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January 26, 2009

To: Supervisor Don Knabe, Chairman
Supervisor Gloria Molina
Supervisor Mark Ridley-Thomas
Supervisor Zev Yaroslavsky
Supervisor Michael D. Antonovich

From: William T Fujioka
Chief Executive Officer

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County Counsel

RESPONSE TO BOARD ORDER OF DECEMBER 9, 2009 TO IDENTIFY STATE LAW PROVISIONS LIMITING A PUBLIC ENTITY'S ABILITY TO CONDEMN PROPERTY AND HOLD IT INDEFINITELY, WITHOUT IMPLEMENTING THE PUBLIC USE FOR WHICH THE PROPERTY WAS CONDEMNED, AND TO RECOMMEND LEGISLATION, AS APPROPRIATE

On December 9, 2008, your Board directed the Chief Executive Office, in consultation with the County Counsel's Office, to review existing State laws and provide a report to your Board (1) identifying State law provisions that limit a public entity's ability to condemn property and hold it indefinitely, without implementing the public use for which the property was condemned, and (2) recommending legislation, as appropriate, that would require that property acquired through eminent domain be developed for the intended public use within a fixed time frame or be returned to the original property owners.

Our offices have conducted a review of the applicable State laws pertaining to this issue. SB 1650 (Kehoe, Chapter 602, Statutes of 2006), established new procedures that limit a public entity's ability to acquire property by eminent domain, and to hold that property indefinitely without implementing the public use for which the property was condemned. These procedures are discussed in more detail below.

Code of Civil Procedure Section 1245.245

Code of Civil Procedure (CCP) Section 1245.245 was added to Title 7 of California's Eminent Domain Law in 2006 by SB 1650. SB 1650 was one of a number of bills introduced in reaction to the United States Supreme Court's 2005 decision in *Kelo v. City of New London*, to address public concerns over potential eminent domain abuses.

CCP 1245.245 contains several provisions, which impact a public entity's ability to acquire property by eminent domain and hold it indefinitely, without implementing the public project for which the property was purportedly condemned. These provisions are summarized as follows:

- Additional notice and hearing requirements. If a public entity fails to use property acquired through eminent domain for the public use stated in the resolution of condemnation, within 10 years of the adoption of the resolution, the condemned property will be subject to the right of first refusal and surplus property sale provisions described below, unless the public entity adopts a resolution reauthorizing the public use of the condemned property. The resolution must be adopted by a 2/3 vote, after the public entity has conducted a noticed hearing.

- Right of first refusal to prior owner(s). If a public entity fails to adopt a resolution reauthorizing the public use of the condemned property, the public entity must offer the prior owner(s) the right of first refusal to purchase the condemned property back from the public entity. If the condemned property was a single-family residence and the prior owner(s) is/are of low or moderate income, the buy back price must be the lesser of the present fair market value of the property or the original purchase price paid by the public entity, adjusted for inflation. In all other cases, the buy back price must be the present fair market value of the property.

- Sale as surplus property and return of financial gain to prior owners of residential property. If the prior owners cannot be located (after diligent efforts) or decline to buy back the condemned property from the public entity, the public entity must sell the property as surplus property. If the condemned property was residential, the public entity must pay to the prior owner(s) the amount, if any, by which the price received by the public entity in the surplus property sale exceeds the original purchase price paid by the public entity to the prior owners(s), adjusted for inflation.

The provisions of CCP Section 1245.245 apply to property acquired by eminent domain after January 1, 2007.

The legislative history of SB 1650 indicates that it was drafted in response to extensive testimony given at several public hearings before several State legislative committees. The legislative history of the bill also indicates that earlier versions of SB 1650 were opposed by numerous public agencies including the Association of California Water Agencies and various water districts which indicated that sufficient statutory protections already existed. Other groups were concerned that there was no mandated time limit between the adoption of a resolution of necessity by a public entity to support an eminent domain action and when the project was started. After a number of amendments were adopted, SB 1650 passed the Assembly on a vote of 77 to 0, and the Senate by a vote of 40 to 0.

Possible Legislation to Make the Provisions of SB 1650 More Restrictive

We are not currently recommending any specific revisions to these procedures; however, if your Board determines that the provisions of SB 1650 are not restrictive enough, you may want to consider pursuing legislation to revise these procedures in the following areas:

- Reduction of the 10-year period within which a public entity must implement the public use for which the property was condemned;

- Elimination of the ability to re-authorize the public use of condemned property for additional 10-year periods.

- Extension of the right of first refusal to buy back condemned property at the price paid by the public entity (adjusted for inflation) to all prior owners (not only low or moderate income) and all types of residential property (not only single-family residential) and/or to the prior owners of all types of properties (not only residential); and

- Extension of the right to receive any financial gain derived from a public entity's sale of condemned property as surplus to the prior owners of all types of properties (not only residential).

WTF:RGF:GK
MY:sb

c: Executive Officer, Board of Supervisors
County Counsel