Memorandum 2020-12

Eminent Domain: Pre-Condemnation Activities
(Draft Revised Tentative Recommendation)

In 1975, the Legislature enacted a comprehensive recodification of eminent domain law, on the Commission’s recommendation. In this study, the Commission is considering one aspect of that law, the compensation of a property owner for losses caused by a condemnor’s actions before an eminent domain action is commenced.

This memorandum presents a staff draft of a revised tentative recommendation on that subject, incorporating all decisions the Commission has made in the study to date. Once approved by the Commission, the revised tentative recommendation would be circulated for public comment to assist the Commission in later preparing a final recommendation for submission to the Legislature.

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

PROPOSED REFORMS

The attached draft implements all of the Commission decisions in this study to date. Specifically, it proposes that the Eminent Domain Law be amended to make the following improvements to existing law:

• Codify the holding of Property Reserve Inc. v. Superior Court, to make clear that a property owner has a waivable right to a jury

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.


3. An initial tentative recommendation in this study, addressing only a single issue, was circulated for public comment in 2017.

4. Property Reserve Inc. v. Superior Court, 1 Cal. 5th 151 (2016).
trial determination of the amount of compensation owed for losses caused by pre-condemnation activity.

- Provide that a property owner who is entitled to compensation under Section 1245.060 for losses due to pre-condemnation activity has the option of instead seeking that compensation as a defendant in an eminent domain action related to that property.
- Codify California case law providing that a property owner may seek compensation for “Klopping damages” as a defendant in an eminent domain action.
- Make clear that a property owner who seeks compensation for either kind of pre-condemnation loss as a defendant in an eminent domain action must plead the claim for that compensation in the owner’s answer.

The attached draft also proposes a number of technical revisions, to conform existing law to the changes described above and to make technical stylistic improvements. Those technical revisions will not be further discussed in this memorandum, but staff is happy to answer any questions about them at the upcoming Commission meeting.

In addition, the draft proposes a more substantive conforming revision to the existing statute. That revision is discussed below.

**Separate Assessment of Compensation by Trier of Fact**

After drafting language to implement the decisions noted above, the staff reviewed the remainder of the statutory Eminent Domain Law to evaluate whether any other provision in that statute would need to be revised to conform to the proposed reforms.

The staff found one such provision, Section 1260.230. That section requires that the trier of fact in an eminent domain action separately assess distinct types of compensation that are claimed by the property owner.

Because the Commission’s recommendation would add two new types of compensation that could be claimed by the property owner, Section 1260.230 should be revised to also require separate assessment of each of those types of compensation. That would extend the existing policy of requiring separate assessment by the trier of fact, so that it would apply to the new types of compensation that could be claimed in an eminent domain action. The staff sees no policy or practical reason to do otherwise. **Does the Commission agree with that conforming change?**
Next Step

The Commission now needs to decide whether to approve the staff draft, with or without changes, as a revised tentative recommendation to be circulated for public comment.

Respectfully submitted,

Steve Cohen
Staff Counsel
Eminent Domain: Pre-Condemnation Activities

March 2020

The purpose of this revised tentative recommendation is to solicit public comment on the Commission’s tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the revised tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS REVISED TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN May 29, 2020.

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this revised tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF REVISED TENTATIVE RECOMMENDATION

California’s statutory Eminent Domain Law includes comprehensive procedures relating to the taking of private property for public use. One part of that law governs a potential condemnor’s entry and activity on private property for the purpose of evaluating suitability for public use. That kind of pre-condemnation activity can itself constitute a taking, entitling the property owner to compensation.

California case law has established that a property owner may also be entitled to compensation for losses caused by a condemnor’s unreasonable actions before an eminent domain proceeding has commenced. This kind of loss is known colloquially as “Klopping damages.”

The Law Revision Commission tentatively recommends that the Eminent Domain Law be revised to make the following improvements related to compensation for pre-condemnation losses:

- Codify the holding of Property Reserve Inc. v. Superior Court,¹ to make clear that a property owner has a waivable right to a jury trial determination of the amount of compensation owed for losses caused by pre-condemnation activity.
- Provide that a property owner who is entitled to compensation under Code of Civil Procedure Section 1245.060 for losses due to pre-condemnation activity has the option of instead seeking that compensation as a defendant in an eminent domain action related to that property.
- Codify California case law providing that a property owner may seek compensation for Klopping damages as a defendant in an eminent domain action.
- Make clear that a property owner who seeks compensation for either kind of pre-condemnation loss as a defendant in an eminent domain action must plead the claim for that compensation in the owner’s answer.

Other technical or conforming revisions are also proposed.

This tentative recommendation was prepared pursuant to Resolution Chapter 158 of the Statutes of 2018.

