

**TOWN OF
APPLE VALLEY, CALIFORNIA**

AGENDA MATTER

SUBJECT ITEM:

PROPERTY ACQUISITION POLICIES AND PROCEDURES

SUMMARY STATEMENT:

At the meeting of May 12, 2009, councilman Sagona, with the consensus of the town Council, recommended that an item be agendized to discuss the Town's policies and procedures for real estate purchases. It was also requested that the discussions include the restrictions and guidelines imposed upon the Town on how we acquire property per the Brown Act.

Based on this request, the Town's legal counsel has provided the attached memorandum that details the policies and procedures for property acquisition, which includes federal and state statutes and regulations.

In order to ensure compliance with the law, the Town of Apple Valley must adhere to certain rules during the property acquisition process. Most of these rules apply even if eminent domain is not used.

The Town Attorney will be available to answer questions of Council regarding this process.

Recommended Action:

Informational Item Only.

Proposed by: John Brown, Town Attorney

Item Number _____

T. M. Approval: _____

Budgeted Item Yes No N/A

**ATTORNEY/CLIENT WORK PRODUCT
ATTORNEY/CLIENT PRIVILEGED DOCUMENT**

Memorandum

To: Members of the Town Council **CLIENT-MATTER No.:** 28314.00009
for the Town of Apple Valley

FROM: John Brown, Esq., Town Attorney
Kendall H. MacVey, Esq.
Mona Nemat, Esq.

DATE: June 3, 2009

RE: Property Acquisition Policies and Procedures

We were asked to provide a guideline for property acquisition policies and procedures. The controlling federal and state statutes and regulations are the Federal Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970 [the "Federal Act"] (42 U.S.C. § 4600, et. seq. and 49 C.F.R. part 24) and the California Relocation Assistance Act [the "California Act"] (Gov. Code, § 7260, et. seq. and 25 C.C.R. section 6000, et. seq.). The Town of Apple Valley must adhere to certain rules to ensure compliance with the law during the property acquisition process. Many, if not most, of these rules apply even if eminent domain is not used. The possibility that eminent domain may be used will trigger additional requirements. Because the Town of Apple Valley has the power of eminent domain, the possibility that eminent domain may be used will likely exist for most of its real property acquisitions.

I. THE FEDERAL AND CALIFORNIA ACTS

II.

As a preliminary matter, a public agency cannot discriminate in its dealings with members of the public and must follow and apply its policies and regulations in the same manner regardless of any innate characteristic of property owners. It cannot discriminate based on race, gender, age or various other characteristics identified both in state and federal laws and regulations.

A. Federal Real Property Acquisition Act

1. Act Requirements

The Federal Act has several policy provisions and can be very difficult to navigate for those not familiar with the guidelines. The failure to comply could result in the loss of federal funding for the project or other projects. For example, the Federal Act encourages the use of negotiation to acquire real property, rather than acquisition through eminent domain (42 U.S.C. § 4651(1)). In addition, the real property that the public agency is interested in acquiring must be appraised before the initiation of negotiations to purchase the property (42 U.S.C. § 4651(2)). There are a number of specific requirements for the appraiser and appraisal delineated in the Act (49 C.F.R. §

24.102-104 [must use USPAP and UASFLA, etc.]). For instance, the owner must be given the opportunity to accompany the appraiser during the property inspection (49 C.F.R. § 24.102(c)(1)), and the agency must have a qualified review appraiser examine the appraisal to assure it meets the appraisal requirements in 49 C.F.R. § 24.2(a)(3) and 24.103 and all other applicable requirements (49 C.F.R. § 24.104(a)). Before the initiation of negotiations to purchase the property, the agency must establish the amount it believes to be “just compensation,” and must make an expeditious offer of no less than the appraised fair market value (42 U.S.C. §4651(3)). Any decrease or increase in the fair market value prior to the date of valuation caused by the likelihood of public acquisition of the property is to be disregarded in determining compensation. (*Ibid.*). If a material change has occurred in the property, or a significant delay has occurred since the time of the appraisal of the property, the agency must have the appraisal updated or redone, and, if necessary, reestablish just compensation (49 C.F.R. § 24.102(g)). The agency must provide the property owner with a written statement of, and summary of the basis for, the amount established as just compensation (42 U.S.C. § 4651(3)). In addition, all incidental expenses, including recording fees, transfer taxes, mortgage prepayment penalties and real property taxes, must be reimbursed to the property owner (42 U.S.C. § 4653(1)-(3)).

