

Memorandum 2020-7

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

In this study, the Commission¹ is examining Code of Civil Procedure Section 1245.060, a provision of eminent domain law that compensates a property owner for harm caused by activities conducted on the property by a prospective condemner (e.g., entry and testing). The compensation provision is part of a procedure that authorizes pre-condemnation entry and activities, with court approval and a deposit of an amount determined by a judge to be adequate for compensation of the property owner for any resulting harms.² That procedure was recommended by the Commission in 1974, as part of its broader work on eminent domain law.³

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

BACKGROUND

This study was prompted by a 2016 decision of the California Supreme Court in *Property Reserve, Inc. v. Superior Court* (hereafter, *Property Reserve*).⁴ In *Property Reserve*, the court concluded that the pre-condemnation procedure satisfies the requirements of the California constitutional takings clause⁵ with one exception — it does not expressly provide a property owner the right to a jury trial on the amount of compensation to be paid, as guaranteed by that clause.⁶ Rather than

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

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

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

5. Cal. Const., art. I, § 19, subd. (a).

6. *Property Reserve*, 1 Cal. 5th at 208.

invalidate the entire procedure, the court judicially reformed Section 1245.060 to include such a right.⁷

Initially, the focus of this study was narrow. The Commission was interested in codifying the holding of *Property Reserve*, so that the language of the statute would be consistent with the judicial interpretation. The Commission has already approved language to accomplish that.⁸

In the course of the study, the Commission also decided to examine three other issues that relate to pre-condemnation activity:

- (1) Should a property owner be able to obtain “interim compensation” under Section 1245.060 (i.e., should the owner be able to receive compensation before the pre-condemnation activities have concluded)?
- (2) Should an owner be able to claim compensation for losses that have not yet occurred?
- (3) Should an owner have the option of receiving compensation for pre-condemnation harms in a subsequent condemnation action (rather than under the Section 1245.060 procedure)?⁹

The Commission decided against taking any position on the first question.¹⁰ This memorandum will address the second and third issues.

COMPENSATION FOR LOSSES THAT HAVE NOT YET OCCURRED

The staff has found no published appellate authority specifically addressing whether an owner may make a claim under Section 1245.060 for losses that have not yet occurred.

However, general law does permit the award of damages for prospective harms, provided they can be proven with sufficient certainty.¹¹

That principle has been applied in inverse condemnation cases (which provide a remedy for government taking of property without compensation).¹²

7. *Property Reserve*, 1 Cal. 5th at 208-09.

8. See Minutes (Nov. 2019), p. 4.

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

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

11. See Civ. Code § 3283 (“Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or *certain to result in the future.*”) (emphasis added); *Boeken v. Philip Morris USA, Inc.*, 48 Cal. 4th 788, 799 (2010) (“The general rule is that a tort plaintiff may recover prospective damages, *as long as it is sufficiently certain that the detriment will occur.*”) (emphasis added).

12. *Frustuck v. City of Fairfax*, 212 Cal. App. 2d 345, 367 (1963) (“[W]here appropriate to a particular situation, the measure of damages may be the cost of making repairs; the loss of use of the property; lost profits; *loss of prospective profits*; increased operating expenses pending repairs;

The staff sees no rationale or public policy suggesting why Section 1245.060 should expressly provide for a contrary result, if the owner sought compensation for that same loss pursuant to that section.

Given that general law, it seems nearly certain that a property owner could claim compensation for prospective damages under Section 1245.060, provided that the harm could be proven with sufficient certainty.

There doesn't seem to be any need to codify that general principle in the section. Existing law seems sufficient. Moreover, it might be difficult to craft language that would adequately capture the subtleties of the case law.

The staff recommends against pursuing the matter further.

CLAIM FOR PRE-CONDEMNATION DAMAGES IN CONDEMNATION ACTION

Norman Matteoni, an attorney who has authored a treatise on eminent domain law,¹³ has been a Commission consultant on the subject, and was lead counsel for the plaintiff landowners in *Property Reserve*, has suggested that the Commission propose a revision that would allow an owner to seek compensation for pre-condemnation harm in the condemnation action that typically follows pre-condemnation activity.¹⁴ Specifically, Mr. Matteoni urges:

Section 1245.060(d) should be expanded to provide the opportunity to raise the pre-condemnation 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."¹⁵

Mr. Matteoni's rationale for this request is as follows:

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

all of the detriment proximately caused by the injury as in other tort actions, and present *and prospective damages* that are the natural, necessary or reasonable incident of the taking of property." (internal citations omitted; emphasis added)).

