



**U.S. Department of Justice**

Environment and Natural Resources Division

AMG/TLP/MEG: 33-12291

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John P. Devine  
Supervising Deputy Attorney General  
State of California, Department of Justice  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102-7004

**Re: Condemnation of 1.59 Acres of Land Situated in Alameda County, State of California, adjacent to the Alameda Federal Center**

Dear Mr. Devine:

This letter responds to your correspondence dated November 7, 2013 (the "State's Letter"), which was sent in response to the United States' letter of August 1, 2013, notifying you of the General Services Administration's ("GSA") request to condemn certain property interests involving McKay Avenue in Alameda County. The State's Letter raises several issues underlying two primary areas of disagreement between the State of California and GSA. Those primary areas of disagreement concern: (1) GSA's right to complete a sale of 3.899 acres of land at the Alameda Federal Center (the "Alameda Sale Property") to STL Company, LLC, (the "High Bidder") and (2) whether existing easements underlying McKay Avenue can be transferred with title to the Alameda Sale Property and with the retained Alameda Federal Center land upon its conveyance by GSA.

We have carefully considered the State's arguments regarding each area of disagreement and based on the information provided thus far, concluded that: (1) conveyance of the Alameda Sale Property to the High Bidder is statutorily authorized, and (2) condemnation<sup>1</sup> is the most efficient means by which to confirm that the easements underlying McKay Avenue can be transferred with title to the Alameda Sale Property and with the retained Alameda Federal Center land.

**I. GSA's Legal Authority and Process Leading to Sale of the Alameda Property**

The Alameda Sale Property does not fall within the category of "excess" federal property under 40 U.S.C. § 102(3). Instead, its sale is taking place as part of a statutorily authorized

<sup>1</sup> The U.S. Department of Justice lacks discretion to decline the filing of an authorized condemnation referral. 40 U.S.C. § 3113.

process designed to promote government efficiency and cost savings through the relocation and consolidation of federal agency operations. See Title IV of Public Laws 100-440 and 101-136, (funding Section 210(e) of the Federal Property and Administrative Services Act of 1949, as amended). In accord with that process, the federal tenant – the U.S. Department of Agriculture (“USDA”) – concluded that its agency components could be more efficiently managed if GSA were to consolidate USDA functions on a portion of the 7.6-acre Alameda Federal Center site. The public laws that provide funding to accomplish such consolidations require sale of the resulting vacated property. See, for example, Public Law 100-440, Sept. 22, 1988; 101-136, Nov. 3, 1989:

*Provided*, That such relocations shall only be undertaken when the estimated proceeds from the disposition of the original facilities approximate the appraised fair market value of such new facilities and exceed the estimated costs of relocation.

In other words, the statutes that provided funds for USDA’s consolidation require that the relocation generate revenue that exceeds the costs of relocation.

The Alameda Sale Property was therefore never subject to GSA’s disposal process for a public benefit conveyance.<sup>2</sup> Furthermore, the policies and procedures for relocation projects, developed by GSA in coordination with the Department of the Treasury and the Office of Management and Budget (“OMB”), specifically contemplate the waiver of public benefit screenings in order to provide for the sale of vacated properties. See GSA Order PRMP 4000.1B, June 29, 1994, Chapter 2, Unique Disposals and Considerations, Paragraph 21:

This asset management initiative is intended to provide an incentive to agencies to report valuable, underutilized properties excess for sale by GSA and to provide the highest monetary return to the Government.

