

## Memorandum 2017-43

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

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In June, the Commission<sup>1</sup> released a tentative recommendation that would codify the Court's holding in *Property Reserve Inc. v. Superior Court*<sup>2</sup> and make related technical corrections.<sup>3</sup> The deadline for public comment on the tentative recommendation was August 8, 2017.

The Commission is fortunate to have received comment from both the California Department of Water Resources (which was a party in *Property Reserve Inc.*) and attorney Norman E. Matteoni (who represented Property Reserve, Inc. in the case). Because their comments do not overlap, the letters are discussed separately, below.

**After considering these comments, the Commission needs to decide whether to approve the attached draft as a final recommendation, with or without changes.**

All statutory references in this memorandum are to the Code of Civil Procedure.

## COMMENTS OF DEPARTMENT OF WATER RESOURCES

Chief Counsel Spencer Kenner writes on behalf of the Department of Water Resources ("DWR").

DWR does not express any position on whether the law should be reformed along the lines proposed in the tentative recommendation. Instead, DWR suggests specific adjustments to the Commission's proposed language. Those suggestions are discussed below.

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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. See *Tentative Recommendation on Eminent Domain: Precondemnation Activities* (June 2017).

## Reference to “Damages”

The proposed law would make the following substantive revision to Section 1245.060 (for clarity, the proposed technical revisions are not reproduced here):

(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 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.

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

DWR suggests that the bare reference to “damages” in the proposed insertion be replaced with more precise language: “the amount of actual damage or substantial interference.”<sup>4</sup> That expanded language would emphasize two important details that are not as clearly expressed in the tentative recommendation. Those two details are discussed below.

### *Amount of Compensation*

DWR states that “inclusion of the word ‘amount’ is essential as the general rule is that the jury determines the amount of compensation, and all other questions, including entitlement, are decided by the court.”<sup>5</sup>

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4. See Exhibit p. 5.

5. See Exhibit pp. 5-6.

The addition of the word of “amount” would be compatible with the Court’s holding in *Property Reserve, Inc*:

Although we conclude that section 1245.060 as presently written does not afford a property owner the right to have a jury determine the *amount* of compensation within the precondemnation proceeding itself, and further agree with the Court of Appeal that the statute is constitutionally deficient in this respect, in our view the appropriate remedy for this constitutional flaw is not to invalidate the precondemnation entry and testing statutes as applied to any precondemnation testing activity that rises to the level of a taking or damaging of property for purposes of the state takings clause. Instead, we conclude that the appropriate remedy for this constitutional flaw is to reform the precondemnation entry statutes so as to afford the property owner the option of obtaining a jury trial on *damages* at the proceeding prescribed by section 1245.060, subdivision (c).<sup>6</sup>

Read in context, it seems clear that the Court is equating a jury trial on “damages” (in the second sentence above, which was the source for the language in the tentative recommendation) with a jury determination of the “amount of compensation” (in the first sentence).

That makes sense because, as the DWR correctly notes, the California takings clause guarantees the right to a jury determination of the *amount* of compensation owed:

There is no dispute that the California takings clause guarantees a property owner whose property has been taken or damaged for public use a right to have the *amount* of just compensation ascertained by a jury, if the property owner so chooses.<sup>7</sup>

**In order to make clear that the jury trial right only applies to the determination of the amount of compensation, the staff recommends that a revision along the lines proposed by DWR be made.**

#### *Scope of Compensation*

DWR also proposes that the reference to “damages” be replaced with a reference to the *kinds* of losses that are to be compensated under Section 1245.060 — “actual damage to or substantial interference with the possession or use of the

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6. *Property Reserve, Inc. v. Superior Court*, 1 Cal. 5th at 208 (emphasis added).

7. *Id.* at 207 (emphasis added). See also *People ex rel. Dep't of Pub. Works v. Russell*, 48 Cal. 2d 189, 195 (1957) (“In an eminent domain proceeding the amount of compensation is to be determined by the jury. (Const., art. I, § 14.) All other issues are to be tried by the court ....”).

property....”<sup>8</sup> This would avoid any implication that the word “damages” is being used in a narrower sense (i.e., to exclude compensation for substantial interference with possession or use).

