

REAL ESTATE AND CITIES:
Tips and Tricks

by Jonathan T. Koury

**Assistant City Attorney
City of Bryan, Texas**

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I. INTRODUCTION TO AUTHOR AND TOPIC

After graduating with a degree in Political Science/French from Austin College, I studied law at SMU Dedman School of Law in Dallas. My first experience with real estate began with the U.S. Small Business Administration, closing home loans for Katrina victims. Later I cut my teeth doing tax sale foreclosures for Laredo I.S.D. and Laredo Community College. But I didn't really take an interest in real estate until after moving to Austin. I began my municipal career working for Carey Bovey and Alan Bojorquez in 2008. Alan suggested that I develop real estate into an area of specialized focus. So I built on my past experience with real estate, targeted related CLE courses, and handled all the real estate issues the firm would let me get my hands on. Later, after moving to Bryan, real estate became a big part of my job description as I inherited the files from the then recently eliminated real estate department. Over the past six years I have participated in multi-million dollar land sales, cleared up title for HUD loans, bought and sold buildings, drafted deeds, easements, liens, and related policies, and learned quite a bit along the way.

Contact Information:

- Phone: 979-209-5154 / Fax: 979-209-5160
- Email: jkoury@bryantx.gov
- Address: P.O. Box 1000
Bryan, Texas 77805

In this paper, I will share insights about issues that come up during real estate transactions, both buying and selling, and the tips and tricks for getting to closing. Some of these issues are specific to cities and others are typical concerns in just about any real property transaction. As a side note, there are a lot of ways that cities obtain property besides purchasing (e.g. dedication, foreclosure, etc.) and there are a lot of exceptions to the rules regarding sales which are not going to be discussed here. Instead, this paper focuses on negotiated transactions, and it is structured around the four basic stages of such a transaction: 1) Negotiation of basic terms, 2) Preparation of the Contract for Sale, 3) Feasibility/Due Diligence, and 4) Closing. This paper is more of a practicum than a legal brief, and so we will be discussing the various issues facing cities when buying or selling real property by following two hypothetical scenarios.

Scenario One: Your client city is considering buying land for a fire station, and Deputy Fire Chief O'Malley has been tasked with making it happen. Working with the city engineer, Chief O'Malley has identified the best spot for the new station. And because condemnation is too complicated and isn't going to be discussed in this paper, we are super lucky to have a willing seller. The Chief has asked for your help in obtaining the property.

Scenario Two: Deputy City Manager Sharon Smith is in charge of economic development in the city. The city acquired a downtown parcel at a tax foreclosure sale. The dilapidated warehouse that used to sit on the property was demolished after the Building and Standards Commission declared it dangerous, and the city acquired the property to preserve its interest in the demolition lien. Now Ms. Smith has an interested buyer wanting to put in a brand new shopping center, which will fit perfectly with the city's comprehensive plan and bring thousands of dollars in new revenue to the city. Spoiler alert, you get to ruin her day.

II. NEGOTIATION

This should be the shortest part of the paper because, as lawyers, we are not usually involved at this point. Often your client will come to you with the details “already worked out”. Regardless, you will still need to answer a lot of the same questions. In both scenarios, the question of whether the city can buy/sell the property is not necessarily clear cut. In both scenarios, the Public Information Act and the Open Meetings Act will provide exceptions that allow the city to keep the location of the property and the price being negotiated confidential. However, the process of the negotiation in each scenario is going to be very different.

Scenario One: The first thing that Chief O’Malley needs to know is whether he is actually talking to the real owner. The local County Appraisal District (“CAD”) will give you a working knowledge in that regard. Typically the person paying taxes on the property is the owner, or at least knows who the owner is. But look for red flags such as a child paying taxes for a parent (living or dead). It doesn’t help to have negotiated a price with one of ten heirs if the others aren’t willing to sign. Even if you don’t see any red flags, Chief O’Malley should not rely solely on CAD information. We are anticipating spending upwards of six figures on this station, so we will need to engage a title company and get a title commitment (more on that later). Another consideration with regards to ownership is making sure that conflict of interest rules are not being violated. Look for connections between the owner (or their broker) and city staff or city council to see if the purchase would violate state law or charter provisions.

The second thing you need to discuss with the Chief is how to arrive at the purchase price. Are we using bond funds for this purchase? If so, we need to get an appraisal.¹ He tells you no, we have a separate fund with sufficient money to purchase the property. So we are not required to get an appraisal, but then how do we know what the property is worth? The CAD

¹ Tex. Loc. Gov’t Code Ann. § 253.051 (property may not be purchased with bond funds without appraisal).

appraisal is a good start, but again it is by no means determinative.² As a practical matter, it is best to get a feel for the area how far off the CAD appraisal typically is (e.g. 30%, 50%, etc.) and use that as a benchmark. Do we want to get an appraisal as a general rule? I would say no for several reasons. First off, they cost money and take time to obtain. Secondly, they are not definitive, so you are still going to have to negotiate a price with the owner. Third, once you have the appraisal, that information is either likely, or guaranteed, to become public.³ You already have a free appraisal from the CAD, so for most acquisitions it is not worth it to obtain a separate appraisal. Additionally, there is the potential for public backlash if the price paid appears to be more than the property is worth.

