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On remand

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

YOUNG'S MARKET COMPANY, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent,	D068213 (San Diego County Super. Ct. No. 37-2015-00007265-CU-PT-CTL)
SAN DIEGO UNIFIED SCHOOL DISTRICT, Real Party in Interest.	

Petition for writ of mandate from an order of the Superior Court of San Diego County, Lisa C. Schall, Judge. Petition denied, stay vacated.

Allen Matkins Leck Gamble Mallory & Natsis and Kenneth Erik Friess, Nicholas S. Shantar for Petitioner.

Stark & D'Ambrosio and James A. D'Ambrosio, George A. Rios, III for K1 Speed, Inc., as Amicus Curiae on behalf of Petitioner.

Dannis Woliver Kelley and Janet L. Mueller, Cameron C. Ward, Kirsten Y. Zittlau, Karina K. Samaniego, on behalf of Real Party in Interest.

This matter comes to us on remand from the California Supreme Court, with directions to vacate our earlier decision (*Young's Market Co. v. Superior Court* (2015) 242 Cal.App.4th 356, review granted Jan. 13, 2016, S230808) and reconsider the cause in light of its opinion in *Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151 (*Property Reserve*). Having done so, we conclude the superior court did not err by issuing its order, and deny the writ petition.

FACTUAL AND PROCEDURAL BACKGROUND

Young's Market Company (Young's) owns approximately two acres of real property in downtown San Diego adjacent to an elementary school owned and operated by real party in interest San Diego Unified School District (District). The property contains an over 50,000 square foot industrial building, a parking lot and landscaping. Young's leases the property to K1 Speed, Inc. (K1), which operates an indoor kart racing center with arcade lounges, eating areas and retail merchandising. K1 operates seven days a week.

In March 2015, District petitioned for an order granting it a right of entry under the Eminent Domain Law (Code Civ. Proc., § 1245.010 et seq.[1]), asserting it was interested in potentially acquiring the property to expand the elementary school and

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1 Further statutory references are to the Code of Civil Procedure. As the California Supreme Court did (*Property Reserve*, *supra*, 1 Cal.5th at p. 166, fn. 1), we will refer collectively to the provisions of the Eminent Domain Law at issue here—sections

construct other school facilities. By its petition, District sought under sections 1245.010 and 1245.030 to conduct certain investigations and environmental testing on the property. It alleged it was authorized to acquire property by eminent domain for those purposes and required access to conduct mandated preliminary studies and assessments. District had sought to obtain consent, but Young's declined to provide access, telling District it was not interested in selling the property. District attached a survey prepared by an environmental assessment consultant detailing the scope of the proposed work, which included drilling bore holes to conduct groundwater and soil samples, then backfilling with sand or bentonite grout and resurfacing with concrete, as well as bulk sampling of building materials suspected to contain lead or asbestos.[2] District stated it expected the

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1245.010 to 1245.060—as the precondemnation entry and testing statutes. The court in *Property Reserve* distinguished precondemnation proceedings from the judicial proceeding that the law prescribes for the condemnation of property, and referred to the latter as a classic condemnation action or proceeding. (*Property Reserve*, at p. 166, fn. 2.) We do so here as well.

[2] District's proposed work was detailed in a "Limited Phase II Environmental Site Assessment and Hazardous Building Materials Survey" as: site reconnaissance and marking of boring locations with white paint; a geophysical survey to evaluate the proposed boring locations for potential subsurface utility conflicts; coring 10 locations of concrete using a two-inch diameter drill bit in concrete up to six inches thick; boring 33 holes within a 50-foot square grid partially outside of the building's footprint, 30 holes at three feet deep and three at 20 feet deep; collecting soil samples from the borings; collecting groundwater samples from the 20-foot borings; boring three 15-foot holes adjacent to the 20-foot holes per Department of Toxic Substances Control requirements; collecting two soil vapor samples; abandoning the borings by backfilling the three-foot holes with clean sand to near the ground surface and resurfacing with concrete; backfilling the 20-foot holes with bentonite grout to near the ground surface and resurfacing with concrete; surveying and inspecting the building to identify homogeneous areas, suspect materials and suspect surfaces; nondestructive X-ray fluorescence testing to test surfaces suspected to contain lead; bulk sampling by a Division of Occupational

work would take eight to 10 business days to complete. It believed any compensation for the activities would be nominal and stated it was prepared to deposit the probable amount as determined by the court. District's proposed order stated in part that District "shall not access the [property] on more than ten (10) business days within a sixty (60) day period without the prior consent of this Court" and it would "deposit with this Court the total probable amount of just compensation of One Thousand Dollars ($1,000) or _____ ($_____)."

Young's opposed the petition. Characterizing District's actions as a sweeping and comprehensive drilling and sampling project, it argued the precondemnation entry and testing statutes only authorized innocuous or superficial entries on property, akin to preparing a survey or map, and not such an unrestricted property-wide occupation assertedly lasting from two weeks to 60 days or more. It asserted District's proposal went far beyond the precondemnation statutes, and was an unconstitutional taking under the United States and California Constitutions as reflected in *Jacobsen v. Superior Court of Sonoma County* (1923) 192 Cal. 319 (*Jacobsen*). Young's argued District's proposal to remove dirt and building materials effected an obvious permanent physical occupation or per se taking for which it was required to file a classic condemnation suit and pay just compensation as determined by a jury. Young's alternatively asked the court to stay the action to await the California Supreme Court's decision in *Property Reserve*, *supra*, 1

Safety and Health Certified Asbestos Consultant or Site Surveillance Technician of postage-stamp-sized pieces of building materials suspected to contain asbestos; and visual identification and quantification of building materials falling under the Universal Waste Rule.

