

Second Supplement to Memorandum 2019-50

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

In this study, the Commission¹ is reviewing part of California's statutory eminent domain law² that relates to pre-condemnation activity.³ The pre-condemnation statute⁴ was enacted on the Commission's recommendation in 1974.⁵

The current study was prompted by a decision of the California Supreme Court in *Property Reserve, Inc. v. Superior Court* (hereafter, *Property Reserve*),⁶ which held that the pre-condemnation statute is consistent with the requirements of the takings clause of the California Constitution,⁷ with one exception. The statute does not expressly provide that the property owner has the right to a jury trial on the question of the amount of compensation due the owner, as the constitution requires.

Rather than invalidate the statute, the court judicially reformed it to include that jury trial right.⁸

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. Eminent domain law provides a process for taking private property for a public use. The entity that exercises the condemnation power is referred to as the condemnor.

3. Pre-condemnation activity refers to entry onto property before commencement of the condemnation process, in order 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. If this activity causes specified harm to the property, the pre-condemnation statute provides ways that an owner may recover compensation for that harm. See Code Civ. Proc. §1245.060.

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

5. See *The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601, 1738-52 (1974).

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

7. Cal. Const. Art. I, Section 19(a).

8. A court may reform the meaning of a statute to conform the statute to constitutional requirements, "if it can conclude with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute to invalidation of the statute." See *Kopp v. Fair Pol. Practices Com.*, 11 Cal. 4th 607, 615 (1995).

The Commission decided to codify the effect of the court’s holding, so that the language of the statute would be consistent with its reformed meaning. Work on that issue is near completion.⁹

In the course of this study, the Commission also decided to address another issue that had been raised in public comment: whether the pre-condemnation statute should permit “interim compensation” (i.e., the compensation of an owner before the pre-condemnation process is complete), or whether it should preclude such relief (i.e., owner compensation can only be provided after the pre-condemnation activities have ended). The language of the existing statute does not expressly address that point.

In April, the Commission provisionally decided that the pre-condemnation statute should be revised to preclude interim compensation.¹⁰

In response to that decision, the Commission received a letter from attorney Gerry Houlihan.¹¹ Mr. Houlihan pointed to a case recently decided by the United States Supreme Court that he finds relevant to the interim compensation question, and urged the Commission to reconsider its decision. That letter is discussed in the First Supplement to Memorandum 2019-50.

After the release of that memorandum, Mr. Houlihan wrote the Commission a second time, explaining and expanding on his arguments against the Commission’s decision. In this second letter, he also raised the possibility that the Commission’s proposed reform would violate the California Constitution.

Mr. Houlihan’s second letter was received too close in time to the Commission’s September meeting to give it the level of analysis that it warranted. Rather than consider the matters raised by Mr. Houlihan without the benefit of all of his input, the staff recommended that consideration of the interim compensation issue be postponed until the November meeting. The Commission agreed and did not consider Memorandum 2019-50 or its First Supplement in September. Those materials are now on the agenda for the November meeting.

This memorandum discusses the new information provided in Mr. Houlihan’s second letter. That letter is attached as an Exhibit.

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

9. See Memorandum 2019-50.

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

11. Mr. Houlihan was one of the attorneys of record in *Property Reserve*.

For convenience, the remainder of this memorandum will use the term “condemnor” to refer to an entity engaged in pre-condemnation activity, despite the fact that the entity is arguably not a condemnor until a condemnation action has been commenced.

BACKGROUND

Existing Law

Section 1245.060 provides 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.¹²

Subdivision (a) establishes the right to compensation when “the entry and activities upon property cause actual damage to or substantial interference with the possession or use of the property....” The owner may elect to bring a civil action under subdivision (a) or instead pursue the more expedited deposit procedure provided in subdivision (c). In addition, subdivision (d) makes clear that the section does not preclude any other remedies that might exist.

12. The referenced “funds on deposit” are required to be paid by another pre-condemnation provision, Section 1245.030(c).

Section 1245.060 does not expressly address whether interim compensation is available to an owner.

