

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE



455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-5522
Facsimile: (415) 703-5480
E-Mail: John.Devine@doj.ca.gov

November 7, 2013

Andrew M. Goldfrank
U.S. Department of Justice
Environment and Natural Resources Division
Land Acquisition Section
P.O. Box 7611
Washington, DC 20044

RE: Condemnation of 1.59 Acres of Land, Situated in Alameda County, State of California and the State of California, et al., Alameda Federal Center

Dear Mr. Goldfrank:

The California Department of Parks & Recreation desires to respond to your letter dated August 1, 2013, indicating that the United States General Services Administration ("GSA") intends to condemn property interests currently held in fee by the State of California on McKay Avenue in Alameda County.

After receiving your letter, subsequent telephone conferences took place with Assistant United States Attorneys Marc Gordon and Doug Chang, and they explained that GSA intends to file a declaration of taking for only the street and sidewalk on McKay Avenue at this time.

Your letter seeks any comments or suggestions deemed relevant to the proposed acquisition. We want to provide two immediate suggestions.

1. Inclusion of California Department of Parks & Recreation in Matter.

We are extraordinarily troubled by GSA's intent to take public land for a private developer's benefit. For more than five decades the California Department of Parks & Recreation, East Bay Regional Park District, and federal government have jointly used McKay Avenue in a manner that can only be characterized as entirely uneventful and useful to the federal government. Further, the California Department of Parks & Recreation cannot identify any problem with the federal government's continued use of McKay Avenue.

If the federal government desires improvements or upgrades to the roadway and sidewalk to address any access or security issues for the Alameda Federal Center, then we are willing to

enter into immediate discussions about them, in concert with the East Bay Regional Park District.

Since your letter discusses the selling of excess land at the Alameda Federal Center, we want to address that process. We are exceedingly frustrated by the lack of comity on the part of GSA toward California Department of Parks & Recreation, especially after their longstanding association in such close geographical proximity.

Beyond that frustration exists the very genuine concern that the California Department of Parks & Recreation did not receive notice of GSA's intended sale of excess federal land. GSA was obligated to do so under 41 C.F.R. §102-75.255, which requires that "the disposal agency must expeditiously make the surplus property available for acquisition by State and local...governmental units...." This section also requires that "[t]he disposal agency must consider the availability of real property for public purposes on a case-by-case basis, based on highest and best use and estimated fair market value." To that end, 41 C.F.R. §102-75.350, clarifies the following:

"Based on a highest and best use analysis, disposal agencies may make surplus real property available to State and local governments...at up to 100 percent public benefit discount for public benefit purposes. Some examples of such purposes are...park and recreation...."

Given the impetus of these regulations, even though various exceptions do occur within some of them, we request that you revisit entirely the already-initiated process of selling 3.89 acres of excess land at the Alameda Federal Center. In revisiting the matter, a potential opportunity exists for the federal government to meet the requirements of the federal regulations, and to maximize the benefits to the GSA for its intended disposition of the excess property.

While certain earlier negotiations previously transpired between GSA and the East Bay Regional Parks District about the acquisition, the California Department of Parks & Recreation was not a party to them.

Therefore, we suggest that GSA now enter into negotiations with California Department of Parks & Recreation, as the federal regulations contemplate in such situations.

2. McKay Avenue is Already Devoted to a Public Use.

California Parks & Recreation will challenge the United States' authority to take property in this case on the grounds that the taking is not supported by sufficient Congressional authority and that the taking is not for a "public use" within the meaning of the Takings Clause.

We understand that to prevail on a challenge to the United States' authority to take, California Department of Parks & Recreation must distinguish this instant case from the United States Supreme Court's opinion in *Kelo v. City of New London*, 545 U.S. 469 (2005), and the

Ninth Circuit's opinion in *United States v. 1.33 Acres of Land*, 9 F.3d 70 (9th Cir. 1993). These cases reveal that both the "public use" clause and the legislation relied on by the GSA in the instant case have been interpreted broadly. Despite this, many other cases and the federal regulations demonstrate that the public necessity, public purpose, and best use of this property is decidedly different from GSA's current position.

