

TAB #2

# PALMIERI TYLER

ATTORNEYS AT LAW

ANGELO J. PALMIERI (1926-1998)  
ROBERT F. WALDRON (1927-1998)

DENNIS W. GHAN*	MELISA R. PEREZ
DAVID D. PARR*	MICHAEL I. KEHOE
CHARLES H. KANTER*	CHADWICK C. BUNCH
PATRICK A. HENNESSEY	ANISH J. BANKER
DON FISHER	RYAN M. PRAGER
WARREN A. WILLIAMS	ERIN BALSARA NADERI
JOHN R. LISTER	ERICA M. BOROSKY
MICHAEL H. LEIFER	JOBHUA J. MARK
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NORMAN J. RODICH	KATHERINE M. SHAW
MICHAEL L. D'ANGELO	BRIAN GLICKLIN
STEPHEN A. SCHECK	CAROLYN H. CLARK
DONNA L. SNOW	M. OMAR HANMIM
RYAN M. EASTER	NAZANI N. TEMOURIAN
ELISE M. KERN	

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P.O. Box 19712  
Irvine, CA 92623-9712

**Anish J. Banker**  
Direct Dial (949) 851-7220  
Direct Fax (949) 825-5412  
mliefer@ptwww.com

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MICHAEL C. CHO, OF COUNSEL  
RONALD M. COLE, OF COUNSEL  
MICHAEL J. GREENE\*, OF COUNSEL  
ROBERT C. IHRKE, OF COUNSEL  
GREGORY N. WEILER, OF COUNSEL  
ALAN H. WIENER\*, OF COUNSEL

JAMES E. WILHELM, RETIRED  
DENNIS G. TYLER\*, RETIRED

\*A PROFESSIONAL CORPORATION

## VIA CERTIFIED MAIL

**RETURN RECEIPT REQUESTED AND FACSIMILE (510) 286-5482/(916) 653-5776**

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

Mark L. Weaver  
Deputy District Director  
Right of Way and Land Surveys  
State of California, Department of  
Transportation  
111 Grand Avenue  
P.O. Box 23440  
Oakland, California 94623-0440

**Re: Objection to Proposed Adoption of Resolution of Necessity for Acquisition of Portions of Certain Real Property Located along Mission Rd. and Identified as Assessor Parcel Number (APN) 096-001-003009 (Caltrans Parcel 63339) (the "Subject Property") for construction of a HOV / HOT Lane on Interstate 690 in Sunol, California (the "Project")**

Dear Executive Director and Mr. Weaver:

This firm represents the Lee owners of the above-referenced real property located in Alameda County (the "Subject Property").

We received a letter from Senior Right of Way Agent Shalvin Singh providing notice of a proposed California Transportation Commission ("CTC") hearing intending to adopt a Resolution of Necessity concerning the Subject Property in connection with the Project. Based on the notice received, the CTC's hearing is scheduled to be held at the

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Lincoln Plaza Auditorium located at 400 P Street, Sacramento, California, on June 28, 2017.

This letter serves to notify Caltrans of the property owners' objection to the CTC's proposed adoption of a Resolution of Necessity to condemn portions of the Subject Property for the Project. We also request that this letter be included as part of the formal record on that agenda item.

We believe that the adoption of the resolution of necessity is improper at this time on each of the following grounds:

**1. Caltrans Has Failed To Extend A Legitimate Precondemnation Offer Pursuant to Government Code section 7267.2.**

California law requires that Caltrans make a proper offer of just compensation based upon its approved appraisal prior to initiating a condemnation proceeding. Compliance with Government Code section 7267.2 is a *mandatory* prerequisite to adopting a resolution of necessity and initiating an eminent domain action. (Code Civ. Proc., §§ 1240.040, 1245.230, subd. (c)(4); *City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005.) Failure to strictly comply with the requirements of this section are grounds for dismissal of the proceeding.

Here, the "appraiser", acting on Caltrans's behalf, did not come close to engaging in a proper analysis. The construction and use of the Project in the manner proposed to the Subject Property were not considered. This Project calls for an undertaking of significant duration. As far as we can tell, based upon the information provided so far, there will be extensive construction activities. Of course, there will be further related construction activities, the specifics of which, however, have not been disclosed to the property owners.

As Caltrans is aware, in any part-take eminent domain proceeding (such as this one), the real estate appraiser is required to value the entire larger parcel in the "before" and the so-called "after" conditions, and assess any impacts occurring to the remainder property relating to either or both the parts taken and/or the construction and use of the Project in the manner proposed in order to properly assess severance damages. This appraisal improperly fails to undertake the required analysis.