So Chief O'Malley says they have a price, and it is \$43,560 for the property, there are still a deal points you may want to discuss with the seller. The price looks a lot like \$1/square foot for an acre property, and the Chief confirms, they were negotiating between \$0.90 and \$1.25 and settled on \$1. Because we are talking about a price per square foot, that raises the question on whether the sale price will be adjusted based on a survey.⁴ If so, is it "Total Area" (i.e. square footage of land being sold) or "Net Area" (i.e. the total area less any easements, rights of way, floodplain, etc.). Something else to be discussed is the apportionment of closing costs for surveys, title policies, curative matters, etc. that will be incurred. Ideally part of the negotiation will determine where those costs will be apportioned so that there is less confusion later.

Scenario Two: It is time to rip the Band-Aid off and tell Deputy City Manager Smith that the city cannot sell the property to the interested buyer at the price she negotiated. As a

² My favorite irony in this job is that owners have a tendency to scream and throw fits when the CAD values their property for tax purposes, but when it comes time for us to buy the property from them, gee whiz is the CAD appraisal a low ball number. I've always wanted to make it a deal point, the city will pay "full value" for your property, but you owe us back taxes for the last seven years. As of publication of this paper, no one has let me do that.

³ In the case of condemnation, the city is required to provide the owner with any appraisals previously obtained by the City. Tex. Prop. Code Ann. § 21.0111(a).

⁴ A related question for larger transactions is whether the price is per acre or per square foot

general rule, you cannot sell public property without going through one of three public processes: 1. competitive sealed bids, 2. public auction, or 3. engaging a broker.⁵ There are a number of exceptions to the rule, which for the sake of expediency I have decided are mostly inapplicable to this scenario. Ms. Smith's interested buyer is an existing downtown property owner that wants to expand his existing rental properties across the platted alley and incorporating the city's vacant lot. Abandonment of the unused alley falls within one of the common exceptions, but we will address that later. For now you can assure Ms. Smith that the sale of the vacant lot will need to follow one of the three prescribed methods: 1. obtain a real estate broker, 2. schedule a public auction, or 3. request sealed bids. Each of these approaches has pros and cons, and so it is a judgment call for the city council which approach they want to take.

- Broker – because your client is a home rule city, this is an option. The property must be listed with the multiple listing service (“MLS”) for at least 30 days. The city can specify terms of the transaction (although in this instance they are more easily negotiable) and unlike the other options, the city has the ability to negotiate a higher price. The cost of this option is, most likely, highest because a broker is typically paid 4-5% of the sale price at closing (or 6% if the buyer is represented by a broker and they split the commission).
- Public Auction – a notice goes into the paper once a week for three consecutive weeks at least 20 days before the date of the auction. The city has the option of specifying the terms of the transaction and again must accept the highest bidder or none. The cost of this option may be higher if a professional auctioneer is hired.
- Sealed Bids – you put a notice in the paper once a week for two weeks at least 14 days in advance of the sale. The request for bids can specify terms of the transaction that best meet the city's needs (i.e. selection of the title company, allocation of closing costs, etc.). While the city has the option of rejecting all bids, it is otherwise obligated to accept the highest bidder⁶, and there is no

⁵ Tex. Loc. Gov't Code Ann. § 272.001; § 253.008; and § 253.014.

⁶ There is some question about whether terms other than sale price can be considered in a request for bids under state law. See *id* at § 272.001(a). There is no case directly on point, but the line of cases interpreting the statute, its predecessor, and similar statutes, seem to indicate that price must be a principal, if not sole, consideration. See *Bell v. Katy Indep. Sch. Dist.*, 994 S.W.2d 862, 866 (Tex.App.—Houston [1st Dist.] 1999, no. pet.) (holding that a purpose of the law is to protect public property in order that it might not be disposed of for less than true value); *West Orange-Cove Consol. Indep. Sch. Dist. v. Smith*, 928 S.W.2d 773, 776 (Tex.App.—Beaumont 1996, no writ) (holding notice and bidding stimulate competition, prevent favoritism, and secures the best price); *Sterret v. Bell*, 240 S.W.2d 516, 520 (Tex. Civ. App.—Dallas 1951, no writ) (holding that there can be no competitive bidding

opportunity for negotiation. The cost of this option is minimal, generally limited to the cost of the notice.

