

## Memorandum 2017-27

**Eminent Domain: Pre-Condemnation Activities  
(Draft Tentative Recommendation)**

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At its April meeting, the Commission directed the staff to prepare proposed legislation to codify the Court's holding in *Property Reserve Inc. v. Superior Court*,<sup>1</sup> and make minor related technical corrections.<sup>2</sup>

In compliance with that direction, the staff has prepared a draft tentative recommendation. It is attached.

**The Commission needs to decide whether to approve that draft for distribution, with or without changes.**

Respectfully submitted,

Brian Hebert  
Executive Director

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1. 1 Cal. 5th 151 (2016).  
2. Minutes (April 2017), p. 3.

# CALIFORNIA LAW REVISION COMMISSION

**STAFF DRAFT**

TENTATIVE RECOMMENDATION

## Eminent Domain: Precondemnation Activities

June 2017

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN August 8, 2017.**

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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## SUMMARY OF TENTATIVE RECOMMENDATION

The California Supreme Court recently held that the statutory procedure for compensation of takings that result from precondemnation entry and testing activities is constitutionally insufficient as drafted. The California Constitution guarantees the right to a jury trial on the amount of compensation owed. The statutory procedure does not.

Rather than invalidate the precondemnation statute entirely, the Court “reformed” it, reading in a jury trial right on the amount of compensation owed. That reformation cured the constitutional infirmity, but created an inconsistency between what the statute says on its face and what the Court reformed it to mean. That inconsistency could cause problematic confusion and error.

The Law Revision Commission tentatively recommends that the precondemnation activities statute be revised to conform to the reformed meaning established by the Court. This tentative recommendation was prepared pursuant to Resolution Chapter 150 of the Statutes of 2016.

## EMINENT DOMAIN: PRECONDEMNATION ACTIVITIES

### BACKGROUND

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2 Both the United States Constitution and California Constitution provide that  
3 property shall not be taken for a public purpose without just compensation.<sup>1</sup> These  
4 two constitutional “takings” clauses are largely similar, but there are some  
5 significant differences. Two of those differences are relevant to this discussion:

- 6 (1) The California takings clause provides that the amount of compensation  
7 shall be “ascertained by a jury unless waived.”<sup>2</sup>  
8 (2) The California takings clause requires that, before a taking occurs,  
9 compensation be “paid to, or into court for, the owner.”<sup>3</sup>

10 The Eminent Domain Law provides comprehensive procedures for the taking of  
11 property for public use, including procedures for compensation of the property  
12 owner.<sup>4</sup> In addition to procedures for formal condemnation, the Eminent Domain  
13 Law also provides a procedure for “precondemnation activities.”<sup>5</sup> Under that law,

14 any person authorized to acquire property for a particular use by eminent domain  
15 may enter upon property to make photographs, studies, surveys, examinations,  
16 tests, soundings, borings, samplings, or appraisals or to engage in similar  
17 activities reasonably related to acquisition or use of the property for that use.<sup>6</sup>

### PROPERTY RESERVE INC. V. SUPERIOR COURT

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19 In *Property Reserve Inc. v. Superior Court*,<sup>7</sup> the California Supreme Court  
20 considered whether precondemnation activities can result in a constitutional  
21 “taking” and, if so, whether the existing statutory procedure is constitutionally  
22 adequate.

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

2. Cal. Const. art. I, § 19(a) (“Private 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. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.”).

3. *Id.*

4. See Code Civ. Proc. §§ 1230.010-1273.050; *Eminent Domain Law*, 12 Cal. L. Revision Comm’n Reports 1601 (1974).

5. Code Civ. Proc. §§ 1245.010-1245.060.

6. Code Civ. Proc. § 1245.010.

7. 1 Cal. 5th 151 (2016).

1 The Court held that precondemnation activity can result in a compensable  
2 taking under the California<sup>8</sup> takings clause:

3 [S]ome pre-condemnation entry and testing activities — when they involve  
4 operations that will result in actual injury to, or substantial interference with the  
5 possession and use of, the entered property — have been viewed as triggering the  
6 protections of the California takings clause.<sup>9</sup>

7 The Court then considered whether the precondemnation activities statute is  
8 constitutionally adequate. With one exception, the Court held that the statute is  
9 compatible with the requirements of the California takings clause. Before entering  
10 property to engage in precondemnation activity, the condemnor must deposit with  
11 the court “an appropriate sum equal to the amount of probable compensation to  
12 which the property owner is entitled.”<sup>10</sup> The property owner can then bring an  
13 action for compensation.<sup>11</sup>

