Off-Site Public Improvements as a Map Condition: Negotiating an Off-Site Acquisition Agreement and Litigating the Developer-Funded Eminent Domain Case

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California law grants local public agencies the ability to impose conditions on private development requiring the construction of public improvements located within land not owned by the developer. Because private parties cannot generally condemn property, public agencies may condemn on the developer's behalf so that the developer may complete the required improvements, while the developer funds the acquisition costs. The agency and developer, who may be locked in conflict regarding issues associated with the proposed development, become strange bedfellows in their shared interest of acquiring the property necessary to construct the required public improvements. Still, conflicts often arise during this property acquisition process. This article identifies issues that often arise in such circumstances, and suggests various means of quelling conflicts before the shared pursuit of completing the off-site improvements mutates into a venue for dispute between the agency and developer.

THE SUBDIVISION MAP ACT

California's Subdivision Map Act, Government Code Section 66410 et seq. is the "primary regulatory control governing the division of property in California."[1] Under the Map Act, local public agencies must, by ordinance, regulate and control the design and improvement of common interest developments, as well as subdivisions that require a tentative and final or parcel map.[2]

Tentative tract maps are typically approved with a long list of conditions of approval. Such conditions of approval primarily list and describe specific public improvements. Generally, public improvements [3] are required to mitigate the impacts created by the arrival of new residents into the community.

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An approved or conditionally approved tentative map expires within two years after approval,[4] though it may be extended upon application by the subdivider.[5] Notwithstanding that a tentative tract map may be in place for several years, moving from an approved tentative tract map with unfinished conditions of approval to an approved final map is an important step in the development process. Unlike the tentative map, final maps have no expiration date and are recorded with the local county recorder's office. For the most part, approval of a final tract map is ministerial,[6] as long as certain requirements are met. First, the final map must conform to both the requirements under the Map Act and local subdivision ordinances applicable at the time of approval of the tentative map. Second, all conditions of approval for the tentative map must be complete in order for the final map to be approved.[7]

SUBDIVISION OFF-SITE IMPROVEMENT AGREEMENT

Government Code Section 66462 applies when conditions of approval are incomplete at the time the final map is submitted to a public agency for approval. Under the Map Act, if tentative map conditions of approval are not yet satisfied, the legislative body can require the developer to enter into a Subdivision Improvement Agreement as a condition precedent to approving the final map.[8] The Agreement requires the developer to complete all remaining conditions of approval and public improvements at the developer's expense within a specific time period.[9] Such an agreement benefits both parties because it allows the public agency to approve the final map even if all public improvements imposed as conditions of approval are not yet completed, and allows the developer to complete public improvements after final map approval.

Section 66462.5 governs the special situation where a tentative tract map condition of approval requires that the public improvement occur "off-site" (i.e., on land not owned by the developer or the local agency).[10] For example, a condition of approval may require the construction of a road primarily located on developer-owned land, but a portion of the road may cross over property owned by a third party due to design or alignment issues.

Section 66462.5 provides that, upon the developer submitting the final map to a public agency for approval, a public agency may not refuse approval of the final map simply because the developer failed to complete off-site public improvements.[11] Instead, within 120 days of filing the final map, the public agency must acquire the off-site land by negotiation, or commence eminent domain proceedings for an interest in the off-site land that allows the improvements to be made.[12] If no such action is taken within 120 days, the condition for off-site improvement is deemed to be waived.[13] To avoid this 120-day time limitation, Section 66462.5 allows the public agency to require the

developer to enter into an “off-site” acquisition agreement, obligating the developer to complete the off-site improvements following the agency’s acquisition of the necessary land.[14] The public agency may recoup costs from the developer equal to the amount that the agency spends to acquire the property.[15]

The case of *Hill v. Clovis* (2000) 80 Cal.App.4th 438 is the only court decision that analyzes Government Code Section 66462.5’s “off-site” acquisition agreement framework, but it offers no clear guidance for the contents of these agreements. Instead, the *Hill* court interpretsed Section 66462.5 as requiring an assumption that both the public agency and developer are “sophisticated parties capable of protecting their own interests” in coming to “mutually agreeable terms” governing the completion of the required improvements after approval of the final map.[16] Such terms thereafter convert the public agency and developer “into business equals bound by a contract negotiated at arms’ length.”[17] In other words, by entering into the contract, the parties move their relative obligations from the bounds of the Subdivision Map Act into the realm of mutual consent, governed by the law of contractual interpretation. Therefore, it is important to enter a well-executed and intelligently written agreement because courts later assume that parties were capable of understanding and consenting to the terms. The remainder of this article addresses issues that the parties should consider when drafting any off-site improvement agreement to avoid the potential for developer/agency conflicts that may arise once the agency’s acquisition process is underway.

