

First Supplement to Memorandum 2019-50

Eminent Domain: Pre-Condemnation Activities (Discussion of Issues)

In this study, the Commission¹ is reviewing a part of California's statutory eminent domain law² relating to pre-condemnation activity.³ The study was prompted by a decision of the California Supreme Court in *Property Reserve v. Superior Court* (hereafter, *Property Reserve*),⁴ which upheld the constitutionality of the pre-condemnation statute after judicially reforming a provision relating to owner compensation.

The Commission's initial step in the study was to propose a codification of the holding in *Property Reserve*.⁵ Memorandum 2019-50 raises a drafting issue in connection with the implementation of that decision.

This supplement relates to a recent Commission decision that an owner whose property is affected by pre-condemnation activity should not be able to seek compensation from funds on deposit with the court, until after the pre-condemnation activity is complete. The supplement analyzes whether that decision should be reconsidered, based on new information.

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

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. California's eminent domain statute was enacted on Commission recommendation. See *The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601, 1738-52 (1974).

3. Code Civ. Proc. §§ 1245.010-1245.390. Pre-condemnation activity is entry onto property by a prospective condemnor 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." See Code Civ. Proc. § 1245.010.

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

5. See Minutes (Sept. 2017), p. 4.

INTERIM COMPENSATION

Code of Civil Procedure Section 1245.060 governs compensation to a property owner for harm caused by pre-condemnation activity. Section 1245.060 reads as follows:

1245.060. (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.

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

At its April meeting, the Commission decided that an owner should not be able to seek compensation under subdivision (c) until all pre-condemnation activity is completed. However, it should be made clear that the revision does not “preclude informal arrangements to cure or mitigate harms before precondemnation activities are complete.”⁶

Following the April meeting, the Commission received an email from attorney Gerry Houlihan, a counsel of record in *Property Reserve*. Mr. Houlihan urges the Commission to revisit its decision on the timing of interim compensation, based on a recent decision of the United States Supreme Court. Mr. Houlihan’s email is attached to this supplement as an Exhibit.

6. See Minutes (Apr. 2019), p. 4.

Mr. Houlihan agrees that most owners will find it cost-effective to wait until pre-condemnation activities are complete before seeking compensation, if the entry is of a short duration.⁷ However, he suggests the Commission's decision could be unfair to an owner facing a lengthy pre-condemnation process.⁸

He points to a change in the law that he believes warrants the Commission reconsidering its decision about the timing of compensation for pre-condemnation activity. In June, the United States Supreme Court decided *Knick v. Township of Scott* (hereafter, *Knick*),⁹ which reversed longstanding precedent that a person seeking compensation for a taking under the Fifth Amendment of the United States Constitution must first exhaust state remedies.¹⁰

Knick seems to have cleared the way for a property owner to seek condemnation *in federal court* for a Fifth Amendment taking that results from pre-condemnation activity in California. Mr. Houlihan indicates that he would pursue that remedy for clients who were adversely affected by the Commission's decision to recommend that claims under Section 1245.060 must wait until after pre-condemnation activity has ended:

Obviously what I would do as lawyer now is bring a claim in federal court immediately if the CA entry statutes precluded my client from seeking compensation until the entries are complete. I doubt the public entities want to be ultimately litigating the right to enter in state court but the compensation claims in federal court so the [Commission] should reconsider its decision to preclude recovery until the activities are complete.¹¹

He also suggests that requiring a property owner to wait until after completion of pre-condemnation activities for compensation of a taking would be "unconstitutional under *Knick*."¹²

The staff does not fully understand that last point. *Knick* was a case about whether an exhaustion requirement must be satisfied before filing a takings claim in federal court. The holding of the case doesn't seem to bear on whether California can impose a time limitation on its own simplified claims process for a particular type of taking, especially as an owner is never required to proceed

7. Exhibit p. 1.

8. *Id.*

9. *Knick v. Twp. of Scott*, ___U.S.___, 139 S.Ct. 2162 (June 21, 2019).

