

The City Attorney
City of San Diego
MEMORANDUM
236-7221

DATE: November 20, 1986

TO: Councilman William Jones, District Four, MS
10A

FROM: City Attorney

SUBJECT: New Post Office for Skyline/Encanto Community
In response to your memorandum dated October 31, 1986, the following question are addressed in order: 1) Whether the City can condemn property for the construction of a post office; 2) Whether the City can assist the United States Postal Service with land assembly; if so, under what circumstances; 3) What are the best and worst time frame scenarios?

1. The City may condemn property for a public use including a federal use by joint resolution between the State and Congress.

The question presents a twofold analysis. The pivotal premise rests upon the sovereignty of the State to exercise its power of eminent domain.

The Postal Service has the power of eminent domain by virtue of an act of Congress (Constitution of the U.S. Article 1, Section 8, 39 U.S.C. Sec. 401). Since the Constitution of the United States did not expressly confer the power of eminent domain upon the federal government, the power to take property for federal public purposes has been found to be implied under the Necessary and Proper Clause to the extent necessary to support federal government programs and the Fifth Amendment declaring that private property may not be taken for public use without just compensation.

Municipalities do not possess inherent authority to take private property by eminent domain. Such authority is expressly delegated by the State. (Constitution of California, Article I, Section 19, California Code of Civil Procedure Secs. 1235.150, 1235.190; Charter of the City of San Diego, Article XIV, Sec. 220).

Historically, there was some diversity of opinion on the subject of the power of a state to exercise its right of eminent domain for a purpose of the Federal Government. Although it is common to assume that the Federal Government (through the U.S. Postal Service) has "the ultimate power of eminent domain," this assumption is not consistent with

concepts of federalism upon which our country was formed. California resolved the issue in 1861 when the Supreme Court decided *Gilmer v. Lime Point*, 18 Cal.229 (1861). The Court concluded that while the Federal Government, as an independent sovereignty, has the power of condemning land (by an act of Congress) within the State of California for its own use, it may lay aside its sovereignty and allow condemnation proceedings to proceed in state courts thereby accomplishing the same end through proceedings authorized by the California Legislature.

Since the Legislature, and not the judiciary, is the exclusive judge of when this right can be exercised, it may

also decide whether another sovereign or corporation may use the property for a public purpose of the State. Essentially, as long as a finding is made by the Legislature that the use is a "public use" it does not matter that the public use is a federal public use. The only constitutional limitation is to provide "just compensation." Therefore, since the City derives its authority of eminent domain from the State, it may likewise exercise its power for a public purpose, including a federal purpose.

Although the answer is easy if it is the Postal Service itself that petitions the State's power of eminent domain in the State Court, the answer is harder if another entity, namely the City of San Diego, petitions by way of its own delegated power in the State Court. Assuming the Council, as the City's governing body, adopted a resolution of necessity, such a resolution could be challenged in court by petition for a writ of mandate pursuant to Section 1085 of the California Code of Civil Procedure. The issue would be whether the Council grossly abused its discretion by exercising the State's power of eminent domain for a federal purpose (California Code of Civil Procedure, Sec. 1245.255(2)(b)).

The rationale of the *Gilmer* decision rests in vital principles of federalism. The right of eminent domain does not exist in the United States, without the consent of the States (by virtue of ratification of the Constitution of the United States). Imagine a line of delegation that starts with the State and extends horizontally to Congress and then vertically downward to the Postal Service. Similarly, a line can be extended vertically downward from the State to the City. For example:

State ----- Congress
City Postal Service

Therefore, in order for the City to proceed by way of condemnation on behalf of the Postal Service, a joint resolution or statute between the legislative arms of the City and the Postal Service, as delegates of the State and Congress, respectively, would need to be adopted. Since Congress has already designated the Board of Governors or Postmaster General as empowered to exercise the eminent domain on behalf of the United States, so long as a

memorandum of understanding is incorporated within the resolution of necessity adopted by Council, we opine that the requirements of the State Code of Civil Procedure will be met.

Of course, the findings pursuant to Code of Civil Procedure Sec. 1245.230 would have to be made; specifically:

- a. The public interest and necessity require the project;
 - b. The project is planned or located in a manner that will be most compatible with the greater public good and the least private injury;
 - c. The property sought to be acquired is necessary for the project; and
 - d. An offer has been made to the owners of record.
2. The City may assist the United States Postal Service with land assembly.

Generally, the Constitution of the United States confers the power to establish and maintain a post office upon Congress. The states have not retained any concurrent power as it relates to the postal service.

Site acquisition for public buildings, particularly a post office, is delegated to the Postmaster General by the Postal Service's Board of Governors and the General Services Administrator concurrently (40 U.S.C., Sec. 604).

Insofar as the federal authorities need not solicit assistance from the City, there is no legal reason why they may not should they so choose.

Although "land assembly" refers to something more than the power of eminent domain, there is no logical difference, in the argument above, between the "general" acquisition of property and the "specific" condemnation of property.

Assuming a public use finding by the relative legislative arms and the appropriate authority to act, title to the post office properties could be obtained outright through purchase, dedication, gift or adverse possession (or by eminent domain).

Therefore, as long as acquisition is appropriately authorized, the City may acquire title to property and transfer this title to the United States for the purpose of a post office.

3. Assuming the condemnation route under the best case scenario it will take approximately eight months to obtain possession and twenty months to record title of target property.

Precondemnation time includes the time to appraise the property, make an offer to the property owner, time to allow property owner to accept or reject offer, preparation of a manager's report, routing to the report to the various City departments, noticing a public hearing for a resolution of necessity, and adoption of the resolution by Council. Generally, it could take between 6 months and a year for this to be accomplished. We have found that the appraisal process is the largest time consumer.

In order to obtain possession of the target property, a complaint must be filed along with an application for an order of the court for immediate possession. This requires the retention of a litigation guarantee, plat drawings of the target property, and a check from the Auditor's office for the amount of the appraisal. After making the deposit and filing the appropriate documents at court, it will take either 30 days if the property is vacant or 90 days if it is occupied to obtain possession.

Depending upon what issues are resolved and what issues are to be presented to a jury it would take about a year to get a Court date.

Assuming successful litigation and no appeal by the property owner, it could take between 4 months and 6 months to record the deed (by way of final judgment).

Therefore, if the project is prioritized internally and smooth coordination between the Postal Service and City is assumed, then eight months for possession and twenty months for resolution of litigation is realistic. Assuming internal snags, public opposition, court congestion, encumbered property and/or lack of coordination between Postal Service and City, then twelve months for possession and thirty-six months for resolution of litigation is probable.

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By

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ALG:db:Lit.

MS-86-10