the provision.

Unless otherwise indicated, all statutory references in this memorandum are to the Code of Civil Procedure.

## BACKGROUND

**United States and California Takings Clauses**

The United States Constitution and the California Constitution both include a takings clause.<sup>4</sup> Those provisions state that a public entity may take private property for public use only if just compensation is paid to the owner of the private property.

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. 1 Cal. 5th 151 (2016).

3. *The Eminent Domain Law*, 12 Cal. L. Revision Comm’n Reports 1601 (1974).

4. U.S. Const. amend. V.; Cal. Const. art. I, § 19.

The United States takings clause simply provides “nor shall private property be taken for public use without just compensation.”<sup>5</sup>

The California takings clause is more detailed, providing that “[p]rivate property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”<sup>6</sup>

While the two clauses are similar, there are some substantive differences. For the purpose of this discussion, there are two significant differences. First, the state takings clause, unlike the federal takings clause, provides private property may be taken only when just compensation has *first* been paid into court for the owner. Second, the California Constitution, unlike the United States Constitution, guarantees the property owner a right to a jury determination of just compensation, unless that right is waived.

### **Condemnation Generally**

A condemnation action occurs when a public entity decides to acquire legal title or exclusive possession of property for public use. In California, the Eminent Domain Law governs condemnation actions and provides a detailed procedure for conducting a condemnation action.<sup>7</sup> The process includes appraisal and negotiation, the adoption of a resolution of necessity after notice and hearing, formal commencement of a proceeding by a complaint and answer, discovery, a bifurcated trial on objections to the right to take and the issue of compensation, and a jury determination of compensation.<sup>8</sup>

### **Pre-Condemnation Activity**

Pre-condemnation activity occurs when a public entity seeks access to property to conduct investigations in order to determine whether the property is suitable for a proposed public project and should subsequently be acquired through condemnation. Pre-condemnation entry and testing are governed by Sections 1245.010-1245.060.

Pre-condemnation activity includes “enter[ing] upon property to make photographs, studies, surveys, examinations, tests, sounds, borings, samplings,

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5. U.S. Const. amend. V.

6. Cal. Const. art. I, § 19.

7. Sections 1245.210-1263.530; Gov’t Code §§ 7267-7267.7.

8. Sections 1245.210-1263.530; Gov’t Code §§ 7267-7267.7.

or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use.”<sup>9</sup>

A public entity must either obtain a property owner’s consent or a court order before entering property to conduct pre-condemnation activity.<sup>10</sup> If proceeding pursuant to a court order, the court must determine 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.”<sup>11</sup> The public entity must deposit that amount with the court.<sup>12</sup> If the pre-condemnation activity causes actual damage to the property or substantially interferes with its use, the property owner is entitled to compensation.<sup>13</sup> As discussed below, the compensation provision was the primary focus of *Property Reserve Inc.*

#### PROPERTY RESERVE INC. v. SUPERIOR COURT

In *Property Reserve Inc. v. Superior Court*,<sup>14</sup> the Court considered two questions: (1) Is pre-condemnation activity a constitutional “taking?” (2) If so, is the pre-condemnation statute constitutionally adequate?

#### **Is Pre-Condensation Activity a Taking?**

In *Property Reserve Inc.*, the California Department of Water Resources (hereafter, “Department”) sought a court order authorizing it to enter 150 private properties in the Sacramento-San Joaquin Delta area to conduct environmental and geological studies in order to determine the feasibility of constructing a tunnel delivering fresh water from Northern California to Central and Southern California.<sup>15</sup>

The proposed environmental activities on all 150 properties comprised mapping and surveys related to plant and animal species, habitat, soil conditions, hydrology, cultural and archaeological resources, utilities, and recreational uses. The Department also intended to conduct geologic studies on 35 of the 150 properties. The suggested geological activities included drilling deep holes or borings to determine subsoil conditions. These holes ranged from one and one-half inches to eight inches in diameter and would reach up to 205

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9. Section 1245.010.

10. Section 1245.020.

11. Section 1245.030(b).

12. Section 1245.030(c).

13. Section 1245.060.

14. 1 Cal. 5th 151 (2016).

15. *Property Reserve, Inc.*, 1 Cal 5th at 168.

feet deep. The Department intended to fill the holes with a kind of cement, which would be left in the holes after the conclusion of the study.<sup>16</sup>

After the Department petitioned for a court order authorizing those activities, the trial court found that the Department could enter the properties for environmental evaluation but not for geological evaluation. Formal condemnation would be required before any drilling could be done.

