

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

**Eminent Domain:
Pre-Condemnation Activities**

September 2020

California Law Revision Commission
c/o UC Davis School of Law
Davis, CA 95616
www.clrc.ca.gov

Cite this report as *Eminent Domain: Pre-Condemnation Activities*, 47 Cal. L. Revision Comm'n Reports 101 (2020).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

c/o UC Davis School of Law
Davis, CA 95616

CRYSTAL MILLER-O'BRIEN, Chairperson
RICHARD SIMPSON, Vice-Chairperson
DIANE F. BOYER-VINE, Legislative Counsel
ASSEMBLY MEMBER ED CHAU
DAVID A. CARRILLO
ANA CUBAS
VICTOR KING
JANE MCALLISTER
SENATOR RICHARD ROTH
RICHARD RUBIN

September 10, 2020

To: The Honorable Gavin Newsom
Governor of California, and
The Legislature of California

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 its 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. That kind of loss is known colloquially as "Klopping damages."

The Law Revision Commission 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 recommendation was prepared pursuant to Resolution Chapter 158 of the Statutes of 2018.

Respectfully submitted,
Crystal Miller-O'Brien
Chairperson

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

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 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

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.

6. Code Civ. Proc. §§ 1245.010-1245.030.

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

The Law Revision Commission 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*,¹¹ 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.

7. Code Civ. Proc. § 1245.030(c).

8. Code Civ. Proc. § 1245.060(a), (c).

9. *Klopping v. City of Whittier* (1972) 8 Cal.3d 39.

10. *Id.* at 52.

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

- 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*,¹² 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.¹³

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

12. *Id.*

13. *Id.* at 192.

compensation due the property owner for a pre-condemnation “taking.”¹⁴

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).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.

14. *Id.* at 208.

15. *Id.*

COMPENSATION IN EMINENT DOMAIN PROCEEDING

Pre-Condensation Activity

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

- (1) Bring a civil action against the condennor.
- (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-condensation 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-condensation 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-condensation activity can be recovered in an eminent domain action.¹⁶ That approach would also be consistent with the existing treatment of Klopping damages, which may be sought in an eminent domain action commenced after the condennor's unreasonable conduct.¹⁷

The Commission sees no policy reason to preclude the recovery of compensation for losses caused by pre-condensation 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

16. *The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601, 1742 (1974).

17. See *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 58.

compensation for losses caused by pre-condemnation activity in an eminent domain action commenced by the condemnor.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.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.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

18. See proposed Code Civ. Proc. § 1245.060(a) *infra*.

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

20. *The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601, 1742 (1974).

applicable to eminent domain proceedings.²¹ The Comment to Section 426.70 explains the purpose of the addition:

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 426.30.²²

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.²³ Pleading Klopping damages in a cross-complaint has been specifically considered and rejected.²⁴

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.

21. *Id.* at 1889.

22. *Id.*

23. See *Redevelopment Agency*, 135 Cal.App.3d at 79, n.2; *People ex rel. Dept. Pub. Wks.*, 91 Cal.App.3d at 352-53; *Richmond Redevelopment Agency*, 48 Cal.App.3d at 350.

24. See *Redevelopment Agency*, 135 Cal.App.3d at 79, n.2; *People ex rel. Dept. Pub. Wks.*, 91 Cal.App.3d at 352-53; *Richmond Redevelopment Agency*, 48 Cal.App.3d at 350.

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 Commission also recommends a small number of technical and minor substantive amendments, to follow standard drafting practices and conform to the reforms discussed above.²⁵

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 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.

25. See proposed Code Civ. Proc. §§ 1245.020, 1245.060(a), 1245.060(d), 1250.320(b), 1260.230(d), and 1260.230(e), *infra*.

PROPOSED LEGISLATION

Code Civ. Proc. § 1245.020 (amended). Entry

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~~ those activities, the person shall secure at least one of the following:

(a) The written consent of the owner to enter upon ~~his~~ 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.

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

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 ~~Divison~~ Division 3.6 of Title 1 of the Government Code, the owner may recover for ~~such~~ that 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 ~~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 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* (2016) 1 Cal.5th 151.

The section is also amended to make technical corrections.

Code Civ. Proc. § 1250.320 (amended). Answer

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 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* (1972) 8 Cal.3d 39; *Redevelopment Agency v. Contra Costa Theatre, Inc.* (1982) 135 Cal.App.3d 73; *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc.* (1979) 91 Cal.App.3d 332; *Richmond Redevelopment Agency v. Western Title Guaranty Co.* (1975) 48 Cal.App.3d 343.

Section 1250.320 is also amended to make a technical correction.

Code Civ. Proc. § 1260.230 (amended). Separate assessment of compensation

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.
