



Uncovering the Truth

When discovering new layers in a case, stay creative and solution-oriented

BY MICHAEL F. YOSHIBA, ESQ.

In June 2008, the California cities of Santa Fe Springs and La Mirada jointly designed a rail/street grade-separation project that required partial-take acquisitions from several properties. Only a few property interests were needed at the beginning of the project for funding certification. One such property was a portion of the backyard of a single-family residence that was needed to replace an existing retaining wall.

The Hidden Wrinkle

The total take area was 949 square feet of fee and a 362 square foot temporary construction easement. Preliminary title reports were obtained, and the property owners of record were appropriately identified. The right of way maps and legal descriptions were prepared and forwarded to the appraiser. In October 2008, the appraisal was approved by the La Mirada City Council, which then directed the right of way agent to make an offer to purchase the property.

When the property owners met with the City, they immediately and enthusiastically agreed to settle for the offered amount. Their eagerness seemed odd, but it certainly was a refreshing change from the usual property owner angst. Escrow was promptly opened in November 2008, the documents were quickly drawn, and the escrow agent began the process of closing this simple transaction.

However, unbeknownst to the City, a new wrinkle was about to send this simple transaction sideways.

Real property lenders in California use a trust deed system to effectuate non-judicial foreclosure for recovering monies lent to borrowers who default on loans. Funds are lent to borrowers using their real property as loan collateral. The non-judicial foreclosure method avoids many of the costs and most of the complexities typically associated with foreclosures performed within the judicial system. The borrowers execute a promissory note in favor of the lenders for the repayment of the money borrowed, and the borrowers then agree to place their property in a trust, and designate a trustee to perform a property foreclosure if the borrower defaults on the terms of the promissory note. Upon such a loan default, the lender notifies the trustee that the borrowers are in default, at which point the trustee then initiates the foreclosure process to sell the property to recover monies for the trust beneficiary/lender.

Foreclosure Crisis

As we all now know, late 2008 was the beginning of the United States' most recent banking and mortgage crisis. It was during that same time when the City learned that these eager property owners were several months behind on their mortgage payments. The lender had declared them in default of their loan, and non-judicial foreclosure proceedings had already been initiated by the trustee even before the City went into escrow with the property owners. Thus, this acquisition now involved a lender, the foreclosure trustee and their respective attorneys.

Despite the pending foreclosure, the property owners remained the owners of record until the completion of the foreclosure process. Therefore, the

purchase and sale agreement was not yet invalid. However, once the lender was aware of the purchase and sale agreement with the City for the partial-take fee and temporary construction easement interest, they refused to subordinate their lien interest without being made whole on the late mortgage payments. What's a city to do?

Evaluating Priorities

Our first task was getting the legal and right of way teams together to evaluate the project priorities and develop a strategy. The property owners remained ready and eager to make a deal with the City, but nothing could move forward without the lender's approval.

Since the project required immediate access to get started, the City decided the best strategy was to cancel the escrow and enter into a right of entry agreement with the property owners. The City decided that the only way to obtain clear title to the part-take fee, given the complexities of the lender and trustee interjected into this proposed acquisition, was by a resolution of necessity and condemnation. The City adopted a resolution of necessity and, shortly thereafter, the condemnation action was filed naming the lender, property owners and trustee as interested parties. Next, the property owner entered into a stipulation to release the

just compensation directly to the lender.

The court eventually issued a Final Order of Condemnation for the part-take fee interest and the case was concluded. However, I subsequently received a call from someone inquiring about the details of the City project and, in particular, the project's impacts on this house. The nature of the call indicated that the property was sold by the previous owners with the new owners having no warning that the City project was about to commence or that portions of the property had been condemned. The new and former owners had been quietly negotiating for a short-sale of the property—a sale of property below existing loan balance—during the active condemnation case. The new owners negotiated a deal with the bank, but did not get (or did not care to inquire or read) a preliminary title report issued by the bank and before buying the house. Fortunately, the City had acquired the property interests in the condemnation case before the short-sale was completed so there was no legal recourse against the City.

In the end, the City faced some unexpected challenges in securing necessary property rights, but remained open, flexible and creative in keeping this rail/street grade-separation project on track. ★



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