Cal.5th 151, or, if it were inclined to grant the petition and allow District to proceed, order District to deposit a minimum of $500,000 toward compensation in lost rent, goodwill and property.

In reply, District argued Young's grossly mischaracterized the duration, nature and extent of the proposed work, which was not as extensive as that proposed by the public entity in *Jacobsen*, *supra*, 192 Cal. 319.[3] It presented the declaration of Lisa Bestard, an environmental testing scientist with the consultant hired by District. Bestard explained that the purpose of the investigative activities was to obtain initial data to evaluate if impacted soil, groundwater and/or soil vapors were present at the property and if so, evaluate if contamination levels precluded it from being used as a future school site. She stated her company's proposal sought a maximum of eight to 10 business days, excluding weekends, to conduct the work, which could be done on consecutive days. Bestard described the drilling rig as a direct-push drill mounted in the bed of a utility truck that would fit within a regular-sized parking space; she explained this type of drill disrupts very little soil around the actual drill space, and approximately three people are involved in the drilling activities. Further, Bestard explained the monitoring wells referenced in

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3 In part, District pointed out that in *Jacobsen* the proposed work included creating four-by six-foot test pits, installing a boring rig and boring to depths of 150 feet or more, and excavating the land. (*Jacobsen*, *supra*, 192 Cal. at p. 322.) District stated that for its proposed work, no borings would occur inside the building facility, the borings would be 2 to 4 inches in diameter and closed off or covered when sampling was complete, and the vast majority would be refilled with sand, not concrete, then resurfaced with concrete to match the original composition. District revised its proposed order to permit it to obtain access to the property for a maximum of 10 consecutive business days excluding weekends.

the project were temporary, as they would stay open for 24 hours at the most. As for the building material sampling, Bestard stated that under her company's proposal, "a small sample (less than the size of a postage stamp) will be removed from an area that is not visible. For example, we would take a small piece of the building material from underneath an electrical outlet (which we would first remove) or remove a small piece of material from behind a piece of equipment (namely, a refrigerator or snack machine)."

District argued its work did not constitute a taking, pointing out that borings and samplings were expressly authorized by section 1245.010 of the precondemnation entry and testing statutes, and it was statutorily mandated to perform such work before a proposed site could be approved as a school site. Finally, District argued the $500,000 in compensation proposed by Young's was speculative and exaggerated; there was no evidence K1 would suffer any business interruption or lost profits, or that Young's would lose rental income, and in the event of unforeseen damage the court could modify its order for a deposit.

The superior court granted the petition, ordering District could enter the property to conduct the investigations identified in its petition on condition that District in accordance with section 1245.030, subdivision (c) deposit with the court $5,000 as a probable amount of compensation and serve K1 with a copy of the order. Under the order, K1 was given 45 days after service to either reach an agreement with District or apply ex parte to enjoin District's investigations. If K1 did not do so or its ex parte application was denied, the court ordered District would then have the "immediate right" to conduct its investigations.

Young's petitioned for a writ of mandate and/or prohibition asking this court to direct the superior court to vacate its order granting the District's petition. It contended District's proposed activities went beyond the precondemnation entry and testing statutes, which to comply with the state and federal Constitutions permitted only innocuous and superficial inspections before condemnation. Young's argued District's actions constituted a permanent physical occupation of its property requiring that District file a classic condemnation action or proceeding to litigate the need for the taking and provide Young's with a jury determination of just compensation. It sought an immediate temporary stay pending resolution of its writ petition.

We stayed the superior court's order, and eventually denied the writ petition. We concluded District's proposed actions were temporary and limited intrusions on the property, and those actions neither violated the precondemnation entry and testing statutes nor constituted a per se taking requiring a jury determination of just compensation.

The California Supreme Court granted Young's petition for review. It deferred action pending its consideration and disposition of related issues in *Property Reserve*, *supra*, 1 Cal.5th 151, and thereafter transferred the matter back to us as stated above. Only District has filed a supplemental brief.

DISCUSSION

I. Property Reserve

In *Property Reserve*, the California Department of Water Resources (the Department) sought to investigate the feasibility of constructing a new tunnel or canal in

the Sacramento-San Joaquin Delta as part of a water delivery system. (*Property Reserve*, *supra*, 1 Cal.5th at pp. 165, 168, fn. 3.) As part of its investigation, the Department proposed to enter over 150 privately owned properties to conduct preliminary environmental and geological studies and testing. (*Id*. at p. 168.) Specifically, the Department sought to conduct environmental mapping and surveys relating to plant and animal species, habitat, soil conditions, hydrology, cultural and archeological resources, utilities, and recreational uses, as well as geological drilling and boring to determine subsoil conditions. (*Id*. at p. 169.) It filed separate petitions in the superior court under section 1245.030 of the precondemnation and entry statutes for this purpose. (*Ibid*.)