10. See *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

11. See Exhibit p. 1.

12. *Id.*

under that process in order to seek compensation. **Further explanation of the point would be helpful.**

The remainder of this discussion focuses on Mr. Houlihan's other point, that the immediate availability of the federal courts to pursue a takings claim for pre-condemnation activity provides a way to circumvent the Commission's proposed timing rule, and that pursuing such a remedy would be disadvantageous for condemnors.

Before proceeding to a discussion of that point, it would be helpful to note that pursuing a claim in federal court is not the only alternative to seeking payment from the funds on deposit under Section 1245.060(c).

Section 1245.060(a) authorizes a civil action for damages to or interference with property that results from pre-condemnation activity, as an express alternative to proceeding under subdivision (c).¹³ In addition, subdivision (d) states that the remedies provided in Section 1245.060 are not exclusive.¹⁴ Most notably, this leaves open the possibility of seeking compensation for such harm in an inverse condemnation action.¹⁵

Discussion

The Commission's Comment to Section 1245.060(c) explains its purpose:

Subdivision (c) provides a simple and expeditious method, in lieu of a civil action, for adjudication of a claim for damages and expenses where a deposit has been made and the funds deposited have not been disbursed.¹⁶

The Commission's decision to preclude claims against the deposit under Section 1245.060(c) until after completion of pre-condemnation activities would keep that process simple and expeditious. It could prevent the presentation of claims that aren't fully determinable (because the harms at issue might be mitigated before the end of the pre-condemnation activities). It would also avoid the cost and inconvenience that could result from a multiplicity of interim claims

13. "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)." Section 1245.060(a).

14. "Nothing in this section affects the availability of any other remedy the owner may have for the damaging of his property." Section 1245.060(d).

15. See *Property Reserve*, 1 Cal. 5th at 186 (citing to Section 1245.060(d)).

16. *The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601, 1742 (1974).

being filed for the same pre-condemnation activity.¹⁷ The burden imposed by such claims may be increased by the decision in *Property Reserve*, which held that a property owner is entitled to a jury trial as to the amount of compensation owed.

On the other hand, Mr. Houlihan is correct that there could be situations in which a property owner would be substantially prejudiced by being made to wait until all pre-condemnation activities have ended before seeking any compensation for harms. This could arise if the losses are large, the wait is prolonged, or both.

He points out that an owner in such a situation could circumvent the delay associated with the Commission's proposed reform of Section 1245.060 by instead filing a takings claim in federal court. As noted above, the owner could also achieve a similar result in state court, either by filing a claim pursuant to Section 1245.060(a), or by bringing an action for inverse condemnation.

Such action may be uncommon, for two main reasons. First, in order for the filing of a civil action to make sense as an alternative to proceeding under the Section 1245.060(c) deposit procedure, most owners would need to perceive the civil action as likely to be completed more quickly than the pre-condemnation procedure. Otherwise, the owner could obtain a recovery more quickly by waiting out the pre-condemnation process and making a claim against the deposit.

Second, the importance of obtaining interim compensation would need to be sufficiently great to outweigh any additional cost and inconvenience that might result from filing a civil action, as compared to making a claim against the deposit.

Despite those considerations, there could be situations in which it would make sense for the owner to circumvent the Commission's proposed limitation on the deposit process, to attempt to achieve relief while the pre-condemnation activities are still ongoing.

As Mr. Houlihan points out, such relief could be sought in federal court. Moreover, as noted above, that relief could be sought in state court, under Section 1245.060(a) or through an action for inverse condemnation.

However, it is not clear whether that would be problematic. The deposit procedure was intended as a simplified alternative to civil action. Precluding a

17. See generally Memorandum 2019-20.

multiplicity of claims for interim relief helps to keep the deposit process streamlined. If an owner has a compelling enough need for interim compensation, there are other avenues in which to pursue that relief.

