

# Memorandum



DATE April 01, 2016

TO Honorable Mayor and Members of the City Council

SUBJECT **Property Acquisition Issues: Authorizing Eminent Domain**

On Wednesday, April 6, 2016, you will be briefed on the Property Acquisition Issues: Authorizing Eminent Domain. The briefing materials are attached for your review.

If you have any questions, please let me know.



Ryan S. Evans  
First Assistant City Manager



Arthur Hudman  
Executive Assistant City Attorney

c: A.C. Gonzalez, City Manager  
Warren M.S. Ernst, City Attorney  
Craig D. Kinton, City Auditor  
Rosa A. Rios, City Secretary  
Daniel F. Solis, Administrative Judge  
Eric D. Campbell, Assistant City Manager  
Jill A. Jordan, P.E., Assistant City Manager  
Mark McDaniel, Assistant City Manager  
Joey Zapata, Assistant City Manager  
Jeanne Chipperfield, Chief Financial Officer  
Sana Syed, Public Information Officer  
Elsa Cantu, Assistant to the City Manager – Mayor & Council

# PROPERTY ACQUISITION ISSUES: AUTHORIZING EMINENT DOMAIN

BY  
CITY MANAGER'S OFFICE  
AND  
CITY ATTORNEY'S OFFICE

April 6, 2016

# PURPOSE AND BACKGROUND:

- Council deferred three acquisition resolutions from the March 23, 2016 Agenda and the Mayor requested the City Manager and City Attorney give Council a brief presentation at the April 6, 2016, Council meeting regarding options for handling such matters.
- This briefing is not a comprehensive overview of eminent domain law or the City's land acquisition policies and procedures.
- Rather, it focuses on issues raised at the March 23, 2016, Council meeting regarding resolution language authorizing acquisition, including the exercise of eminent domain, if such becomes necessary, of property needed for City projects.

# ACQUISITIONS AND EMINENT DOMAIN: Some Legal Considerations

- The City must provide owners with due process as required by the United States and Texas Constitutions and State law.
- Legal Procedures and Safeguards Involving Eminent Domain (examples):
  - Acquisitions must be for a valid public purpose.
  - The City is required to make an initial offer in writing to the owner.
  - The City is required to provide the owner at the time of an offer all appraisal reports the City has acquired.
  - The City is required to make a final offer in writing to the owner.
  - The final offer must be made at least 30 days after the initial offer and the owner must be provided at least 14 days to respond.
  - The City must give owners the **Landowner's Bill of Rights** (See Attachments) before or at the same time as it first represents that it has eminent domain authority and at least 7 days before a final offer.
  - Eminent domain actions must be authorized via state mandated motion language and a record vote of Council.

# THE AUTHORIZATION PROCESS:

The City used a single acquisition resolution that addresses both voluntary, agreed acquisitions and use of eminent domain for the three pulled items:

- See the Attachments for an example.
- The form of resolution specifies, among other matters:
  - Owner information;
  - Price and closing costs authorized to be paid;
  - Project (public purpose) for which the property is being acquired;
  - Type of property interest being acquired (fee simple title, easement, leasehold, etc.); and
  - Description of the property being acquired.
- The form of resolution authorizes acquisition on the specified terms, including the use of eminent domain, if necessary.
- This single resolution approach is most frequently used for projects considered time sensitive.
- The City also often does a separate resolution for voluntary, agreed acquisitions and/or a separate resolution for use of eminent domain, rather than addressing the two possible events into a single resolution.

# THE AUTHORIZATION PROCESS: (continued)

- The single resolution approach works as follows:
  - If the parties can agree to a voluntary sale on substantially the terms authorized in the resolution, there is a closing without further action before Council.
  - If the parties cannot agree on a voluntary sale on substantially the terms authorized in the resolution, the City is free to file an eminent domain action without going back to Council.
  - The parties are free to continue negotiations up to and even after the filing of an eminent domain action.
  - Any material change from the terms originally approved by Council in the resolution, either through an agreement before or in a later settlement of a filed eminent domain action, will require a further Council resolution approving the changed terms.