13. See Matteoni & Veit, *Condemnation Practice in California* (Cont. Ed. Bar 2019).

14. See Memorandum 2017-43, pp. 8-9, and Exhibit pp. 1-2, and 3. The Commission previously deferred a decision on Mr. Matteoni's recommendation. See Minutes (Sept. 2017), p. 4.

15. See Memorandum 2017-43, Exhibit p. 3.

precondemnation entry in the last 40 years that has not been followed by a direct action.¹⁶

In a subsequent email to the staff, Mr. Matteoni clarified that his proposal is to provide for an *alternative* procedural remedy for owner compensation, rather than a substitute:

It is important that CCP §1245.060 continue to allow the property owner to elect to pursue damages immediately in the pre-entry proceedings or avail itself of another remedy. The other remedy can be inverse or, if it is reasonably certain that a condemnation action will be filed, by answer in the condemnation case. There should be no trap in the interest of efficient pursuit of the claim. Where the damages are not great, the owner may choose to make the claim to the pre-entry court; but where greater, it probably is more efficient to make the claim in the condemnation action so that there is only one jury trial.¹⁷

Mr. Matteoni's suggestion raises two issues:

- Should the law permit compensation of pre-condemnation harms in a subsequent condemnation action?
- If so, what type of pleading should be used in that proceeding to raise the claim?

Those issues are discussed separately below.

Should Compensation for Pre-Condensation Harm be Available in a Subsequent Condemnation Action?

The staff found no published appellate decision expressly addressing whether a property owner can claim compensation for pre-condemnation harm in a subsequent condemnation action.

However, the Commission's official Comment to Section 1245.060 submitted to the Legislature in 1974 states in part:

It is important to note that, if an eminent domain proceeding eventually is filed to take the property, or a portion of it, a defendant in the eminent domain proceeding may recover only by a cross-complaint in the eminent domain proceeding. See CODE CIV. PROC. § 426.70 and Comment thereto.

Setting aside the reference to a cross-complaint (which will be discussed in the next part of this memorandum) it seems clear the Commission is asserting

16. See Memorandum 2017-43, Exhibit pp. 1-2.

17. Email from Norm Matteoni to Steve Cohen (12/11/19) (on file with Commission).

that, once a condemnation proceeding is commenced, the property owner's remedy for pre-condemnation harm would be in that proceeding.

When the Commission drafted that Comment, the California Supreme Court had recently decided another case addressing harms that a property owner might suffer, before the commencement of a formal condemnation proceeding. In *Klopping v. City of Whittier*,¹⁸ the court held that a property owner was entitled to compensation for harms suffered as a result of the condemnor's unreasonable delay in commencing condemnation, after having publicly announced the intention to condemn the property. Harms that a property owner suffers as a result of such a delay, or other unreasonable pre-condemnation conduct on the part of a condemnor, are now informally known as "Klopping damages."

Importantly, appellate opinions following *Klopping* have expressly held that an owner may claim Klopping damages in a direct condemnation action.¹⁹

Thus, the Commission's Comment to Section 1245.060 (which is considered to be evidence of legislative intent) and the related *Klopping* cases stand for the proposition that a property owner can claim compensation for pre-condemnation harms in a subsequent condemnation action.

That makes sense as a matter of policy. As Mr. Matteoni points out, it would often be more economical to address the pre-condemnation claims in the related condemnation action, to avoid the need for two separate trials. This is even more important now that *Property Reserve* has affirmed that the owner has a right to a jury trial as to the amount of compensation when proceeding under Section 1245.060.

For the reasons discussed above, the staff agrees with Mr. Matteoni that an owner should have the option of claiming compensation for pre-condemnation harms in a subsequent condemnation proceeding. The procedural issue of how to plead such a claim is discussed next.

