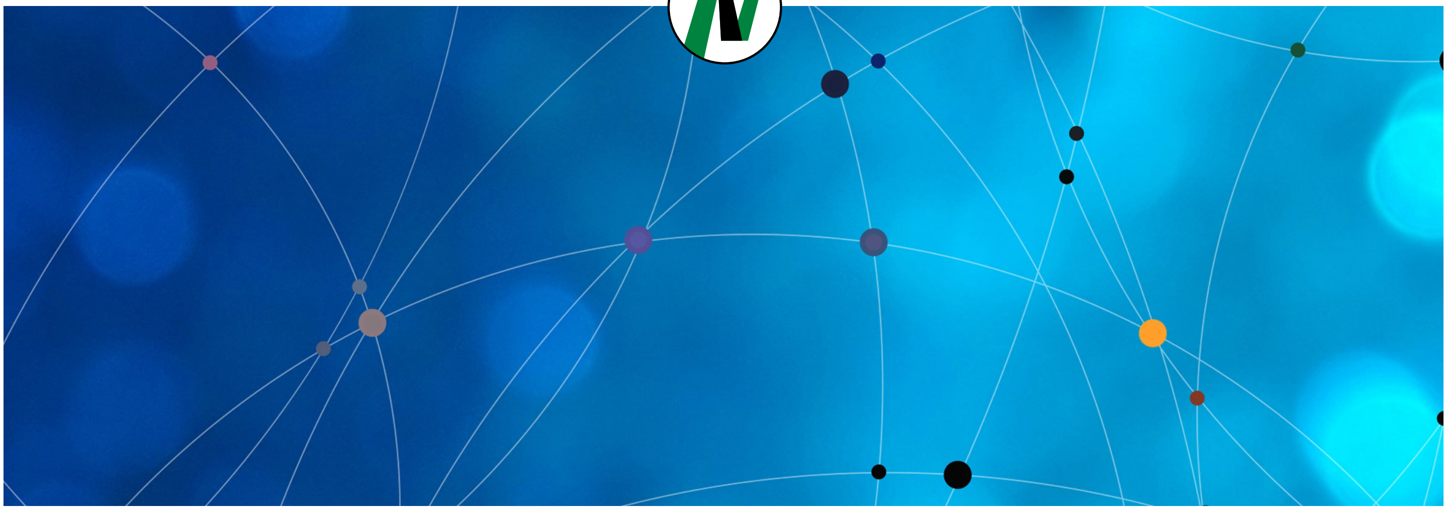

When it Comes to Property Acquisitions & Private Development, Timing may be Everything

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As the old adage goes, the three most important things to consider with real estate are location, location, and location. But any developer who has lived through a real estate cycle, and any public agency that is under a funding deadline or working through a project's environmental approvals, knows that timing may be even more important than location. Indeed, timing considerations often create competing interests between public agencies and developers. On the one hand, before commencing right of way acquisition, public agencies are required to comply with complicated environmental processes that may take years to complete. On the other hand, during this environmental approval process for a public project, a property owner's plans for development face uncertainty if the planned public project may alter or limit the scope of potential uses of the property. If a developer decides to forge ahead with its project despite a planned public project, it could easily result in a far greater cost for the public agency to acquire the necessary right of way. The timing risk associated with two planned projects that conflict is precisely the situation the California Court of Appeal addressed in *Jefferson Street Ventures, LLC v. City of Indio* (April 21, 2015 [ordered published May 15, 2015]), Case No. G049899.

Pertinent Facts and Holding

Jefferson Street Ventures, LLC was the owner of a vacant 26.85-acre parcel of land located in the City of Indio. The City had been planning the nearby I-10/Jefferson Street interchange reconstruction and enlargement since the preparation of environmental studies began in 2001. Acquisition of right of way could not begin until all environmental review was complete and approved, which was not expected until 2010.

In 2005, Jefferson submitted an application to the City for development of a shopping center. In 2007, the City conditioned approval of Jefferson's application upon Jefferson's leaving approximately one-third of its property undeveloped to accommodate its interchange project. While the City intended to acquire the development-restricted property eventually through either negotiated purchase or eminent domain, it was not yet able to do so due to funding constraints and environmental reviews. When Jefferson's development application was being approved, City staff explained that the City could not allow development on the part of the site designated for the interchange because the City would incur additional costs for the property if and when it was later taken for the interchange.

Jefferson sued the City contending that the City's conditions qualified as a taking because they prohibited indefinitely the development of over one-third of its property in order to preserve that property for possible future right of way. The trial court ruled in favor of the City. The Court of Appeal reversed, holding that the development restrictions constituted a de facto taking of the development-restricted portion of Jefferson's property requiring payment of just compensation.

The Court cited to an earlier decision, *People ex rel. Dept. of Transportation v. Diversified Properties* (1993) 14 Cal. 4th 429 ("Diversified"), for the proposition that "governmental regulation of the development of land rises to the level of a 'taking' if it denies an owner economically viable use of his land." *Diversified* essentially precluded an agency from using development restrictions to "land bank" property so that it could acquire it at a later date in an undeveloped and, consequently, less costly condition. The Court found that the City's treatment of Jefferson's proposed development involved the same type of "land banking."

The City argued that that it was not prohibiting development on Jefferson's property because Jefferson remained free to develop the remaining 17 acres. Thus, the City argued that Jefferson had not been denied all beneficial use of its land, as is generally required to find a regulatory taking. (See *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 130-131.) But the Court held that it was the City that divided the property into discrete segments and that, absent the City's land use regulations, all of it would be developable. The City's decision to preclude Jefferson from developing a substantial portion of the property in order to leave it in an undeveloped state for the City's project "would exalt form over substance."

A Few Takeaways

This decision highlights the quandary that public agencies and developers often face with conflicting public and private projects and their timing. Public agencies know they are going to build a project eventually, but they cannot get funding and commence right-of-way acquisition until they receive environmental clearances. Projects also often require coordination with other agencies that operate on their own schedules. In the interim, the public agency sees a developer seek entitlements on vacant land where the cost to acquire will increase dramatically if developed prior to acquisition. From the developer's perspective, time is money. Being forced to hold vacant property for a prolonged period exposes the developer to holding costs while also exacerbating its market risks. This could impact financing and even the very viability of a new development.

Ultimately, the key is for public agencies and developers to do their best to work together. But this may cause public agencies to find themselves performing a tightrope act where, on the one hand, they want to communicate with an impacted developer to provide a good sense for acquisition timing so that the developer may (hopefully) plan its development accordingly. On the other hand, public agencies must be careful not to go too far in communicating an intention to condemn such that they are exposed to precondemnation delay damages. (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 52.)

In our experience, the key for public agencies is to coordinate precondemnation planning efforts efficiently to minimize undue delay, and explore potential alternatives with impacted owners who have development plans. This can in some circumstances include an early "protective acquisition" of the property in question before the agency achieves environmental compliance.

It is also important for project engineers to coordinate with right-of-way professionals so that these types of acquisition issues may be identified early. The earlier these potential problems are flagged, the more likely it is that a creative solution may be identified. At times, a simple solution may be to modify a project to eliminate the impact on the developer's project thereby eliminating significant costs associated with certain property acquisitions. The *Jefferson* case is a good reminder for agencies to proactively identify potential right-of-way challenges early so that they may hopefully be eliminated before becoming major problems.