Timing

In considering the issues discussed in this memorandum and in the First Supplement, the staff believes it would be helpful for the Commission to have some sense of the typical duration of pre-condemnation activity. Unfortunately, we only have anecdotal information on that point. At the Commission's April 2019 meeting, a representative of the Department of Water Resources indicated that pre-condemnation activity is often completed within a matter of months. However, Mr. Houlihan writes that he has seen two cases in which pre-condemnation activity went on for 6 and 7 years.¹³ In the case at issue in *Property Reserve*, the trial court had authorized one aspect of the proposed pre-condemnation activity to continue for a period of one year.¹⁴

The pre-condemnation statute itself sets no upper limit on the duration of pre-condemnation activity.

CALIFORNIA CONSTITUTION

In the staff's view, the most significant new point made by Mr. Houlihan's second letter is an assertion that a rule that prohibits interim compensation would be inconsistent with the takings clause in the California Constitution (hereafter the "California Takings Clause").¹⁵

The California Takings Clause is set out in Section 19(a) of Article I of the California Constitution, which reads as follows:

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.

The first sentence of that provision sets out a general rule prohibiting a taking of private property for public use unless just compensation "has *first* been paid to, or into court for, the owner."

13. Exhibit, p. 4.

14. *Property Reserve*, *supra* at 170.

15. Exhibit, pp. 1-3.

The second sentence establishes a narrow exception. The Legislature may permit a condemnor to possess property following the commencement of an eminent domain proceeding — but before final judgment in that proceeding — if two conditions are satisfied:

- (1) The condemnor must deposit into court an amount that a court determines to be the probable amount of just compensation.
- (2) There must be a “prompt release” of the deposit to the property owner.

The second sentence of Section 19(a) was the basis for an expedited eminent domain procedure known as the “quick take” procedure.¹⁶ That procedure allows a condemnor to take possession of property that is the subject of a condemnation action, before that action has been litigated to a final judgment,¹⁷ if the condemnor has deposited a judicially-determined probable amount of just compensation,¹⁸ for prompt release to the property owner.¹⁹

In *Property Reserve*, the court concluded that the pre-condemnation statute is compatible with the second sentence of the California Takings Clause:

In the precondemnation entry and testing statutes, the Legislature relied on the procedural approach set forth in the second sentence of article I, section 19, subdivision (a) of the California Constitution, fashioning procedural protections for the respective interests of the property owner and the public entity in a manner that serves the fundamental purpose of the state takings clause in light of the special characteristics of the precondemnation setting.

...

In view of the unquestioned need for precondemnation entry and testing in order to avoid the ill-advised and premature condemnation of private property and the substantial uncertainties inherent in the precondemnation testing context, the Legislature established a statutory scheme that takes into account the significant public and private interest in an expedited precondemnation procedure and at the same time extends to a property owner the fundamental procedural protections embodied in the second sentence of article I, section 19, subdivision (a) of the California Constitution whether or not a public entity's proposed precondemnation activities actually rise to the level of a taking or damaging of property for purposes of the state takings clause. First,

16. *Property Reserve*, *supra* at 188. See also Sections 1255.010-1255.480

17. Sections 1255.410-1255.480.

18. Sections 1255.010-1255.080.

19. Sections 1255.210-1255.280.

the statutes require the public entity to institute a judicial proceeding under the Eminent Domain Law prior to undertaking any precondemnation entry or testing that poses a risk of damage or interference with the property owner's possession or use of the property. ... Second, the statutes require the trial court to limit the public entity's authorized activities (or, in the terminology of the second sentence of Cal. Const., art. I, § 19, subd. (a), to limit the nature and extent of the public entity's authorized "possession" of the property) to those activities that are reasonably necessary to accomplish the public entity's investigatory purpose. (§ 1245.030.) Further, the statutes require the public entity, prior to undertaking such activities, to deposit into court for the benefit of the property owner an amount that the court determines, based on the circumstances of the particular case, is the probable amount of just compensation for the activities authorized by the court. (*Ibid.*) Finally, the statutes provide a procedure through which a property owner can promptly obtain compensation from the deposit for any loss suffered as a result of the public entity's precondemnation activities, and, if those funds are insufficient, can obtain a judgment for the unpaid portion.²⁰

Mr. Houlihan suggests that the pre-condemnation statute would not be compatible with the second sentence of the California Takings Clause if it were amended to preclude interim compensation, because such a requirement could prevent the constitutionally-required "prompt release" of compensation to a property owner.

