

Memorandum 2019-20

Eminent Domain: Pre-Condemnation Activities

In this study, the Commission¹ is examining the Eminent Domain Law provisions that govern compensation to a property owner who suffers actual damage to or substantial interference with the possession or use of property as a result of “pre-condemnation activity.”² Pre-condemnation activity is the entry on property that might be condemned, in order to “to make photographs, studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use.”³

This study was prompted by the California Supreme Court’s recent decision in *Property Reserve v. Superior Court*,⁴ which assessed the constitutionality of the statutory pre-condemnation activity procedure. In that case, the court upheld the statute, but reformed it to provide for a jury trial on the question of the amount of compensation owed. The Commission was particularly interested in that case because the Eminent Domain Law, including its pre-condemnation activity provisions, were enacted on the Commission’s recommendation.⁵

As a first step in this study, the Commission decided to recommend language to codify the court’s holding in *Property Reserve*.⁶

In response to public comment, the Commission decided to broaden this study to also address the following issues:

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). 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. Code Civ. Proc. §§ 1245.010-1245.390.

3. Code Civ. Proc. § 1245.010.

4. *Property Reserve v. Superior Court*, 1 Cal. 5th 151 (2016).

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

6. Minutes (Sept. 2017), p. 4.

- Whether Section 1245.060 should be revised to make clear that a property owner is not entitled to compensation under that provision for losses that have not yet occurred.
- Whether Section 1245.060 should be revised to expressly provide that compensation may not be provided under that provision until all pre-condemnation activities have terminated.
- Whether Section 1245.060 should be revised to expressly provide that a claim for losses caused by pre-condemnation activity may be sought in a subsequent condemnation action.⁷

In addressing those matters, the Commission also directed the staff to examine relevant law in other jurisdictions and to have that work performed by law student externs, to the extent practicable.⁸

This memorandum addresses the second of the listed issues, whether the law should allow a property owner to be compensated for harms *before pre-condemnation activities have been completed*. For convenience, this memorandum will refer to such an approach as “interim compensation,” as distinguished from “final compensation.”

This memorandum begins by discussing the laws of other jurisdictions on this issue, before turning to a discussion of competing policy principles, which will include discussion of other laws that involve those principles.

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

BACKGROUND

The Eminent Domain Law provides a comprehensive procedure for “condemnation,” i.e., the taking of property for a public purpose and compensating the property owner.⁹ In this memorandum, the term “condemnor” will be used to refer to entities that have the power to condemn property.

The Eminent Domain Law also includes provisions that govern “pre-condemnation activity.” That law provides a process that a condemnor can use, before commencing formal condemnation, to enter private property and assess its suitability for condemnation for a particular purpose.

Pre-condemnation activities can damage the property or impair a property owner’s use of the property. Therefore, to protect the property owner, the

7. *Id.*

8. *Id.*

9. Sections 1230.010-1273.050.

condemnor must seek an entry order from the courts before entering the property.¹⁰

For example, in the case of *Property Reserve*, the Department of Water Resources filed 150 petitions for entry onto individual properties to conduct environmental surveys.¹¹ The court took declarations from the Department, as well as the property owners, as to the necessity and hardship of these entries before issuing entry orders.¹² The entry orders authorized Department employees to enter each property for a maximum of 25 to 66 days (depending on the property), over a one-year period, to conduct the necessary studies and surveys.¹³

Before entering property for pre-condemnation activities, the condemnor must also deposit with the court the amount of compensation that is likely to be owed to the owner as a consequence of the activities.¹⁴

Under that law, the court “shall 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.”¹⁵ The terms “actual damage” and “substantial interference” exclude liability for minimal annoyance or interference that does not seriously impinge upon or impair possession and use of the property.¹⁶

The Eminent Domain Law further provides procedures for modification as well as retention of the deposit. Under the retention statute, unless earlier disbursed by the court, the deposit may be retained for a period of six months after completion of the activities, with the option to extend that period after a showing of good cause.¹⁷

The pre-condemnation statutes do not expressly address whether part of a deposit may be withdrawn before all pre-condemnation activities have ceased. This seems to leave open the question of whether a property owner can seek interim compensation from the deposit, or must wait until the activities have ceased for lump sum final compensation.