The trial court granted the Department limited authority to enter each parcel for a maximum of 25 to 66 days over a one-year period to conduct the various types of environmental surveys and mapping. (*Property Reserve, supra,* 1 Cal.5th at pp. 169-170.) Its order set forth a schedule designating the amount of probable compensation (between $1,000 and $6,000, depending on property size) that the Department was required to deposit before entering any of the properties. (*Id*. at p. 171.) The court, however, relying on *Jacobsen, supra*, 192 Cal. 319, denied the Department's request as it related to the proposed geological drilling and boring on 35 of the properties, which would take between 4 and 14 working days to complete and would leave hardened bentonite grout topped with native topsoil in each hole. (*Property Reserve*, 1 Cal.5th at

pp. 171-173.)[4] The court acknowledged the current precondemnation entry and testing statutes included boring and were enacted after *Jacobsen*, but it concluded *Jacobsen* had held such drilling would constitute a taking or damaging of property under California's takings clause. (*Property Reserve,* at p. 173.)

In a split decision, the Court of Appeal affirmed the order denying the proposed geological drilling and boring, but reversed the order granting authority to conduct the environmental activities. (*Property Reserve, supra,* 1 Cal.5th at pp. 173-174.) It held that properly interpreted, the precondemnation entry and testing statutes only authorized innocuous and superficial activities, but because the geological activities resulted in "permanent structures"—the hardened bentonite—being placed in the ground, they resulted in a per se taking under both the federal and state takings clauses. (*Id*. at p. 174.) The Court of Appeal further held that with respect to the environmental surveys and mapping, the precondemnation entry and testing statutes were constitutionally deficient:

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4 More specifically, the Department's geological testing would begin with a two- or three-day entry to determine the best location for test drill operations. (*Property Reserve, supra*, 1 Cal.5th at p. 171.) The Department would then conduct testing on each of 35 properties involving pushing a rod into the ground that would create a hole one and one-half inches in diameter and up to 205 feet deep that would be refilled after the rod was withdrawn. (*Id*. at pp. 171-172.) That process generally required four persons and up to four vehicles, including a five- or 25-ton truck and a portable toilet, and typically would be done in a single day. On 28 of the properties, the Department would additionally drill larger soil borings or drill holes ranging from about four to eight inches in diameter, also up to 205 feet deep, which would also be refilled once drilling and retraction of soil for sampling was completed. (*Id*. at p. 172.) These drilling operations involved larger drill rig equipment and a five-person crew as well as other equipment and materials, and required a 100- by 100-foot worksite to be used for a period of five to 10 days, bringing the total period of such activities with regard to the 28 properties to no more than 14 working days. (*Ibid*.)

the proposed testing constituted both a taking and damaging of property, and the Department was required to proceed to condemn a temporary easement through a classic condemnation proceeding to obtain the authority to conduct it. (*Id*. at pp. 167, 174)

The California Supreme Court reversed. (*Property Reserve, supra*, 1 Cal.5th at pp. 168, 213.) It summarized the precondemnation and entry statutes section by section, explaining with respect to the entry procedures that the statutes (as reflected in sections 1245.030 and 1245.040[5]) required a deposit of probable compensation in the superior court for damage or the owner's interference with use, and implicitly contemplated a hearing and the property owner's opportunity to be heard on the petition. (*Id*. at pp. 175-176.) The court held the trial court thus properly held hearings on the Department's petition and afforded the owners the opportunity to participate. (*Id*. at p. 176.) The Supreme Court further pointed out that the statute (§ 1245.060[6]) gave the property owner

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5 Section 1245.030 provides that on a petition for an entry order, "the court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use. [¶] . . . After such determination, the court may issue its order permitting the entry. The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit with the court the probable amount of compensation." (§ 1245.030, subds. (b), (c).) Section 1245.040 authorizes the court on notice and hearing to modify any order under section 1245.030 and require the public entity to deposit additional funds if it determines the initial deposit is inadequate. (*Property Reserve, supra*, 1 Cal.5th at p. 176; § 1245.040, subds. (a), (b).)

6 Section 1245.060 subdivision (a) provides: "(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 [the Tort Claims Act presentation requirements], the owner may recover for such damage or

the right to recover damages if the entry caused actual damage or substantial interference with possession or use of the property. (*Ibid*.) Also, the trial court could require payment of the funds out of the deposited funds or if those funds were insufficient to pay the full amount of the award, the owner was entitled to a judgment against the public entity for the unpaid portion. (*Id*. at pp. 176-177.)