Before you present a recommendation to the city council, there are a number of considerations to address. If something other than price of the property is a major concern, think about how best to effectuate that purpose. Land use rules, deed restrictions, reversions, or deeds of trust would be options for ensuring a favorable outcome. Each of those options has consequences in terms of the bids the city is likely to receive. Additionally, the city can set conditions of the sale in a manner that promotes the desired outcome as well. For example, you can dictate the kinds of information that must be provided. If price of the property is the major concern, Ms. Smith should consider obtaining an appraisal. This is not a given, because it is not a legal requirement and there are trade-offs. An appraisal can be beneficial in that the city council has a reasonable expectation of what the property is worth, but they are not determinative of fair market value. While they are confidential prior to the sale, they become public after the fact, meaning the city council might be in an awkward position if no bids meet/exceed the appraised value.

When drafting the request for proposals or bids, there are a number of factors Ms. Smith should address, beyond the statutorily required description of the property, time for submitting bids, etc. For example, when establishing the procedure for offering sealed bids or offers for exchange, that is the time to go resolve some of the same issues discussed in the previous scenario. In the case of a sale, the city's negotiating position is much stronger and so the terms can be made more favorable. For example, the city should require that bids accept the property

where the terms of the contract prevent or restrict competition); *Tex. Hwy. Comm'n v. Tex. Ass'n of Steel Importers, Inc.*, 372 S.W.2d 525, 527 (holding that non-statutory restrictions on competitive bidding are invalid as they contradict the statute providing for competitive bids). The issue is further muddied in the context of exchanges, because it is not clear how a city would value property being offered in exchange, especially if there are competing offers for cash. If considerations other than price are to be part of the selection process, cities should be as clear as possible with regards to what those considerations are, or risk being subject to a challenge by an unsuccessful bidder.

as is, and there will be no adjustment of the price to account for shortages in area or encumbrances, and that that all closing costs are to be borne by the buyer. One of the down sides of a public sale is that people can later see if they offered too much or too little, and the city can be prejudiced if the winning bidder decides to back out or the sale otherwise falls through. One option to address that is to require bid bonds. Another option is to have a form real estate contract prepared and require the submissions in the form of a signed contract for sale, so that the contract can be executed immediately upon approval by city council.

So in our scenario, the city manager opted for getting sealed bids. So a request for bids was prepared by the city including the terms you discussed with Ms. Smith. Notice was put in the paper as required by law, but instead of the required two weeks, the notice indicated that bidders had a month to respond. As expected, Sharon's interested buyer was one of a few submitters, all cash offers. As expected, their offered price was the amount initially discussed with Ms. Smith, and because it makes for a better story, it was also the best offer. So an action item is taken to council to accept this bid and authorize the sale. The city council is happy with that price, as it exceeds the CAD value and is, in their experience with local real estate, a good price for the property. Note that if the contract negotiations break down or the property otherwise does not proceed to closing, the city retains the option of selling to the next highest bidder, or rejecting all bids.

III. REAL ESTATE SALES CONTRACT

The preparation of the real estate contract can be fairly easy as there are forms produced by the Texas Real Estate Commission ("TREC") that are relatively easy to come by. While as a rule I tend not to like the pre-prepared forms due to the increased likelihood of ambiguous or

irrelevant terms, TREC forms work pretty well in a pinch. Whether you are working from scratch or just filling in the blanks, there are still a lot of things you will need to think about.

Scenario One: Chief O'Malley has been told by the seller's real estate broker that they want to close in ninety days. The first thing to consider is if and when this needs to go to city council. The question of "if" depends not only the price/spending authority but also authority to accept real property on behalf of the city and authority to sign documents on the city's behalf.

The three things that the city council must do are:

- 1) authorize the purchase;
- 2) approve the acceptance of the property; and
- 3) designate a signatory authority.

It may seem like these are redundant, but you will see they are actually not. The first is an authorization to spend a certain amount. Most cities will have delegated a certain amount of spending authority by ordinance, which means no additional action would be required for a specific purchase. Something to note, even if the overall purchase price is outside that authority, the earnest money may not be, so a contract could be entered into with the condition that the city council must approve of the purchase price at a later date. The second thing the council must do is accept, or authorize acceptance of the property. Often, authority to accept is implicitly or explicitly delegated as a part of the platting or site development ordinances. For example, the subdivision ordinance requires dedication of parkland, a plat is submitted with parkland set aside, and the ordinance authorized the Planning & Zoning Commission to approve the plat. But it is equally common for purchases to fall outside the scope of the platting/development process and so some specific action by council would be required. The third action council must take is

more of a formality to give the mayor or city manager authority to sign any/all documents necessary to facilitate the closing.⁷

The question of “when” the city council takes action depends on a number of factors, such as when certain information will be made public, whether the council will debate the location/price, and whether that debate should be public. In our scenario, the city council has not delegated any authority, so at some point the city council will need to take a public action. As mentioned previously, you can discuss the location/price of property in closed session, so the city council can be apprised of the situation while negotiations are pending. The key is to make details public only after doing so will not prejudice the city. Generally speaking, that means you want to have a contract in place for the land you are acquiring before you make any terms public.

