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California Supreme Court Reverses Ruling on Right-of-Entry Statutes



In a unanimous decision today, the California Supreme Court upheld the state's precondemnation right of entry statutes as constitutional, reversing a March 2014 ruling from the Court of Appeal, Third Appellate District (*Property Reserve, Inc. v. Super. Ct.S217738*).

Referring to the appellate court's ruling as

"counterintuitive," today's Supreme Court ruling avoids extensive statutory changes in how agencies access properties for necessary inspections and testing prior to commencing eminent domain actions.

Background of the Entry & Testing Statutes

The California Department of Water Resources sought to build a tunnel to transport water up and down state. Before condemning land for this project, it wanted to study the environmental and geological suitability of properties on which the tunnel was proposed to be constructed. Thus, the DWR sought access to the properties to study and test them under a statutory procedure contained in Code of Civil Procedure sections 1245.010-1245.060.

Those provisions authorize a public agency to enter onto and inspect property it may decide to condemn in the future. Upon petition, the agency 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.

Further, if the entry causes actual damage to "or substantial interference" with the possession or use of the property, the property owner has two options: it can (a) seek an order in the proceeding initiated by the government allowing withdrawal of the funds on deposit, and awarding any further compensation due, or (b) seek recovery for such damage or interference in a separate civil action – such as an inverse condemnation action.

Court of Appeal Decision

In March of 2014, the appellate court determined that these precondemnation entries constitute a taking under the California State Constitution. The appellate

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court noted that any physical intrusion on property, however small, is an automatic, or *per se*, taking. Having found that these activities constitute a taking, the appellate court determined that such precondemnation entries and inspections fell short of the California Constitution's requirements for determining necessity and paying jury-determined just compensation for such takings. In short, the appellate court effectively required a separate condemnation lawsuit to be filed for the "precondemnation" entry and inspection of a property prior to filing a "classic" condemnation action.

The Supreme Court's Reversal

In reversing the appellate Court's ruling, the Supreme Court found that the legislative history of the entry statutes demonstrates intent to create a procedure to conduct investigatory testing and exploration, prior to determining the need to acquire the property. The Court noted that the precondemnation entry and testing statutes establish a statutory compensation procedure and preserve an owner's right to pursue and obtain damages in various types of actions. Thus, the Court found that the statutes create an adequate procedure to enable the property owner to recover money damages.

Moreover, the Court noted that outside of the precondemnation entry and testing context, numerous statutes grant public entities the authority to enter and engage in official activities on private property. (This issue was brought to the Court's attention by an *amicus curie* brief filed by Kendall MacVey of Best Best & Krieger). For example, many activities conducted by public agencies do not constitute condemnation, although they arguably interfere with an owner's property rights (*i.e.*, executing search warrants, conducting health and safety inspections, enforcing fish and game regulations, eliminating nuisances, etc.).

Ultimately, the Supreme Court found that the added delay, expense and uncertainty created by the Appellate Court's ruling was unreasonable, noting "[i]t is counterintuitive to maintain that the commencement of a classic condemnation action is required *before* such precondemnation activities may be undertaken." Having upheld the constitutionality of the entry statutes, public agencies may continue to conduct precondemnation inspections and tests of private property to determine if such property is environmentally and geologically suitable for a proposed project, prior to initiating classic eminent domain procedures.

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