A review of *Property Reserve's* analysis under article I, section 19 makes it abundantly clear that the court found that the entry statutes complied because there was a deposit and a mechanism for prompt release. (See *Property Reserve* at pp. 201-202 [entry statutes provide a procedure through which a property owner can promptly obtain compensation for the deposit of any loss suffered as a result of the precondemnation activities] (emphasis added).)

Thus, prompt release of the deposit is a constitutional requirement and any interpretation of the entry statutes that would permit deferring that release of the deposit until years after the damages occurred is not consistent with *Property Reserve's* own analysis.²¹

Property Reserve does strongly suggest that the pre-condemnation statute must provide for a "prompt release" of compensation to an owner, in order to be consistent with the California Takings Clause.

20. *Property Reserve*, *supra* at 200-02 (footnotes omitted).

21. Exhibit, p. 3 (emphasis in original).

It seems clear that allowing interim relief would result in a prompt release of compensation. Under such a scheme, a property owner would not need to wait for pre-condemnation activity to have ended before receiving compensation. Presumably, as soon as the property owner suffers a definite harm, the owner could make a claim and receive payment from the amount that is on deposit with the court.

However, there are arguments to be made that the pre-condemnation statute would also be consistent with the prompt release requirement of the California Takings Clause, even if interim relief is not permitted.

First, it isn't clear from the opinion in *Property Reserve* whether the court read the pre-condemnation statute as providing for interim compensation. There is nothing in the statute that expressly provides for such relief. If the court did not assume the availability of interim relief, then it would seem that the court found relief under the pre-condemnation statute to be constitutionally "prompt" even if the compensation must wait until after the pre-condemnation activity has been completed.

Why might that be? It is possible that the court was measuring the promptness of the pre-condemnation deposit procedure against the most likely alternative source of relief, a separate civil action. The pre-condemnation deposit process might appear "prompt" as compared to the time required to fully litigate a civil action. That may be why the court described the pre-condemnation process as a "a special, compact, and expedited procedure."²²

The court may also have been assuming that there are special reasons why the compensable harms caused by pre-condemnation activity should be evaluated as a whole, rather than as a series of discrete harms:

Unlike the circumstances that give rise to the quick take procedure, in which the public entity has already decided to condemn the property and the property interest that will be taken by a public entity is known and certain at the outset, in the precondemnation setting the public entity is still in the process of determining whether to condemn the property. In this setting, as the facts of the present case demonstrate, *whether a public entity's proposed precondemnation activities will rise to the level of a compensable taking or damaging of property for purposes of the state takings clause, and, if so, the extent of the loss that will actually be sustained by a property owner for which compensation is due, cannot reliably be determined until the scope of the precondemnation activities that are*

22. *Property Reserve*, *supra* at 192.

authorized by the trial court is known and the activities have actually been undertaken by the public entity. Even in those situations when it appears from the trial court's order that some damage to property will be unavoidable, the extent of the damage that will actually be incurred ordinarily would be speculative because the public entity, in carrying out the approved activities, may be able to minimize the damage sustained by the property owner and thus reduce the compensation that is due and the ultimate cost to the public.²³

In other words, there may be an argument that the amount of compensation due an owner for pre-condemnation activity cannot, in some cases, be determined until the pre-condemnation activity is complete. The Commission has heard from public entities that some damage to an owner's property can and will be mitigated before the precondemnation activity is completed. Test holes are bored; they are later filled in.

One could argue that the constitutional prompt release requirement does not require an adjudication of compensation claims before they are fully ripe. In other words, if pre-condemnation activity is seen as a single and undifferentiated whole, rather than a series of discrete events, then it may be necessary to wait until that process is complete before making any attempt to calculate the amount of compensation owed the property owner. "Prompt release" may mean compensation that is released as soon as the dust has fully settled.

On the other hand, it is also possible that the court in *Property Reserve* was not considering how the concepts of "prompt release" and interim compensation interrelate — an issue that was not briefed to the court.