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¹ Property Reserve Inc. v. Superior Court, 1 Cal. 5th 151 (2016).
EMINENT DOMAIN: PRE-CONDEMNATION ACTIVITIES

INTRODUCTION

The “takings clause” of the California Constitution provides that private property shall not be taken for a public purpose without just compensation.2 California’s statutory Eminent Domain Law3 establishes a procedure that can be used to take private property for public use.4 Consistent with the takings clause, that law requires that the property owner receive just compensation for the property taken.5

A property owner may also be entitled to compensation for losses suffered as a result of a condemnor’s actions prior to commencing an eminent domain action. This tentative recommendation considers two ways in which that may arise:

(1) Pre-condemnation activity. Under existing statutory law, a condemnor who is considering taking private property for a public use may petition the court for permission to enter the property and conduct testing to evaluate its suitability.6 As a condition of such entry, the condemnor must deposit with the court an amount determined sufficient by the court to compensate the property owner for losses caused by the pre-condemnation activity.7 If such losses do occur, the property owner may seek compensation by pursuing a civil action, or by applying to the court for an award from the amount deposited by the condemnor.8

(2) “Klopping” damages. In Klopping v. City of Whittier,9 the California Supreme Court held that a property owner was entitled to seek compensation for loss caused by a condemnor’s unreasonable delay following an announcement of intent to commence an eminent domain action, or by other unreasonable conduct by the condemnor, prior to commencing the eminent domain action.10

2. Cal. Const. art. I, § 19(a) (“Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.”).
3. Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure.
4. See Chapter 3 (commencing with Section 1240.010) of Title 7 of Part 3 of the Code of Civil Procedure.
5. See Chapter 9 (commencing with Section 1263.010) of Title 7 of Part 3 of the Code of Civil Procedure.
10. Id. at 52.
The Law Revision Commission tentatively recommends that the Eminent Domain Law be revised to make the following improvements related to compensation for pre-condemnation losses:

- Codify the holding of Property Reserve Inc. v. Superior Court, to make clear that a property owner has a waivable right to a jury trial determination of the amount of compensation owed for losses caused by pre-condemnation activity.

- Provide that a property owner who is entitled to compensation under Code of Civil Procedure Section 1245.060 for losses due to pre-condemnation activity has the option of instead seeking that compensation as a defendant in an eminent domain action related to that property.

- Codify California case law providing that a property owner may seek compensation for Klopping damages as a defendant in an eminent domain action.

- Make clear that a property owner who seeks compensation for either kind of pre-condemnation loss as a defendant in an eminent domain action must plead the claim for that compensation in the owner’s answer.

### RIGHT TO JURY TRIAL

In Property Reserve, the California Supreme Court considered whether activity authorized by California’s statutory pre-condemnation procedure can constitute a “taking” of an owner’s property for purposes of the “takings clause” of the California Constitution, and if so, whether the procedure is compatible with constitutional requirements.

The court first held that pre-condemnation activity authorized by the statute can result in a taking under the California takings clause:

[S]ome pre-condemnation entry and testing activities — when they involve operations that will result in actual injury to, or substantial interference with the possession and use of, the entered property — have been viewed as triggering the protections of the California takings clause.

The court then considered whether the pre-condemnation activity statute satisfied the requirements of the California takings clause. The court held that it did, with one exception. Specifically, the statute violates the California takings clause because it does not provide for a jury determination, unless waived, of the amount of compensation due the property owner for a pre-condemnation “taking.”

11. Property Reserve Inc. v. Superior Court, 1 Cal. 5th 151 (2016).
12. Id.
13. Id. at 192.
14. Id. at 208.
Rather than invalidate the statute based on that infirmity, the court reformed it:

Although we conclude that section 1245.060 as presently written does not afford a property owner the right to have a jury determine the amount of compensation within the precondemnation proceeding itself, and further agree with the Court of Appeal that the statute is constitutionally deficient in this respect, in our view the appropriate remedy for this constitutional flaw is not to invalidate the precondemnation entry and testing statutes as applied to any precondemnation testing activity that rises to the level of a taking or damaging of property for purposes of the state takings clause. Instead, we conclude that the appropriate remedy for this constitutional flaw is to reform the precondemnation entry statutes so as to afford the property owner the option of obtaining a jury trial on damages at the proceeding prescribed by section 1245.060, subdivision (c).\(^\text{15}\)

The court’s reformation of the compensation provision cured the constitutional deficiency in the pre-condemnation statute, but could create a serious practical problem. There is now a significant substantive inconsistency between the text of that compensation provision, and its meaning as construed by the California Supreme Court. That could lead to confusion and error.

To avoid that problem, the Commission recommends that Code of Civil Procedure Section 1245.060(c) be revised to codify the court’s reformation of that provision.