2. Applicability

The Regulations adopted pursuant to the Federal Act (49 C.F.R. § 24.001, et. seq.) clearly state that they apply exclusively in situations where eminent domain is used or is threatened or planned to be used by the public agency in acquiring the property at issue (49 C.F.R. § 24.101(b)(1)). The Regulations apply to all governmental acquisition of real property for a project unless: (1) the public agency in question does not have the power of eminent domain, or (2) the acquisition is “clearly a voluntary, arm’s length transaction” that meets certain other conditions (49 C.F.R. § 24.101(a)(1); 24.101(b)(1)).

There are four conditions that must be satisfied for a voluntary transaction to be free from the requirements of the Federal Act’s regulations (49 C.F.R. § 24.101(b)(1)). First, the acquiring agency must determine and inform the owner in writing that if negotiations fail, it will not use eminent domain to acquire the property (49 C.F.R. § 24.101(b)(1)(iv)). Second, no specific site or property is designated for acquisition (49 C.F.R. § 24.101(b)(1)(i)). The agency may limit its search to property in a particular geographic area without violating this requirement, however. (*Ibid.*). Third, the property to be acquired must not be “part of an intended, planned, or designated project area where all or substantially all of the property within the area is to be acquired within specific time limits” (49 C.F.R. § 24.101(b)(1)(ii)). Finally, the agency must inform the property owner in writing of the agency’s estimate of the property’s fair market value before a contract to purchase is signed (49 C.F.R. § 24.101(b)(1)(iii)). No appraisal is required in this situation, though the estimate must be prepared by a person familiar with the real estate values in the area, and the agency must keep in its files an explanation of the basis for the estimate. (See, Housing and Urban Development Handbook 1378, Chapter 5, 5-1(a)(1)(c)).

As with the California Act, discussed *infra*, the real property provisions of the Federal Act create no rights or liabilities, and violation of the provisions in the Federal Act do not affect the validity of any property acquisition, whether by purchase or condemnation (42 U.S.C. § 4602 subd. (a)). The Federal Act sets forth guidelines. (See, *Consumers Power Co. v. Costle* (E.D.Mich. 1979) 615 F.2d 1147, 1149.). Therefore, if the Federal Act applies, it would not create any rights that give rise to a legal cause of action. (*Ibid.*). However, if the landowner brings a successful inverse condemnation claim, and the court finds that the Federal Act applies, the landowner may be entitled to their costs and attorneys' fees under the Act. (See, *Robinson v. State* (2001) 20 P.3d 396, 399.). In addition, the Federal Act requires that a federal agency providing money for a project must not approve the project unless the acquiring public agency has given satisfactory assurances that it was guided "to the greatest extent practicable under State law, by the land acquisition policies" under the Federal Act, and that property owners will be paid or reimbursed as specified in the Act (42 U.S.C. § 4655(a)). Put another way, if there are any federal funds involved in the project for which property is being acquired, the acquiring agency must follow the federal guidelines. This is true regardless as to whether the funding is used for property acquisition or some other purpose. The receipt of federal funds for any purpose triggers the obligation to comply. The failure to comply may result in the loss of federal funds for the project or other projects.

3. Department of the Interior Guidance

The Department of the Interior Office of the Regional Solicitor has issued "General Compliance Guidance on the Allocation of Section 6 Funds to States and Territories for Land Acquisition," which points out that Section 6 grants must comply with a number of requirements for receiving federal financial assistance and refers to the Federal Aid Tool Kit, available at <http://training.fws.gov/fedid/toolkit/toolkit.pdf>. This website states that "[f]ederal agencies may not approve any grant unless the grantee provides assurances that it will comply with the [Federal] Act," including the Regulations (49 C.F.R. § 24) and the Department of the Interior Uniform Relocation Assistance and Real Property Acquisition Regulations (41 C.F.R. 114-50 [applying only to furnished, inhabited property]). Its only specification beyond the Act itself is a requirement that "[p]rices to be paid for lands or interests in lands must be fair and reasonable," and if persons will be displaced by the property acquisition, the relocation assistance provisions of the Act must be met.

