

November 6, 2017

**VIA FEDERAL EXPRESS AND
EMAIL (IWeinert@octa.net)**

Laurena Weinert
Clerk of the Board of Directors
550 South Main Street
Orange, California 92863

Re: November 27, 2017 Board Meeting
Sendero Apartments HB LLC's Objection to Proposed Resolution of Necessity
APN: 107-231-17
Caltrans Parcel Nos.: 103020-1, 2, 4, 5

Dear Ms. Weinert:

I represent Sendero Apartments HB LLC, which owns the above referenced property ("Sendero"). I am in receipt of the October 24, 2017 notice of intent to adopt a resolution of necessity and notice of hearing on November 27, 2017 at 9:00 a.m. **Sendero objects to the adoption of a resolution of necessity and requests an opportunity to appear before the Orange County Transportation Authority ("OCTA") and be heard at the November 27, 2017 hearing** on the proposed resolution of necessity ("Resolution of Necessity" or "Resolution").

Adoption of the proposed Resolution would authorize the OCTA to condemn Sendero's interests in certain portions of the property located at 8955 Riverbend Drive, Huntington Beach, CA 92647, bearing APN 107-231-17 (the "Property"), for construction of the Interstate 405 ("I-405") Improvement Project between State Route 73 and Interstate 605 (the "Project").

According to its website, the OCTA in cooperation with the California Department of Transportation ("Caltrans") is widening the I-405 between State Route 73 ("SR-73") and Interstate 605 ("I-605"). The Project will improve 16 miles of I-405 between the SR-73 freeway in Costa Mesa and I-605 near the Los Angeles County line. The Project includes adding one regular lane in each direction between Euclid Street and I-605 and making improvements to freeway entrances, exits and bridges. In addition, the Project will add the 405 Express Lanes, incorporating the existing carpool lanes and a new lane in each direction between SR-73 and I-605.

The general purpose lane portion of the project is a Measure M (Orange County's half-cent transportation sales tax) project and will be funded by a combination of local, state and federal funds, with the express lanes portion of the project financed and primarily paid for by those who choose to pay a toll and use the 405 Express Lanes. Construction is anticipated to start in early 2018 and will be completed in 2023.

Although there are no full property acquisitions as part of the Project, there are some locations along the 16-miles of the Project where the OCTA requires temporary construction easements ("TCE's") or partial

acquisitions. With respect to the Property, the OCTA is seeking two proposed fee acquisitions, along with a permanent footing easement, and a proposed TCE.

I. The Project Is Not Planned In A Manner Most Compatible With The Greatest Public Good And The Least Private Injury

A public agency has no right to condemn property or adopt a resolution of necessity unless the condemning agency (here, the OCTA) concludes, based on “substantial evidence” that “[t]he proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.” Cal. Code Civ. Proc. §§ 1245.230(c)(2), 1250.370; *Redevelopment Agency v. Norm’s Slauson*, 173 Cal. App. 3d 1121, 1125 (1985). In fact, a resolution of necessity adopted absent such “substantial evidence” is invalid, lacks conclusive effect, and is evidence of “a gross abuse of discretion” by the public agency. *City of Stockton v. Marina Towers, LLC*, 171 Cal. App. 4th 93 (2009); *Norm’s Slauson*, 173 Cal. App. 3d at 1125-1126.

A. OCTA Lacks “Substantial Evidence” That “The Proposed Project Is Planned Or Located In The Manner That Will Be Most Compatible With . . . The Least Private Injury”

Sendero objects to the adoption of the proposed Resolution of Necessity because there is no substantial evidence that the Project is “planned or located in the manner that will be most compatible with the greatest public good and the least private injury.” Cal. Code Civ. Proc. §§ 1245.230(c)(2), 1250.370.

While Sendero does not dispute that the Project may present some future public good (e.g. widening of the I-405, increase freeway capacity, improve traffic and interchange operations and enhance safety), the present location for the Project, combined with the timing of the adoption of the Resolution of Necessity and the anticipated attempt to acquire early possession of Sendero’s Property, will cause enormous private injury that will disproportionately inflict harm on the residents of the Sendero Apartment Homes.

If the OCTA adopts a Resolution of Necessity on November 27, 2017, it is expected that the OCTA would file an eminent domain lawsuit shortly thereafter. We anticipate that the OCTA will serve a motion for immediate possession concurrently with (or soon thereafter) its eminent domain complaint, under the guise of the need for “timely delivery of the parcels,” maintaining construction schedules and the potential cost of delay.

The OCTA’s forced and immediate possession of the Property in order to make way for the Project will result in the taking of property, improvements and facilities that Sendero presently uses for the benefit of its residents. This scenario does not represent the greatest public good with the least private injury.

B. The Proposed Project Has Been Planned And Located In A Manner That Will Adversely Impact Sendero’s Business Operations On The Property

Sendero does not wish to delay construction of the Project; however, the property interests to be acquired for a right-of-way, followed by construction and operation of the “improved” I-405, will cause significant and permanent adverse effects to Sendero, the facilities it provides to its residents, and Sendero’s ability to continue its business.

The construction and operation of the Project in such close proximity to Sendero will have disastrous impacts on Sendero’s business operations. Sendero Apartment Homes is an apartment community located next to the existing I-405 freeway and includes 152 one and two bedroom floor-plans that open up to patios. Sendero markets its community as “coastal living,” offering a resort style pool and spa and

outdoor gas barbeque grills, and situated just minutes from the Huntington Beach Pier, and shopping and dining options of nearby Bella Terra and South Coast Plaza.