10. Section 1245.010.

11. *Property Reserve v. Superior Court*, 1 Cal. 5th 151, 168 (2016).

12. *Id.* at 170.

13. *Id.*

14. Section 1245.030

15. Section 1245.030(b).

16. Section 1245.060 Comment.

17. Section 1245.050.

It would probably be helpful for the law to address this point expressly, to avoid any uncertainty on the issue. This memorandum is intended to provide some analysis of whether or not interim compensation during pre-condemnation activities should be permitted.

EXISTING LAW

Laws of Other States

As directed by the Commission, the staff examined the eminent domain statutes in all of the other states, to see whether any state had addressed the issue of interim compensation during pre-condemnation activities.

Nearly all states provide statutory procedures for a property owner to recover compensation for damage or interference sustained in the course of pre-condemnation activities. Many of these states include a deposit procedure similar to that of California. However, no state has addressed the issue of interim compensation in the context of pre-condemnation proceedings. If the Commission were to recommend expressly allowing a property owner to claim compensation while pre-condemnation activities are still ongoing, it would likely be first to do so.

Model Eminent Domain Code

The staff also examined the Model Eminent Domain Code, which was promulgated by the Uniform Law Commission. This model code was under development at the same time that the Law Revision Commission was finalizing its recommendation on the *Eminent Domain Law*. The Commission's recommendation makes clear that it drew upon the Model Code in its own work on eminent domain:

The Commission has examined the draft of the Model Eminent Domain Code and the Uniform Eminent Domain Code. The Commission has drawn upon all these sources in producing a modern Eminent Domain Law within the existing California statutory framework.¹⁸

Like California's law, the Model Code requires a deposit for pre-condemnation activity compensation and allows the court to retain the deposit

18. *The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601, 1627 (1974).

for six months following termination of entry.¹⁹ Further, the Model Code includes the following comment:

During this period, the owner or occupant of the property may apply to the court for payment of compensation, out of the deposited sum, if compensable damages are incurred by reason of the entry and suitability studies.²⁰

This suggests that, under the Model Code, a property owner can only apply for compensation during the six-month retention period, which begins *after* the pre-condemnation activities have ceased.

Despite looking to the Model Code in its own study, the Commission did not include an equivalent Comment in its recommendation.

The staff is not sure what implication should be drawn from the discussion above. However, it does seem that the Uniform Law Commission decided against including interim compensation for pre-condemnation activity in the Model Code.

Conclusion

Unfortunately, the laws of other states do not provide useful guidance on how to address the issue addressed in this memorandum.

The Model Code provides one relevant piece of information. But that information is derived from a comment, rather than statutory text. Moreover, only one state (Alabama) is listed by the Uniform Law Commission as having adopted the Model Code.²¹

CONTENDING POLICIES

The staff believes that there are two main policies at issue in this study, which are in tension.

First, there is concern about the burden that pre-condemnation imposes on the property owner, if interim compensation is not allowed. If the losses suffered by the property owner are substantial and the period of pre-condemnation activity is lengthy, a rule that only allows final compensation could impose a significant hardship.

19. Model Eminent Domain Code Section 303(b).

20. Model Eminent Domain Code Section 303(b), Uniform Law Comm'n, comment.

21. <<https://www.uniformlaws.org/committees/community-home?CommunityKey=47ea00b2-8003-4116-9608-41434f0a5658>>

Balanced against that concern is a legitimate concern about the burden that interim compensation would impose on the condemnor and the courts. Any provision for interim condemnation will involve court processes to determine the amount of compensation owed for the period claimed. As discussed below, there may also be process costs required to ensure that other parties' interests are protected. Finally, it may be difficult to quantify interim harm and compensation correctly, as there may be an opportunity for the condemnor to mitigate harms before it completes its pre-condemnation activities (returning the land to the condition it was in before the condemnor's entry).

