

## First Supplement to Memorandum 2017-43

**Eminent Domain: Pre-Condemnation Activities  
(Draft Recommendation)**

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In June, the Commission<sup>1</sup> released a tentative recommendation that would codify the Court's holding in *Property Reserve Inc. v. Superior Court*<sup>2</sup> and make related technical corrections.<sup>3</sup>

Memorandum 2017 presented public comments on the tentative recommendation. These comments included a suggestion from the Department of Water Resources ("DWR") that the proposed law be revised to address the *timing* of property owner compensation.

The staff has since exchanged email on that topic with Deputy Attorney General Neli N. Palma. Ms. Palma offers additional input on the timing issue, which the staff greatly appreciates.

All statutory references in this memorandum are to the Code of Civil Procedure.

**Two Issues**

The staff sees two closely related, but different timing issues:

- (1) *Prospective Compensation*. Can a court award compensation for losses caused by pre-condemnation activities *before those losses have actually occurred*? In other words, may a court award prospective compensation for future speculative losses?
- (2) *Interim Compensation*. Can a court award compensation for losses caused by pre-condemnation entry and activities *before the precondemnation activities have been completed*? In other words, must the property owner wait until the pre-condemnation activities

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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](http://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. 1 Cal. 5th 151 (2016).

3. See *Tentative Recommendation on Eminent Domain: Precondemnation Activities* (June 2017).

have completely ended before seeking compensation, or may the property owner seek interim compensation?

In its letter, DWR proposed that Section 1245.060(c) be revised to add the language shown in underscore below:

In a proceeding under this subdivision, and if the entry and activities upon property has caused actual damage to or substantial interference with the possession or use of the property, the owner has the option of obtaining a jury trial on the amount of actual damage or substantial interference.<sup>4</sup>

The staff reads that language as addressing only the first issue — compensation may only be provided under Section 1245.060(c) for activities that have caused (past tense) damage to or substantial interference with the possession or use of the property. The language does not clearly rule out an award of interim compensation, before the pre-condemnation activities are fully completed.

Nonetheless, in explaining its proposal, DWR stated that “any jury trial would necessarily occur at the property owner’s election *only after the entries are completed.*”<sup>5</sup> This suggests that DWR intended its proposal to address the second issue as well.

The email from Ms. Palma proposes a slightly different approach, adding the underlined language below to the language that the Commission was proposing to add:

In a proceeding under this subdivision, the owner has the option of obtaining a jury trial on the amount of compensation for actual damage to or substantial interference with the possession or use of the property resulting from the entry.<sup>6</sup>

Again, the staff believes that the proposed language could be read as addressing only the first issue. Nonetheless, in explaining the proposal, Ms. Palma stated: “This would indicate that the compensation claim would come only after the entry is completed.”<sup>7</sup> In other words, the language is intended to address the second issue as well.

### **Process Concern**

In response to DWR’s suggestion, the staff expressed a process concern.<sup>8</sup>

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4. See Memorandum 2017-43, Exhibit p. 5.

5. *Id.* (emphasis added).

6. Email from Neli N. Palma to Brian Hebert (9/7/17) (on file with Commission).

7. *Id.*

8. See Memorandum 2017-43, p. 5.

This proposal was developed as part of the Commission's work with King Hall law student externs. The hope was that the proposal would be completed in time for introduction of implementing legislation in 2018. Ideally, that would mean approving a final recommendation at the September meeting, to provide sufficient time to find a legislative author before the end of this year.

If both of the timing issues discussed above were addressed by the proposed law, the staff believed that it would be necessary to circulate a revised tentative recommendation for further review and public comment. This would almost certainly preclude the introduction of implementing legislation in 2018.

For that reason, the staff recommended that DWR's timing reform not be addressed in this proposal. Instead, it would be examined in a future law student project.<sup>9</sup>

In the discussion that follows, the staff considers whether that process concern applies equally to *both* of the timing issues identified above.

### **Prospective Compensation**

In its letter, DWR explains why Section 1245.060 should not require compensation for future speculative losses:

As the Supreme Court stated, any loss "cannot reliably be determined until the scope of the precondemnation activities that are authorized by the trial court is known and the activities have actually been undertaken by the public entity." (*Property Reserve, Inc., supra*, 1 Cal. 5th at p. 200.) The Court added that "[b]ecause this matter is before us prior to any precondemnation activities having been conducted, we have no occasion in this case to determine exactly what specific items of actual damage or substantial interference with possession or use of the property are compensable under the statutes in question." (*Id.* at p. 205-206; see also fn. 28 [recognizing that any loss must first be incurred and recovery sought under the provisions of Code of Civil Procedure section 1245.060, subdivision (c) before the court can determine whether the loss is recoverable under the statute].)<sup>10</sup>

Ms. Palma expands on that explanation:

The constitutional compensation due to the owner does not extend to damages that are "conjectural or speculative." (*City of San Diego v. Neumann* (1993) 6 Cal.4th 7386 Cal.4th at pp. 747-748; *Property Reserve, Inc. v. Superior Court* (2016) 1 Cal. 5th 151, 200 [compensation to the owner is to be measured by the loss caused by

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9. *Id.*

10. See Memorandum 2017-43, Exhibit p. 5.

the appropriation, and he or she is “entitled to receive the value of what he has been deprived of, and no more.”].) Second, under the entry statutes compensation is expressly limited to payment for “actual damage to or substantial interference with the possession or use of the property” caused by the entry. (Cal. Civ. Proc. sec. 1245.030; 1245.060, emphasis added.)<sup>11</sup>

The staff agrees that there are good practical reasons why an award of speculative compensation would be problematic. Moreover, the case law — most notably *Property Reserve, Inc.*<sup>12</sup> — strongly suggests that Section 1245.060 does not provide for an award of speculative compensation.