# CLARIFICATIONS ABOUT THE PROCESS:

- The City communicates with owners prior to adoption of acquisition resolutions whether or not eminent domain is involved.
  - A resolution of Council is not necessary for Staff to initiate contacts or start negotiations with owners.
  - City Staff regularly contacts the owners before an acquisition resolution is taken to Council.
    - Community meetings to announce and explain the Project are held.
    - Written notices/solicitations to individual owners are sent.
    - Telephone calls and site visits are made in an effort to open a dialog.
    - This outreach often involves requests by the City to inspect, survey, and/or appraise the property.
  - Staff receives all manner of responses to its outreach.
  - Staff continues communications as long as a deal seems possible or project deadlines do not become an issue.
  - If owners will not deal or project deadlines dictate, Staff refers the file to the City Attorney's Office for filing of an eminent domain action. Even then negotiations continue in hopes of voluntary agreement.

# CLARIFICATIONS ABOUT THE PROCESS: (continued)

- The City starts with fair offers to owners.
  - The United States Constitution and Texas law require just compensation.
  - The City is required by State law to get appraisals from state certified appraisers. Owners are not similarly obligated.
  - The City is required by State law to provide copies of the appraisals supporting its offer. Owners are not similarly obligated.
  - The City is required by State law to make a reasonable, good faith offer to owners as a jurisdictional prerequisite to any eminent domain action. An aggressive, “low ball” offer could put the action at risk of being abated or dismissed.
  - City Staff knows that should an eminent domain action be filed, the Commissioners panel (comprised of three impartial land owners appointed by an elected judge) will be ruling on the compensation issue and, ultimately, a jury of citizens will decide compensation at trial.
  - Staff has no personal or professional incentive to “low ball” owners.

# CLARIFICATIONS ABOUT THE PROCESS: (continued)

- The purchase price / eminent domain award is not the only compensation available to many owners.
  - For acquisitions involving eminent domain, owners are entitled to receive:
    - Reasonable fair market value compensation for the property taken and
    - Compensation for damage, if any, to an owner's remaining property.
  - Relocation Benefits: Displaced owners and tenants can get replacement housing assistance and moving costs in addition to the purchase price / eminent domain award.
    - Required for projects using federal funds.
    - Other projects are covered by city code.
    - The conditions to and formulas for relocation benefits are very fact specific.
    - Historically, the City has been very generous with relocation benefits.
    - Relocation benefits can exceed the purchase price / eminent domain award.

# CLARIFICATIONS ABOUT THE PROCESS: (continued)

- The City does not have unlimited discretion to voluntarily pay any amount deemed necessary to get a deal.
  - The City is generally limited to FMV and other statutory compensation.
  - The Texas Constitution prohibits gifts of public funds.

# CLARIFICATIONS ABOUT THE PROCESS: (continued)

- The City does not have unlimited discretion over the land to be acquired.
  - Eminent domain must have a valid “public purpose.”
    - The City cannot take property for just any purpose or for no purpose.
    - Examples – streets and alleys, parks and open spaces, utility lines and facilities, drainage and flood control, water and wastewater facilities, landfills, municipal buildings, etc.
    - Eminent domain for economic development is prohibited.
    - The public purpose must be identified.
    - If property is acquired through an eminent domain judgment, the former owner has a right to reacquire the property if the public purpose is not pursued.
  - The projects being pursued by the City dictate the property needed.
  - Holdouts can threaten the physical viability of, delay, or increase the cost of an entire public project.
  - Without the possibility of eminent domain action, every owner would have an incentive to be the last holdout.

# CLARIFICATIONS ABOUT THE PROCESS: (continued)

- The City Attorney's Office is not in contact with owners during routine negotiations.
  - Acquisition staff conducts negotiations with owners until those efforts seem useless or deadlines loom.
  - Staff then refers the file to the City Attorney's Office for filing of an eminent domain action.