Furthermore, Mr. Houlihan has pointed out that a property owner may suffer injuries from pre-condemnation that are discrete and definite, for which the compensation owed can be determined without any further development of the record. For example, one client had a cow killed by a condemnor; another had an income-producing business closed for a period of time. He has also described experience with pre-condemnation activity that has lasted for several years. If an owner suffers an immediate and readily-determinable harm from pre-condemnation activity, would compensation several years later plausibly be considered "prompt?"

Ultimately, the staff cannot guarantee that a court would find such a delay to be consistent with the promptness required by the California Takings Clause. If the pre-condemnation statute were amended to preclude interim relief, it is

23. *Id.* at 200 (emphasis added).

possible that a court might find the resulting rule to be unconstitutional as applied to certain facts.

While the staff believes that the issue discussed above provides sufficient reason for the Commission to reconsider its decision regarding interim compensation, Mr. Houlihan's letter also offer some further arguments in support of his position. They are discussed below.

UNITED STATES CONSTITUTION

In Mr. Houlihan's first letter to the Commission,²⁴ he suggested that under the recent holding of the United States Supreme Court in *Knick v. Township of Scott*,²⁵ the Commission's decision to preclude interim compensation would violate the takings clause²⁶ of the Fifth Amendment of the United States Constitution ("Federal Takings Clause"). In the First Supplement, the staff asked for clarification of that contention.²⁷ Mr. Houlihan has expanded on the issue in his second letter.²⁸

In *Property Reserve*, the court found, among other things, that the pre-condemnation activity statute is consistent with the requirements of the Federal Takings Clause.

Mr. Houlihan suggests²⁹ that conclusion is no longer supportable, because the court's reasoning relied on *Williamson Planning Commission v. Hamilton Bank* (hereafter, *Williamson*),³⁰ which was overruled by *Knick*.

The staff is not convinced that *Knick* overruling *Williamson* somehow rendered California's pre-condemnation procedure unconstitutional, because the courts in *Knick* and *Property Reserve* were focused on different parts of *Williamson*.

Property Reserve relied on a part of *Williamson* declaring that the Federal Takings Clause requires a state to provide a "reasonable, certain and adequate" procedure designed to provide "just compensation" to an owner for a taking.³¹ The court then explained why the California procedure met those requirements. Consequently, the procedure did not violate the Federal Takings Clause.

24. See First Supplement to Memorandum 2019-50, Exhibit.

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

26. "[N]or shall private property be taken for public use without just compensation."

27. See First Supplement to Memorandum 2019-50, pp. 3-4.

28. Exhibit, pp. 1-2.

29. Exhibit, pp. 1-2.

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

31. *Williamson*, *supra* at 194-95.

Knick was concerned with a different rule established by *Williamson*, an exhaustion requirement. Under *Williamson*, a property owner could not bring a federal action under the Federal Takings Clause for a taking by a state, without first seeking appropriate relief under that state's procedure (provided that it meets the requirements described above).³² Referring to that state remedy exhaustion requirement, *Knick* held:

We now conclude that [this] state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under [42 U.S.C. §1983] at that time.³³

The staff still does not understand how California's pre-condemnation activity statute could be unconstitutional under *Knick*. The California statute does not impose any impediment to a property owner who wishes to pursue a takings claim in federal court. The statute does not require that state processes be exhausted before bringing such a claim. To the contrary, the relief granted under Section 1245.060 is expressly optional and nonexclusive.³⁴

OTHER ARGUMENTS

Some of Mr. Houlihan's other arguments are discussed briefly below.

Textual Analysis

Mr. Houlihan asserts that language used in Section 1245.050, another provision of the pre-condemnation statute, supports the idea that Section 1245.060(c) allows for interim compensation.³⁵

32. *Williamson*, *supra* at 194.

33. *Knick*, *supra* at 2167-68.

34. See Section 1245.060(a) & (d).

35. Exhibit, p. 3.

Section 1245.050 provides that the amount deposited with the court by a condemnor before commencing pre-condemnation activity must be retained on deposit for six months following the end of pre-condemnation activity, “[u]nless sooner disbursed by court order.”