The Department and landowners both appealed. The Court of Appeal held that (1) the statutory pre-condemnation entry and testing procedure did not satisfy the California takings clause and (2) both the environmental and geological evaluation activities fell within pre-condemnation activities. Consequently, the Department was required to conduct a full condemnation action rather than proceeding under the pre-condemnation entry and testing statutes. The case was then appealed to the California Supreme Court.<sup>17</sup>

In analyzing whether the pre-condemnation activity was a taking for the purposes of the takings clauses, the Court examined its prior 1923 decision *Jacobsen v. Superior Court*.<sup>18</sup> There, the Petaluma Municipal Water District (hereafter “District”) wished to enter private land to make surface surveys and excavations, as well as bore holes, to potentially acquire the land for a reservoir to supply water to Petaluma residents.<sup>19</sup>

The *Jacobsen* Court found that the District’s proposed activities would be a taking of property because the extent and period of the entry, occupation, disturbance, and destruction of the properties by the District constituted an interference with the landowner’s right to possession, occupation, use, and enjoyment of their property.<sup>20</sup>

The District argued that the entry was authorized by former Section 1242, the only then-existing pre-condemnation entry statute. That statute allowed entry and evaluation activities without compensation to the property owner.

The Court held that Section 1242 did not apply to the District’s proposed deep drilling and excavation because the statute only applied to “such innocuous entry and superficial examination as would suffice for the making of surveys or maps.”<sup>21</sup>

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16. *See id.* at 169, 171-72.

17. *See id.* at 167-68.

18. 192 Cal. 319 (1923).

19. *Id.* at 321-22.

20. *Id.* at 328.

21. *Id.* at 329.

In 1959, in response to the *Jacobsen* decision, the Legislature enacted a new pre-condemnation entry statute (former Section 1242.5<sup>22</sup>) that applied only to pre-condemnation entry and testing to determine the suitability of property for reservoir purposes. The new statute required a public entity to obtain a court order authorizing the proposed activity. If the court allowed the activity, the public entity was required to deposit with the court “an amount sufficient to compensate the landowner for any [resulting damages].”<sup>23</sup> This cured the problem identified in *Jacobsen*, by providing express authority for entry to conduct pre-condemnation activities that were more than innocuous, and by requiring that money be deposited in advance for the compensation of the landowner for any taking that might result. But the solution only extended to condemnation of land for reservoir purposes.

In 1969, the Commission considered the issue and recommended that Section 1245.5 be expanded to cover entry for any purpose for which land might be condemned.<sup>24</sup> In other words, the statute would not be restricted to the evaluation of land for reservoir purposes.

Additionally, the Commission recommended changes to the California Tort Claims Act to make clear that a public entity that enters “private property to conduct surveys, explorations, or similar activities, ... is liable for ‘actual damage’ to property or for ‘substantial interference’ with the owner’s use or possession.”<sup>25</sup> In 1970, the Legislature enacted the Commission’s recommended reforms.<sup>26</sup>

In 1974, the Commission recommended a comprehensive recodification and improvement of the Eminent Domain Law, which included the current pre-condemnation statutes.<sup>27</sup> The recommendation was enacted into law in 1975.<sup>28</sup>

Consistent with the decision in *Jacobsen*, and the line of statutory reforms described above, the Court in *Property Reserve, Inc.* held that “some pre-condemnation entry and testing activities — when they involve operations that will result in actual injury to, or substantial interference with the possession and

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22. 1959 Cal. Stat. ch. 1865, § 1.

23. *Id.*

24. *Recommendation Relating to Sovereign Immunity, No. 10 — Revisions of the Governmental Liability Act*, 9 Cal. L. Revision Comm’n Reports 801, 811 (1969).

25. *Id.*

26. 1970 Cal. Stat. ch. 662, § 3; *see also Recommendation Relating to Sovereign Immunity, supra* note 24, at 811.

27. *The Eminent Domain Law*, 12 Cal. L. Revision Comm’n Reports 1601 (1974).

28. 1975 Cal. Stat. ch. 1275.

use of, the entered property — have been viewed as triggering the protections of the California takings clause.”<sup>29</sup>

### **Is the Pre-Condensation Statute Constitutionally Adequate?**

Because pre-condensation activity can result in a taking, such activity must be conducted in a way that satisfies the requirements of the federal takings clause and the California takings clause.

In considering whether the federal takings clause was satisfied, the Court found that the objection was premature because the property owners were raising objections *before* any taking had occurred.<sup>30</sup> Unlike the California takings clause, the United States Constitution allows for compensation of a taking *after* the taking has occurred.

In considering whether the California takings clause was satisfied, the first question the Court considered was whether a taking in the context of a pre-condensation activity must be authorized under the full condemnation procedure.<sup>31</sup> The Court held that the full condemnation procedure was not required.

The pre-condensation entry and testing statutes, as they currently stand, “establish a special, compact, and expedited procedure” that public entities must comply with before engaging in pre-condensation activities.<sup>32</sup> For the most part, the Court found this expedited procedure to be constitutionally sufficient.<sup>33</sup> This was, in part, because the procedure requires the public entity to (1) obtain the consent of the property owner or obtain a court order authorizing the activities and (2) “deposit an appropriate sum equal to the amount of probable compensation to which the property owner is entitled.”<sup>34</sup>

However, the Court did find one constitutional defect in the pre-condensation entry and testing statute. Specifically, the statute does not provide for a jury determination of the amount of compensation due the property owner, as required by the California Constitution.<sup>35</sup>

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29. 1 Cal. 5th at 192 (emphasis in original).

