Real Estate 101:
The Basics of Selling City-Owned Real Property

Texas City Attorneys Association
Summer Conference June 18, 2020

Allison Bastian-Rodriguez, Attorney
abrodriguez@rampagelaw.com
Denton Navarro Rocha Bernal & Zech, P.C.
Rio Grande Valley office
701 E. Harrison, Suite 100
Harlingen, Texas 78550
(956) 421-4904
www.rampagelaw.com

Allison A. Bastian-Rodriguez

Allison A. Bastian-Rodriguez joined the law firm of Denton Navarro Rocha Bernal & Zech, P.C., Rio Grande Valley office as an Associate Attorney in 2018. Her practice focuses on municipal real estate transactions, regulation and governance of land use, economic development, and general contracting issues for governmental entities. She also provides general legal support in the firm's City Attorney/General Counsel practice areas -- including open meetings and elections issues, ordinance drafting, and public information requests -- and serves as a municipal court prosecutor for various South Texas cities.

Prior to joining the firm, Ms. Bastian-Rodriguez served as the Assistant, and then Deputy, City Attorney for the City of Brownsville. She is a member of the Real Estate Trust and Probate Law (REPTL) Section of the State Bar of Texas, and serves on the Real Estate Forms Committee for 2019-2021. She received her Juris Doctor from Oklahoma City University in 2007.

A former graphic designer, Ms. Bastian-Rodriguez earned a Bachelor of Fine Arts in Visual Communication from the University of Oklahoma in 1994.

"Buy land, they're not making it anymore." --Mark Twain

One of your client city managers has just called to tell you an individual has offered to buy the old, abandoned public works building site in order to operate a mixed-use fruit stand and upscale apartment complex. That building has been sitting empty for years and the city needs the money. "When can we sell it?" she asks earnestly.

In the same call, she adds that a local non-profit is interested in the same property—the public works building site—to build affordable housing. But the non-profit is asking the city to donate the property, or at least sell it for less than fair market value.

To wrap up the call, your city manager plans to propose to sell part of its municipal tennis courts—which are located adjacent to a city park—at the next city council meeting. It's not really part of the local park, she explains—it's just *next* to the park. Through your research, you discover that the tennis courts land was purchased about a century ago with something called "park purchase warrants," which are a predecessor to park bonds.

And while you're no doubt a savvy city attorney, real estate is an area that you may deal with here and there, but not with any consistency … so where do you begin?

The intent behind this paper and presentation is to kick-start the direction you need to go in by identifying the steps to take when helping your clients sell city-owned real property. And by the way--while the title of this paper focuses on the sale of real estate, sometimes what you might first anticipate being a sale may change, depending on the circumstances as you move through the process and complete your homework. That is why the term "conveyance" is sometimes used throughout this paper as it encompasses different types of real property transfers—whether they be sales, donations, or otherwise.

We're Gonna Bring You the Power

The power of home rule cities to sell and convey real property is usually addressed by its charter. The home-rule charter of the City of Harlingen, for example, provides:

> "The City of Harlingen, made a body politic and corporate by the adoption of this Charter… may take, hold, and purchase personal and real property within or without the City limits, as may be needed for the corporate purposes of [the] City, and may sell any real or personal property owned by it…"[1]

[1] Harlingen, Texas City Charter, pt. I, Art. I, § 2

For general-law cities, the authority, naturally, is statutory. Type A general law cities may sell or otherwise convey real property to carry out a municipal purpose;[2] and a Type B municipality may "dispose of" property inside its boundaries.[3]

Ask Questions First; Ask Questions Later

When approached by an interested buyer of city property, a good first question to ask is, who is the potential buyer? The answer to that question will determine the applicable law, and there actually may be more than one set of legal authority governing the possible transaction—or, there may be several statutory options to choose from under which to proceed. If the potential buyer is a private individual, the options will be different than, say, if it is a university, another political subdivision, or a developer of affordable housing.

A good second question to ask is, what is the nature of the property in question? The answer to that question may also yield additional legal requirements for the city to follow or consider—for example, if it is a public park or was conveyed with deed restrictions. The rules are different also for abandoned alleys the adjoining property owner wants to buy, or for pieces of land which are shaped like pretzels and therefore hard to develop.

And, as obvious as it sounds, the city must be sure to have actual record title ownership of the property in question. Circumstances where well-meaning governmental entities did not actually hold title in fee but believed their equitable interests (due to in-kind maintenance or other activities) were enough to authorize the sale are not unheard of.