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<sup>2</sup> Pursuant to 40 U.S.C. § 102(3), GSA’s disposal process for excess property is triggered by a landholding agency’s determination that property in its inventory is no longer needed to serve that agency’s mission and, therefore, is “excess” to its needs. Once reported to GSA pursuant to 40 U.S.C. § 524, GSA examines whether other federal agencies may have a use for the subject property. 40 U.S.C. § 521. If not, the property is determined “surplus” to federal needs. 40 U.S.C. § 102(10). The GSA Administrator is vested with discretion to offer this category of surplus property for various “public benefit” programs (*e.g.*, “education, health, park and recreation, the homeless, historic monuments, public airports, highways, correctional facilities, ports, and wildlife conservation,” 41 C.F.R. § 102-75.350), for negotiated sale, or for public sale. See 40 U.S.C. §§ 545, 550. Within that discretion is authority to assign excess property to the Secretary of the Interior for conveyance to public entities for park and recreation purposes. 40 U.S.C. § 550(e). However, the Administrator is not required to make such property available for these purposes, but is simply authorized to do so. *Id.* (“The Administrator, in the Administrator’s discretion and under regulations that the Administrator may prescribe, may assign to the Secretary of the Interior for the disposal”). GSA regulations authorize the Administrator to waive public benefits screening. 41 C.F.R. § 102-75.351. In any event, as noted above, the sale of the Alameda Sale Property is taking place pursuant to the applicable GSA relocation program and is not subject to GSA’s procedures for disposing of excess or surplus property.

When vacated properties are sold, the disposal proceeds are deposited into an account from which GSA is authorized to incur relocation expenses and fund future projects. 40 U.S.C. § 572(a)(2)(A)(ii). For the Alameda Federal Center, GSA submitted a relocation proposal to OMB in order to gain apportionment of its relocation funds to accomplish the consolidation of USDA functions, including the proposed sale of the vacated portion of the property. This proposal was approved by OMB on November 21, 2008, and the sale proceeded as described below.

## **II. Inclusion of California Department of Parks & Recreation in Matter**

The State's Letter asserts that the California Department of Parks & Recreation ("California Parks") was entitled to notice but received none regarding GSA's intended sale of the Alameda Sale Property. See State Letter at page 2. Notice to the State was not mandated, see 41 C.F.R. § 102-75.351; nonetheless, based on our review of available information, we believe the State was effectively placed on notice of the impending sale by virtue of GSA's notice to the State's agent.

The East Bay Regional Park District ("EBRPD") has operated Crown Memorial State Beach ("Beach") on behalf of the State since 1966. Over the years EBRPD has held itself out as an agent of the State of California for all purposes related to McKay Avenue and the Beach. See, e.g., December 7, 2006 letter from Diane D. Althoff, Chief, Design and Construction, EBRPD to Jovad Soltani, Asset Manager, GSA (copy attached). The letter was a follow up to a meeting regarding utilities and improvements on McKay Avenue. In this letter, EBRPD explicitly stated that it was "acting as agent for the State of California." GSA relied upon such representations and upon the Alameda Memorial State Beach Park Operating Agreement between the State and EBRPD dated December 7, 1966, and renewed through December 6, 2016 (the "Operating Agreement"). Pursuant to the Operating Agreement, EBRPD is responsible for the "care, maintenance, development, operation, and control of the real property" which includes McKay Avenue. See Operating Agreement at page 1.

During this entire process GSA cooperated extensively with EBRPD, explaining why a public benefit conveyance is not possible and detailing the relocation project and process. EBRPD was given an opportunity to acquire the subject property through a negotiated sale. In fact, GSA delayed auction of the Alameda Sale Property to allow EBRPD time to obtain an appraisal. See February 4, 2010 letter from EBRPD to GSA. GSA kept EBRPD regularly informed throughout this process. As the State's Letter notes, EBRPD was involved in the pre-sale negotiations regarding the Alameda Sale Property, and placed a bid on it at public auction. However, EBRPD's final bid was not the high bid, and therefore GSA concluded discussions with EBRPD regarding the Alameda Sale Property.

While GSA believes that communications with EBRPD provided notice to the State, we also note that the sale of the subject property was advertised in a number of publications between March and June 2011, including the *San Francisco Chronicle*, the *Alameda Journal* and the *San Francisco Business Times*. The State was thereby on legal notice of the proposed sale. A contract now exists for the sale of the subject property to the High Bidder, and GSA must honor that contract.

### III. Public Purpose for the Condemnation

The acquisition will serve equally valid dual purposes: enabling GSA to modernize McKay Avenue and the underlying utilities for the long-term benefit of the remaining Alameda Federal Center property, and facilitating conveyance of the Alameda Sale Property. Either purpose is independently sufficient to sustain a federal condemnation. A full explanation follows.

