

SENATOR JIM BEALL, Ex Officio
ASSEMBLY MEMBER JIM FRAZIER, Ex Officio
MITCH WEISS, Executive Director



CALIFORNIA TRANSPORTATION COMMISSION

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March 24, 2020

Mr. Charles S. Krolikowski
NEWMAYER & DILLION LLP
895 Dove Street, Fifth Floor
Newport Beach, CA 92660

Dear Mr. Krolikowski:

Thank you for your letter of March 23, 2020 regarding the request to personally appear and submit written objections for your clients Mark H. Balan and Kamala Balan, Trustees of the Balan Family Trust. Be advised that your March 23, 2020 letter will be made available to the California Transportation Commission (Commission) at the March 25, 2020 meeting and included as part of the official record of that meeting.

The letter you received dated March 19, 2020 was given in accordance with the Governor's Executive Order, No. N-25-20. The notice provided ways in which members of the public could observe the meeting and provide comment. Two physical locations – in Orange County and in Sacramento County – were to be made available for those members of the public who wished to gather there, to observe and to comment on the meeting.

However, on March 17, 2020 the Governor issued a new executive order, No. N-29-20. This new order removes the requirement that a location be made available for the public to gather for purposes of observing and commenting at the meeting. At the same time, the Orange County Public Health Officer issued an order banning all public and private gatherings within the county. The order is effective until the end of March.

Obviously, the paramount interest is in protecting the health of Californians by retarding the spread of the coronavirus. At the same time, the Commission wants to provide reasonable

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opportunities for members of the public to observe and to participate safely in its meetings. Consequently, the Commission will not make available any locations for public gathering, neither in Santa Ana nor in Sacramento. However, the Commission will continue to provide means by which members of the public may observe and comment on the meeting telephonically or electronically.

The March 25, 2020 Commission meeting will be held via webinar. Should you wish to participate on the meeting via computer please visit:

<https://attendee.gotowebinar.com/register/6815589312098899212>.

There, you will be provided dial information, instructions for participation, an access code, and audio pin to join the meeting. The Commission will hear the Resolution of Necessity request to acquire a portion of your client's property at or any time after 1:00 p.m. on March 25, 2020.

In the event you do not or are unable to participate in the March 25, 2020 Commission meeting, be advised that your letters of November 8, 2019 and March 23, 2020 will be made available to the Commission at the March 25, 2020 meeting and included as part of the official record of that meeting.

To view a live webcast of the meeting, please visit:

<https://www.youtube.com/channel/UCASI3gyTEuhZffC13RbG4xQ>

If you wish to only listen to the meeting:

Phone Number: (415) 655-0060, Access Code: 317-324-513

I apologize and for any inconvenience this may have caused.

Sincerely,



MITCH WEISS
Executive Director

Attachments:



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949 854 7000

March 23, 2020

Charles S. Krolikowski
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VIA E-MAIL

Executive Director
California Transportation Commission
P.O. Box 942873
Mail Station 52
Sacramento, CA 94273-0001

Antonio Avila
California Department of Transportation
1750 E. Fourth Street, Suite 100
Santa Ana, CA 92705
Antonio.avila@dot.ca.gov

Re: Caltrans Project No. 1213000086
Parcel No. 103763-1
Request to Personally Appear and Submit Written Objections Mark H. Balan and
Kamala Balan as Trustees of the Balan Family Trust

Dear Executive Director:

As you know, this office represents Mark H. Balan and Kamala Balan as Trustees of the Balan Family Trust, the owners (“Owners”) of certain real property and improvements located at 120 S. Coast Highway, Laguna Beach, CA 92651, commonly referred to by the California Department of Transportation (“Caltrans”) as Caltrans Parcel No. 103763-1 (the “Subject Property”).

In light of the current state of global affairs, we are shocked that the California Transportation Commission (the “Commission”) still appears to be taking private property like business as usual. While we understand and sympathize with the need for continuity in this uncertain time, federal and state constitutional rights cannot—and were not—so easily cast aside. Despite the pandemic caused by COVID-19, Caltrans still seeks to acquire an interest in the Subject Property by eminent domain for construction related to its ongoing public project (“Project”) now being held by teleconference only at an uncertain time on March 25, 2020.