The court turned to the landowners' arguments that under *Jacobsen*, *supra*, 192 Cal. 319, which involved borings and excavations for a proposed reservoir site, the precondemnation entry and testing statutes authorized only innocuous entries and superficial examinations, and the Department had applied an unreasonably expanded interpretation of the statutes to authorize its proposed activities. (*Property Reserve*, *supra*, 1 Cal.5th at pp. 177, 180-181.) It rejected those arguments, holding as a matter of statutory interpretation and legislative intent that the current precondemnation entry and testing statutes were intended to apply to the types of activities proposed by the Department. (*Id*. at pp. 177, 184.) It observed the statutes' plain language, which included reference to "borings" (§ 1245.010), encompassed the Department's proposed testing activities and nothing in the statutory language indicated an intent to limit the statutes' application to innocuous or superficial surveys or testing: "The explicit listing of 'examinations, tests, soundings, *borings*, [and] samplings' [citation] without qualification

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interference in a civil action or by application to the court under subdivision (c)." Subdivision (c) of that section provides: "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 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." (§ 1245.060, subd. (c).)

reasonably suggests that the Legislature contemplated that the statute would apply to all of the designated testing activities that are reasonably necessary to determine whether the public entity should utilize its authority to acquire the property for the stated public purpose by use of eminent domain." (*Property Reserve*, at pp. 177-178.)

Reviewing *Jacobsen* in depth and the evolution of the precondemnation statutes since former section 1242 at issue in that case, the court explained further that the post-*Jacobsen* legislative history of the current statutes refuted the landowners' proposed interpretation. (*Property Reserve*, *supra*, 1 Cal.5th at p. 181.) Specifically, in response to *Jacobsen*, the Legislature in 1959 enacted a new entry statute, former section 1242.5, which addressed exploration to determine suitability as reservoir sites and "was intended to apply to the kind of deep drilling and excavations that are inevitably required in evaluating whether property is suitable for such a purpose." (*Property Reserve*, at p. 181.) In that statute, the Legislature compelled the public entity to obtain judicial authorization and deposit an amount sufficient to compensate the owner for any damage, thus overcoming the constitutional objections to such precondemnation testing activities expressed in *Jacobsen*, *supra*, 192 Cal. at pages 326-329. (*Property Reserve*, at p. 182.) Thereafter, the Legislature amended the statute to apply to the entries and activities of all public entities having the power of eminent domain. (*Id*. at p. 183.) This amendment followed a Law Revision Commission report that observed that precondemnation exploration of potential sites for other projects could involve potentially damaging activities, including drillings, borings, and the use of explosives. (*Id*. at pp. 182-183.) In 1975, the Legislature enacted the current precondemnation entry and testing statutes. (*Id*.

at p. 183.) This history, the Supreme Court concluded, "demonstrates a legislative intent to create a procedure under which a public entity that is considering acquisition of property for a public project can conduct the type of extensive investigatory testing and exploration that the *Jacobsen* decision concluded was not permitted under the entry statute in effect at that time." (*Property Reserve*, at p. 184.) Thus, it held the current statutes did not limit activities to those that were only innocuous or superficial, but are "properly interpreted to encompass the type and degree of precondemnation environmental and geological testing at issue here." (*Ibid*.)

The Supreme Court next addressed the constitutional questions under the federal and state takings clauses (U.S. Const., art. V; Cal. Const., art. I, § 19) and the Court of Appeal's conclusions that given the breadth and duration of the Department's environmental and geological activities, the precondemnation procedure, including the provision for statutory damages, was not sufficient to satisfy California Constitutional requirements. (*Property Reserve*, *supra*, 1 Cal.5th at pp. 185, 194, 203.) It concluded, as had the Court of Appeal (*id*. at p. 187, fn. 13), the landowners could not rest any challenge on the federal takings clause, which merely required payment of just compensation after a taking had occurred, because they had mounted their challenge before the Department had undertaken any activities and before any determination of damages. (*Id*. at pp. 185-187.) Under these circumstances, no court could decide that the available California procedures had not yielded just compensation so as to run afoul of the federal takings clause. (*Id*. at p. 187.)

As for California's takings clause, the court pointed out it applies to the "taking and damaging" of property and requires payment of just compensation ascertained by a jury *before* any taking or damaging. (*Property Reserve*, *supra*, 1 Cal.5th at pp. 187-188.) The court found significance in the second sentence of the clause providing that "[t]he 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." (*Id*. at p. 188, citing Cal. Const., art. I, § 19, subd. (a).) In part, it observed that the fact the California takings clause is interpreted to provide for an inverse condemnation action demonstrates that the clause does not require a classic condemnation action in every instance where a public entity engages in a compensable taking or damaging of public property. (*Id*. at p. 189.)[7] Precondemnation entry and testing procedures, the court observed, fall between a classic condemnation proceeding, where a public entity seeks to obtain title to property or a compensable property interest for construction of a public project, and an inverse condemnation action, where the entity does not intend to enter but nevertheless causes damage. (*Id*. at pp. 188-190.) "Here, the proposed precondemnation entry and testing activities upon the subject property are intentional, but the public entity is not seeking to obtain title to or exclusive possession of the property for a significant period of time. Rather, the public entity is seeking

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[7] "Most obviously, in the inverse condemnation context, a public entity has not been required to bring a condemnation action before undertaking activity that may possibly result in a taking or damaging of property. Instead, in that setting, the public entity satisfies its obligation under the takings clause by paying damages that are awarded to the property owner in a subsequent inverse condemnation action." (*Property Reserve*, *supra*, 1 Cal.5th at p. 199.)

temporary access to the property to conduct investigations that are needed to decide whether the property is suitable for a proposed project and should thereafter be acquired by the public entity. Furthermore, as in the inverse condemnation context, the public entity is not acting for the purpose of taking or damaging the private property at issue, and any loss suffered by the property owner is often an unavoidable consequence of the public entity's necessary exploratory activities." (*Id*. at p. 190.)