As you know, the United States originally owned 100+ acres at this site in the city of Alameda, developed in 1942 as the U.S. Maritime Officer Training School. In 1961, GSA conveyed a portion of the property to the State, via a public benefit conveyance for park purposes. Included in the conveyance was a private roadway referred to as McKay Avenue. Utilities located in McKay Avenue serving both the park property and the remaining federal land were not separated at the time of the conveyance. Instead, GSA's deed to the State reserved egress and utility easements over McKay Avenue.

In recent years, USDA has invested over \$1.5 million dollars to upgrade and expand its facilities at the Alameda Federal Center. However, the shared infrastructure underlying McKay Avenue has not been modernized and the roadway has not been maintained, leading to ongoing problems. In November 2006, GSA and EBRPD met to discuss the need to upgrade McKay Avenue, including the underlying utilities. EBRPD's follow-up letter of December 7, 2006, confirmed the joint use of these facilities. This letter also identifies the need for the buyer of the proposed sale parcel to modernize the roadway and utilities as part of future development. However, possibly as a result of its failure to acquire the Alameda Sale Property, EBRPD has been unwilling to coordinate with the High Bidder in planning the necessary road and utility improvements. It is this change in position by EBRPD which necessitated GSA's condemnation request. In effect, the position taken by EBRPD and the State attempts to restrict the United States' right as an ordinary property owner to convey land it owns subject to easements that should necessarily transfer with title to the land.

To the extent that a court may deem the disputed easement language inadequate to have created rights running with the United States' title, it will be necessary for GSA to acquire such rights in order to carry out the will of Congress in disposing of real property efficiently and for highest monetary return to the federal government. Condemnation will enable it to do so. As the State's Letter concedes, the federal "public use" clause has been interpreted broadly. *See Kelo v. City of New London*, 545 U.S. 469 (2005); *United States ex rel. TVA v. Welch*, 327 U.S. 546, 554 (1946). In *Southern Pacific Land Co. v. United States*, 367 F.2d 161 (9th Cir. 1966), a landowner asserted that the United States was taking mineral rights not for its own use, but only to increase the price it would receive upon a future sale of the subject property. The Ninth Circuit specifically recognized that an "advantageous liquidation of the Government's investment is a legitimate consideration in determining the estate to be taken." *Id.* at 163; *see also United States v. 1.33 Acres, Situated in County of San Luis Obispo*, 9 F.3d 70 (9th Cir. 1993).

Instead of proceeding with condemnation to resolve the instant dispute regarding McKay Avenue, the State suggests that GSA initiate a quiet title suit. The United States could

theoretically bring a quiet title action, but in the event of an adverse decision would need to initiate a subsequent condemnation anyway to acquire the needed easements. Proceeding with the planned eminent domain action will conserve judicial resources and those of the parties by permitting the United States to confirm its existing rights or, alternatively, to acquire the rights needed to serve the Alameda Federal Center and the Alameda Sale Property in one suit. Initiation of condemnation in no way means that the United States agrees with the State's or EBRPD's interpretation of the rights reserved under the 1961 deed. *See, e.g., United States v. 93.970 Acres of Land*, 360 U.S. 328, 330-31 (1959).

### Conclusion

We understand that EBRPD and the State desire to acquire the Alameda Sale Property. However, as detailed, *supra*, GSA is mandated to recover the costs of consolidating USDA operations at the Alameda Federal Center, and STL Company, LLC, proffered the high bid at public auction of the Alameda Sale Property. Absent the State's recognition of the transferability of title to the retained easements with title to the Alameda Sale Property, we intend to commence condemnation both to protect the United States' existing investment in the Alameda Federal Center land and to facilitate conveyance of title to the Alameda Sale Parcel.

Sincerely,



Andrew M. Goldfrank  
Chief  
Land Acquisition Section

Enclosures

Copy: GSA Regional Counsel Samuel Morris