



What is Better? part 3

Acquisition by Purchase Agreement or Final Order of Condemnation

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“You are free to choose, but not free from the consequences of your choices”

— Unknown author

The final part three of 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 third article examines factors to consider when selecting between options: 1) time, 2) complexity, and 3) client.

Time

Calculating how long it will take to acquire property by purchase and sale agreements or condemnation will be, at best, an educated guess. You are at the mercy of the diligence of the escrow agent and the court clerk and judge's calendar. Clearing liens recorded against the property takes an inordinate amount of effort and time, whether in escrow or in a condemnation lawsuit. Holdover tenancies from uncooperative occupants failing to vacate per contract termination clauses lead to delays in close of escrow when a precondition to closing is that the property be tendered vacant. Tenants failing to abide by a court order of prejudgment possession to the agency is equally problematic. It is not uncommon for tenants subject to a termination of occupancy to file an action in bankruptcy. Even if the tenant never proceeds past the initial bankruptcy filing with documents identifying interested parties, assets and outstanding debt balances, there will be inevitable delays to escrow closing and any court-approved eviction.

Delays in escrow closing affect agency funding reimbursement availability, construction contract requests for proposals/bids. Correspondingly, there will be delays in contractor selection and the start of the construction project. Coordination of the time window of the secured orders for possession with uncompleted purchase and sale agreements are highly problematic. The window for contractor use of acquired temporary construction easements won't match the timing of any uncompleted transactions, creating construction schedule conflicts for the agency and contractor. The inherent uncertainty of open-ended escrow and condemnation case processes are cost accelerants and time thievery.

Complexity

Acquisitions by condemnation lawsuit are complex and nuanced but much more predictable. On occasion, the condemning agency must navigate through the process of attempting to serve corporate entities having several layers of shell companies with similar but different legal names. The differences between LLC, Inc., DBA, APC are small but significant. Similarly, service upon a common-named individual that lists themselves in recorded business documents as Mike Smith, but whose legal name is Michael Smith requires extra investigation and often multiple attempts at service of process.

Service of process upon State and federal agencies with property interests requires diligence and more often trial and error. Each agency branch has a very specific service address and designated recipient for accepting complaints in condemnation. Some accept and respond to "misdirected" legal documents, others let the documents languish unattended.

Purchase and sale agreement transactions are preconditioned upon the proper identification of legal ownership interest holders and signatories. We've encountered unresolved estates needing to be cleared by probate concerning long-deceased owners with an unresolved current owner or trustee identification. Property interest transfers, by escrow or the court, are subordinate to legal proceedings

involving divorce, bankruptcy, corporate dissolution, quiet title and unlawful detainer. Voluntary purchase and sale agreement transactions do not typically take precedence over the aforementioned active court cases.

Client

One absolute is that I've never encountered a public agency client that prioritized and preferred condemning a property instead of an acquisition by voluntary agreement. In California, public agencies require a two-thirds majority vote to adopt a resolution of necessity. Therefore, public agencies of five decision makers require a minimum four-fifths vote, panel of seven needs five-sevenths and so on, to approve a resolution of necessity. Most public agencies have never voted to adopt a resolution of necessity to condemn property rights. The notion of holding a public hearing advocating to involuntarily take property rights is uncomfortable at best when presented for consideration and vote at an openly hostile public hearing.

Public agency voting members invariably prefer offering excessive compensation or proposed project design changes than voting to condemn property rights. Mutually agreed compensation amounts must be balanced against excessive amounts that appear to be gifts of public funds. Just compensation settlements must be based upon competent appraisal information by qualified appraisers.

Epilogue

A final order of condemnation is the necessary last lawsuit step in providing actual legal notice of the public agency's property rights acquisition and provides a predictable conclusion to the acquisition process. Purchase and sale agreements with an escrow to complete the transaction without a resolution of necessity hearing, is the definitive client-preferred acquisition method. However, time, complexity and client preferences are the final arbiters of which option is most appropriate.

As always, I'm hoping this series was helpful and provided some insight on advantages and disadvantages of these two acquisition options. If you have any questions or comments, send me an email. ✉



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