ESSENTIAL TERMS

Certain recitals should be included in even the simplest off-site acquisition agreement. Essential recitals include the following information: (1) the specific condition(s) of approval requiring off-site acquisition; (2) a precise description of the property to be acquired; (3) a description of the developer’s attempts and failure to acquire the property; and (4) written demand and renewal of request for acquisition under Section 66462.5.

Because eminent domain authority is a core governmental power, the agreement should also clarify that the developer-funded acquisition does not usurp the authority and discretion of the public agency’s council or board to make the findings necessary to proceed with eminent domain to acquire the property. A public agency may proceed with eminent domain only after it adopts a resolution of necessity following a hearing at a public meeting.[18] At that hearing, the public agency council or board may adopt a resolution of necessity only after it finds and determines that, *inter alia*: (1) the public interest and necessity require the proposed project; (2) the proposed project is planned or located in the manner that will be most compatible with

the greatest public good and the least private injury; and (3) the property described in the resolution is necessary for the proposed project.[19] Appropriate recitals should therefore be made in the off-site acquisition agreement clarifying that the agreement is not an attempt to make findings necessary to adopt a resolution of necessity, and that the council or board retains its discretion to make such findings at a future hearing. Not only will these provisions help to inform the council or board, but they are also valuable to help avoid any right-to-take challenges that may arise on grounds that the adoption of the resolution of necessity was a predetermined result.[20]

Because there is no guarantee that the agency council or board will approve the condemnation, the off-site acquisition agreement should specify that any failure to adopt the resolution is not a breach of the agreement. Oftentimes, public agencies will also demand that language be included in the agreement indicating that failure to adopt a resolution of necessity may not be deemed a waiver of the off-site condition requiring the improvement's construction. Such a provision has not, however, been tested in a published case. On the one hand, the *Hill* case appears to allow such a provision on the assumption that the provision was a mutually-agreeable term executed by sophisticated parties. On the other hand, such a term could effectively put the project in perpetual limbo, allowing the public agency to delay final map approval without affording the developer the opportunity to acquire the property necessary for the off-site improvement. In such circumstances, such a provision could result in the developer filing an inverse condemnation action against the public agency.

Since a contested condemnation process will result in litigation, both the agency and developer should include language in the off-site acquisition agreement anticipating such circumstance. For example, the agreement should specify whether public agency counsel must be used, or whether the developer is entitled to participate in the decision to retain eminent domain counsel. More importantly, the agency and developer should reach an understanding in the agreement on the role the developer may play in the litigation. For example, the agreement should set forth whether the developer may assist in the strategic decisions in the litigation related to discovery, law and motion, and the retention of expert witnesses. Most often, public agencies prefer to insist that condemnation counsel retain sole and unfettered discretion to direct all strategic litigation decisions. Nevertheless, the agreement may include provisions allowing the developer to consult with condemnation counsel, or at the very least be apprised of the matter's status (either orally or in writing). The parties should also consider whether to grant the developer decision-making authority over any appeals.

Because Section 66462.5 allows the public agency to recoup the off-

site property acquisition costs from the developer,[21] the off-site acquisition agreement should define precisely what “costs” the agency seeks to recoup, as well as set forth the manner and frequency of repayment. Recoverable costs generally include just compensation for the property and any damages to the remainder, plus any and all litigation costs, relocation expenses,[22] and attorney’s and expert’s fees related to the eminent domain action (both agency’s and property owner’s), and may additionally include staff time. It is recommended that the agreement state that the developer is liable for such costs, whether the property is acquired or not, and even if the resolution of necessity is not adopted. A developer with an established relationship with a public agency may be successful in negotiating a pay-as-you-go approach. However, the preferred approach by many public agencies is to require an initial retainer consisting of both the initial estimate of the property’s value as well as a reasonable estimate of the litigation costs, which may be increased on request as the litigation progresses.[23] In some instances, the agency may also insist on having the developer obtain a letter of credit or other similar means of securing payment.