# CITY MANAGER'S RECOMMENDATIONS:

- If the single resolution format, authorizing in one resolution both a voluntary, agreed acquisition and the use of eminent domain, if necessary, is to be changed the City Manager's Office recommends using:
  - a single specific resolution for voluntary, agreed acquisitions that would go to Council if and only if a deal is ready to close; and
  - a separate resolution for eminent domain authorizations that would go to Council if and only if Staff is convinced that a deal is not likely or project deadlines dictate.

**(This is the process currently most often used by Sustainable Development – Real Estate for acquisitions.)**
- Direct Staff to provide more information in the Agenda Information Sheets about negotiations, contact history and possible relocation benefits.

# QUESTIONS?

# ATTACHEMENTS

- Attachment A – Resolution Example “click”
- Attachment B – Landowner’s Bill of Rights “click”

## Attachment A

COUNCIL CHAMBER

March 23, 2016

### **A RESOLUTION DETERMINING UPON THE NECESSITY OF ACQUIRING REAL PROPERTY AND AUTHORIZING ITS APPROPRIATION AND/OR CONDEMNATION FOR PUBLIC USE.**

**DEFINITIONS:** For the purposes of this resolution, the following definitions of terms shall apply:

"CITY": The City of Dallas

"PROPERTY": Approximately 35,920 square feet of property located in Dallas County, and being the same property more particularly described in "Exhibit A", attached hereto and made a part hereof for all purposes.

"PROJECT": Mill Creek/Peaks Branch/State-Thomas Drainage Relief Tunnel

"USE": The construction, installation, use, and maintenance of a realigned section of roadway, utility relocation, land area to support tunnel construction and operation, together with such appurtenant facilities as may be necessary.

"PROPERTY INTEREST": Fee Simple

"OWNER": Floyd E. Garner, provided, however, that the term "OWNER" as used in this resolution means all persons having an ownership interest, regardless of whether those persons are actually named herein.

"OFFER AMOUNT": \$31,000.00

"CLOSING COSTS AND TITLE EXPENSES": Not to exceed \$3,000.00

"AUTHORIZED AMOUNT": \$34,000.00

**BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DALLAS:**

**SECTION 1.** That the USE of the PROPERTY for the PROJECT is a public use.

**SECTION 2.** That public necessity requires that the CITY acquire the PROPERTY INTEREST in the PROPERTY for the PROJECT.

## Attachment A

COUNCIL CHAMBER

March 23, 2016

**SECTION 3.** That for the purpose of acquiring the PROPERTY INTEREST in the PROPERTY, the Assistant Director of the Department of Sustainable Development and Construction Department, Real Estate Division, or such person as she may designate, is hereby authorized and directed to offer the OFFER AMOUNT as payment for the PROPERTY INTEREST in the PROPERTY.

**SECTION 4.** That in the event the OWNER accepts the OFFER AMOUNT, the Chief Financial Officer is authorized and directed to draw a warrant in favor of the OWNER, the then current owner of record, or the title company closing the transaction described herein in the OFFER AMOUNT payable out of 2006 Bond Funds: Fund No. 3T23, Department TWM, Unit T525, Activity SDRS, Program No. PB06T525, Object 4210, Encumbrance No. CT-TWM06T525J9 and CLOSING COSTS AND TITLE EXPENSES payable out of 2006 Bond Funds: Fund No. 3T23, Department TWM, Unit T525, Activity SDRS, Program No. PB06T525, Object 4230, Encumbrance No. CT-TWM06T525J10. The OFFER AMOUNT, CLOSING COSTS and TITLE EXPENSES together shall not exceed the AUTHORIZED AMOUNT.

**SECTION 5.** That the CITY is to have possession of the PROPERTY at closing; and the CITY will pay the CLOSING COSTS AND TITLE EXPENSES. In the event of condemnation, the CITY will pay costs as may be assessed by the Special Commissioners or the Court. Further, that expenses determined by the City Attorney to be necessary are authorized for payment. All costs and expenses described in this section shall be paid from the previously described funds.