It may be that this issue is straightforward and uncontroversial enough that it could be addressed in this study, without the need for preparation and circulation of a revised tentative recommendation. If the Commission wishes to take that approach, the staff recommends that the proposed law be revised to include the language shown in bold below:

**Code Civ. Proc. § 1245.060 (amended). Compensation**

12450.060. (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~~ Division 3.6 of Title 1 of the Government Code, the owner may recover for ~~such that~~ that 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~~ the claimant's costs and, if the court finds that any of the following occurred, ~~his~~ 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 ~~such that~~ 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 the option of obtaining a jury trial on the amount of compensation for actual damage to or

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11. Email from Neli N. Palma to Brian Hebert (9/7/17) (on file with Commission).

12. 1 Cal. 5th 151 (2016).

substantial interference with the possession or use of the property that was caused by the entry and activities upon 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 (c) of Section 1245.020 is amended to codify the holding in *Property Reserve Inc. v. Superior Court*, 1 Cal. 5th 151 (2016) **and to make clear that only actual losses can be compensated under that subdivision; compensation for speculative future losses is not provided.**

Subdivisions (a), (b), and (d) are amended to make technical corrections.

That language, which is similar to the language proposed by DWR and Ms. Palma, would seem to adequately address the first issue, without addressing the second issue. **Would the Commission like to include such language, with or without modification, in the draft recommendation?** If so, the staff will prepare explanatory text for inclusion in the recommendation's narrative preliminary part. In the interest of expediting completion, **the staff would recommend that the narrative language be presented to the Chair for approval, rather than the entire Commission** (as the Commission has done in similar situations in the past).

### **Interim Compensation**

As noted above, DWR also seems to be suggesting that the law be revised to make clear that compensation can only be provided under Section 1245.060(c) once all pre-condemnation entry activities have terminated.

Ms. Palma makes this point explicitly:

[In *Property Reserve, Inc.*,] the Supreme Court noted that the public entity could minimize any potential damage in the process of actually carrying out the entries: "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." (1 Cal. 5th at p. 200.) As such, the entries must necessarily be completed before compensation can be assessed and awarded.<sup>13</sup>

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13. Email from Neli N. Palma to Brian Hebert (9/7/17) (on file with Commission).

Until the pre-condemnation activities are completed, a determination of losses may well be speculative. Damage caused at an early stage of pre-condemnation activity could perhaps be mitigated or entirely cured in a later stage of the activity. Further, a multiplicity of interim compensation awards would be less efficient and consume more judicial resources than a single comprehensive award at the end of the pre-condemnation activity.

On the other hand, there may be some kinds of early losses that would not be susceptible to later mitigation (e.g., interference with possession or use). And, if the losses are sufficiently large and the pre-condemnation activities protracted, requiring the property owner to wait until the end of the process for any compensation could impose a hardship.

The staff sees nothing in the language of the pre-condemnation entry statutes that clearly precludes interim compensation. Nor could staff find useful guidance on this point in case law, California Attorney General opinions, eminent domain practice treatises, or the Uniform Law Commission's commentary on Section 305 of the Model Eminent Domain Code (on which Section 1245.060 is based<sup>14</sup>). Consequently, under existing law, it seems that a property owner could at least argue that interim compensation should be provided. Expressly foreclosing that possibility could be seen as a substantive change, rather than the kind of technical clarification that this study was intended to achieve.

There is one aspect of the pre-condemnation statutory procedure that Ms. Palma cites as support for the notion that existing law does not permit interim compensation. Before a court issues an order authorizing pre-condemnation entry, the court must determine "the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use."<sup>15</sup> The person seeking the order must deposit that amount with the court.<sup>16</sup> Section 1245.040 then provides a mechanism for modification of the court's order, *including modification of the amount on deposit*. Because this is the only provision of the statute that expressly provides for interim action, one could infer that it was intended as the only form of interim relief available. As Ms. Palma states:

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14. See 12 Cal. L. Revision Comm'n Reports 1601, 1741 (1974).

15. Section 1245.030(b).

16. Section 1245.030(c).

The existing statute sufficiently addresses [concern about compensation where the pre-condemnation activities are protracted] in that Code of Civil Procedure section 1245.040 permits the court to increase the amount on deposit, which deposit shall be retained for six months following the termination of the entry in accordance with Code of Civil Procedure section 1245.050, subdivision (a). That is the owner's remedy – to seek increase of the deposit. In addition, if the funds on deposit are not insufficient to pay the full amount of the award for actual damage or substantial interference, the court is authorized to enter judgment for the unpaid portion pursuant to Code of Civil Procedure section 1245.060, subdivision (c). This statutory scheme does not contemplate successive awards.<sup>17</sup>

**Considering the lack of clear guidance directly on this issue, the staff is inclined against expressly foreclosing the possibility of interim relief, without first giving property owners and other interested persons an opportunity to comment on the legal and policy merits of the issue.** If the Commission agrees, we will revisit the matter in a future project. If the Commission would prefer to address the issue in this study, it could either direct the staff to prepare a revised tentative recommendation or add language to the attached draft.

#### CONCLUSION

**The Commission needs to decide whether to adopt the attached draft as a final recommendation, with or without changes, for publication and submission to the Governor and Legislature.**

Respectfully submitted,

Brian Hebert  
Executive Director

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17. Email from Neli N. Palma to Brian Hebert (9/8/17) (on file with Commission).