18. See *Klopping v. City of Whittier*, 8 Cal. 3d 39 (1972) (hereafter, "*Klopping*.")

19. See *Redevelopment Agency v. Contra Costa Theatre, Inc.*, 135 Cal. App. 3d 73, 79 (1982); *Richmond Redevelopment Agency v. Western Title Guaranty Co.*, 48 Cal. App. 3d 343, 350 (1975).

Form of Pleading

Background

Mr. Matteoni suggests that an owner should be permitted to claim Section 1245.060 damages in the owner's *answer* in the subsequent condemnation proceeding.

As discussed below, there is reason to argue that a claim for pre-condemnation harm (including Klopping damages) in a subsequent condemnation proceeding should be asserted in a cross-complaint, rather than in the property owner's answer. If the Commission decides to expressly permit pre-condemnation harms to be claimed in a subsequent condemnation proceeding, it may wish to specify the form of pleading.

In a typical civil action, the plaintiff's complaint alleges a compensable harm suffered by the *plaintiff*, caused by one or more defendants.²⁰ A defendant's answer to that complaint generally consists of a denial of the allegations in the plaintiff's complaint.²¹ Significantly, the answer may not include a claim for affirmative relief.²²

A cross-complaint is used by a defendant to allege a distinct compensable harm suffered by the *defendant*, caused by either the plaintiff or a third person (if the harm has a specified relationship to the plaintiff's complaint).²³

Those general rules have slightly different application in a condemnation proceeding. In such a proceeding, the complaint generally does not assert any compensable harm suffered by the plaintiff (the condemnor). Instead, the complaint alleges grounds sufficient to justify condemnation of the property at issue.²⁴ The property owner's answer may include a denial of the sufficiency of the grounds for condemnation but, importantly, the answer must state "the nature and extent of the interest the defendant claims in the property described."²⁵ It is the owner's interest in the property that entitles the owner to compensation for condemnation of the property. If the owner is claiming compensation for loss of business "goodwill," that must also be included in the answer.²⁶

20. See Section 425.10(a).

21. See Section 431.30(b).

22. See Section 431.30(c).

23. See Section 428.10.

24. See Section 1250.310.

25. See Section 1250.320(a).

26. See Section 1250.320(b).

Commission Commentary

As noted earlier, the Commission's Comment to Section 1245.060 states that a claim for damages related to pre-condemnation activity should be claimed by filing a *cross-complaint*.

That Comment refers to Section 426.70, which was added on the Commission's recommendation to make the law on compulsory cross-complaints applicable to eminent domain proceedings.²⁷ The purpose of that change was expressly aimed at specifying the method of pleading for Klopping damages. The Comment to Section 426.70(a) explains:

Subdivision (a) of Section 426.70 — by making this article applicable to eminent domain proceedings — codifies the principle that a related cause of action must be asserted against the plaintiff in an eminent domain action or it is barred. *Klopping v. City of Whittier*, 8 Cal.3d 39, 58, 500 P.2d 1345, 1360, 104 Cal. Rptr. 1, 16 (1972) (damages caused by precondemnation announcements). The related cause must be asserted as a cross-complaint. See Section 426.30.

Recall that Commission Comments and Recommendations are generally entitled to great weight as evidence of legislative intent.²⁸

This strongly suggests that statutory law requires that the kind of pre-condemnation damages at issue under Section 1245.060 (as well as Klopping damages) should be asserted in a cross-complaint, rather than an answer.

That makes general sense, given the general nature of an answer and cross-complaint. The answer is to respond to the plaintiff's claims. By contrast, the cross-complaint is used to assert an affirmative claim against the plaintiff.

However, as discussed below, there is clear appellate authority to the contrary.

Appellate Authority

In three cases that were decided after the Commission history discussed above, courts have held that a claim for Klopping damages should be asserted in a property owner's answer in a subsequent condemnation proceeding, rather

27. *The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601, 1889 (1974).

28. See generally *2018-2019 Annual Report*, 45 Cal. L. Revision Comm'n Reports 473, 488-95 (2018).

than by cross-complaint.²⁹ None of those cases discussed the statutes and Commission commentary described above.

The first of those opinions looked closely at the language of the *Klopping* decision, which it said compelled the conclusion that such damages “constitute part of the eminent domain award and the just compensation payable to the property owners.”³⁰ The second opinion simply cited the first with approval.³¹ The third opinion, which cited to the two previous opinions, stated that it is “now settled that liability for unlawful precondemnation activities may be considered a part of a single eminent domain proceeding,” and that “a separate claim is not required.”³² The staff has found no contrary appellate opinions.