**SECTION 6.** That if the OWNER refuses to accept the OFFER AMOUNT, the CITY will appropriate the PROPERTY INTEREST in the PROPERTY for the PROJECT under the laws of eminent domain and the provisions of the Charter of the City of Dallas. In such case, the City Attorney is authorized and requested to file the necessary proceeding(s) and take the necessary action for the prompt acquisition of the PROPERTY INTEREST in the PROPERTY by condemnation or in any manner provided by law.

**SECTION 7.** That in the event it is subsequently determined that additional persons other than those named herein have an interest in the PROPERTY, the City Attorney is authorized and directed to join said parties as defendants in said condemnation proceedings or suit(s).

**SECTION 8.** That to the extent the PROPERTY is being purchased wholly or partly with bond proceeds CITY has obtained an independent appraisal of the PROPERTY'S market value.

**SECTION 9.** That OWNER has been provided with a copy of the Landowner's Bill of Rights as required by Texas Property Code Section 21.0112.

# Attachment A

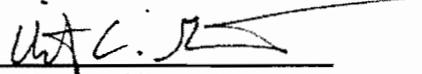
COUNCIL CHAMBER

March 23, 2016

**SECTION 10.** That in the event the City Attorney files a condemnation proceeding because the OWNER refused to accept the OFFER AMOUNT; and in the event the special commissioners appointed by the Court return an award that is the same amount or less than the OFFER AMOUNT, the City Attorney is hereby authorized to deposit the award in the registry of the Court and to settle the condemnation proceeding, or if the condemnation proceeding becomes a lawsuit, the lawsuit, for amount not to exceed the OFFER AMOUNT; and the Chief Financial Officer is hereby authorized to issue a check drawn on the previously described funds in an amount not to exceed the OFFER AMOUNT made payable to the County Clerk of Dallas County, to be deposited into the registry of the Court, to enable the CITY to take possession of the PROPERTY without further action of the Dallas City Council; and the Chief Financial Officer is hereby authorized to issue a check drawn on the previously described funds in an amount not to exceed \$3,000.00 for CLOSING COSTS and TITLE EXPENSES in favor of the title company closing the transaction described herein. The Award, CLOSING COSTS AND TITLE EXPENSES together shall not exceed the AUTHORIZED AMOUNT.

**SECTION 11.** That this resolution shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so resolved.

**APPROVED AS TO FORM:**  
**WARREN M. S. ERNST, City Attorney**

BY   
**Assistant City Attorney**

**Attachment A**

EXHIBIT A  
CITY OF DALLAS DRAWING NO. 423R-54 (PARCEL 151)  
DESCRIPTION OF A 0.8246 ACRE (35,920 SQ. FT.)  
TRACT TO BE ACQUIRED  
ALL OF LOT 13, BLOCK 7,  
SOUTH DALLAS GARDENS ADDITION  
CITY OF DALLAS BLOCK 7/6122  
THOMAS LAGOW SURVEY, ABSTRACT NO. 759  
CITY OF DALLAS, DALLAS COUNTY, TEXAS  
FROM FLOYD E. GARNER

Being situated in the Thomas Lagow Survey, Abstract Number 759, Dallas County, Texas, and being all of Lot 13, Block 7 (Block 7/6122, Official City of Dallas Block Numbers) of the South Dallas Gardens addition, an addition to the City of Dallas dated May 27, 1913, and Recorded in Volume 1, Page 448 of the Map Records of Dallas County, Texas, and being all of the property conveyed to Floyd E. Garner by Warranty Deed with Vendor's Lien dated March 17, 1994, and recorded in Volume 94056, Page 00463 of the Deed Records of Dallas County, Texas, and containing approximately 0.8246 of an acre (35,920 square feet) of land, according to the plat thereof.