**COMPENSATION IN EMINENT DOMAIN PROCEEDING**

**Pre-Condemnation Activity**

Code of Civil Procedure Section 1245.060 provides two ways in which a property owner can be compensated for losses caused by pre-condemnation activity:

1. Bring a civil action against the condemnor.
2. Apply to the court for compensation from the amount deposited for that purpose.

There may be situations in which it would be more convenient and efficient for the property owner to forego those options, and instead seek compensation for pre-condemnation loss in a subsequent eminent domain action. Such an approach could conserve judicial resources, especially if the property owner intends to exercise the right to have a jury determine the amount of compensation due the owner for losses caused by the pre-condemnation activity.

Although Code of Civil Procedure Section 1245.060 is silent on the point, the Commission’s Comment to that provision indicates that damages for pre-condemnation activity can be recovered in an eminent domain action.\(^\text{16}\) That

\(^{15}\) Id.

\(^{16}\) The Eminent Domain Law, 12 Cal. L. Revision Comm’n Reports 1601, 1742 (1974).
approach would also be consistent with the existing treatment of Klopping damages, which may be sought in an eminent domain action commenced after the condemnor’s unreasonable conduct.\(^\text{17}\)

The Commission sees no policy reason to preclude the recovery of compensation for losses caused by pre-condemnation activity in the subsequent eminent domain proceeding. Nor does the Commission see any practical problem that would result from that approach.

For the reasons discussed above, the Commission recommends that the law be revised to expressly allow a property owner to seek compensation for losses caused by pre-condemnation activity in an eminent domain action commenced by the condemnor.\(^\text{18}\) This would be an optional alternative to seeking compensation either in a civil action against the condemnor, or from the amount deposited with the court by the condemnor prior to engaging in the pre-condemnation activity.

**Klopping Damages**

Courts have consistently held that Klopping damages may be recovered in an eminent domain action.\(^\text{19}\)

The Commission recommends that the Eminent Domain Law be revised to codify that rule.

**FORM OF PLEADING**

If an owner is authorized to seek compensation for pre-condemnation loss in an eminent domain action, it would be helpful to specify the form of pleading the owner must use to assert that claim. As discussed below, there is likely to be some confusion on this point.

In the Comment to Code of Civil Procedure Section 1245.060, the Commission states that compensation for losses caused by pre-condemnation activity may only be sought in a subsequent eminent domain proceeding by means of a cross-complaint.\(^\text{20}\) As authority for that position, the Commission cites Code of Civil Procedure Section 426.70 and the Comment to that section.

Section 426.70 was added on the Commission’s recommendation, to make the law on compulsory cross-complaints applicable to eminent domain proceedings.\(^\text{21}\)

The Comment to Section 426.70 explains the purpose of the addition:

\(^{17}\) See Klopping v. City of Whittier, 8 Cal. 3d 39, 58 (1972).

\(^{18}\) See proposed Code Civ. Proc. § 1245.060(a) infra.


\(^{21}\) *Id.* at 1889.
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 pre-condemnation announcements). The related cause must be asserted as a cross-complaint. See Section 426.30.  

Despite that guidance, courts have subsequently held that Klopping damages should be pled as part of the property owner’s answer in an eminent domain action. Pleading Klopping damages in a cross-complaint has been specifically considered and rejected. 

The Commission sees merit in providing that claims related to pre-condemnation activity be pled in the defendant’s answer. This would minimize the number of pleadings required (by avoiding the need for a cross-complaint and an answer to that cross-complaint). Moreover, it would make sense for the procedure that is used to claim compensation for pre-condemnation activity losses to parallel the existing practice that governs Klopping damages. Both types of claims involve a loss suffered as a result of the condemnor’s actions before commencing an eminent domain action.

The Commission recommends that Code of Civil Procedure Section 1250.320 be revised to require that a claim by a property owner in an eminent domain action for losses caused by pre-condemnation activity be included in the owner’s answer. Further, to avoid any confusion on the point, the Commission recommends that Section 1250.320 codify existing case law and require Klopping damages to also be pled in the owner’s answer.

TECHNICAL AND MINOR SUBSTANTIVE REVISIONS

The tentative recommendation also proposes a small number of technical and minor substantive amendments, to follow standard drafting practices and conform to the reforms discussed above.

The most significant conforming revision is to Code of Civil Procedure Section 1260.230, a provision that requires the trier of fact in an eminent domain action to separately assess distinct types of compensation that are claimed by the property owner. Because the Commission’s recommendation would add two new types of compensation that could be claimed by the property owner, the recommendation proposes to revise Section 1260.230 to require separate assessment of each of those types of compensation. That would extend the existing policy of requiring

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22. Id.
24. Id.
25. See proposed Code Civ. Proc. §§ 1245.020, 1245.060(a), 1245.060(d), 1250.320(b), 1260.230(d) and (e), infra.
separate assessment by the trier of fact, so that it would apply to the new types of
compensation that could be claimed in an eminent domain action.