In view of these distinctions, the Supreme Court rejected the argument that the precondemnation entry and testing statutes violated California's takings clause as applied to the Department's proposed environmental and geological testing. With regard to the environmental testing, surveying and sampling, the court found it unnecessary to decide whether the trial court's order granted the Department a compensable temporary easement. Assuming without deciding it did so, the court held the precondemnation entry and testing statutes' procedures satisfied the requirements of the state takings clause as long as the statute was reformed to provide a property owner the option of obtaining a jury trial on the measure of damages. (*Property Reserve*, *supra*, 1 Cal.5th at pp. 196-197.) A classic condemnation action was not necessary and would be counterintuitive, according to the Supreme Court, given that the purpose of precondemnation activities was to decide whether the property was suitable and whether a classic condemnation action should be commenced, and in that setting, the public entity is not seeking to obtain legal title or exclusive possession for any significant period of time. (*Id*. at pp. 197-199.) "Instead, the public entity is seeking permission to enter the property and conduct specific activities for a limited period of time—activities that do not oust the property

owner from its ownership or possession of the property even though they may potentially cause some property damage or interfere with the owner's possession and use of the property." (*Id*. at p. 199.)

The Supreme Court stated that in the precondemnation context, the Legislature relied on the procedural approach set out in the second sentence of the state takings clause, and acting under the authority granted in that sentence, provided comparable protections to the property owner—institution of a judicial proceeding before entry, court authority to limit the possession to activities reasonably necessary to accomplish the public entity's purpose, a deposit of probable just compensation, and a procedure to obtain compensation for any losses—so as to satisfy the requirements of that clause. (*Property Reserve*, *supra*, 1 Cal.5th at pp. 200-202.) The court concluded that the Legislature did not violate the state takings clause by authorizing a public entity to proceed under the expedited precondemnation procedure, which it enacted to satisfy the constitutional flaws *Jacobsen* found in the prior statute, rather than through a more elaborate classic condemnation proceeding. (*Property Reserve*, at pp. 198, 202.) California constitutional requirements are satisfied "so long as (1) the public entity obtains a court order specifying the activities that may be conducted on the property and first deposits in court an amount that the trial court determines is sufficient to cover the probable compensation to which the property owner may be entitled for losses sustained as a result of the entry and testing activities, and (2) the property owner is entitled to recover damages for any injury to the property and any substantial interference with its possession or use of the property resulting from the public entity's activities." (*Id*. at

p. 202.)

Further, the Supreme Court held that the statutory damages set out in section 1245.060 provide a constitutionally adequate measure of just compensation under California's takings clause, even assuming an entry order might in some cases constitute a compensable temporary easement. (*Property Reserve*, *supra*, 1 Cal.5th at pp. 203, 204.) It explained that just compensation is the amount required to compensate the property owner for what the owner has lost, and determining that amount was not subject to a rigid or fixed standard, or a fair market value standard in all cases. (*Id*. at p. 204.) Because the precondemnation entry and testing statutes authorized only temporary and limited types of activities, which were further restricted by the individualized nature of each court order, there generally would not be a reliable and consistent means of establishing a fair market value for the particular easement at issue. (*Ibid*.) Nor would rental value be a valid measure of loss in addition to actual damages, since with respect to the environmental order at issue, the owner retained full possession and use of the property over the period covered by the order, notwithstanding the authorized testing activities, and thus such an award would be unjust to the public. (*Ibid*.) Rather, the court held "the compensation authorized by section 1245.060, subdivision (a)—damage for any 'actual damage' to the property and for 'substantial interference with the [property owner's] possession or use of the property'—appears on its face to be a reasonable means of measuring what the property owner has lost by reason of the specific precondemnation activities that are authorized by the trial court's environmental order." (*Id*. at p. 205.)

The Supreme Court agreed that the precondemnation entry and testing statutes were constitutionally deficient in that they did not grant a property owner the right to have a jury determine the amount of just compensation, a requirement of the California takings clause. (*Property Reserve, supra,* 1 Cal.5th at p. 208.) However, the court declined to hold the statutes unconstitutional on that ground, instead reforming them so as to afford the property owner the option of obtaining a jury trial on the measure of damages at the proceeding prescribed by section 1245.060, subdivision (c). (*Ibid*.) Doing so, the court held, was in keeping with the Legislature's intent to adopt a procedure that satisfied the California takings clause, and it would not undermine the purposes and policies of the precondemnation entry and testing legislation. (*Id*. at pp. 208-209.)