4. Analysis

Though the Town of Apple Valley does have the power of eminent domain, if it meets the conditions for a "voluntary, arm's length transaction," it appears that it is exempt from the Federal Act. In addition, even if it were to apply, because there is no private right of action under the Federal Act, a property owner could not bring a suit for violation of the Act. However, if the Town of Apple Valley does not meet the conditions for a "voluntary, arm's length transaction" and fails to follow the suggested policies of the Federal Act, the Federal Agency which is providing money for the project could withhold the money on the basis that the Act was not complied with. In addition, if a property owner were to bring a successful inverse condemnation case

against the Town of Apple Valley, the Act could entitle a property owner to its costs and attorneys' fees. For these reasons, if there is even a possibility that the Town of Apple Valley may use its powers of eminent domain, it must set up procedures to meet the Federal Act requirements, described above, to demonstrate that the Town of Apple Valley is in compliance with the Federal Act.

B. California Relocation Assistance Act

The California Act, found in California Government Code section 7260, et. seq., and 25 C.C.R. section 6000, et. seq., covers procedures for providing relocation assistance to persons and businesses displaced by public agency acquisition of their homes. If no one will be displaced by the public agency's property acquisition, much of this Act does not apply. In addition, some sections in this Act only apply if the public agency has the power to and plans to use eminent domain to acquire the property in question. (See, *Johnston v. Sonoma County Agricultural Preservation & Open Space Dist.* (2002) 100 Cal.App.4th 973, 987.).

Whether the public entity is proceeding via purchase negotiations or eminent domain, however, Government Code section 7260 is applicable. (*Beaty v. Imperial Irrigation Dist.* (1986) 186 Cal.App.3d 897, 906.). This section lays out the policies public entities should consider when acquiring property by negotiation or condemnation. (See, Gov. Code, § 7267 [acquisition by negotiation favored over acquisition by eminent domain]; Gov. Code, § 7267.1 [public entities should make "every reasonable effort" to acquire real property expeditiously]; and Gov. Code, §§ 7263.3-7263.4 [regarding treatment of property occupants]).

Only three sections of the California Act appear apply to unoccupied property that will be acquired by negotiation rather than eminent domain: Government Code section 7260; Government Code section 7267; and Government Code section 7267.1. Section 7260 merely includes definitions of terms used in the California Act. Section 7267 lays out the policy behind the California Act. It says:

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the public programs, and to promote public confidence in public land acquisition practices, public entities shall, to the greatest extent practicable, be guided by the provisions of Sections 7267.1 to 7267.7.

Section 7267.1 states:

- (a) The public entity shall make every reasonable effort to acquire expeditiously real property by negotiation. [¶] (b) Real property shall be appraised before the initiation of negotiations, and the owner, or the owner's designated representative, shall be given an opportunity to accompany the appraiser during his or her inspection of the property.

However, the public entity may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value.

Section 7267.2, which delineates the requirements for an appraisal, obligates a public agency to use fair market value for the property valuation and requires that a statement be provided to the owner that describes the basis for the calculations of just compensation. (*Ibid.*). However, this section by its terms and as interpreted by case law only applies to eminent domain actions, and acquisitions that could potentially end up in the litigation process, not wholly voluntary sales. (*Melamed v. City of Long Beach* (1993) 15 Cal.App.4th 70 [holding that, if a public agency purchases property “in a routine buy/sell transactions, rather than in a precondemnation situation, section 7267.2 by its terms is inapplicable” (emphasis added)]). If there is any possibility that eminent domain may be used, the Town of Apple Valley must follow these requirements as well.

Sections 7267.2, which, as noted above, applies to acquisitions that could end up in eminent domain proceedings. (*Melamed, supra*, 15 Cal.App.4th at 83.). The failure to comply may result in dismissal of the eminent domain action (*City of San Jose v. Great Oaks Water Co.*, (1987) 192 Cal. App. 3d 1005). In addition, most of the remaining sections of the California Act concern relocation of displaced persons. Therefore, even if the Town of Apple Valley were to use its eminent domain powers, the majority of the California Act would be inapplicable to the type of bare ground land the Town of Apple Valley is interested in acquiring.

Similar to the Federal Act, the failure of the public entity to comply with the California Act requirements cannot usually constitute the basis of a cause of action. (*Melamed, supra*, 15 Cal.App.4th at 82-83.). This is because Government Code section 7274 expressly provides that the property acquisition sections of this Act create no rights or liability and do not affect the validity of any property acquisitions, whether by purchase or condemnation. (*Ibid.*) However, some authority suggests that the failure to comply can be evidence of unreasonable precondemnation, for which damages may be obtained.

