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Legal Update: Government Precondemnation Entry and Inspection – A Review of *Property Reserve, Inc. v. Superior Court* (2014)

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There are four ways the government can enter onto private property:

- It has permission of the property owner.
- In an emergency (Tenth Amendment/police power).
- It has a search warrant, based on probable cause (Fourth Amendment).
- It takes private property for a public purpose, and pays just compensation (Fifth/Fourteenth Amendment).

In California until very recently, the government could also enter private property *before* condemning it, to conduct “precondemnation” tests and inspections. No more.

On March 13, 2014, in a split decision, the Court of Appeal for the Third Appellate District held that California statutes which authorize precondemnation entry and inspection activities are unconstitutional, because they purport to authorize takings without affording the property owner the rights guaranteed by the California Constitution. (*Property Reserve, Inc. v. Superior Court* (2014) 2014 WL 978309.)

The two compelling principles from which the court’s decision flows are: (i) constitutional protections relating to private property are unyielding, even when they result in greater expense and inconvenience for the government, and, (ii) the essence of private property is the right to exclude others, especially the government, and when that right is impaired, a taking occurs.

I. THE ENTRY STATUTES.

The State of California, through the Department of Water Resources, seeks to build a tunnel to transport water from the north to the south of the State. Before condemning land needed for the project, it wanted to study the environmental and geological suitability of properties on which the tunnel may be constructed. It sought access to the properties for study and testing under a statutory procedure contained in Code of Civil Procedure sections 1245.010-1245.060.

Those provisions authorize a public agency to file a petition for an order from the Superior Court permitting entry onto, and inspection of, property it may condemn in the future. The Superior Court must identify the purpose for the entry, the nature and scope of the activities to be conducted, and specify the terms of entry in an order. The probable amount of compensation relating to the entry is deposited with the Court.

If the entry causes actual damage to “or substantial interference” with the possession or use of the property, the property owner has two options: he or she can (i) seek an order in the proceeding initiated by the government allowing withdrawal of the funds on deposit, and awarding any further compensation due, or (ii) seek recovery for such damage or interference in a separate civil action (i.e., an inverse condemnation action).

There is no clear requirement or mechanism in the statute to establish, or challenge, the public necessity of the proposed activities, nor is a jury trial assured with respect to just compensation. And, as discussed below, therein lies the rub.

II. THE PROPOSED ACTIVITIES ARE A TAKING BECAUSE THEY INVOLVE A PHYSICAL INTRUSION.

The Court first determined that the proposed activities constituted a taking. They included borings over 100 feet deep and 6 inches in diameter, extraction of earth from the borings, and filling the borings with grout, as well as physical entry onto the property for up to 66 days during the year to conduct various studies.

The Court noted that any physical intrusion on property, however small, is a per se taking. This concept was well established by the United States Supreme Court in *Loreto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, in which the Court found that a state statute that authorized a cable television carrier to attach a cable and two cable boxes on the roof of a residential apartment building was a per se taking. As the Supreme Court noted in that case, “[A]n owner is entitled to the absolute and undisturbed possession of every part of his premises.”

The Third District had no trouble concluding that the state’s proposed borings and earth removal constituted a per se taking since they involved physically invading and altering the property. Similarly, the Court found that environmental studies which required physical entry by 6-8 persons onto portions of the landowner’s properties for up to 66 days of the year amounted to the condemnation of a temporary easement. The Court noted in this regard that the very essence of private property is the right to exclude others, and in particular the government, and that right was impaired by the entry.

III. THE ENTRY STATUTES DO NOT PASS CONSTITUTIONAL MUSTER.

Having determined that the proposed activities were a taking, the next question was whether the taking was authorized by the entry statutes. The Court found that measured against the standard of Article I, Section 19(a) of the California Constitution, it was not. That section states: “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 an 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 Court held that the entry statutes fell short of that standard because they do not amount to an “eminent domain proceeding” initiated by the condemnor in which the necessity of the take and just compensation will be determined. In effect, the entry statute compels the property owner to initiate action to recover compensation, whether in response to the ‘precondemnation’ petition filed by the government, or in a separate, inverse condemnation action. This additionally falls afoul of Government Code section 7267.6, which prohibits the government from intentionally forcing a property owner to initiate legal proceedings to recover compensation for a taking. The Court noted that while the Fifth Amendment to the United States Constitution does not require determination or payment of just compensation before the taking (i.e., it can be determined after), the case before it was governed by the California Constitution, which provides additional protections to the property owner.

The proper procedure for a condemnor to follow if it seeks to take or damage property in the course of a precondemnation inspection is to file an “eminent domain proceeding” for that purpose, and pay just compensation as determined by a jury after a finding of public necessity. Presumably it would then file a second proceeding to permanently acquire whatever property interest it chooses to acquire.

Justice Blease dissented from the opinion, opining that none of the proposed activities amount to a taking because they are not permanent or exclusive, nor in a fixed location. And since the extent of damage is not known at the outset, it is appropriate to fix the compensation due after the actual entry. Moreover, the entry statute constitutes a legislatively prescribed “eminent domain proceeding” within the meaning of Article I, section 19 of the California Constitution.

IV. WHAT NOW FOR PRECONDEMNATION ENTRY?

By requiring, in effect, a separate condemnation lawsuit to be filed for the “precondemnation” entry and inspection phase, this ruling will add delay, expense and uncertainty to the condemnation process. The government will need to establish a “public necessity” for the (pre-condemnation) take, which may present a challenge where the purpose of the first “take” is to determine whether the government will permanently acquire the property. The Court’s clear message in this case is that the constitutional protections against governmental interference with private property cannot be compromised and are not subject to “shortcut proceedings,” even if the result is greater expense and inconvenience for the government. So for now, if the government wants to enter property and “look around” as a prelude to possible condemnation, it must either obtain the property owner’s permission, or file an eminent domain action.

Given the dissenting opinion, and the significance of the issue, this case is a candidate for review by the California Supreme Court or failing that, legislative “correction.” Stay tuned for developments.

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