For a variety of reasons, often related either to the acquisition costs of the property or issues related to the overall development, the developer may wish to terminate the acquisition proceedings. To account for this scenario, the off-site agreement should include a recital stating that developer’s termination of acquisition proceedings will not waive the condition of approval. Furthermore, the agreement should explain that the developer is liable for any and all damages related to abandonment of eminent domain proceedings.[24] The agreement should also contain provisions obligating the developer to continue to pay for the acquisition costs in the event that the public agency is not able to abandon the condemnation proceedings.[25]

DISCRETIONARY TERMS

In addition to the essential terms, the parties may wish to address the following additional issues in their off-site agreement to comprehensively address both the agency’s and developer’s expectations about the property acquisition process. Such issues include the type and frequency of status reports to the developer, developer’s access to litigation and work-product materials and attorney bills, indemnity, settlement, and confidentiality.

Typically, when retaining litigation discretion, public agencies nevertheless allow for a certain degree of transparency regarding the acquisition process by granting the developer access to status reports and litigation materials and other attorney work-product. Additionally, some developers are allowed access to the actual attorney billing related to the eminent domain proceedings. It is generally a safe practice to include provisions that describe when status reports and

copies of litigation materials, including attorney bills, will be delivered to the developer. While automatic delivery is an option, it is generally not a good idea, as any failure to be proactive on the agency's part could give rise to the agency's liability under the agreement. A better alternative is to provide the developer with such materials only on demand.

Typically, the ultimate approach that public agencies take toward off-site acquisition agreements is to ensure that the agency incurs no expenses or other liability of any kind when acquiring property on the developer's behalf. Therefore, it is recommended that the agreement include indemnification provisions that (1) hold the public agency harmless from third party claims arising from the steps taken by the agency to acquire the off-site property; (2) hold the agency harmless from third party claims related to developer breaches of the off-site development agreement; and (3) hold the agency harmless from claims by the developer. In this regard, the agency may wish to consider imposing a bond or undertaking on the developer to ensure the agency is protected, allowing the agency to increase the amount upon the agency's discretion.

At the outset, any portion of the agreement pertaining to settlements should include a recital that any settlement ultimately requires council or board approval, and that such power cannot be delegated. Beyond that, there are three basic approaches to drafting terms related to settlement. The first approach is where the settlement decision is the sole and exclusive responsibility of the public agency. No notice to the developer is required, and the agency retains exclusive authority to negotiate and consummate an acquisition above the amount of the agency's appraised value. This approach, however, has the potential for problems if the developer ultimately complains about the price.

The second approach is a modified version of the first. Under the second alternative, a developer is entitled to notice of settlement proposals and may provide comments. However, final discretion remains vested with the agency. Though the developer may find some comfort in knowing it has an opportunity to be heard on the matter, this approach still does not completely eliminate the risk of dispute. Indeed, the right to comment without any final say may instead create its own set of problems regarding the degree of deference to which the council or board should give to the developer's opinions. (does this completely eliminate risk of dispute with the developer on the price? Probably not.

The third approach is to require developer approval prior to presentation of the settlement proposal to the council or board. Under this scenario, the agreement should include a recital that the developer's rejection of the settlement is not grounds for waiver of the development condition. The public agency should also include in the

agreement a special recital explaining Section 1250.410 of the Eminent Domain Law. Section 1250.410 mandates that, 20 days before the valuation trial in an eminent domain case, the condemnor and owner must exchange final offers and demands.[26] If the court later determines that the condemnor's offer was unreasonable and the owner's demand was reasonable, the owner may be awarded its litigation expenses.[27] Therefore, it is in the developer's interest that the agreement include a provision showing that the developer understands the potential for liability if the developer fails to be reasonable.

Where the parties agree to allow developer participation in any eminent domain litigation, an interesting issue arises as to whether the attorney work-product or attorney-client privileges protect developers communications with agency's condemnation counsel. Since the public agency and developer have a common interest in the nature and result of any eminent domain action, it appears reasonable for the agency and developer to argue that the common interest doctrine protects their communications with agency counsel.[28] To advance such an argument, however, there must be a reasonable expectation of privilege regarding shared information.[29] Therefore, it is recommended that the off-site acquisition agreement include language akin to a joint defense agreement, acknowledging the common interest and including agency and developer promises to keep information shared with condemnation counsel confidential to the extent permitted by law.[30] However, the parties cannot assume that the joint defense agreement will withstand scrutiny as currently, there is no case law upholding such agreementsholding that an agency may share otherwise protected information with a developer without waiving the privilege.[31]

