



COVENANTS AND RIGHT OF WAY

The benefits of creative problem-solving

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Right of way requirements for projects get evaluated in conjunction with efficient designs, safety concerns and available funding. Each of these considerations are primary project drivers that identify what public projects can and do get constructed. Right of way maps are prepared depicting which properties will be needed for the project and title reports are ordered to identify recorded ownership rights, including the fee ownership and any easements, conditions, covenants and restrictions.

City street widening projects present planning challenges, particularly when planners seek to reconcile a project's need for additional right of way with the existing title conditions, covenants and restrictions. In one recent City public project in San Bernardino County, the City obtained a title report showing a covenant that reserved ownership of a small strip parcel to the City, which required the property owner to vacate the 10-foot strip of property ("Parcel 10") along the existing public street within 90 days of notice. With the Parcel 10 covenant, the City would not require any new right of way from this property, however, it would be difficult getting the property owner to agree to promptly remove the existing 50-year-old commercial building straddling Parcel 10 and the remainder property.

The City's Public Works department sent several notices to the property owner requesting removal of the portion of the building in the City's right of way, but the property owner didn't respond. Seeking to maintain the project's right of way clearance and delivery timeline, the City filed a declaratory relief action with the court to enforce the City's covenant, as well as a court order to remove the encroaching improvements. Declaratory relief cases are often given

priority case status if extreme urgency can be shown. Here, the City had a critical need to secure possession of Parcel 10 for right of way certification and to maintain expiring project funding commitments. Right of way certification was necessary before the City could issue a Request for Proposals (RFP) for construction of the project.

The Court Decision

The court hearing was set, and briefs and declarations supporting motion were prepared and filed. In a close decision—and despite the probability of losing project funding—the court determined that there was insufficient urgency shown to justify the immediate and extraordinary relief requested. The court invited the City to resubmit the same motion for immediate relief with additional declarations from the funding agency and project engineers.

Concurrently, the City started the eminent domain process by sending notice of decision to appraise the property with the Parcel 10 covenant as a condition to the appraisal assumptions. The appraisal didn't find any damages because the covenant directed the owner to bear costs of removal of encroaching improvements, including a cut-and-reface of the remainder building.

The City considered the possibility of extensive litigation in both cases. Litigation costs would far outweigh the value of clearing title to Parcel 10 through the courts. Alternatively, the City could continue with the declaratory relief action, prevail and proceed to eject the tenant and property owner from the encroaching area with the legal process taking up to 24 months.

The Aftermath

The project funding commitment source would not wait several years for the courts to resolve the Parcel 10 covenant dispute, and would instead transfer the funds to another project ready and able to immediately use the funding. Although condemnation cases are more expedient and certain than the declaratory relief



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action subject to a judge's ruling, there was no specific statutory mechanism in condemnation law that forces an owner to pay for the demolition or cut and reface of the building improvements. It was uncertain whether the property owner had financial resources to pay for removing the encroaching improvements. There was no certainty that the tenant would be able to relocate within the requisite project time frame.

The City decided to identify the realistic and practical options available and to determine the best direction moving forward based upon available project funds and timing. The City opted to ask the property owners if they were interested in voluntarily selling the entire property to the City. It would not be appropriate for the City to seek to acquire the entire property unless the City could identify

a current or future public use for the property. The City identified the entire property as ideal for a street widening construction activities staging area.

Based upon this proposed public use, the City offered to purchase the entire property and the owner agreed that it was a mutually beneficial arrangement. The property owners didn't have to relocate the tenant since the City relocated the tenant, and they didn't have to litigate the covenant issue. The tenant successfully relocated within the general vicinity with a similar rental rate. The property owner sold the property for a fair amount, received the advantage of favorable tax reinvestment benefits, and the City was able to get right of way certification and retain the project funding. Both parties avoided protracted litigation with a creative solution to a complex problem. ♣

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