Also, Caltrans's offer is based on a stale appraisal considering stale information that is over one year old. The offer was based on a March 22, 2016, appraisal relying on sales data from years prior between 2004 and 2015. A cursory review of recent sales of

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comparable properties in the surrounding area indicate a unit rate in excess of the per square foot rate relied upon by Caltrans in its precondemnation offer. Offers based on an appraisal over six (6) months old does not show that "just compensation" has been offered. As such, Caltrans appraisal does not comply with the federal and state transportation agency requirements that govern this Project. Further, there is no showing that Caltrans cannot obtain a more current appraisal despite general knowledge that market has improved and despite federal and state acquisition requirements that mandate Caltrans do so.

Accordingly, Caltrans's precondemnation offer is invalid and cannot support the adoption of a Resolution of Necessity authorizing the acquisition of the sought for portions of the Subject Property.

It is inappropriate to attempt to condemn first, and then suggest that an error can be corrected by a subsequent offer or subsequent appraisal *after* the adoption of a resolution of necessity. (See, *City of Stockton v. Marina Towers* (2009) 171 Cal.App.4th 93.) Caltrans cannot correct its error by simply reappraising *after* adopting a resolution of necessity to retroactively confer upon itself with the authority to do that for which it has already done.

2. **Caltrans Failed To Negotiate In Good Faith Pursuant To Government Code Section 7267.1.**

Government Code section 7267.1 imposes an affirmative obligation on a public entity seeking to condemn property to seek to **acquire that property first by negotiation.** (*Johnston v. Sonoma County Agricultural Preservation & Open Space Dist.* (2002) 100 Cal.App.4th 973.) "The public entity shall make every reasonable effort to acquire expeditiously real property by negotiation." (Gov. Code, § 7267.1, subd. (a).) The duty to negotiate is designed to *avoid* litigation, not avoid the recognition of 19 buildings. "In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the public programs, and to promote public confidence in public land acquisition practices, public entities shall, to the greatest extent practicable, make every reasonable effort to acquire property by negotiation." (8 Witkin, Summary of Cal. Law (9th ed. 2004) Const. Law, § 972.)

Despite repeated requests by the owners for *all* information necessary to assess the adequacy of its precondemnation offer including, but not limited to, the Project plans, not all of the information requested has been provided.

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The fundamental precept of any good faith negotiations is that it be predicated on a *legitimate* precondemnation offer that complies with the Government Code. Here, the offer as proposed cannot be accepted. It fails to account for the substantial damages accruing to the marketability of the remainder property due to the construction and use of the Project as proposed including, but not limited to, its adjacency to a massive project and the associated impacts. Instead of analyzing the Project's true impacts on the Subject Property, Caltrans is prematurely moving forward with this condemnation action. The power of eminent domain is the most coercive power granted to the government under the Constitution relating directly to the ownership of private property. However, with such coercive power comes the responsibility to exercise it appropriately and to seek impartial justice for both the government and private property owner. (See, *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871 ("*Decker*").) Here, Caltrans is ignoring its *affirmative* obligation under the Government Code. Rather, Caltrans seeks to force the property owner to acceptance a knowingly inadequate offer or be involved in a lawsuit.

In this instance, Caltrans's conduct falls below its affirmative duty imposed under the Government Code and higher ethical duty to seek impartial justice. (See, *Decker*, *supra*, 18 Cal.3d at p. 871; See also, Gov. Code, §§ 7267.1, *et seq.*)

3. **Based Upon Information Currently Known, Caltrans's Proposed Project Is Not Planned Or Located In The Manner That Will Be Most Compatible With the Least Private Injury.**

Caltrans's consideration and adoption of a resolution of necessity requires a finding that the Project as proposed is planned and located in the manner that will be most compatible with the greatest public good and the least private injury. (Code Civ. Proc., § 1245.340, subd. (c)(2).) In this case, however, Caltrans has not provided adequate information to the property owners of any viable Project alternatives that may exist and enable Caltrans to obtain all of the amenities of the Project as proposed. As far as we can tell, based upon the scant information provided, there may be other viable project alternatives that will less disruptive and damaging to the Subject Property, the specifics of which, however, have not been disclosed to property owners.

Caltrans must consider all alternatives before an informed determination can be made as to whether the Project as proposed is "most compatible with the greatest public good and the least private injury."

