



California Supreme Court Upholds Right of Entry Statutes, but "Reforms" them to Comply with Constitution

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When public agencies analyze a potential public project, they often need to gain access to private property for surveys, testing, and to otherwise investigate whether a particular property is suitable for a planned project. Often, agencies gain access by talking with the property's owner and reaching agreement on a right of entry. But where the owner refuses to allow access, the agency must resort to the courts.

For decades, agencies have followed a set of rules that allow them to obtain a court-ordered right of entry with minimal notice and without most of the formality of a full-blown eminent domain action. But some owners have complained that allowing the government unwelcomed access to their private property constitutes a taking, regardless of the agency's effort to describe its conduct as a mere right of entry.

The Supreme Court's recent decision in *Property Reserve v. Superior Court* holds that even if these types of surveys, testing and investigations qualify as takings (an issue the Court did not decide), and even if they therefore require compliance with all constitutionally-mandated protections for owners, the existing right of entry statutes are close enough to meeting those requirements that a simple, Court-imposed reformation of them solves any potential problem. The Court therefore held that the existing statutes are valid, but only if they are reformed to include a right to a jury trial on compensation (the one key constitutional protection the Court found lacking).

The end result is that agencies can largely continue with business as usual on their right of entry efforts, and courts will provide any owner who wants one an opportunity for a jury trial on the amount the agency must pay for that right of entry. This represents a huge victory for public agencies, which faced massive project delays and costs if all rights of entry were relegated to a formal eminent domain action.

The Property Reserve Back Story

In *Property Reserve*, the California Department of Water Resources was investigating the potential Sacramento-San Joaquin Delta twin tunnels project. As part of that work, the Department sought access to more than 150 properties to determine their suitability for the project. While the types of investigations the Department sought to conduct varied, for simplification, they sorted into two larger categories: (1) environmental testing and surveys; and (2) geological studies.

California's right of entry statutes provide that a public agency may enter upon property 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. (Code Civ. Proc., § 1245.010.) In order to secure such entry, the agency must obtain the owner's consent or obtain an order from the court. If the agency is required to petition the court for approval, the court may determine (i) the nature and scope of the activities reasonably necessary, and (ii) the amount the agency must deposit as the probable amount of compensation for the entry. If the agency causes damage or substantial interference with possession and use of the property, the owner may recover for such damage in a civil action or by application to the court.

Pursuant to that statutory scheme, and as part of the Department's efforts to analyze the project's environmental impacts in compliance with the California Environmental Quality Act (CEQA), the Department filed petitions to enter the properties and undertake both the environmental studies and the geologic testing to determine the suitability of each property for the project. Several of the owners opposed the Department's efforts, claiming that the proposed rights of entry constituted an unlawful taking of their property.

The trial court permitted some investigations but not others. In particular, the trial court allowed the environmental studies to proceed, but concluded that the requested geologic testing (which involved drilling and re-filling deep holes) qualified as a taking, and therefore required a formal condemnation action.

Neither party was satisfied with the trial court's decision, and both appealed. On appeal, the Court of Appeal restricted the proposed precondemnation testing even further, holding that nearly all precondemnation rights of entry constitute a taking and require a constitutionally-appropriate condemnation action. The Court of Appeal also found that California's right of entry statutes do not meet that standard because, in particular, they do not provide the owner with the right to a jury trial – a specific protection provided to condemnees under the California Constitution.

The Department filed a Petition for Review with the California Supreme Court, which granted the Petition.

The Supreme Court Decision

The Supreme Court opinion starts by concluding that the right of entry process and its broad scope of allowed activities covers the testing and investigations the Department proposed to undertake. The Court explained that the Legislature established the right of entry statutes to provide a mechanism to meet the unquestioned need for precondemnation entry and testing while avoiding the ill-advised and premature condemnation of private property. The question, then, became whether the right of entry procedures pass constitutional muster.

The first question in this analysis was whether the right of entry activities qualified as a taking, requiring the constitutional protections afforded to condemnees. Interestingly, the Court chose to avoid that issue,

concluding that as long as the right of entry statutes meet minimum constitutional requirements, there is no need to decide whether the Department's proposed activities rose to the level of a taking.

The Court thus moved to the second question: did the right of entry statutes meet minimum constitutional thresholds? The Court explained that the right of entry procedure requires (i) the institution of a legal proceeding, (ii) a limitation on the entry to only those activities reasonably necessary to accomplish the investigation, (iii) a deposit into court the probable amount of compensation, and (iv) a process to obtain additional compensation for any losses. The Court concluded that the right of entry statutes' only substantive shortcoming was the fact that they provided no right to a jury trial on the amount of compensation, a constitutional requirement.

In a somewhat surprising twist, the Court did not strike down the statutes because they fail to provide for a jury trial (the typical holding when the Court finds a statute to be unconstitutional). Instead, the Court elected to reform the right of entry statutes. The Court explained that in light of the real need for public agencies to have a simplified means to access properties during their environmental testing, the appropriate remedy is to reform the precondemnation entry statutes so as to afford the property owner the option of obtaining a jury trial on damages In other words, the Supreme Court simply re-wrote the law, correcting the constitutional shortcoming.

Conclusion

The decision is a significant victory for public agencies. Rights of entry are a necessary component to keep public projects on schedule while still complying with the maze of environmental laws that govern their approval. If the Court had elected to strike down the law as unconstitutional, agencies would have had no choice but to resort to a formal condemnation action just to gain access to a property for environmental testing – a process which takes nearly a year just to gain possession – and which would have added additional complications for projects with federal funding, since federal law typically requires that the environmental process be complete before the agency begins condemning property.

The decision also protects property owners, ensuring that they are afforded the basic constitutional protections of a formal eminent domain action even where the agency only seeks a right of entry.

While the decision to reform the statutes may be a bit unusual, and while it may create some initial confusion in terms of how the lower courts should implement this reform, all in all the Court showed real sensitivity towards finding a solution that both protected basic constitutional rights while not wreaking havoc on the already complicated process of seeking environmental approval for a proposed public project.