



Acquisition Challenges in Design-Build Projects

Minimizing private injury in involuntary property takings

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An increasingly popular public project management trend is using Public-Private Partnerships, otherwise known as P3. This method was developed to close the gap between agency bureaucracies and the cost-efficient design and building of public projects. As such, many public agencies have already successfully implemented P3 concepts into their public projects. With this method, contractors are tasked with the project design and construction, while the public agencies typically handle the right of way acquisitions.

There are several types of P3 arrangements that vary depending on the extent of private sector involvement. One such arrangement is design-build, which is a project delivery method that combines two, usually separate services into a single contract. With design-build, the design builder assumes responsibility for the majority of the design work and all construction activities, while owners retain responsibility for financing, operations and maintenance.

A Problem Arises

Recently, a California local public agency decided to build a freeway improvement project with a P3 contractor. The contractor was given the basic conceptual design features for the project and was assigned the responsibility of preparing the final design details for project construction. There was a relatively tight window for completion of the project, so the acquisition process was started before the project construction designs were finalized. As a result, the agency used a more expansive project footprint and acquired more property than they would ultimately need for construction. This would provide more design flexibility to accommodate unanticipated future design changes stemming from field conditions and public comments emerging during the environmental review process.

Based on the contractor's expansive project design footprint and the "not yet final" project design, the agency

began negotiations for voluntary sales agreements with private property owners. Most property owners accepted the offers to purchase. Faced with a few owners who would not voluntarily sell their property, the agency proceeded to obtain a resolution of necessity supporting the involuntary taking of the property. Of course, this created a number of problems.

Resolution Requirements

In California, property acquired by a public agency through a resolution of necessity "shall only be used for the public use stated in the resolution." Public agencies that fail to stay within the public use verbiage stated in the resolution run the risk of having to restart the legal process. Furthermore, an involuntary property taking through the use of the power of eminent domain requires that the proposed project be "planned or located in the manner that will be most compatible with the greatest public good and the least private injury."

Because the proposed property take areas in the resolution were based on the more expansive project footprint, the aforementioned "least private injury" requirement appears to be questionable. The agency could have difficulty proving that the property areas being condemned are the "least private injury" if it cannot demonstrate why those private property areas being taken are specifically needed for the project. In their resolution of necessity, the agency stated, "The public use for the fee and temporary construction easement interests in the property to be acquired is for [the freeway project]." This statement contains no specific mention of "why" the properties being taken were required. The project description in the agency's resolution of necessity is arguably impermissible at law because of its vagueness and failure to specify the reasons behind acquiring the property.

Taking Beyond the Scope

In this project, one property owner had sufficient grounds to challenge the agency's condemnation case and resolution of necessity. After obtaining the resolution against the property owner, the agency did use the part-take areas to construct the freeway project. However, the agency and P3 contractor initiated a late project design change that created an excess property area, which was previously designated as "required" for the freeway project. The agency (or a permittee) proceeded to construct a large, two-sided commercial advertising billboard within the newly created excess land that had been permanently taken from the property owner.

There appears to be little or no correlation between the public use as defined in the resolution of necessity and the newly installed commercial billboard. More importantly, there was no mention that the property was being taken to construct a billboard. Adding further insult to injury, this billboard was

placed in the same area that the property owner had previously sought local entity approval for placing a similar billboard. And the agency further erred by failing to identify this property as "excess" to their project needs in the resolution of necessity, as required by statute. The property owner has viable arguments for challenging it.

The Moral of the Story

These unique issues are the product of P3 projects that utilize the design-build process. Previously, public agencies designed and approved the public project and only then sought bids for a construction contract to build after the project design was finalized. The public agency only acquired those specifically identified property rights that were found necessary for construction. How and whether a court will ultimately decide these issues in the property owner's matter is uncertain, but great care must always be exercised when acquiring properties using eminent domain powers. ☀



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