In light of the highest and best use of this excess property, it becomes difficult to discern how the United States District Court or the Ninth Circuit Court of Appeals will view the taking of State of California property – for the sole purpose of facilitating the sale of land to private developer Tim Lewis Communities ("TLC") – as a public use or necessity. But even more to the point, we fail to see how GSA will ever convince a federal court that a street and sidewalk already devoted to a "public use" still necessitates the federal condemnation of it.

The "public use" question is all the more significant in light of the positions already stated by the East Bay Regional Park District and the local community in Alameda.

The letter you sent mentions that "GSA has requested that eminent domain proceedings commence in order to clear any possible cloud on title." Given the historical and legal background surrounding the property, we suggest that the GSA simply proceed with a quiet title action. For instance, if GSA believes that the easements that serve the federal property will not terminate upon the intended sale of excess land to TLC, that could be readily determined without the necessity of taking property from the State of California.

On a very practical level, it appears disingenuous for the United States to now claim that the proposed condemnation is necessary for any reason (*e.g.*, modernization) other than it would further facilitate the proposed sale of land to TLC.¹ The proposed condemnation runs directly counter to the federal government's offer to sell the excess property "as is."

¹ The proposed condemnation is only being sought after serious questions were raised about the termination of the United States' easements once it finalized the sale of land to TLC. *Compare* Cecily T. Barclay Analysis, on behalf of TLC, re: Access and Utility Rights for Federal Government Property on McKay Avenue dated March 22, 2013 ("... this history establishes the federal government's rights to use the quitclaimed property to provide access and utilities to the property it retained on McKay Avenue. These rights run with the land and will inure to the benefit of the private purchaser once the property is sold") with State of California Department of Parks Recreation letter to Alameda City Attorney dated May 22, 2013, ("State Parks disagrees with this analysis and supports the conclusion of EBRPD that the easement applies only to 'Government-owned property.' Because the property would no longer be Government-owned, the easement would terminate upon transfer of the federal property to the private developer"). Numerous documents obtained by the East Bay Regional Park District, pursuant to a FOIA request, show the concern about this very issue between the GSA and TLC. ("The purpose of the request is to provide GSA and STL with time to develop a common understanding of the strategy (continued...)

As a result, we renew our suggestion that a quiet title action would resolve the disparity of views about the nature of the easements without the necessity of a taking, especially since McKay Avenue is already devoted to a public use.

Conclusion

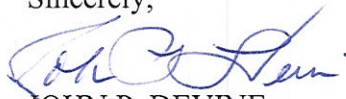
Since the California Department of Parks & Recreation has suggested two very reasonable courses of future action (*i.e.*, direct negotiations with it, as should have occurred before the open bidding process, or a quiet title action), it will not address numerous other issues concerning compensation and attorneys fees, which will necessarily attend any federal taking.

The California Department of Parks & Recreation will endeavor to resolve the question in a collaborative manner with you, even though profound differences exist about the nature of easements and the current trajectory of the federal government's actions. But that collaborative attitude will necessarily dissipate, if not disappear altogether, upon GSA's filing a declaration of taking for McKay Avenue's street and sidewalk. In sum, considerable questions are raised about the "public use" of such intended action by the GSA, and the California Department of Parks & Recreation will fight any eminent domain action.

Ultimately, the federal excess land ought to be owned and controlled by the State of California or East Bay Regional Park District because that indisputably would be the best and highest use of it. The question now facing the federal government is how that can be accomplished in a manner that safeguards the interests of all.

The California Department of Parks & Recreation looks forward to the opportunity to working with you in anticipation that any eminent domain proceedings will become unnecessary.

Sincerely,



JOHN P. DEVINE
Supervising Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

(...continued)

for securing STL's future needed easement rights for access and utilities across McKay Avenue from State of California" - STL correspondence to GSA dated April 16, 2012).

Andrew Goldfrank
November 7, 2013
Page 5

CC: Marc Gordon, United States Department of Justice
Douglas Chang, United States Department of Justice
Claire LeFlore, Chief Counsel, California Department Parks & Recreation
Todd Amspoker, Esq., Counsel for East Bay Regional Park District