There are a couple ways of doing this:

- a. Multiple tracts: executive session discussion of location of the land and prices being negotiated for individual tracts; open session item authorizing expenditures within an overall budget for acquisition and authorizing the mayor or city manager to sign documents necessary to close.
- b. Single tract; council executes: council discusses the location/price in closed session, directs staff to negotiate specific terms with seller, once seller has agreed to terms staff thinks will be acceptable, staff has them sign a contract under those terms, and council approves execution of the contract in open session; authorizes the expenditure for earnest money, closing costs, and purchase price; and delegates authority to sign documents on the city’s behalf.⁸
- c. Single tract; staff executes: council discusses the location/price in closed session and comes to a consensus approval (i.e. no formal vote). Assuming the earnest money is within staff spending authority, staff executes purchase contract with a condition requiring city council approval. After the feasibility period but before closing, the

⁷ The typical closing includes a fair number of documents to be signed including waivers, the HUD-1 settlement statement, and filing instructions. The best approach I have found is to authorize the signatory to sign “any and all documents necessary to facilitate the purchase of [*identify property*].”

⁸ The payment of the balance and completion of the sale have to be contingent upon the absence of issues during the feasibility period. If something comes up that affects the price, or creates a deal breaker title issue, then city council will need to be able to rescind that prior decision. Alternatively, council action to approve the balance and the acquisition could be deferred until after feasibility.

city council approves the purchase of the property and the expenditure of the purchase price and delegates signature authority.⁹

For the purposes of our situation, you have the benefit of a Chief who is very on the ball. The council has already tacitly approved of the location and the price should not be a surprise. So this is an ideal situation for a streamlined approach, especially since the seller wants to close quickly. So the plan is for staff to execute an earnest money contract for the purchase of the property contingent upon getting through the feasibility period and getting city council approval.

Because the other party is represented by a broker, you can ask them for a TREC contract to fill in, or alternatively you can provide them with the terms.¹⁰ It is customary for the buyer to submit a signed contract with the preferred terms as an offer, which is subsequently accepted by the seller and then tendered to the title company. So in this case we are going to suggest a number of terms:

- a. \$43,560 purchase price
- b. \$5,000 earnest money
- c. Ten days for title commitment (i.e. the title company will provide a list of encumbrances or other clouds on title to be accepted or corrected)
- d. Thirty day feasibility period (although we are most likely accepting the property “As Is” we still want to do a thorough title search and be able to back out if there is a problem e.g. the seller doesn’t actually own the property), however we have the option to extend the feasibility period by an additional thirty days if city council has not approved the purchase
- e. Closing to be scheduled on or before sixty days following the end of the feasibility period
- f. Survey to be conducted at buyer (city) expense, purchase price to be adjusted to match any increase or decrease in net area
- g. Inspection to be conducted at buyer expense¹¹

⁹ If there are routine acquisitions, the first step can be skipped and staff can just go to council in the first instance with a signed contract contingent upon their approval.

¹⁰ Many brokers have software that allows them to electronically fill in blanks which is preferable to handwritten or typewritten additions for obvious reasons. If using a hard copy, be aware of the date the form was written, as older editions may be obsolete.

¹¹ One deal term we don’t care about is the broker’s fee. It is coming out of the purchase price, and since we don’t have a broker in this deal, we don’t have any reason to care one way or.

The purchase price was negotiated, but we need to specify how much earnest money we are going to pay. This amount varies, depending on the circumstances, but a fair amount is between five and ten percent of the contract price, and the money is to be counted towards the sale price so it is not an “additional” payment. Note again that we picked an amount within the city manager’s spending authority. The typical form has the earnest money being paid within three days, so be ready with the check to avoid breaching that requirement.

Another thing to note about the TREC form is that the “effective date” is typically the date when the title company has a contract that has been signed by both parties. All the deadlines will relate back to that date, so be sure to find out exactly when the seller signed and delivered to the title company. In this contract, we have some fairly firm dates for the end of the feasibility period and the deadline to close. Even though we are accepting this property “As Is” the feasibility period is still very important. The title search will determine if there are any liens, mortgages, easements, or other encumbrances that need to be resolved (not to mention confirming that the seller has good title).

The metes and bounds survey is something that typically is a seller expense, but in a case such as this all they typically provide is the metes and bounds description attached to their own deed. Because our engineers need a little more detail, we are going to incur the cost of having an updated survey prepared. Older surveys may not show newer utilities, changed lot lines, or other issues that we want to clear up. Additionally, you want to confirm that the property does in fact have one acre of net area. This is because the purchase price is a weird number that should have raised a red flag. There are 43,560 square feet in an acre, and so this deal looks like it was negotiated on the basis of price per square foot. So if the survey comes back showing only

42,000 square feet due to less area or encumbrance by easements, then the purchase price would be reduced accordingly.