14 As noted, the Court did find one constitutional defect in the existing statute.  
15 Specifically, the statute violates the California takings clause because it does not  
16 provide for a jury determination of the amount of compensation due to the  
17 property owner.<sup>12</sup>

18 Rather than invalidate the statute based on that infirmity, the Court reformed it:

19 Although we conclude that section 1245.060 as presently written does not  
20 afford a property owner the right to have a jury determine the amount of  
21 compensation within the precondemnation proceeding itself, and further agree  
22 with the Court of Appeal that the statute is constitutionally deficient in this  
23 respect, in our view the appropriate remedy for this constitutional flaw is not to  
24 invalidate the precondemnation entry and testing statutes as applied to any  
25 precondemnation testing activity that rises to the level of a taking or damaging of  
26 property for purposes of the state takings clause. Instead, we conclude that the  
27 appropriate remedy for this constitutional flaw is to reform the precondemnation  
28 entry statutes so as to afford the property owner the option of obtaining a jury trial  
29 on damages at the proceeding prescribed by section 1245.060, subdivision (c).<sup>13</sup>

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8. The Court did not evaluate the compatibility of the precondemnation activities statute with the federal takings clause. Because the federal takings clause does not require pre-taking compensation, the federal constitutional question was not ripe for decision. *Id.* at 187 (“because the landowners have mounted this challenge before the Department has undertaken any activities and before any determination has been made as to the damages to which the landowners are entitled under the relevant statute and California inverse condemnation principles, it cannot be determined at this point that the available California procedures have not ‘yield[ed] just compensation.’ ... Accordingly, the landowners’ current constitutional challenge cannot rest on the federal takings clause.”).

9. *Id.* at 192 (emphasis in original).

10. *Id.*

11. Code Civ. Proc. § 1245.060.

12. *Property Reserve, Inc.*, 1 Cal 5th. at 208.

13. *Id.*

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## RECOMMENDATION

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The Court's reformation of the precondemnation activity statute cured the constitutional deficiency, without invalidating the otherwise proper statutory scheme. However, that approach could create a serious practical problem. There is now a significant substantive inconsistency between the letter of the statute and its meaning. That could lead to confusion and error.

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To avoid that problem, the Commission recommends that Code of Civil Procedure Section 1245.060 be revised to codify the Court's reformation of that provision.

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The Commission also recommends minor technical corrections in Section 1245.060 and a related provision.

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## REQUEST FOR PUBLIC COMMENT

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The Commission seeks public comment on its tentative recommendation. Comments supporting the proposed approach are just as important as comments suggesting changes to that approach or expressing other views.

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## PROPOSED LEGISLATION

1 **Code Civ. Proc. § 1245.020 (amended). Entry**

2 SECTION 1. Section 1245.020 of the Code of Civil Procedure is amended to  
3 read:

4 1245.020. In any case in which the entry and activities mentioned in Section  
5 1245.010 will subject the person having the power of eminent domain to liability  
6 under Section 1245.060, before making ~~such~~ entry and undertaking ~~such~~ those  
7 activities, the person shall secure at least one of the following:

8 (a) The written consent of the owner to enter upon ~~his~~ the owner's property and  
9 to undertake ~~such activities; or~~ those activities.

10 (b) An order for entry from the superior court in accordance with Section  
11 1245.030.

12 **Comment.** Section 1245.020 is amended to make technical corrections.

13 **Code Civ. Proc. § 1245.060 (amended). Compensation**

14 SEC. 2. Section 1245.060 of the Code of Civil Procedure is amended to read:

15 1245.060. (a) If the entry and activities upon property cause actual damage to or  
16 substantial interference with the possession or use of the property, whether or not a  
17 claim has been presented in compliance with Part 3 (commencing with Section  
18 900) of ~~Divison~~ Division 3.6 of Title 1 of the Government Code, the owner may  
19 recover for ~~such~~ that damage or interference in a civil action or by application to  
20 the court under subdivision (c).

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

25 (1) The entry was unlawful.

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

28 (3) There was a failure substantially to comply with the terms of an order made  
29 under Section 1245.030 or 1245.040.

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

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



- 1     **Comment.** Subdivision (c) of Section 1245.060 is amended to codify the holding in *Property*
- 2     *Reserve Inc. v. Superior Court*, 1 Cal. 5th 151 (2016).
- 3     The section is also amended to make technical corrections.