The proposed revision would parallel the related language in Section 1245.060(a), which triggers the application of subdivision (c):

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).<sup>9</sup>

**The staff recommends that a revision along the lines discussed above be made.**

### **Timing of Compensation**

DWR also proposes that subdivision (c) be revised to add the language shown in underscore below:

In a proceeding under this subdivision, and if the entry and activities upon property has caused actual damage to or substantial interference with the possession or use of the property, the owner has the option of obtaining a jury trial on the amount of actual damage or substantial interference.<sup>10</sup>

That language appears to be intended to clarify a timing issue — “any jury trial would necessarily occur at the property owner’s election *only after the entries are completed.*”<sup>11</sup> DWR explains why it would be proper to defer compensation until after the entry is complete:

As the Supreme Court stated, any loss “cannot reliably be determined until the scope of the precondemnation activities that are authorized by the trial court is known and the activities have actually been undertaken by the public entity.” (*Property Reserve, Inc., supra*, 1 Cal. 5th at p. 200.) The Court added that “[b]ecause this matter is before us prior to any precondemnation activities having been conducted, we have no occasion in this case to determine exactly what specific items of actual damage or substantial interference with possession or use of the property are

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8. Section 1245.060(a).

9. Emphasis added.

10. See Exhibit p. 5.

11. *Id.* (emphasis added).

compensable under the statutes in question.” (*Id.* at p. 205-206; see also fn. 28 [recognizing that any loss must first be incurred and recovery sought under the provisions of Code of Civil Procedure section 1245.060, subdivision (c) before the court can determine whether the loss is recoverable under the statute].) Indeed, the Supreme Court added the jury trial option to Code of Civil Procedure section 1245.060, which is a post-entry procedure, expressly noting that a jury trial request at this “latter” stage of the entry proceedings is appropriate so as to not interfere with or undermine the fundamental policies or purposes of authorized entries. (*Id.* at p. 208.)

**If the Commission wishes to address the timing issue, the staff would recommend a slightly different approach than DWR proposed.** Rather than inserting language into the new sentence on the right to a jury trial, the staff would recommend adding language to Section 1245.060(a). That way, the revision would affect the operation of the section as a whole (including instances where the judge, rather than a jury, determines the amount of compensation). Thus:

(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, after termination of the entry, recover for such damage or interference in a civil action or by application to the court under subdivision (c).

If the Commission wishes to pursue a revision along these lines, it would need to be included in a revised tentative recommendation. This would provide the necessary opportunity to solicit public comment on the additional reform.

Preparing and circulating a revised tentative recommendation would preclude finalizing a recommendation this year, in time for the introduction of implementing legislation next year. This would be an obstacle to the Commission’s current program for law student extern work. Under that program, students are producing a series of small, uncontroversial reform proposals. Once introduced, students can assist with the legislative staffing duties for the implementing bills.

Alternatively, the Commission could omit the timing issue from the present recommendation, in order to allow for introduction of implementing legislation in 2018. The timing issue could then be added to a list of topics for future law student work. **The staff recommends that approach.**

## **Revise Summary of Recommendation**

DWR suggests that the narrative summary at the beginning of the tentative recommendation be revised to conform to the timing revision that it proposed. That will not be necessary if the Commission defers action on the proposal. **If instead, the Commission wishes to include that proposal in the current study, the narrative part of the recommendation will be conformed.**

## **Conclusion**

When the Commission approved the tentative recommendation at its June meeting, some Commissioners expressed reservations about the imprecision of the proposed language. The staff explained that the language had been intentionally drafted to closely track the Court's own statement of its holding. The thought was that using the court's exact language would minimize concerns that the proposed law would somehow change the effect of the holding, rather than simply codifying it.

**In light of the input from DWR, the staff recommends that more precise language be used to codify the holding in Property Reserve, Inc., along the lines discussed above. Thus:**

(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 the amount of compensation for actual damage to or substantial interference with the possession or use of the property.

## COMMENTS OF NORMAN E. MATTEONI

Mr. Matteoni begins by explaining his considerable experience as an expert on eminent domain law:

Our law firm has specialized in condemnation law since its founding in 1974, primarily for property owners but on some occasions for public agencies. Prior to that time I served in the Santa Clara County Counsel office, where for 7 years I was a trial attorney representing public agencies in eminent domain.