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**4. The Property Sought To Be Acquired Is Not Necessary For the Project.**

One of the mandatory components to the necessity determination is that the property sought to be acquired must be necessary for the project. (Code Civ. Proc. § 1240.030, subd. (c).) The Eminent Domain Law defines "property" to include real and personal property and any interest thereon. (Code Civ. Proc., § 1235.170.) Thus, Caltrans must not only consider whether the property is necessary for the project but also whether the particular interest in the property that Caltrans seeks to take is necessary. In the absence of substantial evidence supporting such a determination, the Resolution of Necessity will be invalid.

The property owners are informed and believe that viable Project alternatives exist that would provide all of the amenities of the proposed Project but at a substantially reduced cost and with less private property. Those alternatives would materially reduce the need to acquire any private property for construction of the proposed Project. However, Caltrans has failed to consider those project alternatives.

Barring such consideration, Caltrans cannot make an informed determination as to whether the Subject Property is actually necessary for the project.

**5. Caltrans Is Incapable of Conducting A Fair, Legal, And Impartial Hearing On The Proposed Adoption of The Resolution of Necessity.**

It is believed that Caltrans has already committed itself to the proposed taking, so any hearing resulting in the adoption of the resolution by Caltrans would be a predetermined result. The proposed resolution hearing is a pretense and artifice, and any resolution adopted under these circumstances would be voidable by a court of competent jurisdiction. (See, *Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1127.)

As a condition precedent to the exercise of the power of eminent domain, a public agency "must hold a public hearing to determine whether a particular taking meets the [requirements of Civil Code section 1245.235, i.e., is for a public use, necessary, and designed in such a manner to cause the least private injury]...." (*Norm's Slauson, supra*, 173 Cal.App.3d at p. 1125 [Emphasis added].) "Implicit in this requirement...is the concept that...the [a]gency engage in a good faith and judicious consideration of the pros and cons of the issue and that the decision to take be buttressed by substantial evidence...." (*Id.*, at pp. 1125-1126.) "[A]n agency that would take private property...must...conduct a fair hearing and make its determination on the basis of

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evidence presented in a judicious and nonarbitrary fashion." (*Id.*, at p. 1129.) In the absence of a fair and impartial hearing, the resolution of necessity is void.

If the condemning agency fails to conduct itself in this manner, then the resolution is not entitled to its ordinary conclusive effect and the burden of proving the elements for a particular taking rests on the government agency with the court being the final adjudicator. (*Norm's Slauson, supra*, 173 Cal.App.3d at pp. 1128-1129.) "The governmental agency in such a situation cannot act arbitrarily and then seek the benefit of having its decision afforded the deference to which it might otherwise be entitled." (*Id.* at p. 1129.)

In *Norm's Slauson*, the Court held that the condemning agency's approval of the resolution of necessity was invalid when the agency "simply 'rubber stamped' a predetermined result" because, prior to any hearing on the resolution, it (a) entered into an agreement with a developer by which the agency agreed to transfer a portion of defendant/property owner's restaurant, and the developer agreed to construct a condominium thereon; and (b) issued and sold tax exempt bonds to pay for the acquisition. (*Id.* at p. 1127.) "In short, the agency, without any notice to Norm's [the property owner], in effect sold the property and issued bonds to obtain the money to acquire the property all before taking any steps to condemn the property." (*Id.*, at p. 1125.)

Here, the property owners are informed and believe that Caltrans has impermissibly committed itself to take portions of the Subject Property.

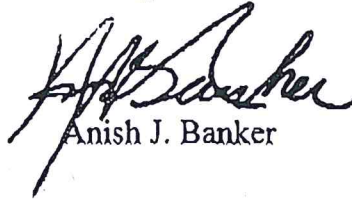
By having already committed to the Project, Caltrans has left itself no discretion but to approve the Resolution. (See, e.g., *Norm's Slauson, supra*, 173 Cal.App.3d at pp. 1127-1130; Code Civ. Proc., § 1245.255, subd. (b).) Accordingly, if the Resolution is adopted, the hearing which led to its adoption will have been a pretense and Caltrans's policy-making board will simply be "rubber stamping" a pre-determined result. If the Resolution is adopted under such circumstances, it will be voidable on that basis.

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On all of the foregoing grounds, our clients object to adoption of the resolution of necessity and respectfully request that the CTC not adopt the resolution. Our clients further reserve their rights to make further objections.

Very truly yours,



Anish J. Banker

AJB:ab

cc: Client  
Shalvin Singh, Senior Right of Way Agent  
Jaspreet Singh, Senior Right of Way Agent  
Audel Lashgari, Associate Right of Way Agent  
Michael H. Leifer