Mr. Houlihan suggests that the reference to an earlier disbursement shows that the payment of compensation can occur before the end of pre-condemnation activity. If interim compensation is not permitted under the statute, he believes that the quoted language would be surplus.

The staff is not persuaded by that textual analysis. It is possible to read the language in Section 1245.050 as simply requiring that the deposit be retained for *up to* six months after the end of the pre-condemnation activity. In other words, the deposit could be disbursed at any point between the end of the pre-condemnation activity and a date six months after that activity ends. Under that reading, the language is not surplus.

Agency Practice Consistent with Availability of Interim Compensation

Mr. Houlihan notes that he has been involved in cases in which the condemnor agreed to pay interim compensation (for business interruption and livestock death), but only after Mr. Houlihan advised he would apply to the court for compensation from the amount on deposit, if compensation was not paid voluntarily.

He believes that the condemnors in those cases “understood the entry statutes permitted a petition to the court,” and that it was the threat of filing a claim for interim relief that led to informal settlement of the claims.³⁶

In short, Mr. Houlihan believes that his experience in those cases supports the idea that the statute is generally understood to provide for interim compensation.

That might be correct, but there is another possible explanation. The condemnors in those cases may have recognized that the harms suffered by the property owner were clearly compensable, and saw no reason to postpone satisfaction of a valid claim. In other words, the condemnors acted voluntarily, rather than being compelled by statute (or the threat of statutory enforcement).

36. Exhibit, pp. 3-4.

Statute of Limitations Problem

Mr. Houlihan also points out a timing problem that could arise if an owner cannot obtain compensation until the end of pre-condemnation activity.

If the duration of the pre-condemnation activity is greater than the time for filing a separate inverse condemnation action, a prudent property owner might file such an action while the pre-condemnation activity is still ongoing, in order to avoid having it be time-barred.³⁷

That concern may be mitigated slightly by case law on when the applicable limitations period begins to run:

[W]here there is continuous and repeated damage, incident to a public improvement, the limitations period *does not begin to run until the situation has stabilized* ...³⁸

This means that the limitation period for an inverse condemnation claim would not begin running at the beginning of the pre-condemnation activity. Rather, it would begin running once a taking occurs and has “stabilized” (presumably this means that the facts have developed to the point where the harm is not speculative).

That authority also suggests a possible solution to the problem discussed above. If the Commission decides to revise the statute to preclude interim compensation, it might consider adding language to make clear that the limitations period for any related cause of action does not begin running until the pre-condemnation activity has concluded.

Practicability of Interim Compensation

Mr. Houlihan points out that the pre-condemnation statute already contemplates that parties may need to return to court while pre-condemnation activity is ongoing.³⁹ Specifically, the statute provides that, after notice and hearing, the court can order a modification of the nature and scope of the activities to be undertaken, or the amount of the deposit with the court.⁴⁰

Given that, Mr. Houlihan suggests that the law contemplates ongoing judicial supervision of the pre-condemnation activity process. He therefore sees no

37. Exhibit, p. 4. Mr. Houlihan asserts that the limitation period for an inverse condemnation is three years. The staff found authority suggesting that the period is five years (because the harm at issue would involve physical entry). See *Bookout v. State of California ex rel. Dept. of Transportation*, 186 Cal. App. 4th 1478, 1484 (2010).

38. *Bookout*, *supra* at 1484 (emphasis added).

39. Exhibit, pp. 4-5.

40. See Section 1245.040(a).

reason why the court could not readily provide interim compensation where “concrete” harms (e.g., “damaged crops, lost livestock or damaged irrigation or drainage”) have clearly occurred.⁴¹

However, there are likely to be many cases where providing interim compensation would not be straightforward, even if the court is “supervising” the pre-condemnation activity to some extent. For example, the parties may not agree on whether discrete harms have occurred, or on the amount of compensation that is due. Such disputes might require costly proceedings to resolve. If this were to happen repeatedly over the course of pre-condemnation activity, the benefit of the deposit procedure as a streamlined alternative to litigation could be minimized or lost.

