

The Devil is in the Details

Even small mistakes can have a big impact

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Given the many unexpected situations that arise during condemnation litigation, eminent domain attorneys must always be well-versed and prepared for every conceivable scenario. In managing civil litigation, attorneys are responsible for maintaining legal documents and procuring relevant information for settlement conferences, mediations and trials. Attorneys are also frequently called upon for pre-condemnation right of way contracts, as well as purchase, sale and escrow agreements. Because these documents contain key terms and clauses, including performance mandates, offers, acceptance, consideration, environmental representations, waivers and releases, they should be written by legal counsel. While some of these documents can be prepared as templates in advance, most will require property-specific legal information on contract law and real property law.

Despite their demonstrated value, many public agencies prepare for the “resolutions of necessity” without attorney review or comment, most often citing fiscal reasons. A resolution of necessity is a government agency’s formal decision to acquire property by eminent domain. It must be adopted before the condemning agency can commence an eminent domain action in court. Hearings for resolutions of necessity do not require legal affirmation or any specific attestation from attorneys concerning the validity of the information being offered to support applications to adopt the resolution. For the hearing, right of way and project staff are primarily responsible for verifying the necessary information concerning the project design, necessity, as well as public purpose and use. In addition, they will be tasked with overseeing hearing notices, site visits and appraisal quality control.

Once a resolution of necessity is adopted by the public agency, a legal document called a “complaint in condemnation” is prepared and filed with the courts. The complaint is the public agency’s initiation of legal proceedings to acquire private property by condemnation through the courts and is based upon the facts alleged therein as determined in the resolution of necessity. Inaccuracies in the facts supporting the resolution of necessity and the complaint can result in serious and costly complications. One such example happened recently.

The Small Things Do Matter

A California public agency spent several years planning and designing a road-widening project. The project involved partial taking acquisitions along the roadway to be improved. The proposed project was environmentally cleared, funding was secured and licensed surveys were conducted. After design and right of way mapping were completed, appraisals and offers were made based on the partial takes identified, and only a handful of cases resulted in resolution of necessity hearings. The requisite findings at the hearings concerned the public use, necessity and the satisfaction of pre-condemnation due process procedures. Once the resolutions of necessity were adopted, complaints were drafted based on the information supporting the resolutions, and these were filed with the courts, which began the formal condemnation process. In one case, the property owner and all parties with potential interests—as identified in the litigation guarantee—were served with a copy of the complaint. All parties appeared and answered the complaint, and the court process was officially underway.



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The appraiser retained for the agency's litigation appraisal posed a seemingly innocuous question concerning the details found in one of the right of way maps. Upon closer inspection, I noted what appeared to be a minor discrepancy in the map. That small discrepancy, however, led to a determination that the map was either based on an incorrect legal description of the proposed take area, or vice versa. The metes and bounds legal description misidentified one vector direction as north instead of south. And that simple mislabeling of direction caused a miscalculation of the square footage, amounting to a difference of less than 100 square feet. No big deal, right?

The significance was that, although the difference in square footage was less than 100 square feet, the condemnation litigation still could not proceed as filed. If the complaint was incorrect, then the resolution of necessity was also incorrect. That's because it relied on the same right of way map and because the appraiser incorrectly valued the take area using an erroneous map and square footage calculation. It was unavoidable—we needed to start over! So we revised the right of way map, ordered a new appraisal,

set a hearing for the agency to approve the appraisal and reset just compensation. Then, we made a new revised offer to the property owner of record, initiated good faith negotiations, scheduled a hearing for an amended resolution of necessity, and adopted the amended resolution of necessity. After seeking the court's permission to amend the complaint, we served the amended complaint and rescheduled the order for a prejudgment possession hearing.

After explaining to the client what needed to be done and the reasons why, a stipulation was negotiated with the property owners and the other parties of record. This allowed the agency to obtain pre-judgment possession sooner than if a re-noticed hearing was needed. The agency was then able to successfully acquire the property interest by a final order of condemnation with the now correct legal description and map. The surveyor was later admonished, and efforts were made to recover the additional expenses incurred. Fortunately, the project schedule had enough flexibility to absorb the delay in obtaining a pre-judgment possession order from the court. This just goes to show that no detail is too small, and it always pays to be on the lookout. ★



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