Having identified those two policy principles, the staff looked for examples in other laws in which one of the two policies seemed to predominate. The hope was that this would shed some light on how California might balance them in this context.

Laws that Favor Interim Compensation

The staff considered examples of situations where an individual is compensated while a harm is ongoing. They are discussed below.

Deposit Procedure in Condemnation

The most persuasive example comes from the Eminent Domain Law itself. While that law does not address interim compensation in the context of *pre-condemnation*, it already provides a process for property owners to receive interim compensation during *condemnation* cases.

Section 1255.210 expressly allows withdrawal of all or part of a deposit during the pendency of a condemnation action (i.e., prior to entry of judgment):

Prior to entry of judgment, any defendant may apply to the court for the withdrawal of all or any portion of the amount deposited. The application shall be verified, set forth the applicant's interest in the property, and request withdrawal of a stated amount.²²

The "defendant" in a condemnation action is any person who has or claims an interest in the property at issue.²³ This would include joint owners, but it would also seem to include those with debts secured by the property.

Pursuant to Section 1268.140, in order to withdraw all or a portion of the deposit, a defendant must provide notice to all other defendants. This notice

22. Section 1255.210.

23. Section 1250.220(a).

requirement was recommended by the Commission to protect the other interested persons when money is withdrawn.²⁴

Further, the actual withdrawal of the deposit is delayed in order to provide adequate time for other defendants, as well as the condemnor, to object.²⁵ If any party objects to the withdrawal, the court must determine, upon hearing, the amounts to be withdrawn, if any.²⁶

Thus, while property owners are provided an avenue for interim compensation in condemnation proceedings, it is a somewhat complicated process that imposes burdens on the courts, the condemnor, and the property owner.

If interim compensation were allowed for pre-condemnation activities, it would probably make sense to build in the same kinds of protections that are described above. The property owner should be required to provide notice to other persons interested in the property so that they have an opportunity to be heard, before funds are disbursed.

In the context of condemnation, where the entire value of the real property is at stake, that degree of procedural cost is probably warranted. It is not clear that the same would be true with respect to pre-condemnation activity, where the amount of compensation would probably be much lower (because it would only relate to a temporary use impairment or slight damage to the property, rather than taking the entire value of the property).

Continuous Trespass

Another area of law that permits interim compensation is continuous trespass.

Under a claim for continuous trespass, a property owner may recover from a trespasser while the trespass is still ongoing. This allows a property owner to bring periodic claims against the trespasser for damages sustained during the period of that trespass.

The underlying theory of the doctrine is that a continuous trespass is series of individual, successive injuries. Therefore, in a claim for continuous trespass a property owner is required to bring periodic successive actions in order to recover for damages accrued during each period of injury.²⁷ While this doctrine

24. Section 1268.140 Comment.

25. Section 1255.230.

26. *Id.*

27. *Starrh and Starrh Cotton Growers v. Area Energy LLC*, 153 Cal. App. 4th 583 (2007).

stands in contrast to modern concerns of preventing repetitive litigation, the doctrine of continuous trespass dates back to Blackstone, writing, “every continuance of a nuisance is a fresh one.”²⁸

The development of this doctrine was meant to facilitate cooperation, negotiation, and accurate discovery of information between parties.²⁹ Since the cost of bringing successive trespass actions was historically quite low, it did not burden the plaintiff to bring multiple actions against the defendant. Further, the defendant potentially benefitted from the scheme, as it allowed the defendant to more accurately anticipate the full cost of the trespass, and thus allowed the defendant to consider the pros and cons of taking steps to end the trespass.³⁰

Arguably, the doctrine of continuous trespass provides support for the award of interim compensation during pre-condemnation activities. Especially where the periodic loss to the property owner is quantifiable and constant, recovery prior to the termination of pre-condemnation activities would ensure the property owner is made whole, and not burdened beyond what is already necessary to perform these pre-condemnation activities. Further, allowing periodic and successive compensation could encourage negotiation between the property owner and potential condemnor, potentially reducing the strain on the courts to adjudicate these claims.