When the Governor authorized state and local bodies to hold public meetings via teleconference, it did so subject to express reservations. (See generally Exec. Ord. No. N-25-20, at ¶ 11, Mar. 12, 2020.)¹ Accordingly, the Order suspended certain provisions of the Bagley-Keene and Brown Acts on the condition that “each state or local body **must give advance notice of the public meeting**[.]” (See *ibid.* [emphasis added].) The Order urged state and local bodies to “use sound discretion and to make reasonable efforts to adhere as closely as reasonably possible to the provisions [. . .] **in order to maximize transparency and provide the public access to their meetings.**” (*Ibid.* [emphasis added].) As such, state and local bodies must still “notice each teleconference[.]” make each “teleconference location [] accessible to the public[.]” post agendas at all teleconference locations, and state bodies must ensure that at least one member of the state body be physically present at the location where the meeting was to be held. (See *ibid.*)

Here, the Commission’s notice (“Notice”) fell short. By letter dated March 19, 2020, the Owners, via counsel, were informed that the Commission “eliminated the physical locations for their March 25, 2020 meeting” contrary to the provisions of the Governor’s Order. (See *ibid.* [state bodies must ensure that at least one member of the state body be physically present in the location where the meeting was to be held].) Moreover, no certain time was given—only that “[t]he Commission will hear the Resolution of Necessity request to acquire a portion of [the Owners’] property at or any time after 1:00 p.m. on March 25, 2020.” The Commission has provided this inadequate Notice despite the heightened protections that apply at any such hearing on the Resolution, which seeks to take an interest in the Subject Property.

The Owners request that this letter be included as part of the permanent record and be provided to the Commission. The Owners also expressly reserve the right to provide additional comment, written or otherwise, up to and at the hearing identified above.

Without waiver of any right or defense in favor of the Owners, including the right to submit comment up to and at the public hearings, the Owners hereby object to the Notice and the proposed Resolution on each of the following grounds.²

1. Caltrans Failed to Make Every Reasonable Effort To Expeditiously Acquire the Property By Negotiation—Not Condemnation.

Per Government Code section 7267.1, Caltrans “shall make every reasonable effort to acquire expeditiously real property by negotiation.” (See Gov. Code, § 7267.1, subd. (a).) Four things are of note in this statutory mandate. First, it is a mandate and cannot

¹ The Order is incorporated by reference herein and has been made publicly-available at <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf> (last accessed Mar. 23 ,2020, at 11:50 a.m. PST).

² As the original notice dated November 1, 2019, acknowledged, the Commission must provide the Owners with a meaningful opportunity to appear and to object at said hearings.

be ignored at Caltrans's whim. (*Ibid.* [using "shall"].) Second, it requires "every reasonable effort" to acquire the Subject Property—not just one attempt—but a sincere, repeated, reasonable effort. (*Ibid.* [emphasis added].) Third, every reasonable effort to acquire the Subject Property must be done "expeditiously" or with speed and efficiency. (*Ibid.*) Finally, Caltrans must make such an attempt to acquire the Subject Property by negotiation—not condemnation. (*Ibid.*)

To date, Caltrans has failed to meet its mandate. Caltrans has not made every reasonable effort to negotiate with the Owners to acquire the Subject Property—it has only made one, unilateral offer and failed to negotiate further. While Caltrans held a meeting to discuss the Project and then requested an offer from the Owners, the Owners' compliance with this request (the submission of a settlement demand) has been met with radio silence from Caltrans.

Moreover, Caltrans has failed to provide or has otherwise improperly placed unreasonable conditions on the Owners' exercise of their constitutional rights with respect to the Owners' request for the reasonable costs of an independent appraisal. Per Code of Civil Procedure section 1263.025, Caltrans is required to pay the reasonable costs of that independent appraisal, not exceeding \$5,000.00. (See Code Civ. Proc., § 1263.025.) Caltrans's overt failure to comply with this duty by making compliance conditioned on unreasonable terms cannot be construed as it making "every reasonable effort" to negotiate.