Finally, the Supreme Court addressed the Department's proposed geological testing, which, due to the hardened grout left on the property, the Court of Appeal had held amounted to a permanent per se taking of property under *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419 (*Loretto*), requiring the Department to commence a classic condemnation action. (*Property Reserve, supra,* 1 Cal.5th at p. 209.) Pointing out the landowner was entitled to be compensated for any interference with possession and use of the property, and for any actual damage caused by the boring and drilling, the Supreme Court disagreed with that notion. It first found it "doubtful" the boring and filling was properly characterized as a permanent occupation of property, and therefore a per se taking for federal constitutional purposes, in part because the Department would not retain any continuing interest in the grout after completion of testing. (*Id*. at p. 209.) Second, even if the grout were considered a permanent physical

occupation and a per se taking, an order authorizing the activity under California's precondemnation and testing statutes would not violate the federal takings clause, as the statutes provide a constitutionally acceptable procedure to recover damages for actual injury or substantial interference with possession or use caused by the continued presence of grout. (*Id*. at p. 211.) And third, even if the geological activities were similar to those at issue in *Jacobsen*, *supra*, 192 Cal. 319, an order under the current precondemnation entry and testing statutes would not violate California's takings clause, which did not always require a classic condemnation action before a public entity engaged in conduct that could result in a taking or damaging of property, and the Department was not seeking to obtain title to the property, permanently maintain holes there, or obtain exclusive possession of any portion for a significant period of time. (*Property Reserve*, 1 Cal.5th at p. 212.) Given the protections and deposit procedures set out in the current precondemnation entry and testing statutes, the California Supreme Court held the statutes satisfied the requirements of California's takings clause as applied to the Department's proposed geological testing. (*Ibid*.)

II. *The Precondemnation Entry and Testing Statutes Authorize District's Proposed Boring and Sampling Activities*

The first contention made by Young's is virtually identical to that made by the landowners in *Property Reserve*: that under *Jacobsen*, *supra*, 192 Cal. 319, the precondemnation entry and testing statutes "authorize privileged entries onto property only for 'innocuous' and 'superficial' inspections prior to condemnation" and the entry statutes must be applied within the confines of the federal and state taking clauses. It

maintains the statutes "cannot serve as an end run" around the California Constitution's prohibition against taking or damaging for public use without just compensation. Young's argues District's petition is an unconstitutional overreach because it gives it an "unfettered right to occupy the property in its entirety for a period of 60 days or more, all while drilling some 46 borings and an unlimited number of samples throughout the property, with no restrictions whatsoever on the time, place, equipment, safety protocols, or other components necessary to enable Young's . . . , or its tenant K-1, to use their property."

We observe preliminarily that District's proposed testing, while it includes bore holes created by drilling as much as 20 feet into the ground, is less extensive than the geological testing involved in *Property Reserve*.[8] Thus, we have no reason to factually distinguish the Supreme Court's analysis of this issue, which applies equally to the sampling and testing proposed by District in this case. As we have summarized above, the California Supreme Court squarely resolved Young's argument. Analyzing statutory

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8 We previously observed, and repeat here, that Young's mischaracterizes the timing and scope of District's work. Contrary to the assertion by Young's that the superior court's entry order "prevent[s] [it] from using the property indefinitely" or contains "virtually no restrictions on the access," the record shows District's proposed work is temporary and restricted in scope: taking only between eight and 10 business days to complete without totally occupying the property, as the work is conducted outside the building's footprint in a parking lot, with three persons boring a limited number of two-by six-inch holes for soil and groundwater sampling, which holes will be filled and restored with sand or grout at the conclusion of the tests. District does not claim any continuing interest or right to the property, and Young's is free to possess, access or dispose of the property (including the sand and grout used to fill the bore holes) and any portion of it after the completion of the work. Thus, the District's entry is strictly temporary for the purpose of conducting the designated tests and sampling.

language and legislative history since *Jacobsen* was decided, it rejected any suggestion that the language of the precondemnation entry and testing statutes limited testing activities to those that were only innocuous or superficial. (*Property Reserve, supra,* 1 Cal.5th at p. 184.) Rather, the current statutes "are properly interpreted to encompass the type and degree of precondemnation . . . testing at issue here." (*Ibid*.) We similarly conclude based on *Property Reserve* that District did not violate the precondemnation entry and testing statutes or overreach by using the precondemnation procedures to obtain authority to conduct the sampling and drilling proposed in this case.

Other assertions made by Young's fare no better. It asserts that *Jacobsen*'s holding was "reaffirmed" in *County of San Luis Obispo v. Ranchita Cattle Company* (1971) 16 Cal.App.3d 383. But the court in *Property Reserve* stated *Ranchita* "did not hold that 'entry upon private lands permitted by the Entry Statute cannot amount to anything other than such innocuous entry and superficial examination as would suffice for making surveys and maps.' " (*Property Reserve, supra,* 1 Cal.5th at p. 184, fn. 11.) Rather, the court in *Ranchita* was discussing an *access agreement* entered into by the parties, it "did *not* hold or suggest that when a public entity obtains a court order pursuant to the entry statute, a court may authorize only superficial examination or testing." (*Property Reserve,* at p. 184, fn. 11.)[9]

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9 Young's also mentions out-of-state authorities—including *Hendler v. United States* (Fed.Cir. 1991) 952 F.2d 1314—that require public entities to exercise their power of eminent domain before drilling or excavating on private property. The California Supreme Court pointed out that none of those jurisdictions had adopted a precondemnation statutory scheme with procedural protections comparable to the statutes

III. *The Order Authorizing District's Testing Under the Precondemnation Entry and Testing Statutes, as Reformed by* Property Reserve, *Does Not Violate California's Takings Clause*

By arguing that *Jacobsen* controls, Young's suggests that the precondemnation entry and testing statutes run afoul of constitutional requirements for takings by not providing for a classic condemnation action. To the extent Young's seeks to invoke the federal takings clause, however, the claim is not cognizable for the same reason explained in *Property Reserve*, as its challenge was made before District has undertaken any activities and before any determination of damages. (*Property Reserve*, *supra*, 1 Cal.5th at pp. 185-187.)