Laws that Disfavor Interim Compensation

The staff next looked for laws that seem to disfavor a series of successive actions. Two examples are discussed below. The first is the general justiciability doctrine of ripeness. The second, which also relates to takings, is inverse condemnation.

Ripeness

The ripeness doctrine is rooted in Article III of the United States Constitution and is designed to prevent the courts from entangling themselves in abstractions.³¹ For a controversy to be ripe it must have reached the point that the facts have sufficiently formed to permit an “intelligent and useful decision to be

28. Kyle Graham, *The Continuing Violations Doctrine* 43 Gonz. L. Rev. 271 (2007-2008).

29. *Id.*

30. *Id.*

31. *Vandermost v. Bowen*, 53 Cal. 4th 421 (2012).

made.”³² This requirement prevents a court from deciding a case based on purely speculative harm.

For present purposes, the ripeness doctrine suggests that a property owner should not be allowed to recover damages until the facts surrounding the alleged injury have become sufficiently ripe for adjudication.

There may be cases where the property owner’s injuries would be certain enough to be more than speculative (e.g., loss of use of an income-producing asset for a fixed period of time might be concrete enough to be adjudicated before the pre-condemnation activities have entirely ended). On the other hand, there may be cases where damages that arise early in the process are mitigated or entirely cured by the condemnor, at a later stage of the pre-condemnation activity. In that case, the property owner’s damages could not be fully ascertained until after activities have ceased.

Inverse Condemnation

A claim of inverse condemnation arises where there is a public taking of, or interference with, land without formal condemnation proceedings.³³ Inverse condemnation can occur in two situations: (1) deprivation of all beneficial economic use and (2) physical invasion.³⁴ Economic deprivation typically arises from land use regulations, like zoning.³⁵ This is sometimes known as a “regulatory taking.” Deprivation by physical invasion can include physical damage to the property, or an encroachment.³⁶ To recover for inverse condemnation, there must be a final determination by a court that the condemnor has taken the property without condemnation and compensation.³⁷

Takings via Land Use Regulations

In considering when a challenge to a land use regulatory taking is ripe, the general rule is a claim has not accrued until a “final and authoritative determination of the type and intensity of development legally permitted on the subject property” is ascertained.³⁸ A property owner must show that “the agency

32. Stonehouse Homes LLC v. City of Sierra Madre, 167 Cal. App. 4th 531, 540 (2008).

33. Serra Canyon Co. v. California Coastal Com., 120 Cal. App. 4th 663, 669 (2004).

34. Lingle v. Chevron USA Inc., 544 U.S. 528, 538 (2006).

35. Big Creek Lumber Co. v. County of Santa Cruz, 38 Cal. 4th 1139, 1151–1152 (2006).

36. Dryden Oaks, LLC v. San Diego County Regional Airport, 16 Cal. App. 5th 383, 397 (2017).

37. Cobb v. City of Stockton, 192 Cal. App. 4th 65, 73 (2011).

38. MacDonald, Sommer & Frates v. Yolo County, 447 U.S. 340 (1986).

lacks the discretion to permit any development, or the permissible uses of the property that are known to a reasonable degree of certainty.”³⁹

This seems to weigh against allowing a series of repetitive actions. Instead, the restriction on the owner’s use of the property must be known with certainty, before a claim can be brought. This avoids repetitive litigation and litigation of speculative claims.

Takings via Physical Invasions

Another distinct type of taking giving rise to a claim for inverse condemnation is a taking by physical invasion. Generally, in order to recover for a taking arising from a physical invasion to the property, the invasion must be permanent.⁴⁰ This requirement would suggest a property owner could not recover until all pre-condemnation activities have ceased and the potential condemnor has had the opportunity to abate the damage.