CONCLUSION

California law allows local public agencies and developers to negotiate an agreement setting forth their relative rights in an off-site acquisition scenario. However, the Legislature offers no guidance as to what such an agreement should entail, leaving the terms to be mutually agreed upon by the agency and developer, parties who the Court of Appeal described as "sophisticated" and "capable of protecting their own interests."32 In essence, the Legislature has chosen not to regulate any further in this field, instead allowing the laws of contractual interpretation to govern any disputes that subsequently arise between the agency and developer during the property acquisition process. The relationship between the developer and agency can become strained, especially in circumstances where the litigation costs or the potential for an adverse jury award become greater than the developer initially expected.,. This, of course, does not occur until after significant time has passed following the drafting of the off-site acquisition agreement. Both the agency and developer

should take care to clearly set forth their relative rights and expectations prior to initiating the condemnation process. Failure to do so may result in unnecessary complications in the relationship between the agency and developer during the overall condemnation process and afterwards.

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Notes:

[1] Hill v. Clovis (2000) 80 Cal.App.4th 438, 445.
[2] Cal. Gov. Code § 66411. All citations are to the Government Code unless otherwise specified.
[3] Public improvements often include "traffic controls, street interchanges, flood control or storm drain facilities, sewer facilities, water facilities, and lighting facilities." Cal. Gov. Code § 66452.6(a)(3).
[4] Cal. Gov. Code § 66452.6(a)(1).
[5] Cal. Gov. Code § 66452.6(e). Acknowledging the impact of the recession, the State Legislature has adopted, and may continue to adopt, a series of automatic extensions of time for tentative tract maps. Beginning in 2008, the Legislature adopted SB 1185 (Lowenthal) which extended a tentative map's expiration date by one year so long as the map would not expire before January 1, 2011. SB 1185 also increased the time for local discretionary extensions for tentative maps from five to six years. Similarly, in 2009, the Legislature adopted AB 333 (Fuentes). Piggybacking off of the provisions added by SB 1185, AB 333 extended a tentative map's expiration date from one year to two years for maps that had not expired as of the date of the bill's passage, and that would expire before January 1, 2012. Most recently, in 2011 the Legislature passed AB 208 (Fuentes), which granted an additional two-year extension to tentative maps that had not expired as of AB 208's passage date, but that were expected to expire before January 1, 2014.
[6] See generally Cal. Gov. Code § 66458 (directing legislative body to

approve final map, so long as certain requirements are fulfilled).
[7] Cal. Gov. Code § 66458(a).
[8] Cal. Gov. Code § 66462(a).
[9] See Cal. Gov. Code § 66462. The developer must post adequate security to guarantee performance of the Agreement. Id. sub. (c).
[10] See Cal. Gov. Code § 66462.5.
[11] Id.
[12] Id. sub. (a).
[13] Id. sub. (b).
[14] Cal. Gov. Code § 66462.5.
[15] Cal. Gov. Code § 66462.5(d).
[16] Hill v. Clovis, supra, at 449 (citing Cal. Gov. Code § 66462(a)(1)).
[17] Id., at 449.
[18] Cal. Code Civ. Proc. § 1240.040.
[19] Cal. Code Civ. Proc. § 1245.235(b).
[20] See Redev. Agency of City of Huntington Park v. Norm's Slauson (1985) 173 Cal.App.3d 1121, 1125-27.
[21] Cal. Gov. Code § 66462.5(d).
[22] See generally Cal. Gov. Code §§ 7260-77; 49 Code Fed. Regs. Part 24.
[23] See, e.g. Hill v. Clovis, supra, at 440-41 (establishing one large deposit to be adjusted once actual acquisition costs were determined).
[24] Cal. Code Civ. Proc. §§ 1268.510; 1268.610.
[25] Cal. Code Civ. Proc. §§ 1268.510(b) (granting court discretion to set aside voluntary abandonment on estoppel theory).
[26] Cal. Code Civ. Proc. § 1250.410(a).
[27] Id. sub. (b).
[28] Oxy Resources California LLC v. Superior Court (2004) 115 Cal.App.4th 874, 888-890.
[29] Id. at 891.
[30] Id.
[31] See iId. at 888 ("[t]here is little California case law discussing the 'common interest' or 'joint defense' doctrine"). To preserve the confidentiality of protected information disclosed to a developer, the court must find the developer's involvement reasonably necessary to further the