And with respect to the California Constitution, *Property Reserve* disposes of any such argument, that is, the state constitutional requirements are satisfied even assuming District's testing constitutes a taking or damaging of property similar to the activities in *Jacobsen*, *supra*, 192 Cal. 319.[10] As for District's entry to conduct sampling of

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at issue here. (*Property Reserve*, *supra*, 1 Cal.5th at p. 203, fn. 23.) And with respect to *Hendler* specifically, the court characterized its language as dicta, observing that the Federal Circuit had since stated *Hendler*'s holding was widely misunderstood, but instead was " 'unremarkable and quite narrow: [*Hendler*] merely held that when the government enters private land, sinks 100-foot deep steel reinforced wells surrounded by gravel and concrete, *and thereafter proceeds to regularly enter the land to maintain and monitor the wells over a period of years*, a per se taking under *Loretto*[, *supra*, 458 U.S. 419] has occurred.' " (*Property Reserve*, 1 Cal.5th at p. 211, fn. 30, quoting *Boise Cascade Corp. v. United States* (Fed.Cir. 2002) 296 F.3d at p. 1357.) As in *Property Reserve*, *Hendler*'s facts are "quite different and distinguishable from [District's] proposed geological activities . . . ." (*Property Reserve*, at p. 211, fn. 30.)

10 Young's does not squarely argue that its property will be damaged within the meaning of the California Constitution.

materials, as *Property Reserve* states, California's taking clause does not always require a public entity to institute a classic condemnation action before it engages in conduct that may result in a taking or damaging of property for which just compensation must be paid under the state takings clause. (*Property Reserve*, *supra*, 1 Cal.5th at pp. 189, 198-199, 211-212.) And with regard to its drilling of bore holes, District, like the Department in *Property Reserve*, "is not seeking to obtain title to private property, to permanently maintain bored holes on the landowners' property, or to obtain exclusive possession of any portion of the property for a significant period of time." (*Id*. at p. 212.) Thus, California's takings clause "does not preclude the Legislature, in the precondemnation entry and testing context, from authorizing a public entity to proceed pursuant to an expedited precondemnation procedure rather than through a more elaborate classic condemnation proceeding." (*Id*. at p. 198.)

Young's does not does not contend the superior court's order fails to grant the procedural protections set out in the current precondemnation statutes, and the record establishes they were afforded below: District obtained a court order following notice and a hearing in which Young's was permitted to participate and given an opportunity to object to District's proposed activities, District deposited in advance of its testing an amount the trial court determined would cover probable compensation for losses Young's might sustain, and Young's is entitled to recover damages for injury or substantial interference with its possession or use of the property. (*Id*. at pp. 202, 206.) Because the court in *Property Reserve* reformed the precondemnation entry and testing statutes to add the option of a jury trial at the stage of the proceeding contemplated by section 1245.060,

subdivision (c), Young's will be permitted to opt for a jury determination of any such damages, meeting California's constitutional requirement of a jury determination of just compensation. (*Id*. at p. 208.) *Property Reserve* held "the precondemnation entry and testing statutes—by requiring the Department to obtain a court order prior to undertaking the geological testing activities, authorizing the trial court to limit the activities in a manner that protects the interests of the property owner, requiring the Department to deposit in court an amount that the court determines is sufficient to cover the damages that may result from the authorized activities, and authorizing a landowner to recover damages for any actual damage to the property or substantial interference with the owner's possession and use of the property resulting from the Department's geological activities—satisfy the requirements of the California takings clause as applied to the proposed geological testing." (*Id*. at p. 212.) *Property Reserve* dictates that the court's order in this case as to District's drilling and boring activities satisfies the requirements of California's takings clause. (*Ibid*.)

IV. *Claim of Per Se Taking*

Finally, as the landowners did in *Property Reserve* with regard to the District's geological testing (*supra*, 1 Cal.5th at p. 211, fn. 30), Young's contends District's proposed testing—both its boring and sampling—constitutes an "obvious 'permanent physical occupation' " under *Loretto*, *supra*, 458 U.S. 419. In *Property Reserve*, the California Supreme Court rejected the argument for several reasons. We do so here as well.

As the Supreme Court explained, *Loretto* involved a statute requiring a residential landlord to permit a cable television company to install cables and a cable box on the landlord's property; the United States Supreme Court majority "drew a distinction 'between a permanent occupation and a temporary physical invasion' of property [citation], and held that 'when [a] physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.' [Citation.] In that case, because '[t]he installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building' [citation], and because '[s]o long as the property remains residential and a [cable] company wishes to retain the installation, the landlord must permit it []' [citation], the high court found that the required installation amounted to a permanent physical occupation and thus constituted a taking of property without regard to the economic impact of the requirement." (*Property Reserve*, 1 Cal.5th at p. 210.)