Aside from failing to negotiate, much less make every reasonable effort to do so, Caltrans has also failed to do so expeditiously by failing to reimburse per the appraisal procedure and sitting on the Owners' requested offer without response. Indeed, offering a unilateral appraisal is not a negotiation. This inflexibility is akin to unreasonable precondemnation conduct. (*Tilem v. City of Los Angeles* (1983) 142 Cal.App.3d 694, 705 [191 Cal.Rptr. 229] [statutory directives of Government Code section 7267 et seq. provide a ready guide for determining whether a public agency has engaged in unreasonable or oppressive precondemnation conduct].)

Thus, the Commission failed to meet the requirements under Government Code section 7267.1.

2. A Government Code section 7267.2 Offer Has Not Been Made.

Government Code section 7267.2 requires that Caltrans make a legitimate offer of compensation pursuant to an approved appraisal before initiating eminent domain proceedings. (See Gov. Code, § 7267.2.) The appraisal report upon which Caltrans has premised its purported precondemnation offer is inadequate in part because it has engaged in unreasonable or oppressive precondemnation conduct obstructing the Owners from acquiring an independent appraisal. Further, no meaningful response was offered to the Owners resulting from the impacts of the takings and Project construction.

Again, no counteroffer was made despite the Owners' compliance with Caltrans's request for such an offer.

Thus, Caltrans failed to meet the requirements for an offer under Government Code section 7267.2.

3. Caltrans Is Incapable of Conducting a Fair, Legal, and Impartial Hearing on the Resolution.

Due to its involvement in designing and ultimately constructing the Project, Caltrans has already committed itself to the Project. As such, the adoption of the Resolution here would be a sham hearing staged for Caltrans to reach a predetermined result.

Along those lines, Caltrans has indicated that it has certain critical deadlines to meet related to the Project. Given that the taking of the Subject Property is a component of those deadlines, there are likely documents and agreements reflecting Caltrans's lack of discretion with respect to its adoption of the Resolution and that it must proceed with the takings and Project regardless of any valid objections raised to the same. As such, any hearing to "consider" the issues pertaining to the adoption of the Resolution would be a sham, rendering the Resolution void. (See *Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1127-1129 [219 Cal.Rptr. 365].)

4. Caltrans Failed to Complete the Necessary Environmental Review for the Project.

From a preliminary review of the Project, there appears to be evidence to support a fair argument that the Project will have significant impacts on the environment as it relates to traffic, circulation, noise, dust, aesthetics, air quality, and other issues. To comply with the California Environmental Quality Act ("CEQA"), Caltrans should update its technical reports related to impacts both during and after construction.

Unless and until all of the potential environmental issues have been addressed, and mitigation measures identified, Caltrans cannot adopt the Resolution as it would violate CEQA.

5. The Project Is Not Planned or Located In a Manner That Will Be Most Compatible with the Greatest Public Good and the Least Private Injury.

The Project is not compatible with the greatest public good because it will disproportionately and negatively impact the Owners' use and enjoyment of the Subject Property. (See Code Civ. Proc., §1245.230, subd. (c)(2)(3).) Thus, the Project is not planned in a manner that will cause the least private injury.

Based on the foregoing, the Owners request that Caltrans wait to adopt the Resolution until all of the above issues have been addressed and resolved. At a minimum,

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Caltrans should continue its hearings to a later date amidst the current global pandemic, after the Owners have acquired an independent appraisal and fully and fairly negotiated the Subject Property's acquisition.

Nothing in this letter shall be construed as a waiver of any right or defense in the Owners' favor and such other objections and defenses are hereby expressly reserved.

If you have any questions or comments regarding the above, do not hesitate to contact the undersigned.

Very truly yours,



Charles S. Krolikowski

CSK:slt

CC: Moss, Debra@DOT <Debra.Moss@dot.ca.gov>
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