I was a consultant to the California Law Revision Commission on Eminent Domain in the early 1970s and served on the State Bar Committee on Condemnation in the late 1970s. I am the author of

CEB's *Condemnation Practice in California*, first appearing in 1973 and continuing annually with updates. In 2002, I served on a resource group advising the CACI Committee on new instructions for condemnation cases. Finally, Gerry Houlihan and I represented Property Reserve, Inc. in the litigation giving rise to your recommendation.<sup>12</sup>

Mr. Matteoni offers a number of suggestions for improvement of the law governing precondemnation entry and testing. His comments "go beyond the modifications proposed for the proposed recommendation. I do not take issue with the proposal."<sup>13</sup> *Thus, there is nothing in his letter that would give reason to modify or abandon the reforms proposed in the tentative recommendation.* His suggestions for possible *additional* reforms are discussed below.

### **Comment Revisions**

In his first four numbered suggestions, Mr. Matteoni suggests changes to *existing* Commission Comments.<sup>14</sup> He appears to be referring to the Comments that the Commission published as part of its 1974 recommendation proposing enactment of the Eminent Domain Law.<sup>15</sup>

It is not the Commission's practice to update its Comments over time. The Commission's recommendations are not living documents, like a regularly updated practice guide or treatise. They are prepared for a very specific purpose, to provide background information to the Legislature and Governor regarding a particular legislative reform proposal.

As such, they have considerable value as legislative history. Commission materials that have been placed before and considered by the Legislature are considered to be declarative of legislative intent,<sup>16</sup> and are entitled to great weight in construing statutes.<sup>17</sup> That value would be undermined if the

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12. See Exhibit p. 1.

13. See Exhibit p. 2.

14. See Exhibit pp. 1-2.

15. See *Recommendation Proposing the Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601 (1974).

16. See, e.g., *Fair v. Bakhtiari*, 40 Cal. 4th 189, 195, 147 P.3d 653, 657, 51 Cal. Rptr. 3d 871, 875 (2006) ("The Commission's official comments are deemed to express the Legislature's intent."); *People v. Williams*, 16 Cal. 3d 663, 667-68, 547 P.2d 1000, 128 Cal. Rptr. 888 (1976) ("The official comments of the California Law Revision Commission on the various sections of the Evidence Code are declarative of the intent not only of the draft[ers] of the code but also of the legislators who subsequently enacted it.").

17. See, e.g., *Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 40 Cal. 4th 1, 12-13 n.9, 145 P.3d 462, 469 n.9, 50 Cal. Rptr. 3d 585, 593 n.9 (2006) (Commission's official comments are persuasive evidence of Legislature's intent); *Hale v. S. Cal. IPA Med. Group, Inc.*, 86 Cal. App. 4th 919, 927, 103 Cal. Rptr. 2d 773, 778 (2001):

Commission were to revise its Comments after they had been seen and relied on by the Legislature. At that point, they would no longer be evidence of the *Legislature's* intent; they would merely be an expression of the Commission's subsequent analytical conclusions. If Comments were updated in this way, the line dividing language relied on by the Legislature from subsequent Commission elaboration would be difficult to discern.

**For that reason, the staff recommends against making the Comment revisions proposed by Mr. Matteoni.** That recommendation is based on the Commission's long-standing practices. It is not a reflection on the substantive merits of the proposed revisions.

### **Claim for Compensation in Subsequent Condemnation Action**

Mr. Matteoni notes that it might be more efficient, in cases where precondemnation entry leads to a condemnation action, to allow the claim for compensation relating to precondemnation takings to be asserted as part of the subsequent action:

Section 1245.060(d) should be expanded to provide the opportunity to raise the precondemnation damage claim by answer in any [direct] condemnation action that may be timely filed to implement the project for which the entry was permitted. The sentence can be modified by adding at the end:

"including the right of the owner to make the claim in the answer to the direct case."<sup>18</sup>

If the Commission wishes to pursue this idea as part of the current study, the staff would need to prepare analysis and implementing language, for inclusion in a revised tentative recommendation. This would provide the necessary opportunity to solicit public comment on the additional reform.

As discussed above, the staff would prefer not to expand the scope of the current study in a way that would preclude approval of a final recommendation this year and the introduction of implementing legislation in 2018.