The rules regarding inverse condemnation via flooding further illustrate the same apprehension towards awarding compensation while the harm is still ongoing. In the context of inverse condemnation via flooding, a claim is ripe after the activity has “stabilized.”⁴¹ According to the Supreme Court in *United States v. Dickinson*, flooding is stabilized where “the consequences of inundation have so manifested themselves that a final account may be struck.”⁴² Federal case law later clarified the doctrine, holding a claim for inverse condemnation accrues when “it is clear that the process has resulted in a permanent taking and the extent of the damage is reasonably foreseeable.”⁴³ California later adopted the same test.⁴⁴

The stabilization requirement ensures that courts do not have to repeatedly hear claims while the full extent of damage to a property remains uncertain.

Although delaying the filing of a claim in this situation may burden property owners by making them wait for compensation until the harm has fully run its course, the rule helps to conserve the resources of the court and the state, by preventing repetitive and conjectural actions.

39. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001).

40. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982).

41. *Lee v. Los Angeles County Metropolitan Transportation Authority*, 107 Cal. App 4th 848, 857 (2003).

42. *United States v. Dickinson*, 331 U.S. 745, 749 (1947).

43. *Boling v. United States*, 220 F. 3d 1365, 1370-1371 (2000)

44. *Pierpoint Inn, Inc., v. State of California*, 70 Cal. 2d 282, 293 (1969).

DISCUSSION

As discussed above, the general ripeness doctrine weighs against allowing repetitive actions for interim harms, before a situation has fully resolved. In pre-condemnation activity, that principle argues against providing interim condemnation. Harms that appear certain while the activities are ongoing may be mitigated or cured later in the process.

That is the approach taken in inverse condemnation, which also involves compensation for takings. If a regulatory taking is alleged, the regulating entity's process must be exhausted before an inverse condemnation claim can be brought. Similarly, if there is an encroachment (like flooding), the situation must be allowed to fully run its course, so that there can be a final reckoning of the harm.

On the other hand, the formal condemnation process does seem to allow for withdrawal of deposited compensation funds, while the condemnation action is proceeding. But that example may be distinguishable from the pre-condemnation situation. Condemnation involves a permanent taking of property. There is no doubt that the property owner will be entitled to compensation for the value of the property taken. While the value of the property is one of the issues to be decided in the condemnation action, it seems likely that the amount deposited by the condemnor is probably close to the actual amount that will eventually be compensated. Allowing the property owner to withdraw deposited compensation funds early seems unproblematic (so long as others who have an interest in the property are given notice and an opportunity to be heard, as the statute provides).

By contrast, in pre-condemnation activity, the full measure of damage to the property owner may be difficult to determine until the activity has fully played out. As discussed above, injuries that seem severe early in the process may be mitigated later. Also, the amount at stake in pre-condemnation is much lower than in formal condemnation. This means that the property owner's need for early compensation would probably be much less acute than in a formal condemnation.

As noted, the common law doctrine of continuous trespass also allows for interim compensation. But that may be the result of the historical development of the doctrine. It is not clear that the principle should be generalized beyond that context.

If the Commission wishes to further explore the possibility of awarding interim damages in pre-condemnation actions, the staff will prepare implementing language. In doing so, it would seem sensible to include third party notice and hearing requirements like those in the condemnation statute. Also, it might be advisable to require that the claim be based on harms that can be quantified with certainty and that are unlikely to be abated by the potential condemnor. This would allow a property owner the potential for prompt recovery while also requiring some measure of ripeness.

If instead, the Commission believes that interim compensation should not be allowed, the staff would draft language to make that rule clear.

Of course, the Commission could also decide to do nothing on the issue and let the law develop through the courts.

How would the Commission like to proceed?

Respectfully submitted,

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