This description is approved as to form.



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Scott Holt, RPLS  
Survey Program Manager

8/7/2015  
Date



Attachment B



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THE STATE OF TEXAS  
LANDOWNER'S  
BILL OF RIGHTS

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PREPARED BY THE



OFFICE OF THE  
ATTORNEY GENERAL OF TEXAS

## Attachment B



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This Landowner's Bill of Rights applies to any attempt by the government or a private entity to take your property. The contents of this Bill of Rights are prescribed by the Texas Legislature in Texas Government Code Sec. 402.031 and Chapter 21 of the Texas Property Code.

1. You are entitled to receive adequate compensation if your property is taken for a public use.
2. Your property can only be taken for a public use.
3. Your property can only be taken by a governmental entity or private entity authorized by law to do so.
4. The entity that wants to take your property must notify you about its interest in taking your property.
5. The entity proposing to take your property must provide you with an assessment of the adequate compensation for your property.
6. The entity proposing to take your property must make a good faith offer to buy the property before it files a lawsuit to condemn the property.
7. You may hire an appraiser or other professional to determine the value of your property or to assist you in any condemnation proceeding.
8. You may hire an attorney to negotiate with the condemning entity and to represent you in any legal proceedings involving the condemnation.
9. Before your property is condemned, you are entitled to a hearing before a court appointed panel that includes three special commissioners. The special commissioners must determine the amount of compensation the condemning entity owes for the taking of your property. The commissioners must also determine what compensation, if any, you are entitled to receive for any reduction in value of your remaining property.
10. If you are unsatisfied with the compensation awarded by the special commissioners, or if you question whether the taking of your property was proper, you have the right to a trial by a judge or jury. If you are dissatisfied with the trial court's judgment, you may appeal that decision.

### CONDEMNATION PROCEDURE

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Eminent Domain is the ability of certain entities to take private property for a public use. Private property can include land and certain improvements that are on that property.

Private property may only be taken by a governmental entity or private entity authorized by law to do so. Your property may be taken only for a public use. That means it can only be taken for a purpose or use that serves the general public. However, Texas law prohibits condemnation authorities from taking your property to enhance tax revenues or foster economic development.

Your property cannot be taken without adequate compensation. Adequate compensation includes the market value of the property being taken. It may also include certain damages, if any, to your remaining property caused by the acquisition itself or by the way the condemning entity will use the property.

## Attachment B

### HOW THE TAKING PROCESS BEGINS

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The taking of private property by eminent domain must follow certain procedures. First, the entity that wants to condemn your property must provide you a copy of this Landowner's Bill of Rights before or at the same time the entity first represents in any manner to you that it possesses eminent domain authority.

Second, if it has not been previously provided, the condemning entity must send this Landowner's Bill of Rights to the last known address of the person in whose name the property is listed on the most recent tax roll at least seven days before the entity makes a final offer to acquire your property.

Third, the condemning entity must make a good faith offer to purchase the property. The condemning entity's offer must be based on an investigation and an assessment of adequate compensation for the property. At the time the offer is made, the governmental condemning entity must disclose any appraisal reports it used to determine the value of its offer to acquire the property. You have the right to either accept or reject the offer made by the condemning entity.

### CONDEMNATION PROCEEDINGS

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If you and the condemning entity do not agree on the value of the property being taken, the entity may begin condemnation proceedings. Condemnation is the legal process for the taking of private property. It begins with a condemning entity filing a claim for your property in court. If you live in a county where part of the property being condemned is located, the claim must be filed in that county. Otherwise, the claim can be filed in any county where at least part of the property being condemned is located. The claim must describe the property being condemned, the intended public use, the name of the landowner, a statement that the landowner and the condemning entity were unable to agree on the value of the property, and that the condemning entity provided the landowner with the Landowner's Bill of Rights statement.