The Phase I environmental is typically a buyer expense, and that is not something you want to negotiate away. The basic purpose of the Phase I is to provide liability protection for the city from the EPA¹² under Superfund¹³. The short version is that in order to qualify as a BFPP¹⁴ the city must conduct an appropriate inquiry into the existence of any hazardous conditions.

The last deal point is with respect to the closing which is scheduled for sixty days after the end of the feasibility period. At your suggestion, Chief O'Malley is requesting a provision that enables the city to ensure that the city council will approve or disapprove of the deal during the feasibility period. This way, if the city council balks, for whatever reason, the city can get its earnest money back.

Suffice it to say that we have a very cooperative seller and they agree to the majority of these terms. The broker provides a clean copy of the TREC form with these terms added, with two caveats: 1. the sales price will not be adjusted based on the survey; and 2. city council approval is a condition for closing, but the feasibility period will not be extended if it has not occurred. So now if the city council disapproves of the sale after the end of the feasibility period, the city will be in breach and will forfeit the earnest money. Chief O'Malley is fairly confident that this will be okay, but is unsure if he will be able to schedule the council meeting agenda item within the next thirty days. So you counter again with an extension of the feasibility period to sixty days, with closing sixty days thereafter. Being reasonable, the seller agrees.

Scenario Two: Many of the same issues apply to Ms. Smith's sale of property, however a good number of the deal points should have been dictated by the terms of the request for bids.

¹² United States Environmental Protection Agency

¹³ Comprehensive Environmental Response, Compensation, and Liability Act a/k/a Superfund

¹⁴ Bona Fide Prospective Purchaser

Note that anything not spelled out clearly in the RFB is negotiable, but any deviation from the terms in the bid or the RFB would subject the sale to a possible legal challenge. In this case, because we submitted a request for sealed bids, we went to city council with a recommended winner, so we already have authorization to enter into a contract at this point, as well as authorization for the mayor to execute the deed at or before closing.

For the sake of this discussion, let's talk about some of the things that we put into the RFB. We wanted to be able to move quickly towards closing following approval by the council, so we put in a requirement that the closing must occur within ninety days of the acceptance of the bid by council. That puts pressure on both parties to enter into a contract quickly, and to schedule the feasibility period and closing within the ninety day time period. While the purchase price was not included in the RFB, the earnest money was set at \$10,000. For smaller transactions, earnest money can serve the same purpose as a bid bond, if the city requires bidders to tender a refundable earnest money payment along with their bids.¹⁵ However since we are planning on taking this to a title company, we opted to follow typical practice and require the earnest money delivered to the title company within three days of executing a contract. As for closing costs, the typical seller costs are accepted by the city, including the cost of a title policy, broker's fees, one-half of the escrow fee, and (nominally) taxes up to the date of closing.¹⁶ The buyer will be responsible for any new survey (we provided whatever legal description we have as part of the request for bids, if you want more than that, it is on your dime), any environmental assessments (although if we don't have one already, we may want to get one of our own), any

¹⁵ Note that this option is out of the ordinary. Typically earnest money is conveyed to the escrow agent, not to one of the parties. It is also expensive/difficult for bidders to tie up cash for large amounts of time, so this can discourage bids. This is an ideal option if the amount is small, and if it is going to be released relatively quickly, i.e. once a contract has been entered into with the winning bidder.

¹⁶ Obviously most of our clients are tax exempt, provided that the property is being used for a public purpose. Property is generally considered "used for a public purpose" as a default unless it is being used for a specific, non-public purpose (i.e. leased for profit). That being said, until the property sells, it should still be exempt.

additional title policy premiums for exclusions/riders etc. requested by buyer, and one-half of the escrow fee.

When we drafted the contract we put the feasibility period at thirty days, with the closing to occur within sixty days thereafter. As a condition of closing, we are adding a requirement that the city will abandon the right of way that sits between the buyer's existing property and the property being sold. The purchase price is set at the bid amount, and it will not be reduced as the result of a survey. The buyer has requested that the city produce documents related to the property (e.g. surveys, environmental assessments, liens, leases, etc.) which we agreed to produce within ten days of execution. Like with the Public Information Act, we have to hand over information that is already in existence, but we do not need to create anything that does not already exist.¹⁷ Even though the property is being sold "As Is", the buyer will still need to conduct inspections and surveys. That will require the negotiation of a "right of entry" agreement where the city allows the buyer, or their representatives, access to the property. It is a good practice to require indemnification agreements from anyone permitted on the property and further to require proof of insurance covering same. At this point, we have the approval for the sale, so the city manager signs the contract.