REQUEST FOR PUBLIC COMMENT

The Commission seeks public comment on its tentative recommendation. Comments supporting the proposed approach are just as important as comments suggesting changes to that approach or expressing other views.
PROPOSED LEGISLATION


SECTION 1. Section 1245.020 of the Code of Civil Procedure is amended to read:

1245.020. In any case in which the entry and activities mentioned in Section 1245.010 will subject the person having the power of eminent domain to liability under Section 1245.060, before making such entry and undertaking such activities, the person shall secure at least one of the following:

(a) The written consent of the owner to enter upon the owner’s property and to undertake such activities, or those activities,

(b) An order for entry from the superior court in accordance with Section 1245.030.

Comment. Section 1245.020 is amended to make technical corrections.


SEC. ___. Section 1245.060 of the Code of Civil Procedure is amended to read:

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, as a defendant in an eminent domain action affecting the property, or by application to the court under subdivision (c).

(b) The prevailing claimant in an action or proceeding under this section shall be awarded the claimant’s costs and, if the court finds that any of the following occurred, the claimant’s 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 that amount paid out of the funds on deposit. If the funds on deposit are insufficient to pay the full amount of the award, the court shall enter judgment for the unpaid portion. In a proceeding under this subdivision, the owner has a right to a jury trial, unless waived, on the amount of compensation for actual damage to or substantial interference with the possession or use of the property.
(d) Nothing in this section affects the availability of any other remedy the owner may have for the damaging of his the owner’s property.

Comment. Subdivision (a) of Section 1245.060 is amended to give the property owner the option of seeking compensation otherwise available under this section in a subsequent eminent domain action affecting the same property. See also Section 1250.320(c).

Subdivision (c) is amended to codify the judicial reform of that subdivision in Property Reserve Inc. v. Superior Court, 1 Cal. 5th 151 (2016).

The section is also amended to make technical corrections.


SEC. ___. Section 1250.320 of the Code of Civil Procedure is amended to read:

(a) The answer shall include a statement of the nature and extent of the interest the defendant claims in the property described in the complaint.

(b) Where the defendant seeks compensation provided in Article 6 (commencing with Section 1263.510) (goodwill) of Chapter 9, the answer shall include a statement that the defendant claims compensation under Section 1263.510, but the answer need not specify the amount of such that compensation.

(c) Where the defendant seeks compensation provided in Article 1 (commencing with Section 1245.010) of Chapter 4, the answer shall include a statement that the defendant claims compensation under Section 1245.060, but need not specify the amount of that compensation.

(d) Where the defendant seeks compensation for loss caused by the plaintiff’s unreasonable conduct prior to commencing the eminent domain proceeding, the answer shall include a statement that the defendant claims compensation for that loss, but need not specify the amount of that compensation.

Comment. Subdivision (c) of Section 1250.320 is added to provide that any claim for losses caused by pre-condemnation activity compensation must be included in the defendant’s answer. See also Section 1245.060(a) (compensation for loss caused by pre-condemnation activity may be sought in eminent domain action, as alternative to other remedies provided in that section).

Subdivision (d) is added to provide that if any claim for loss caused by the plaintiff’s unreasonable conduct prior to commencing the eminent domain proceeding, must be included in the defendant’s answer. This subdivision does not establish or affect the scope of the defendant’s right to compensation for a plaintiff’s unreasonable conduct. That right has been established by case law. See Klopping v. City of Whittier, 8 Cal. 3d 39 (1972); 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).

Section 1250.320 is also amended to make a technical correction.


SEC. ___. Section 1260.230 of the Code of Civil Procedure is amended to read:

As far as practicable, the trier of fact shall assess separately each of the following:

(a) Compensation for the property taken as required by Article 4 (commencing with Section 1263.310) of Chapter 9.

(b) Where the property acquired is part of a larger parcel:
(1) The amount of the damage, if any, to the remainder as required by Article 5 (commencing with Section 1263.410) of Chapter 9.
(2) The amount of the benefit, if any, to the remainder as required by Article 5 (commencing with Section 1263.410) of Chapter 9.
(c) Compensation for loss of goodwill, if any, as required by Article 6 (commencing with Section 1263.510) of Chapter 9.
(d) Compensation claimed under subdivision (c) of Section 1250.320.
(e) Compensation claimed under subdivision (d) of Section 1250.320.

Comment. Subdivision (d) of Section 1260.320 is added to require the trier of fact to separately assess compensation for loss caused by the plaintiff’s pre-condemnation activity, if that compensation was claimed in the defendant’s answer.
Subdivision (e) is added to require the trier of fact to separately assess compensation for loss caused by the plaintiff’s unreasonable conduct prior to commencing the eminent domain proceeding, if that compensation was claimed in the defendant’s answer.