### SPECIAL COMMISSIONERS' HEARING

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After the condemning entity files a claim in court, the judge will appoint three landowners to serve as special commissioners. These special commissioners must live in the county where the condemnation proceeding is filed, and they must take an oath to assess the amount of adequate compensation fairly, impartially, and according to the law. The special commissioners are not authorized to decide whether the condemnation is necessary or if the public use is proper. After being appointed, the special commissioners must schedule a hearing at the earliest practical time and place and provide you written notice of that hearing.

You are required to disclose to the governmental condemning entity, at least ten days before the special commissioners' hearing, any appraisal reports used to determine your opinion about adequate compensation for the property. You may hire an appraiser or real estate professional to help you determine the value of your private property. You may also hire an attorney regarding these proceedings.

At the hearing, the special commissioners will consider evidence on the value of the property, the damages to remaining property, any value added to the remaining property as a result of the project, and the uses to be made of the property being taken.

### SPECIAL COMMISSIONERS' AWARD

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After hearing evidence from all interested parties, the special commissioners will determine the amount of money to be awarded as adequate compensation. You may be responsible for the costs if the Award is less than or equal to the amount the condemning entity offered before the condemnation proceeding began. Otherwise, the condemning entity will be responsible for the costs. The special commissioners will give a written decision to the court that appointed them. That decision is called the "Award." The Award must be filed with the court and the court must send written notice of the Award to all parties.

## Attachment B

After the Award is filed, the condemning entity may take possession of the property being condemned, even if either party appeals the Award of the special commissioners. To take possession of the property, the condemning entity must either pay you the amount of the Award or deposit the amount of the Award into the registry of the court. You have the right to withdraw the deposited funds from the registry of the court.

### OBJECTION TO THE SPECIAL COMMISSIONERS' AWARD

If either you or the condemning entity is dissatisfied with the amount of the Award, either party can object to the Award by filing a written statement of objection with the court. If neither party timely objects to the Award, the court will adopt the Award as the final judgment of the court. If a party timely objects to the special commissioners' Award, the court will hear the case in the same manner as other civil cases.

If you object to the Award and ask the court to hear the matter, you have the right to a trial by judge or jury. The allocation of costs is handled in the same manner as with the special commissioners' Award. After that trial, either party may appeal any judgment entered by the court.

### DISMISSAL OF THE CONDEMNATION ACTION

A condemning entity may file a motion to dismiss the condemnation proceeding if it decides it no longer needs your property. If the court grants the motion to dismiss, the case is over and you are entitled to recover reasonable and necessary fees for attorneys, appraisers, photographers, and for other expenses incurred to the date of the hearing on the motion to dismiss.

You may also file a motion to dismiss the condemnation proceeding on the ground that the condemning entity did not have the right to condemn the property, including a challenge as to whether the property is being taken for a public use. If the court grants your motion, the court may award you reasonable and necessary fees for attorneys, appraisers, photographers, and for other expenses incurred to the date of the hearing or judgment.

### RELOCATION COSTS

If you are displaced from a residence or place of business, you may be entitled to reimbursement for reasonable expenses incurred while moving personal property from the residence or relocating the business to a new site. You are not entitled to these relocation costs if they are recoverable under another law. If you are entitled to these costs, they cannot exceed the market value of the property being moved and can only be reimbursed for moving distances within 50 miles.

### RECLAMATION OPTIONS

If private property was condemned by a governmental entity, and the purpose for which the property was acquired is canceled before the 10th anniversary of the date of the acquisition, you may have the right to seek to repurchase the property for the fair market value of the property at the time the public use was canceled. This provision does not apply to property acquired by a county, a municipality, or the Texas Department of Transportation.

### DISCLAIMER

The information in this statement is intended to be a summary of the applicable portions of Texas state law as required by HB 1495, enacted by the 80th Texas Legislature, Regular Session. This statement is not legal advice and is not a substitute for legal counsel.

### ADDITIONAL RESOURCES

Further information regarding the procedures, timelines and requirements outlined in this document can be found in Chapter 21 of the Texas Property Code.