IV. FEASIBILITY PERIOD

The feasibility period, title review period, or due diligence period, is the thirty day or so period during which the buyer can elect to terminate the contract and walk away. It is the buyer's opportunity to conduct tests, get surveys, go over title issues, or otherwise investigate to determine if there are any potential issues with the property. If the buyer elects to terminate the

¹⁷ This is not necessarily the case for all contracts. For example, if the city is selling a tract for which no survey or other legal description exists, it is typically a seller's expense to provide a survey.

contract, they typically receive their earnest money back. The end of the feasibility period is usually the trigger for establishing the closing date.

Scenario One: The first thing that we need to review is the title commitment. The title company must confirm that title is vested in the seller, or we have a whole new ball game. Clouds on title are not necessarily a deal killer, but they can be. If you have unknown owners (i.e. record owner is a deceased relative), that can put you in the position of having to condemn. As is often the case, the people who have a hypothetical interest neither know, nor care. This property has belonged to one part of the family for years, so there is no expectation of interest. In order to resolve those kinds of issues, a quitclaim deed or a deed without warranty is the tool of choice. Anyone who has an unwanted interest, or who may have one, is asked to sign over the interest to the family member selling the property to the city. If the title lists any liens, mortgages, or deeds of trust, then the city will need releases as a condition of closing. If the lien, mortgage, or deed of trust is to be paid off using proceeds from the sale, make sure the lender/lienholder has provided the title company with wire instructions and a signed release.

Because this is Texas, we can guess that the mineral rights have been severed from the surface estate. But you need to verify that those leases or mineral reservations included a surface waiver. Especially because the city is a governmental entity, if a person owns mineral rights, they have an inherent right to access those minerals. Typically, pooling agreements and surface waivers guarantee that their right to access those minerals is fulfilled at a drill site located elsewhere. A one acre tract is not big enough for a drill pad site, but just the same it is important to verify that we are not going to be opening our client up to a takings claim in the future. Be sure to obtain a survey and make sure that the title company obtains it prior to the end of the

feasibility period. The survey can impact the title commitment and raise issues that you have not seen before, and consequently have not resolved.

Also during the feasibility period, it will be your client's responsibility to engage a surveyor. Ideally, you want to get one that is comfortable being paid at closing, but since it is a "Buyer's cost" it may be just as easy to pay the surveyor directly. Similarly a Phase I environmental survey will be required. In both cases, you may want to get a right of entry from the seller to allow the surveyors onto the property. Both of these things should be obtained as quickly as possible following execution of the contract. Chief O'Malley needs to know that even though we negotiated an extension of the feasibility period, he still doesn't have a whole lot of time. We still need to engage the surveyor, get the right of entry, schedule the surveys, and get the finished product back in time to present any issues to city council. Meanwhile, you can keep working on the title commitment. Any issues that were raised by the title company need to be evaluated. If they are a problem, you notify the seller that the city has an objection to X, Y, or Z. The seller may opt to resolve the issue or not. But if they refuse, then the city has the option of waiving the objection, fixing the issue itself, or terminating the contract.

Scenario Two: For the most part, the city is not driving this particular train. Initially, our responsibility is limited to providing surveys, environmental reports, leases (if any), and any other documentation requested by the buyer. Once the title company provides a commitment, the buyer will look at schedule B and C for any items that need to be addressed. The one issue that might come up is the lien that was filed way back in the day for demolition of the dangerous structure. You and I and Ms. Smith know that the lien was wiped out in the tax sale foreclosure, and that even if that weren't the case, the doctrine of merger wiped it out when the city became the fee owner. But title companies want things to be nice and orderly in the record and so the

city might be asked to file a release of that lien. If that is the case, take your typical release and instead of saying “for value received” as the consideration for the release, state that the lien is released due to being extinguished at a tax sale foreclosure and be done with it. Then roll your eyes, grab a fresh cup of coffee, and move on to more important things.

Another issue that you may need to address is the “Right of Entry” that the buyer wants for his surveyors. Depending on the scope of the project being planned, the number and type of surveys being conducted may vary. For larger complexes (e.g. multi-story commercial, industrial, etc.) soil sampling (i.e. boring) might be necessary. Boundary surveyors will need access to the exterior of the property while civil engineers may need to look at the interior. The “right of entry” will allow the buyer to assign the limited right to go onto the property and conduct whatever surveys, tests, or samplings you agree to allow them to conduct. It should include an indemnity provision by the buyer, in favor of the city. You can also require that the buyer carry insurance and name the city as an additional insured.

Note that the typical process will have a title objection period that is part of the feasibility period. Within ten or so days following the release of the title commitment, the buyer can raise any objections to clouds on title, and the seller would then have ten or so days to resolve those issues, or not. If the seller resolves the issue to the buyer’s satisfaction (meaning the title company’s satisfaction) a revised title commitment will be issued without the cloud. If the seller elects not to resolve the issue, the buyer has the option of terminating the contract, or waiving the objection, meaning that the deed will include a reference to, and be subject to, the referenced issue. However, in this case, since the property is being accepted “As is” so title issues will have to be resolved at the buyer’s expense.