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In an effort to discern legislative intent, an appellate court is entitled to take judicial notice of the various legislative materials, including committee reports, underlying the enactment of a statute. (*Kern v. County of Imperial* (1990) 226 Cal. App. 3d 391, 400, fn. 8 [276 Cal. Rptr. 524]; *Coopers & Lybrand v. Superior Court* (1989) 212 Cal. App. 3d 524, 535, fn. 7 [260 Cal. Rptr. 713].) In particular, reports and interpretive opinions of the Law Revision Commission are entitled to great weight. (*Schmidt v. Southern Cal. Rapid Transit Dist.* (1993) 14 Cal. App. 4th 23, 30, fn. 10 [17 Cal. Rptr. 2d 340].)

18. See Exhibit p. 2.

**For that reason, the staff recommends against addressing Mr. Matteoni's proposal in this recommendation. Instead, we could add it to our list of future law student work.**

#### CONCLUSION

The staff has prepared a draft recommendation, which is attached. The content of the draft is consistent with the staff recommendations made in this memorandum. If the Commission disagrees with any of those recommendations, the draft can be revised accordingly.

**The Commission now needs to decide whether to approve the attached draft as a final recommendation, with or without changes, for publication and submission to the Legislature and Governor.**

Respectfully submitted,

Brian Hebert  
Executive Director

August 3, 2017

Norman E. Matteoni

Peggy M. O'Laughlin

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**Re: Comment on Tentative Recommendation re Eminent  
Domain: Precondemnation Activities**

Dear Law Revision Commission:

Thank you for the opportunity to comment on this recommendation.

Our law firm has specialized in condemnation law since its founding in 1974, primarily for property owners but on some occasions for public agencies. Prior to that time I served in the Santa Clara County Counsel Office, where for 7 years I was a trial attorney representing public agencies in eminent domain.

I was a consultant to the California Law Revision Commission on Eminent Domain in the early 1970s and served on the State Bar Committee on Condemnation in the late 1970s. I am the author of CEB's *Condemnation Practice in California*, first appearing in 1973 and continuing annually with updates. In 2002, I served on a resource group advising the CACI Committee on new instructions for condemnation cases. Finally, Gerry Houlihan and I represented Property Reserve, Inc. in the litigation giving rise to your recommendation.

GENERAL COMMENTS

Preliminarily, I think that the modification of the entry statute is not as simple as calling out the right to a jury trial.

To protect the property owner against an uninvited investigation of its property for potential condemnation, the law should be mindful of the costs to the owner in pursuing relief. While the statute provides for the alternatives of having the judge decide the damages or any other remedy, the statute should encourage the avoidance of two trials, by

allowing the owner to make its claim in a subsequent direct condemnation action. This, of course, assumes that the subsequent action follows within a relatively short time. In my experience, there has not been a precondemnation entry in the last 40 years that has not been followed by a direct action. (The testing called for by the *Property Reserve* case was not typical in that it was directed at three alternate alignments through the San Francisco Bay Delta.) If a claim of damages is made in a precondemnation proceeding before the filing of the direct action, there should be the right to consolidate that claim with the subsequent direct action.

#### SPECIFIC COMMENTS ON THE STATUTE AND PROPOSED LEGISLATION

These comments go beyond the modifications proposed for the proposed recommendation. I do not take issue with the proposal. Nonetheless:

1. Section 1245.010's existing Comment should be expanded to state:

"Once the scope of the public project is determined, temporary occupation of the property for construction related activity (typically referred to as a "temporary construction easement" in direct condemnation action) is not a precondemnation entry, and shall be entitled to compensation for the period reserved for such activity."

I think this is an important distinction to be made, as the decision in *Property Reserve* is premised on the understanding that the precondemnation entry for testing was necessary to decide whether to acquire the property.

2. Section 1245.030(b)'s existing Comment should include the reference,

"See *Property Reserve Inc. v. Superior Court* (2016) 1 Cal.5<sup>th</sup> 151, 212."

It is important to emphasize to trial judges the obligation of crafting conditions to minimize the impact of the entry. As the decision points out, the trial judge must take into consideration the concerns of the property owner and devise conditions to protect its interest.