CONCLUSION

If the pre-condemnation activity statute were revised to preclude interim compensation, it is possible that a court could find, under certain facts, that the statute does not provide for the “prompt release” of compensation that the California Takings Clause requires. **Given that possibility, the staff recommends that the Commission reverse its decision to expressly preclude interim compensation.**

If the Commission agrees, there is a related question that must be answered. Should the statute remain silent on the issue of interim compensation or be revised to expressly allow for it?

The staff recommends that the statute be left unchanged on this issue.

According to Mr. Houlihan, he has not had any problem making claims for interim compensation under the existing statute. Thus, existing law seems to be flexible enough to allow for the prompt resolution of immediate and definite harms.

The staff is also concerned that any attempt to expressly authorize interim compensation could cause unforeseen problems. For example, under existing law the court has some flexibility if it is presented with a claim for interim compensation. If it finds that the compensation due is not sufficiently certain, or concludes that a series of small claims would be unduly burdensome and should be consolidated into less frequent and larger claims, it would have the room to

41. Exhibit, pp. 4-5.

fashion an appropriate solution. If, instead, the matter is reduced to black letter law, the court's hands might be tied in problematic ways.

It is also worth pointing out that this study was originally intended to be narrow and quick (and perhaps suitable for law student extern work). The intention was just to codify the holding in *Property Reserve*. In response to public comment, the Commission decided to broaden the scope slightly, to include a small number of related issues (which were expected to be narrow). Devising a statutory procedure for interim compensation, from whole cloth, would broaden the study even further.

How would the Commission like to proceed on the issue of interim compensation?

Would it like to reverse its earlier decision to recommend that interim compensation be expressly prohibited? If so, should the statute be revised to expressly authorize interim compensation?

Finally, if the answer to that last question is yes, should a procedure for seeking interim compensation also be added to the statute?

Respectfully submitted,

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September 25, 2019

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Re: CLRC Consideration of Rights of Entry on 9/26/19

Dear Brian:

I received your email and the short memo attached thereto. Unfortunately, I cannot make it to Sacramento on 9/26, but I provide the following to clarify what I was trying to communicate in that short email. In sum, I do not believe there is any legal authority for deferring compensation once a taking has occurred. The fact that the damage can be remediated later goes to the amount of compensation due not to, whether a taking has occurred. Under both the Federal and California Constitutions the protection of just compensation is self-executing and vests in the property owner a right to compensation.

There appears to be no legal basis for conditioning the payment for damages that are certain until the right of entry has ended. In fact, I believe the proposed note is not even consistent with the *Property Reserve* decision and is unlikely to be followed by a court since it conflicts with the prompt release requirement of the California Constitution.

In *Property Reserve* the California Supreme Court analyzed the entry statutes under the Federal and California Constitutions. *Property Reserve* concluded that the entry statutes did not violate the Fifth Amendment based on *Williamson County*. *Williamson County* found that the Fifth Amendment only prescribes takings without the payment of just compensation. In other words there is no taking until just

compensation is denied. (*Property Reserve* at pp. 185-186 citing *Williamson Planning Commission v. Hamilton Bank* (1985) 473 U.S. 172, 194-195 (1985).) Accordingly *Property Reserve* held the entry statutes precluded a finding a taking had occurred because the entry statutes provided a reasonable, certain and adequate provision for obtaining compensation. (*Id.* at pp. 185-186.)

Knick v. Township of Scott, 139 S.Ct. 2162 (2019), however, rejected *Williamson's* holding that the availability of an adequate compensation procedure precludes a finding that a taking has occurred. (*Knick* at pp. 2170-2172.) "A property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it. . ." (*Knick* at pp. 2170.) "The availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim . . ." (*Knick* at pp. 2171.¹) Thus *Property Reserve's* rationale for concluding the entry statute comports with the Fifth Amendment has been overruled.

