



What is Better?

Acquisition by Purchase Agreement or Final Order of Condemnation

part 1

BY MICHAEL F. YOSHIBA, ESQ.

This is a three-part series exploring the legal complexities of acquisition by 1) purchase and sale agreement, 2) final order of condemnation, and 3) appropriate situations for using each option. This first article examines legal complexities in acquisition by purchase and sale agreements.

“Wow, that was easy!” – Property owner’s acceptance of the first written offer

You receive a call from the property owner responding to the first written offer letter. They agree to meet, and you instantly charm them with your bubbly personality, knowledge of the project, the appraisal process and fair market value. Negotiations went much better than expected and the property owner immediately agrees to sign the “acceptance” page at the end of the offer letter and hands it back to you. However, negotiations are quite finished because the agreement is not final until you’ve prepared and get the property owner to agree and execute a purchase and sale agreement. The original “acceptance” is not a binding commitment to sell their property to the agency. The legal effect of that “acceptance” is more akin to a promise [without consideration] to agree... a promise that is expressly conditional upon a later agreement on the terms of formal written purchase and sale agreement.

Purchase and Sale Agreement

Although the agency and seller have agreed on the purchase price, a real estate transaction in an eminent domain setting requires terms that protect both the property seller and the buyer agency. This is especially true where a property seller is not represented by legal counsel. Purchase and sale agreements for acquisition of real property contain terms that specify the rights being acquired, the agreed consideration, both monetary and specific performance and conditions to the closing of the transaction that must be satisfied before the property rights can be transferred. Some common conditions to completing the transaction: no hazardous materials or contaminated soil found upon inspection, clearance of all lender and lienholder contractual obligations, verified proof of ownership and no existing commitments to sell the property to others.

You will find a mutual waiver of rights to later bring suit and current and future release of legal liabilities relating to this proposed transaction. Where property owners are not represented by an attorney, the agency must take great care to allow the property owners ample time to consider and seek legal counsel before signing documents. Without this step, property owners can later claim that the agency was in a superior bargaining position and tailored a contract that specifically denied the property owner of valuable rights or waivers of rights that they did not understand. The agreements include binding attorney fee and cost recovery provisions and also directives to arbitration or mediation in lieu of a court remedy. The purchase and sale agreements necessarily include legal descriptions with terminology that are sure to baffle even the most educated property owners.

Completing tasks required in real estate transactions are invariably assigned to an escrow, a neutral company or individual. This is necessary because the buyer and seller have competing and conflicting interests and thus the parties need someone to help complete the transaction. Someone to gather all the items required to be exchanged and competently complete the agreement terms in the specific manner and the agreed order of completion. Most often, you will find that the agency prepares one document called a Purchase and Sale Agreement and Escrow Instructions, rather than preparing separate documents. Once both parties agree and sign the Purchase and Sale Agreement and Escrow Instructions, they will give the completed document to the escrow agent for processing.

Escrow Instructions

Opening an escrow is certainly not the end of the tale. The escrow agent is tasked with executing the instructions of the parties and within the stated timeframe, typically 60 or 90 days. The escrow agent first makes a checklist of the tasks needed to complete the transaction and the contractual obligations of the parties.

A major legal hurdle for the escrow agent is identifying all title “exceptions,” persons or entities that have actual or claim of rights to the property or upon the sale of the property. Title exception holders

are most often mortgage and judgment lienholders. For each title exception, the escrow agent is required to contact each title exception holder to determine whether they will make a demand for all or part of the monetary compensation being offered to the property owner. It should be no surprise that lenders are notoriously bureaucratic, and it is difficult to find the appropriate contact person, making resolution is even more challenging.

Many lenders are out of state and in different time zones. Those lenders contacted often delay their decision-making by referring it to their legal department or outside counsel. Involving the lender's attorney, now morph into demands for reimbursement of attorney fees and processing costs, even in those situations where the lender is willing to execute a waiver. Repeat this scenario for every title exception holder that the escrow agent is able to contact. For those title exception holders that cannot be contacted, the agency must decide whether to take title subject to the exception or extend escrow until that interest is resolved.

An extended escrow results in potential delays in starting the agency's project. One solution to escrow delays is to get a Right of Entry from the property owner before close of escrow.

Right of Entry Before Close of Escrow

Agreements for a right of entry before close of escrow is both relieving and maddening. This is another complex written agreement that also needs to be reviewed and approved by the property owner. It is specific in identifying conditions for early entry onto the property, start time of project work, limitations on work hours and area being impacted, compensation, testing, and liability for environmental report findings. Furthermore, it is difficult to anticipate what remedies are available to the property owner in the event the escrow does not close, and the Purchase and Sale Agreement and Escrow Instructions is cancelled. This form of agreement is necessarily wordy and sometimes as complex as a Purchase and Sale Agreement.

Next in article, Part 2, we will explore the Legal Complexities in Acquisition by Final Order of Condemnation. 🌟



Michael F. Yoshida is a shareholder in the Eminent Domain and Litigation Departments of the Los Angeles law firm, Richards, Watson & Gershon.