As Mr. Houlihan notes, a California condemnor might be inconvenienced if the property owner decides to litigate the issue of compensation in federal court, because of the dual forum issue. The staff is not sure how significant a concern that is. **Further comment on this point would be helpful.**

Moreover, if an owner does choose to file a civil action rather than wait for the end of pre-condemnation activities, it is not clear why the owner would choose to seek relief in federal court rather than under state law. That seems particularly true because the grounds provided for an action under Section 1245.060(a) may be broader and more easily established than the grounds for proving a taking under the U.S. Constitution.¹⁸ The possibility of an award of attorney's fees might make it more attractive to proceed in federal court.¹⁹ However, attorney's fees may also awarded in a state court inverse condemnation case.²⁰

Although not raised by Mr. Houlihan, the Commission should also consider the possible increased burden on state court resources, if more property owners decide to file civil actions rather than proceed under the deposit procedure. If the Commission's decision to preclude interim compensation from the deposit leads to more civil actions being filed, that would weigh against the benefits of keeping those cases out of the deposit process.

The Commission should consider whether the matters discussed above warrant reversing its decision regarding the timing of claims against the deposit under Section 1245.060(d).

In deliberating on that point, it might be helpful to consider:

- How common would it be for owners to file civil actions rather than wait for the end of pre-condemnation activity and make a claim against the deposit?
- How likely would it be for such actions to be filed in federal court rather than in state court (under state law)?

18. While the Fifth Amendment requires compensation for a "taking," Section 1245.060(a) authorizes recovery for "actual damage to or substantial interference with the possession or use of the property...."

19. Reasonable attorney's fees may be awarded to a prevailing party in such an action. See 42 U. S. C. § 1988(b).

20. Code Civ. Proc. § 1036.

- Would it be a problem if cases involving significant losses and urgency are brought as civil cases rather than under the deposit procedure?
- How much burden would such actions impose on the parties?
- How much burden would such actions impose on the courts?
- Would those burdens be greater than the burden of allowing owners to make multiple claims under the deposit procedure?

Another possibility that the Commission may wish to consider would be to generally bar pre-completion claims against the deposit, but provide exceptions for appropriate circumstances. For example, perhaps a claim against the deposit could be allowed with the agreement of the condemnor. This would allow for interim relief in cases where it is plainly appropriate. Another possibility would be to allow interim relief at the discretion of the court, based on some showing of unusual urgency or harm. Such exceptions might provide a streamlined way of addressing exigencies, without opening the flood gates.

How would the Commission like to proceed?

Respectfully submitted,

Steve Cohen
Staff Counsel

EMAIL FROM GERRY HOULIHAN (JUNE 21, 2019)

Brian,

Not sure where you are on the pre-condemnation activities piece. The last thing I saw this spring indicated the committee felt a landowner who suffered damage would have to wait until the end of the activities to seek compensation. I believe the Committee relied on the portion of the Property Reserve decision that talks about *Williamson County/Hamilton Bank* federal case and that the availability of just compensation at some point is sufficient to preclude a finding of a taking. The CA Supreme's reliance on *Williamson County* in the case of a physical occupation case which the entries are, as opposed to a regulatory taking case was legally infirm to begin with but that point is moot since *Williamson County* was overruled by the US Supremes today in *Knick v. Township of Scott*. In *Knick* the court reiterated that a right to compensation accrues the moment a taking (or in California a damaging) occurs regardless of whether or not a method of ascertaining compensation exists. I believe this undercuts the committee's decision to not permit recovery until the activities are complete based on the entry statute's compensation scheme.

Generally most owners will find it cost effective to wait until the end to recover for damages if the entry is of a short duration. But in a lengthy entry this could be unfair. For example if the public entity accidentally killed some cows (this has happened by the way) the rancher should be able to seek compensation from the court to replace those cows immediately and not wait until two or three years later when the entries end. Similarly if the public entity damages the irrigation, crops or power supply for a piece of property making the owner pay to repair and seek compensation years later when the entry activities are complete is unfair and unconstitutional under *Knick*. Obviously what I would do as lawyer now is bring a claim in federal court immediately if the CA entry statutes precluded my client from seeking compensation until the entries are complete. I doubt the public entities want to be ultimately litigating the right to enter in state court but the compensation claims in federal court so the committee should reconsider its decision to preclude recovery until the activities are complete.

Gerry Houlihan