

Memorandum 2019-50

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

In this study, the Commission¹ is examining the Eminent Domain Law provisions that govern compensation to a property owner who suffers actual damage to or substantial interference with the possession or use of property as a result of “pre-condemnation activity.”² Pre-condemnation activity is the entry on property that might be condemned, in order to “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.”³

This study was prompted by the California Supreme Court’s decision in *Property Reserve v. Superior Court*,⁴ which assessed the constitutionality of the statutory pre-condemnation activity procedure. In that case, the court upheld the statute, but reformed Code of Civil Procedure Section 1245.060 to provide for a jury trial on the question of the amount of compensation owed. The Commission was particularly interested in that case because the Eminent Domain Law, including its pre-condemnation activity provisions, was enacted on the Commission’s recommendation.⁵

As a first step in this study, the Commission decided to recommend language to codify the court’s holding in *Property Reserve*, by revising Section 1245.060.⁶ The Commission circulated a tentative recommendation with language to

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. Code Civ. Proc. §§ 1245.010-1245.390.

3. Code Civ. Proc. § 1245.010.

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

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

6. Minutes (Apr. 2017), p. 3.

accomplish that reform.⁷ After considering public comment on the tentative recommendation, it made some adjustments to its proposed language.⁸

The Commission also decided to expand the scope of this study. In addition to codifying the holding of *Property Reserve*, the Commission decided to consider whether Section 1245.060 should be revised to achieve the following purposes:

- To make clear that a property owner is not entitled to compensation under that provision for losses that have not yet occurred.
- To expressly provide that compensation may not be provided under that provision until all pre-condemnation activities have ended.
- To expressly provide that a claim for losses caused by pre-condemnation activity may be sought in a subsequent condemnation action.⁹

This memorandum will raise a new drafting issue in connection with the proposed codification of the holding in *Property Reserve*. One or more supplements to the memorandum will discuss the other issues listed above.

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

CODIFICATION OF *PROPERTY RESERVE*

After considering public comment on its tentative recommendation, the Commission decided to recommend that the following sentence be added to Section 1245.060(c), to codify the holding in *Property Reserve*:

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.

The use of the word “option” in that sentence parallels the terminology used in *Property Reserve*:

[W]e 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

7. *Eminent Domain: Precondemnation Activities* (June 2017).

8. Minutes (Sept. 2017), p. 4.

9. *Id.*

on damages at the proceeding prescribed by section 1245.060, subdivision (c).¹⁰

Having given the matter more thought, the staff now believes that it might be better to parallel the relevant constitutional language, rather than the language of the opinion.

Section 19(a) of Article 1 of the California Constitution provides (with emphasis added):

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 use of the term “waived” in this constitutional provision has important interpretative implications, which might be lost if the Commission’s proposed language omits that term.¹¹ A similar problem might result from use of the word “option” in the proposed legislation, rather a “right” to a jury trial.¹²

To avoid these possibilities, the staff recommends that the Commission’s proposed revision of Section 1245.060(c) be revised as follows:

In a proceeding under this subdivision, the owner has the option of obtaining 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.

The staff does not believe that such a change would have any significant disadvantages. It would differ from the language used in the holding of *Property Reserve*, but that language was probably being used in a more general sense, to convey the meaning of the Court’s holding, rather than with the greater technical precision that is helpful in drafting statutes.

10. *Property Reserve, Inc.*, 1 Cal 5th. at 208 (emphasis added).

11. See Cal. Const. Art. I, § 16 (“Trial by jury is an inviolate right and shall be secured to all. . . . In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.”) See also *March v. Pettis*, 66 Cal.App.3d 473, at 476 (1977) (Pursuant to Art. I, § 16, in civil cause, a trial by jury must be afforded unless party waives that right as prescribed in Code Civ. Proc. § 631.”).

12. See *City of Perris v. Stamper*, 1 Cal. 5th 576, at 593 (2016)) (“[Article I, Section 19 of the California Constitution] thus guarantees landowners the *right* to have a jury determine the amount of just compensation owed for a taking.” (emphasis added)).

Given the likelihood that the Commission will need to circulate a second tentative recommendation in this study anyway (to address the other issues that were added when the scope of the study was expanded), there should be opportunity for public comment on the proposed revision, if the Commission decides to make it.

How would the Commission like to proceed on this point?

NEXT STEP

The staff intends to prepare one or more supplements to this memorandum, for consideration at the September meeting, to discuss the other issues that will be addressed in this study.

Respectfully submitted,

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