One issue that we agreed upon in the contract was the abandonment of the alleyway as a pre-condition for closing. For the buyer's plan to work, they need the alleyway that sits between the property being sold and the adjacent property that currently belongs to the buyer. Ms. Smith originally planned on just lumping the alley and the property together as one parcel, but the sticklers down in the planning department pointed out that to do so would require a re-plat. In this scenario, the alley is located within the same subdivision as the buyer's current property, which is not on the same plat as the city's property. The buyer doesn't want to have to re-plat twice and so you are called in to save the day. The good news is that our "problem" is also our solution. As I mentioned previously, there are a number of exceptions to the generally applicable rule that property cannot be sold with public bidding, auction, or engaging a broker. One of those exceptions is the sale/abandonment of streets or alleys.¹⁸ Streets or alleys can be closed and abandoned in two ways: 1. in equal shares to all adjacent property owners; or 2. if the street/alley is part of a plat, then in equal shares to adjacent property owners within the same plat.¹⁹ So in our scenario, the alley is being abandoned to the only adjacent property owner within the plat, negating the need to re-plat at this time. Because the right of way abandonment was listed in the contract as a necessary pre-requisite to closing, you need to work with city staff to shepherd the buyer's right of way abandonment request through the process and get the city council to approve of the abandonment prior to the deadline to close.

V. CLOSING

After the end of the feasibility period, you are at the point where most of the uncertainty has been eliminated. Any issues with the land or title have been discovered and dealt with, or

¹⁸ *Id* at § 272.001(b)(2). Also, if the land is being sold to the adjacent property owners, it may be sold/conveyed for less than fair market value. *Id* at § 272.001(b).

¹⁹ *Id* at § 272.001(c). The typical right of way abandonment has the closed right of way being split down the middle and shared with property owners on either side. However, in the odd case of a right of way on the edge of a subdivision, adjacent properties outside the subdivision are not entitled to a share.

will be accepted by the parties. The buyer's unilateral option to back out of the contract has expired. This is game time. This thing is happening, and you need to get ready. Preparation of documents, obtaining financing, satisfaction of any pre-requisites for the sale, and scheduling the closing are the tasks at hand. The title company will be your best friend during this portion. The closing is their show, so for the most part, your job is pretty much just to get the title company everything they ask for and keep your client contacts in the loop.

Scenario One: The Chief is all set to buy this property for the city. The city has budgeted for the purchase, and the city council granted authority to spend the money and authorized the city manager to sign whatever documents are necessary to complete the sale. A key document you want to get from the title company is the HUD-1 Settlement Statement. Technically speaking, this document is only legally required in certain residential transactions, but a title company is required by law to provide a settlement statement at closing and so, in my experience at least, this form is used even when not technically required.²⁰ The settlement statement outlines all the details of the sale, the names of the parties, addresses, the legal description of the property, the price to be paid, and all the closing costs. There is a buyer side and a seller side of the document so that the costs can be apportioned to one party or the other as dictated by the purchase contract.²¹ There are a lot of typical costs in transactions including broker's fee, document preparation fee, survey costs, etc. and it is important to review the statement to make sure that those costs are accurate and are being paid for by the correct party. In this case, the transaction is fairly typical and straightforward, so there is not much to worry about. Note that a preliminary HUD-1 may be a requirement, along with the purchase contract,

²⁰ Tex. Ins. Code Ann. § 2702.051 – 2702.054.

²¹ State mandated forms are separate for buyer and seller. A key advantage of the HUD-1 is that both buyer (a/k/a borrower) and seller are using the same form. This helps with transparency because both parties can see what the other side is responsible for paying.

for your finance company to prepare the payment, but the HUD-1 is documentation that auditors like to see following a real estate transaction, so you will be getting a final HUD-1 at closing.

There are a few things to keep in mind with regards to payment. In addition to the HUD-1, purchase contract, and council action authorizing the payment, if you are paying a company (i.e. a corporation, LLC, or other legally recognized entity), you also need IRS form W-9. The same will apply if the seller is the estate of a deceased owner or a trust. If the purchase money is going to be in the form of a check, you need to know the title company's name so the check can be issued properly. You also need to give the finance department sufficient notice so that the check can be prepared in time for closing. Alternatively, it is becoming more the norm for money to be wired electronically. In that case, you will need to provide your finance department with wiring instructions from the title company.

Now for the closing, the Chief has indicated that he doesn't care about attending, but you need to make sure the city manager is available. If the title company is able to provide you with documentation that needs to be signed by the city in advance, you may be able to get them signed in advance and then the only person who needs to be at the actual closing is the seller. As a general rule, I suggest making sure that someone attends the closing to make sure that everything has gone smoothly, answer any questions, and rapidly inform you if something has gone amiss.