Here, District's activities are comparable to, but involve a lesser intrusion than those proposed by the Department in *Property Reserve*. District's testing involves sampling minimal amounts of building surfaces (described by Bestard as "less than the size of a postage stamp"), disturbing two- to six-inch diameter portions of the land in order to take soil and groundwater samples, and refilling the holes with sand or bentonite grout. The testing does not require access to the entirety of the property, and will be completed in a maximum of 10 business days.

Under the circumstances, we adopt *Property Reserve*'s analysis to likewise reject the characterization of these actions as involving a permanent physical occupation within the meaning of *Loretto*: "Unlike the cable box in *Loretto*, which was owned and

controlled by the cable company and which the property owner was not permitted to remove, [District] will retain no continuing interest in the grout after its testing activities are completed. If [Young's] chooses, it may remove the grout at any time and replace it with any substance it desires (so long as, of course, the substance complies with any applicable health and water regulations). . . . [T]he *Loretto* decision cannot properly be interpreted to mean that a public entity that, after digging up soil or conducting other activities on private property that temporarily alter the property's condition, returns the property to the same or a comparable state as the property previously enjoyed, is to be viewed as having undertaken a permanent physical occupation of the property that amounts to a per se taking of a property interest. A public entity's restoration of property to the equivalent of its prior state is not the same as a public entity's authorizing a third party to attach a structure or fixture to a property owner's property when the structure or fixture continues for an unspecified period to be controlled by the third party. Because here [District] would not retain possession of or any interest in the filling material after its testing is completed, the proposed . . . activities do not involve any continued or permanent occupation of any portion of the landowners' property that would effectively impinge upon the owner's right to possess, use, or control the area in question." (*Property Reserve*, *supra*, 1 Cal.5th at pp. 210-211.) Thus, "[u]nder these circumstances, [District's proposed testing] would not constitute a permanent physical occupation of [Young's] property within the meaning of the *Loretto* decision." (*Id.* at p. 211.)

And as *Property Reserve* further concluded, even if the extraction and testing of building material samples or placement of grout is somehow viewed as a permanent

physical occupation, the court's order authorizing such activity still does not violate the federal takings clause. "[B]ecause the precondemnation entry and testing statutes provide a procedure by which a property owner may recover damages for any actual injury or substantial interference with the property owner's possession or use of its property that is caused by the continued presence of the grout on its property, the statutes do not on their face violate the federal takings clause." (*Property Reserve*, *supra*, 1 Cal.5th at p. 211.)

Based on the foregoing, the superior court did not err by issuing its order under the precondemnation entry and testing statutes authorizing District to enter the property and conduct its proposed testing under the conditions specified therein.

V. *Amicus K1's Arguments*

This court granted K1 leave to file an amicus curiae brief on behalf of Young's. However, we address only those arguments that do not expand on the appellate issues raised by Young's. Thus, to the extent K1 seeks to raise the necessary party issue or its own interests, we will not consider the arguments. (See *Connerly v. State of California* (2014) 229 Cal.App.4th 457, 463, fn. 6, citing *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1047, fn. 12.)

Our conclusions above resolve K1's amicus argument that District's geological activities constitute a permanent physical occupation and thus a per se taking under *Loretto*, *supra*, 458 U.S. 419. K1 additionally argues that the order grants District a "profit à prendre," that is, an easement conferring the right to remove some product or resource from the land. "A *profit à prendre* has been defined as the 'right to make some use of the soil of another, . . . and it carries with it the right of entry and the right to

remove and take from the land the designated products or profit and also includes right to use such of the surface as is necessary and convenient for exercise of the profit.' " (*Kennecott Corp. v. Union Oil Co.* (1987) 196 Cal.App.3d 1179, 1186.) As this court explained in *Kennecott*, such a profit interest "is a means by which a party may explore for and extract resources *until it chooses in its sole discretion to surrender its right to do so*." (*Kennecott Corp*, at pp. 1187-1188, italics added.) Here, the District's entry and "extraction" of materials is not so unlimited under the superior court's entry order, which incorporates District's description of the nature, scope and timing of the entry and testing in its petition.

And we reject K1's argument that we must construe the superior court's order as "permitting 'the most injurious use of the property reasonably possible.' " K1 maintains that if we construe the order in such a way, "there is nothing to stop the District from attempting to drill within the building where K1 operates its go kart racing business." For this proposition, K1 relies on *County of San Diego v. Bressi* (1986) 184 Cal.App.3d 112, which discusses a jury's determination of damages in a condemnation action: "The jury in a condemnation action must '. . . once and for all fix the damages, present and prospective, that will accrue reasonably from the construction of the improvement and in this connection [the jury] must consider the most injurious use of the property reasonably possible.' [Citation.] In determining the most injurious use of the property reasonably possible, the jury must consider the entire range of uses permitted under the resolution of necessity." (*Id*. at p. 123, italics omitted.) *Bressi* was not decided in the context of the precondemnation entry and testing statutes, under which the court determines the

probable amount of compensation for associated injuries from the entry; the case addressed the respondent's evidentiary argument as to what evidence the jury could consider on retrial in a county's proceeding to condemn certain easements. (*Id*. at pp. 121-124.) *Bressi* has no bearing on the issues presented in this case.

DISPOSITION

The petition is denied. The stay issued on July 1, 2015, is vacated. San Diego Unified School District shall recover its costs of this writ proceeding.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.