C. Compliance

If the Town of Apple Valley begins using eminent domain, it must comply with both the California Act and the Federal Act discussed above. Many public agencies adopt procedures integrating both Acts to ensure, to the greatest extent possible, that their acquisition procedures are in compliance with all state and federal rules. By following such procedures, an agency is likely to receive necessary certification of projects with Caltrans oversight and/or federal funding at issue.

II. VARIOUS CALIFORNIA LAWS RELATED TO EMINENT DOMAIN

A. Offer Letter

California Eminent Domain laws (Code of Civil Procedure 1230.010, et. seq.) also require an acquiring entity to follow certain producers prior to and during the course of

an eminent domain proceeding. For example, pursuant to Government Code section 7267.2, a letter offering to acquire the property must be sent to the owner of the property, as reflected on the last county assessor's role. The letter must contain certain information and must offer the owner up to \$5,000.00 to retain an independent appraiser. It must also have attached to it a summary of the agency's basis for valuation (Government Code 7267.2) and an informational pamphlet outlining the eminent domain process (Government Code 7267.2(a)(2)).

B. Independent Appraisal

As discussed above, Government Code section 7267.2 requires that up to \$5,000.00 in reasonable costs be offered to a property owner for an appraisal at the time a public entity offers to purchase property under a threat of eminent domain. The interpretation of the Government Code section is interpreted to require the offer of the \$5,000.000 when the offer is made.

C. Prejudgment Possession

Changes in the California eminent domain laws in recent years have made it much more difficult for an agency to obtain possession of a property prior to judgment. Before the laws changed, at the time of filing the complaint in eminent domain, an agency could seek immediate possession on an ex-parte basis. It would be incumbent on the owner to try to have the order granting prejudgment possession set aside. Now, however, the burden has shifted and the timing to obtaining possession is significantly longer.

The practical effect of this legislation has been a dramatic impact on an agency's ability to obtain an order for possession. In other words, generally it takes significantly longer to obtain an order for possession and to obtain possession of property and is easier for property owners to challenge orders for possession on hardship grounds. It is important to keep in mind that the statutory time frame for the hearing process establishes a minimum time frame. Because court calendars must be accommodated, the process sometimes takes significantly longer than the statutory minimums.

D. Use of Property

Code of Civil Procedure section 1240.030 limits the use of property acquired by eminent domain to the stated public use in the resolution of necessity authorizing condemnation. It requires the adoption of a new resolution of necessity whenever a condemned property is put to a different public use than what is stated in the original resolution of necessity. In other words, the public use stated in the resolution of necessity defines the use that may be made of the property. For this reason, it will be more important than ever that the public use in the resolution of necessity be carefully delineated. For example, if a public use is defined to be only for street purposes, there may be an issue if the property can be used for other purposes, such as storm drains and utilities. On the other hand, if the public use is too broadly or generally described, an owner might contend that the described use exceeds the scope of the project for which the property is being acquired and challenge the validity of the taking.

If the property is not put to the stated public use within ten years of adoption of the applicable resolution of necessity, a public entity must adopt a new resolution finding

the continued public interest and necessity require using the property for its original stated public use. If a public agency fails to adopt a new resolution as required, the public entity must offer a right of first refusal to the original owner to repurchase the property under specified conditions. The new law also requires offering lease backs to occupants of condemned property under certain circumstances.

E. Redevelopment Agencies

Section 33373 of the California Health and Safety code is intended to give potential buyers additional notice regarding properties that fall within a redevelopment area. Most significantly, it requires that a local legislative body record, with the county recorder, a statement describing any land situated in a redevelopment project area within 60 days of any action adopting or amending a redevelopment plan. (The previous law included no time limit for this recording.) In addition, the new law prohibits a redevelopment agency from commencing an action in eminent domain under an adopted or amended redevelopment plan before the required statement is recorded.

Section 33373 requires the statement to be recorded not later than 60 days following adoption of a redevelopment plan or amendments to a redevelopment plan. If a plan amendment adds territory to the project area, the statement would be required to contain: (1) a prominent heading in boldface type noting that the property is located within a redevelopment project; (2) a description of the provisions of the redevelopment plan that authorize the agency to use of the power of eminent domain; and (3) a general description of any limitations on the use of the power of eminent domain contained in the redevelopment plan.