The last thing to consider is where to send the signed originals after they are recorded. If the city secretary does not maintain a vault or other collection of originals, determine where the documents are supposed to be held, and provide that information to the title company. The typical practice is for the title company to record the documents and have the recorded documents returned to them, but you can give them advance instructions on where to send the

originals once that has happened. They will provide a packet that includes the HUD-1, a copy of all documents that were signed, and the original deed.

Scenario Two: This is kind of a big deal. Sharon is excited because not only is the city getting paid off for its long term interest in protecting the downtown from deteriorating, but the city is actually getting paid off with a pretty big check. As a result, the mayor has decided he wants to be at the closing, which complicates things a little because now the city secretary needs to be at the closing as well to attest to his signature. As you discussing scheduling with Ms. Smith, you remind her that the authorization to sell property has to be in the form of an ordinance.²² The city's charter requires two readings of an ordinance in order for it to pass and there is only one meeting left before the date for closing required by the contract. So, part of the scheduling discussion now involves amending the purchase and sale agreement to extend the deadline to close. The buyer is being very accommodating, and so Ms. Smith schedules two items for the next council meeting: 1. first reading of the ordinance authorizing the sale; and 2. authorization to the mayor to execute an amendment to the purchase and sale agreement extending the deadline to close by an additional thirty days.

Meanwhile, you are getting documents ready for the closing. The city's accounting department has provided wiring instructions (so that the title company can wire the money directly to the city) as well as a filled out W-9 (which includes, among other things, the city's tax ID number). Because you are preparing the general warranty deed and other documents for closing, you make a note to have the title company remove the fee for "Document Preparation" from the preliminary HUD-1. The city council has completed the right of way abandonment process for the alley, resulting in a quitclaim deed to the alley in the name of the buyer. Rather than make the extra trip to the property records office, you provide the signed, unexecuted deed

²² Tex. Loc. Gov't Code Ann. § 253.001(c).

to the title company. The HUD-1 is adjusted to increase the filing fees to account for the deed to the road as well as the other documents being filed. A few weeks before the closing, you get a call from the title company. The buyer is financing this transaction, and there is going to be a deed of trust securing the note. The lender's attorney wants the deed to be modified to include a vendor's lien, which the city will be transferring to the lender. Thankfully, they have read the deed you prepared and kindly forwarded a redlined version that includes their requested language. The title company does not really care, other than to make sure that the buyer, seller, and lender are all in agreement with regards to the final product.

At last comes the day of the closing. You are there with Ms. Smith, the mayor, the city secretary, the buyer, their attorney, and a very competent (albeit frazzled looking) escrow agent for the title company. Ms. Smith previously delivered the quitclaim deed for the road and all the financing related documents, so you are not (literally speaking) bringing anything to the table. First, the escrow agent (i.e. closing officer) sits next to the buyer with a stack of documents and hands them over one at a time, explaining the significance of each. This takes longer than you would otherwise think because a bunch of the documents are related to the financing (deed of trust, promissory note, related disclosures, etc.) and so they are things you have not seen before. After that part is concluded, she sits next to the mayor and breaks out the stack of documents he needs to sign. The only document the city secretary really needs to attest to is the deed, but there are a few additional documents to sign.²³ The kicker is that even though the loan was pre-approved, it will probably be a few days before it actually gets funded. Banks tend to wait for documents to be signed before actually releasing the funds to the title company. So it will be a

²³ One example is an "Affidavit of Non-production" which is stating that in the affiant's knowledge there is no use of the surface for the production of oil, gas, or other minerals. If there was any question about surface rights, that issue would have been brought up and addressed earlier in the process. You should be comfortable advising the client to sign this affidavit at this point.

week or so before the title company lets you know that the funds have actually arrived. The good news is that the title company is an escrow agent, so they hold onto the signed deed until they have the money, and then typically file the deed and release the funds at/near the same time.

VI. CONCLUSION

Well here we are, in Scenario One we are the proud owner of the site for a shiny new fire station and hopefully we gave the neighbors a heads up that they are about to get an increase in noise but a decrease in homeowner's insurance premiums. In Scenario Two we are just a smidge richer. In both scenarios, it is probably a good idea to update the city's property book. If your city doesn't have one, it might be a good idea to get one. A property book is a listing of all the property owned by the city that was conveyed by separate instrument (i.e. not easements, not platted dedications), which is a significant benefit to the city if there is every a question about whether or not a particular parcel was intentionally accepted or sold by the city. As I mentioned in the introduction, this paper is not going to cover all the different issues that might come up during a property sale/purchase. In fact, I would venture to say that most of the property that a city acquires is acquired through other means (e.g. dedication, platting, etc.). But for those times that your clients do need to have a more traditional transaction, I hope that this paper gave you a better feel for what to expect.