According to the OCTA, there will be many sound walls that will be reconstructed or added as part of the Project. First, these sound walls clearly will have significant aesthetic impacts to the Sendero Apartment Homes. Further, these sound walls will only reduce the level of freeway noise, but will not eliminate it. The noise pollution associated with the Project both during and after construction will negatively impact Sendero's business, as such noise will likely cause Sendero to lose residents and, thereafter, have problems leasing its units. Sendero expects similar problems with the expected light pollution that is certain to accompany the Project.

Similarly, adverse traffic impacts, interference with ingress and egress, unknown construction impacts, all of which are currently in the process of being evaluated by Sendero, and other adverse impacts not yet identified, will certainly have a significant negative impact on Sendero's business operations.

II. The Proposed Resolution Of Necessity Seeks To Authorize Condemnation Of Property Not Necessary For The Project

A public agency has no right to condemn property or adopt a resolution of necessity unless the condemning agency concludes, based on "substantial evidence," that "[t]he property described in the resolution is necessary for the proposed project." Code Civ. Proc. §§ 1245.230(c)(3), 1250.370; *Norm's Slauson*, 173 Cal. App. 3d at 1125. The "extent of the taking" is "conclusively establishe[d]" by the resolution of necessity, and the condemning agency cannot later, at trial, introduce evidence to "reduce the scope of the taking." 1 Matteoni & Veit, *Condemnation Practice in Cal.* (Cont. Ed. Bar 3d ed. 2012) § 6.25, 357-358; see, e.g., *Coachella Valley Water District v. Western Allied Properties, Inc.*, 190 Cal. App. 3d 969 (1987); *County of San Diego v. Bressi*, 184 Cal. App. 3d 112, 116 (1986); see also *People ex rel. Dept. of Public Works v. Schultz Co.*, 123 Cal. App. 2d 925, 931-932 (1954). Therefore, if the Resolution of Necessity includes property that is not "necessary" for the Project, the OCTA must not adopt the Resolution.

Moreover, as discussed above, the OCTA's statement of necessity is conclusory and is not supported by any substantial evidence. On these grounds alone, the OCTA must not adopt the Resolution.

III. The OCTA Failed To Provide Sendero The Statutorily Required Offer And Therefore May Not Adopt The Proposed Resolution Of Necessity

A public agency cannot condemn property or adopt a resolution of necessity unless the condemning agency concludes, based on "substantial evidence," that "the offer required by Section 7267.2 of the Government Code has been made to the owner or owners of record." Cal. Code Civ. Proc. §§ 1245.230(c)(4), 1250.370; Cal. Govt. Code § 7267.2 ("Prior to adopting a resolution of necessity pursuant to Section 1245.230 of the Code of Civil Procedure," a condemnor is required to make the owner an offer to purchase the property for the full amount of just compensation); *Norm's Slauson*, 173 Cal. App. 3d at 1125.

The offer the OCTA made to Sendero was not calculated in the manner prescribed by law. Code Civ. Proc. §§ 1263.310 *et seq.* For example, the OCTA egregiously failed to make an offer that included any severance damages to that portion of the Property which was not condemned -- severance damages to which Sendero is entitled. Code Civ. Proc. §§ 1263.310, 1263.410; *City of Livermore v. Baca*, 205 Cal. App. 4th 1460, 1472 (2012) (condemnee entitled to severance damages where project resulted in

increased traffic hazards on the property, a temporary loss of landscaping, and temporary impaired access to the property)

The OCTA has not made an offer of “just compensation” satisfying the requirements of Section 7267.2 of the Government Code. The OCTA’s proposed condemnation would seriously compromise the intended use of the Property as an apartment community, and would cause Sendero damages in an amount yet to be determined. The OCTA’s failure to provide Sendero an offer that includes compensation for these severance damages, and complete compensation for its losses, precludes the OCTA from properly adopting the proposed Resolution of Necessity. Code Civ. Proc. § 1245.230(c)(4); Govt. Code § 7267.2; *Norm’s Slauson*, 173 Cal. App. 3d at 1125.

IV. Predetermination: Adoption Of The Resolution Of Necessity Will Have No Conclusive Effect Because The OCTA Has Already Committed Itself To Condemn The Property

A resolution of necessity lacks conclusive effect where the condemning agency has “irrevocably committed itself to take the property in question, regardless of any evidence that might be presented at hearing.” *Norm’s Slauson*, 173 Cal. App. 3d at 1127.

Here, Sendero objects to the adoption of the proposed Resolution of Necessity because the OCTA has already determined that the Resolution of Necessity will be approved. Also, the OCTA has already committed itself to the fee taking of the Property because it has already determined that the path and right-of-way for the Project requires the Property. In addition, construction schedules and state and federal funding require expeditious possession of the Property.

Put simply, the OCTA has irrevocably committed itself to take the Property, regardless of any evidence that Sendero may present in opposition at the November 27, 2017 hearing. Accordingly, the adoption of the Resolution of Necessity would be, at worst, a sham where the OCTA exercises no discretion at all due to the predetermined nature of the proceeding, or at the very least, a gross abuse of discretion. In either event, the Resolution will not have conclusive effect. See Cal. Code Civ. Proc. § 1245.255(b); *Norm’s Slauson*, 173 Cal. App. 3d at 1125-1127 (a condemning agency must, at the hearing concerning the adoption of a proposed resolution of necessity, “engage in a good faith and judicious consideration of the pros and cons of the issue.”).

V. Conclusion

Based on all the foregoing, Sendero respectfully requests that the Orange County Transportation Authority refuse to adopt the proposed resolution of necessity on November 27.

Very truly yours,

DENTONS US LLP



Ivor E. Samson