This apparent consensus in appellate authority is confirmed by at least one treatise, the one authored by Mr. Matteoni specifically addressing condemnation practice in California. This CEB treatise, which is likely relied on by many practitioners, notes that while this pleading issue has been the subject of some confusion (generally because of the Commission Comment), “the assertion of *Klopping*-type damages by answer has become the accepted practice, and cross-complaints are no longer seen.”³³

Precedent aside, there is a plausible rationale for including a claim for pre-condemnation damages (including *Klopping* damages) in an answer. One could argue that one purpose of the answer is to describe the scope of compensation that the property owner is entitled to as a result of the condemnor’s actions. As noted earlier, the owner is required to describe the owner’s interest in the property at issue (which would determine the compensation due if the property is taken) as well as any business goodwill that would be lost if the property is taken. Requiring that harms from the condemnor’s pre-condemnation activity be stated in the answer would simply round out the picture of the kinds of harm that would need to be compensated if the property is taken.

A similar argument was made by Gideon Kanner, a former consultant to the Commission on eminent domain law, when the Commission was considering the

29. See *Redevelopment Agency v. Contra Costa Theatre, Inc.*, 135 Cal. App. 3d 73 (1982); *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc.*, 91 Cal. App. 3d 332 (1979); *Richmond Redevelopment Agency v. Western Title Guaranty Co.* 48 Cal. App. 3d 343 (1975).

30. *Richmond Redevelopment Agency*, 48 Cal. App. 3d at 349-51.

31. *People ex rel. Dept. Pub. Wks.*, 91 Cal. App. 3d at 352-53.

32. *Redevelopment Agency*, 135 Cal. App. 3d at 79.

33. See Matteoni, *Condemnation Practice in California* (Cont. Ed. Bar 2019), § 8.52.

form of pleading that should be used to claim Klopping damages. Mr. Kanner argued that such damages should be claimed in the answer, explaining:

the “just compensation” to which the owner in a direct condemnation action is entitled should be an all-inclusive term that covers all constitutionally compensable damages payable in a condemnation action, [as that approach] will simplify condemnation pleadings, and is therefore pragmatically preferable to the cross-complaint method.³⁴

The Commission was not persuaded by that argument, but it is reasonable and could justify the approach that has been taken by the courts on this issue.

Conclusion

As noted earlier, the staff agrees with Mr. Matteoni that the law should allow a property owner who suffers harm as a result of pre-condemnation activities to elect to claim compensation for those harms in a subsequent condemnation proceeding (if one is commenced). The staff also agrees that it would be helpful to state that rule expressly, to avoid any uncertainty.

If the Commission agrees, it would also be helpful to expressly state whether such a claim should be expressed in the owner’s answer or in a cross-complaint. There seems to be significant scope for confusion on that point, with a fairly strong argument from legislative history that the claim must be made in a cross-complaint in conflict with clear appellate authority holding that the claim must be made in the answer and not in a cross-complaint.

The staff recommends that the case law rule be codified. It would be less disruptive to follow the prevailing practice rather than requiring that practitioners and courts change their practices. While there is good reason to prefer the use of a cross-complaint to assert claims that can be seen as a claims for affirmative relief, one can also justify use of an answer based on Mr. Kanner’s argument.

While the original focus of this study was on the treatment of damages that arise under the statutory procedure for pre-condemnation activities, there also seems to be scope for confusion or dispute over the proper form of pleading for Klopping damages. **If the Commission decides to prescribe the form of pleading for pre-condemnation harm claims in a subsequent condemnation**

34. See Memorandum 73-87, Exhibit I.

action, it should consider making that clarification applicable to Klopping damages as well.

NEXT STEP

Whatever the Commission decides about the matters discussed above, the staff will prepare implementing statutory language and present it for consideration at a future meeting. If the drafting is sufficiently straightforward, the staff might present that language in the form of a draft tentative recommendation that collects all of the Commission's decisions in this study, not just its decisions on the issues discussed in this memorandum.

Is that agreeable with the Commission?

Respectfully submitted,

Steve Cohen
Staff Counsel