III. EMINENT DOMAIN PROCEDURES¹

A. Notice of Decision to Appraise

Once a public agency decides to acquire property and notices of decision to appraise are issued to property owners, the public agency is required to state its acquisition procedures. This is normally accomplished by attaching to the Notice of Decision to Appraise a Notice of Property Acquisition Procedures, which includes information on the process the Town of Apple Valley will follow. It is recommended that the appraiser be retained through legal counsel to maintain confidentiality and privilege as to the contents of the appraisal report.

B. Offer Letter

After the appraisal is completed, it should be reviewed by legal counsel for legal sufficiency and then submitted to the Town Council for authorization to make a government code offer, discussed above. This will initiate the negotiation process. An owner must be given a minimum of 30 days to consider the offer.

C. Resolution of Necessity and Obtaining Legal Possession

¹ The environmental certification process for a project must be complete prior to submitting a resolution of necessity for the use of eminent domain to City Council for adoption.

To simplify time lines, this portion of the memo will assume that the goal is for the resolution of necessity hearing to take place on July 16, 2009 for the acquisition of vacant land. Assuming that a litigation guarantee is received prior to that time and any conflicts of interest are cleared, we could begin preparing documents for the eminent domain court action as soon as the resolution is passed.

Even though in this example the only property to be acquired is vacant land, any Order for Possession issued by the court will not be effective for a period of time after the Order for Possession is issued. Any construction cannot begin until the Town gets possession of the property.

Here is a rough outline of estimated time frames for the eminent domain process:

1. Updated litigation guarantees will be ordered by the Town of Apple Valley (or BB&K, if you wish) by **July 1, 2009**, and should be available by the middle of July.
2. The Town of Apple Valley must hold a Resolution of Necessity hearing.² At least 15 days' written notice to the property owners is required. For example, if the Town wants to hold a Resolution of Necessity hearing on **July 16, 2009**, we would need to give the property owners written notice no later than **July 1, 2009**.
3. The Council adopts a Resolution of Necessity and authorizes the Town of Apple Valley to acquire the property through eminent domain proceedings.
4. The eminent domain pleadings usually can be filed within a week or two of the adoption of the Resolution of Necessity by the Council. If the Town of Apple Valley requires immediate possession of the property, the Town of Apple Valley will need to deposit the appraised fair market value with the State Condemnation Deposits Fund prior to filing the eminent domain action and requesting prejudgment possession.
5. After the initial filing of the eminent domain action, we must wait for issuance of the Order for Possession. Code of Civil Procedure section 1255.410 requires a noticed motion for the issuance of a prejudgment Order for Possession, which must include a statement to the effect that if the property owner or tenant opposes the motion, a written opposition must be filed within 30 days from the date the motion is served. The hearing on this motion would have

² The Town must wait at least 30 days after sending the Offer Letter.

to be held at least 60 days after the Town of Apple Valley filed its motion.

As such, if the Town of Apple Valley filed an eminent domain lawsuit by **August 1, 2009**, a hearing could not be held until at least **October 15, 2009**, assuming that the property owner could be served within the first two weeks after filing the action, and depending upon the court's scheduling of the hearing. If the Motion is successful, the Town of Apple Valley could take possession 10 days after the issuance of the Order. We recommend that the Town of Apple Valley assume that it will take at least 90 to 120 days for the Town to obtain possession after filing its eminent domain action.³

Assuming that appraisals have been adequately reviewed and proper offers made, if the Town of Apple Valley adopted a Resolution of Necessity on **July 16, 2009**, the earliest it would have possession would be late September. Of course, the noticed motion process would be unnecessary if the property owner simply consents to letting the Town of Apple Valley take possession prior to judgment.

It should be noted that an Order for Possession will give the Town of Apple Valley physical possession only. The Town of Apple Valley will not hold or be able to convey legal title to the property until the property is transferred by negotiated purchase (grant deed) or until the eminent domain action is concluded (with a judgment and final order of condemnation), which could take several years.

IV. RECOMMENDATION

Given the complexity of the preacquisition and acquisition process, it is strongly recommended that you consult legal counsel for all property acquisitions. While some of the pre-resolution procedures can be done in house, the failure to follow a single procedure could result in having to begin the entire process again and/or losing funding for the project. Best Best & Krieger LLP has an Eminent Domain Practice Group that specializes in this area of the law, and can assist the Town of Apple Valley in all phases of the process.

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³ It is important to note that these timelines are rough estimates for unoccupied property. The time it takes to obtain possession of occupied property increases significantly.