30. *Id.* at 186-88.

31. *Id.* at 202.

32. *Id.* at 192.

33. *Id.*

34. *Id.*

35. *Id.* at 208.

## Reformation

Once the Court found that the pre-condemnation compensation statute was constitutionally insufficient, it could have either (1) invalidated the statute or (2) reformed the statute to cure the defect.<sup>36</sup> The Court decided to reform the statute. The standard for determining whether it is appropriate to reform a statute is discussed below.

### *Reformation Generally*

In *Kopp v. Fair Political Practices Commission*,<sup>37</sup> the Court explained that a reviewing court may, in certain circumstances and consistent with the separation of powers doctrine, reform a statute to conform it to constitutional requirements. A court may do so, instead of simply declaring a statute unconstitutional and unenforceable, if it satisfies a two part test. The court must conclude with confidence that:

- (1) It is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body.
- (2) The enacting body would have preferred such a reformed version of the statute instead of invalidation of the statute.<sup>38</sup>

### *Reformation of Pre-Condemnation Statute*

In *Property Reserve Inc.*, the Court held that the two-prong *Kopp* test was satisfied:

In light of the legislative history of the pre-condemnation entry and testing statutes discussed above, it is clear that the Legislature intended to adopt a procedure that satisfies the requirements of the California takings clause. Further, providing a property owner the ability to obtain a jury determination of damages at the latter stage of the pre-condemnation proceeding will not interfere with or undermine the fundamental purposes or policies of the pre-condemnation entry and testing legislation. Thus, we conclude that both prongs of the *Kopp* standard are satisfied here.<sup>39</sup>

In referencing the legislative history of the pre-condemnation entry and testing statutes “discussed above,” the Court appears to be referring to its earlier discussion of the Legislature’s response to *Jacobsen*, and the subsequent

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36. *See id.* at 208.

37. 11 Cal. 4th 607 (1995).

38. *Id.* at 615.

39. 1 Cal. 5th at 208-09.

Commission recommendations, all of which were focused on ensuring that the pre-condemnation entry statute provides the constitutionally-required compensation. That focus suggests that the Legislature would welcome judicial reformation of the statute to cure a takings clause defect and that such a reformation would be consistent with the Legislature's intention in reforming the pre-condemnation compensation statute.

*Effect of Reformation*

Based on the analysis above, the Court held that the statute should be reformed to "afford the property owner the option of obtaining a jury trial on damages at the proceeding prescribed by section 1256.060, subdivision (c)."<sup>40</sup>

SHOULD THE PRE-CONDEMNATION STATUTE BE REVISED?

The Commission needs to decide whether Section 1256.060 should be revised to conform to the Court's holding. Although the reformation cured the statute's constitutional infirmity, it created a significant substantive difference between the language of the statute and its legal effect. If the section is not revised, there is a risk that some judges, practitioners, and property owners will not realize that the reformed statute provides for a jury trial on the issue of compensation.

Currently, Section 1245.060 provides:

(a) If the entry and activities upon property cause actual damage to or substantial interference with the possession or use of the property, whether or not a claim has been presented in compliance with Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code, the owner may recover for such damage or interference in a civil action or by application to the court under subdivision (c).

(b) The prevailing claimant in an action or proceeding under this section shall be awarded his costs and, if the court finds that any of the following occurred, his litigation expenses incurred in proceedings under this article:

(1) The entry was unlawful.

(2) The entry was lawful but the activities upon the property were abusive or lacking in due regard for the interests of the owner.

(3) There was a failure 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, upon application of the owner, the court shall determine and award the amount the

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40. *Id.* at 208.

owner is entitled to recover under this section and shall order such amount paid out of the funds on deposit. If the funds on deposit are insufficient to pay the full amount of the award, the court shall enter judgment 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.

The Court indicated that it was reforming subdivision (c) of that section. That subdivision fails to state that the property owner is entitled to a jury determination of just compensation. Rather, the subdivision refers to the “court” making that determination, which strongly suggests that the amount of compensation is *not* a question for a jury. That seems like it could lead to confusion.

The Court specifically held that it was reforming subdivision (c) to “afford the property owner the option of obtaining a jury trial on damages....”<sup>41</sup> The statute could be conformed to that reformed meaning with a fairly straightforward revision:

(c) If funds are on deposit under this article, upon application of the owner, the court shall determine and award the amount the owner is entitled to recover under this section and shall order such amount paid out of the funds on deposit. If the funds on deposit are insufficient to pay the full amount of the award, the court shall enter judgment for the unpaid portion. In a proceeding under this subdivision, the owner has the option of obtaining a jury trial on damages.

**Does the Commission wish to pursue a recommendation along those lines?**

If so, the staff will prepare a draft tentative recommendation for consideration at a future meeting.

Respectfully submitted,

Elisa Shieh  
Law Student Extern

Brian Hebert  
Executive Director

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41. *Id.*