This leaves only the analysis of the entry statutes under the California Constitution to support this Committee's belief that the entry statute can validly defer compensation until the entries are complete. *Property Reserve* analyzed article I, section 19 requirements at pages 177-188: "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." The court specifically found that the entry statute was a proceeding in eminent domain that complied with this section of the Constitution. *Property Reserve* at p. 201, note 2:

"[W]e conclude the precondemnation proceeding is reasonably viewed as an eminent domain proceeding as that term is used in the second sentence of article I, section 19, subdivision (a) of the California Constitution. . . . The second sentence of article I, section 19 recognizes the Legislature's authority to permit a

¹ While *Knick* is a procedural case this analysis of when a taking occurs under federal law is a substantive issue.

public entity to obtain *exclusive* possession of property . . . before a jury determination and payment of compensation so long as the public entity deposits an amount equal to probable compensation before taking such possession. Given that, it is reasonable to interpret the second sentence as likewise recognizing the Legislature's authority to permit a public entity to effect a lesser interference with the owner's possession and use of the property . . . under the precondemnation entry and testing statutes, which define a different type of eminent domain proceeding . . . **so long as the same procedural protections apply.**" (Emphasis added.)

A review of *Property Reserve's* analysis under article I, section 19 makes it abundantly clear that the court found that the entry statutes complied because there was a deposit and a mechanism for prompt release. (See *Property Reserve* at pp. 201-202 [entry statutes provide a procedure through which a property owner can promptly obtain compensation for the deposit of any loss suffered as a result of the precondemnation activities] (emphasis added).)

Thus, prompt release of the deposit is a constitutional requirement and any interpretation of the entry statutes that would permit deferring that release of the deposit until years after the damages occurred is not consistent with *Property Reserve's* own analysis.

Now turning to practical considerations, I have always interpreted Section 1245.050 governing the deposit of funds to authorize interim damage awards by the court: "(a) Unless sooner disbursed by court order, the amount deposited under this article shall be retained on deposit for six months following the termination of the entry." Though the reference to a disbursement is not in the context of damages, the "unless sooner disbursed by court order" language would seem to be surplusage since the entry would have to have ended for there to be no deposit remaining. On the few occasions I have needed to secure interim compensation (for business interruption of a gas station for a full day and the loss of livestock), both public entities understood the entry statutes permitted a petition to the court. In both instances the agencies opted to pay the damages short of a petition actually being

filed. In both instances it was the threat of the landowner filing a petition that alerted the entity that its contractor was operating in a deficient manner and allowed the Agency to demand performance.

The entire logic of the entry statute procedure--similar to the early possession procedure--is that it provided an expedited process that benefits both the owner and the condemning entity. From my perspective the only benefit to the owner under the current statute is the ability of the owner to be reimbursed in an expedited proceeding that occurred after the damage is inflicted. It enables a quick resolution of the owner's claims without having the headache of a long period of litigation. Making the owner wait until the end of the entry effectively eliminates the only benefit that the Legislature (as well as the commentators) intended when proposing the deposit entry statute solution to *Jacobsen*. By delaying the time when damages can be recovered, I believe it encourages inverse condemnation lawsuits for the simple reason inverse condemnation (under Section 1036) requires the payment of litigation expenses which are not readily available under the entry statutes barring unreasonable conduct. Similarly an action in federal court under Section 1983 entitles the owner to attorney's fees as well. Moreover interest is available on inverse awards and runs from the date of taking or damaging. (*Holtz v. S.F. Bart Dist.* (1976) 17 Cal.3d 648, 651.)²

Deferring claims until the entry has concluded also raises statute of limitation issues. For example, I am aware of two rights of entry that extend 6 and 7 years. But the statute of limitations for inverse condemnation is 3 years for damaging without taking physical control of the property. (*Bookout v. Caltrans* (2010) 186 Cal.App.4th 1478.) Thus the inability to bring an interim petition for damages that occurred in the first three years will necessitate a prophylactic inverse action to preserve the claim.

The entry statute is premised on balancing the public agency's needs with the property owner's constitutional rights. The entry statute anticipates the parties having to return to court for various reasons (e.g. amending order, increasing or

² Though interest is not mentioned in the entry statutes, I believe a court would be compelled by just compensation precedent to award interest for any taking or damaging reimbursed under Section 1245.060(c).

decreasing the deposit) and expects ongoing judicial supervision. There is no reason that the court cannot address and reimburse concrete damages that have accrued and fairness dictates that immediate reimbursement be made e.g., damaged crops, lost livestock or damaged irrigation or drainage.

Thank you for your time.

Very truly yours,



GERALD HOULIHAN

GH:cab