3. Section 1245.060(b) – the existing Comment to this section, regarding costs and recovery of litigation expenses, needs to be reinforced. I suggest adding:

“As in a direct condemnation there can be no award to the person seeking the entry for costs or litigation expenses, regardless of the result of a claim.”

In any event, statutory codes should always be awarded to the owner. Finally, where the owner, through counsel, has obtained conditions to protect its interest, it should be entitled to statutory fees.

4. Section 1245.060(b)(2) – the existing language “abusive or lacking in due regard for the interests of the owner” is somewhat puzzling. I think it was intended to reinforce the standard in sub-subsection (3) – “failure substantially to comply with the terms of the order.” I do not want to ~~remove~~ it, but believe there should be some comment, such as

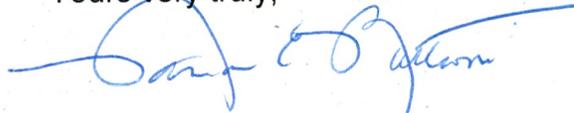
“Precondemnation entries are an accommodation to the potential condemnor and must be managed to avoid interference with the actual use of the property by its owner or tenant.”

5. Section 1245.060(d) should be expanded to provide the opportunity to raise the precondemnation damage claim by answer in any direction condemnation action that may be timely filed to implement the project for which the entry was permitted. The sentence can be modified by adding at the end:

“including the right of the owner to make the claim in the answer to the direct case.”

Thank you for the opportunity to comment.

Yours very truly,



NORMAN E. MATTEONI

NEM/jm

**DEPARTMENT OF WATER RESOURCES**

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August 15, 2015

Brian Hebert, Executive Director  
California Law Revision Commission  
In Care Of King Hall Law School  
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Via Electronic Transmittal: [bhebert@clrc.ca.gov](mailto:bhebert@clrc.ca.gov)

RE: Proposed Revisions to Eminent Domain Law's Precondemnation Entry Statutes

Dear Mr. Hebert:

The State of California, by and through the Department of Water Resources (the "State"), respectfully submits the following comments to the proposed revisions to the Eminent Domain Law's precondemnation entry statutes (Code Civ. Proc., §§ 1245.010 –1245.060). These proposed revisions come in response to the California Supreme Court's decision in *Property Reserve, Inc. v. Superior Court* (2016) 1 Cal. 5th 151.

## I. Background

In *Property Reserve, Inc.*, *supra*, 1 Cal. 5th 151, the California Supreme Court upheld the precondemnation entry statutes. These statutes allow public entities to seek a court order to enter private property to conduct studies in order to determine the suitability of properties for a contemplated public project.<sup>1</sup> The Supreme Court held that these provisions authorized the trial court to issue an order allowing the State to conduct environmental and geological studies to determine the feasibility of a possible water conveyance facility in the Sacramento-San Joaquin Delta. (*Id.* at p. 213.) The Court noted that the Legislature had, under the broad authority granted by the takings clause (Cal. Const., art. I, § 19(a)), determined that a procedure less elaborate than that embodied in a "classic condemnation action" is constitutionally adequate in the precondemnation setting. (*Id.* pp. 190-207.) It held that it need not determine whether the proposed activities constitute a taking or damaging of property because, even assuming that they do, the entry statutes provide valid procedures for public agencies to conduct such testing when that procedure is reformed to comply with the jury trial requirement imposed by the takings clause. (*Id.* at p. 167.) The Court thus reformed the statutes to comply with the jury trial requirement imposed by the California Constitution. (*Id.* at pp. 208-9.)

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<sup>1</sup> Although many of the entries under these statutes "generally precede" a classic condemnation action, the Law Revision Comments to Code of Civil Procedure section 1245.010 also expressly recognize that this provision "does not preclude such studies after the proceeding to acquire the property has commenced."

## II. Proposed Changes and Comments

The Tentative Recommendation is to make both substantive revisions and technical corrections to the precondemnation entry statutes. The proposed revisions for Code of Civil Procedure section 1245.060(c) are as follows:

(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~~ that 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.

The State proposes modifications to the last sentence being considered for inclusion so that it reads as follows: **“In a proceeding under this subdivision, and if the entry and activities upon property has caused actual damage to or substantial interference with the possession or use of the property, the owner has the option of obtaining a jury trial on the amount of actual damage or substantial interference.”**

First, this modified language clarifies that any jury trial would necessarily occur at the property owner’s election only after the entries are completed. As the Supreme Court stated, any loss “cannot reliably be determined until the scope of the precondemnation activities that are authorized by the trial court is known and the activities have actually been undertaken by the public entity.” (*Property Reserve, Inc.*, *supra*, 1 Cal. 5th at p. 200.) The Court added that “[b]ecause this matter is before us prior to any precondemnation activities having been conducted, we have no occasion in this case to determine exactly what specific items of actual damage or substantial interference with possession or use of the property are compensable under the statutes in question.” (*Id.* at p. 205-206; see also fn. 28 [recognizing that any loss must first be incurred and recovery sought under the provisions of Code of Civil Procedure section 1245.060, subdivision (c) before the court can determine whether the loss is recoverable under the statute].) Indeed, the Supreme Court added the jury trial option to Code of Civil Procedure section 1245.060, which is a post-entry procedure, expressly noting that a jury trial request at this “latter” stage of the entry proceedings is appropriate so as to not interfere with or undermine the fundamental policies or purposes of authorized entries. (*Id.* at p. 208.)

Second, by replacing the word “damages,” the modified language more closely tracks the statute which only authorizes compensation for “actual damage or substantial interference with possession or use of the property.” (Code Civ. Proc., § 1245.060, subd. (a).)

Finally, inclusion of the word “amount” is essential as the general rule is that the jury determines the amount of compensation, and all other questions, including entitlement,

Brian Herbert, Executive Director

August 15, 2017

Page 3

are decided by the court. (*People v. Ricciardi* (1943) 23 Cal.2d 390, 401.) “We have long held that this jury right applies only to determining the appropriate amount of compensation....” (*City of Perris v. Stamper* (2016) 1 Cal.5th 576, 593; *People ex rel. Department of Transportation v. Dry Canyon Enterprises, LLC* (2012) 211 Cal.App.4th 486, 491, 492.)

### III. Proposed Changes to the Summary of Tentative Recommendation

In addition to the aforementioned comments, the State also respectfully submits the following proposed changes to the Summary of Tentative Recommendation so that it tracks the existing statutory language and reads as follows:

The California Supreme Court recently held that the statutory procedure for determining the amount of compensation of actual damage or substantial interference that may result from precondemnation entry and activities is constitutionally insufficient as drafted. The California Constitution guarantees the right to a jury trial on the amount of just compensation owed for the taking or damaging of property for public use. The statutory procedure under the precondemnation entry statute does not.

Rather than invalidate the precondemnation entry statute entirely, the Court “reformed” it, reading in a jury trial right on the amount of compensation owed if the entry and activities upon property cause actual damage to or substantial interference with the possession or use of the property. 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.

If you have any questions or need additional information, please call me at (916) 651-0874.

Sincerely,



Spencer Kenner  
Chief Counsel

#Em-560

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**STAFF DRAFT**

RECOMMENDATION

Eminent Domain: Precondemnation Activities

September 2017

California Law Revision Commission  
c/o King Hall Law School  
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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 if the precondemnation entry and activities causes actual damage to or a substantial interference with the possession or use of the property. 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. The Commission also recommends a small number of minor technical corrections. This tentative recommendation was prepared pursuant to Resolution Chapter 150 of the Statutes of 2016.

## EMINENT DOMAIN: PRECONDEMNATION ACTIVITIES

### BACKGROUND

1  
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 for 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

18  
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. §§ 1230.010-1273.01; *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 — it  
15 does not provide for a jury determination of the amount of compensation due to  
16 the property owner, as required by the California takings clause.<sup>12</sup>

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

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

The Court’s reformation of the precondemnation activity statute cured its 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.

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.

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

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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 a technical correction.

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 the amount of compensation  
36 for actual damage to or substantial interference with the possession or use of the  
37 property.

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

3 **Comment.** Subdivision (c) of Section 1245.020 is amended to codify the holding in *Property*  
4 *Reserve Inc. v. Superior Court*, 1 Cal. 5th 151 (2016).

5 Subdivisions (a), (b), and (d) are amended to make technical corrections.

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