Once the correct governing law is determined based on the potential buyer and proposed land use, the mechanics of the sale—negotiating deeds and sales contracts—can commence, followed by addressing other matters such as ordering new surveys, addressing title matters, and finally closing on the property. What follows therefore is an overview of some common real estate sale scenarios and the laws which govern them; then a look at some documents which come into play—that is, deeds and real estate contracts or purchase and sale agreements—followed by some considerations regarding title insurance along with a few practical tips sprinkled throughout. This is necessarily a very brief overview and does not come close to addressing every possible legal situation or document which may arise, but is instead intended to give an overview of some of the most fundamental elements of real property sales for the city legal counsel to visualize the basic steps of the process and more quickly address the needs of the client.

[2] Tex. Loc. Gov't Code Ann. § 51.015
[3] Tex. Loc. Gov't Code Ann. § 51.034

Who Wants to Buy It, Anyway?

A common scenario is when a private individual pretty much pops out of somewhere and wants to buy a tract of property that the city owns. The individual calls the city manager, or mayor, or planning director, who in turn calls *you*, and asks if the city can legally sell.

The answer is a qualified yes. The municipality can sell real property to a private individual; however a city typically cannot just sell real property it owns outright without complying with certain statutory requirements. Unless an exception is implicated by the prospective buyer or use, the city has to comply with either (1) the public bidding procedures outlined in Local Government Code chapter 253; (2) the sealed bidding procedures outlined in Local Government Code chapter 272; or (3) the broker listing option also found in chapter 253. Keep in mind that, with each of these options, the city has to obtain fair market value so as not to run afoul of the Texas Constitutional provision against the grant of public money.[4]

> Local Government Code section 253.008: Selling Real Property by Public Auction
>
> (b) To sell real property by public auction, the governing body of a municipality shall publish notice of the auction before the 20th day before the date the auction is held. The notice for sale of the real property must be published once a week for three consecutive weeks before the date the auction is held in a newspaper of general circulation in the county in which the municipality is located and, if the real property is located in another county, in a newspaper of general circulation in the county in which the real property is located. The notice must include a description of the real property, including its location, and the date, time, and location at which the auction is to be held.[5]

Keep in mind that, when selling real property by public auction under chapter 253, the city must sell the land to the highest bidder--by definition, an "auction" is a public sale of property to the highest bidder.[6]

> Local Government Code section 272.001: Selling Real Property by Sealed Bid
>
> (a) [B]efore land owned by a political subdivision of the state may be sold or exchanged for other land, notice to the general public of the offer of the land for sale or exchange must be published in a newspaper of general circulation in either the county in which the land is located or, if there is no such newspaper, in an

[4] Tex. Const. art. III, § 52

[5] Tex. Loc. Gov't Code Ann. § 253.008

[6] AUCTION, Black's Law Dictionary (11th ed. 2019)

adjoining county. The notice must include a description of the land, including its location, and the procedure by which sealed bids to purchase the land or offers to exchange the land may be submitted.[7]

Under the notice and sealed bids procedure, chapter 272 does not specifically state that the sale must go to the highest bidder, but rather to the bidder who provides the "best benefit" to the taxpayers. Indeed, subsection 272.001(d) does not require the governing body of a political subdivision to accept *any* bid or offer for the sale of real property.

Local Government Code section 253.014: Listing Property with a Broker
(Home Rule only)

(b) The governing body of a home-rule municipality may contract with a broker to sell a tract of real property that the municipality:

(1) owns; or

(2) holds in trust and has the authority to sell.

(d) If a contract is made under Subsection (b) with a broker to list the tract of real property for sale for at least 30 days with a multiple-listing service, the governing body on or after the 30th day after the date the property is listed may sell the tract of real property to a ready, willing, and able buyer who is produced by any broker using the multiple-listing service and who submits the highest cash offer.[8]

This option became available to home-rule cities in 2013. Selling the property by listing it with a broker is unique in that it takes the competitive nature out of the sale as it applies to the potential buyers.

What follows next are other statutory options which may arise depending on the potential buyer characteristics, and so renders the live auction, sealed bid, and broker listing options unnecessary.

[7] Tex. Loc. Gov't Code Ann. § 272.001

[8] Tex. Loc. Gov't Code Ann. § 253.014

Local Government Code section 272.001(g): Selling to an Entity Which Develops Affordable Housing

The conveyance of real property to an entity which develops low- or moderate-income housing does not require bids or a broker listing:

> (g) A political subdivision may acquire or assemble land or real property interest, except by condemnation, and sell, exchange, or otherwise convey the land or interests to an entity for the development of low-income or moderate-income housing. The political subdivision shall determine the terms and conditions of the transactions so as to effectuate and maintain the public purpose. If conveyance of land under this subsection serves a public purpose, the land may be conveyed for less than its fair market value. In this subsection, "entity" means an individual, corporation, partnership, or other legal entity.[9]

To proceed under this section, the city must find and adopt public purposes related to affordable housing and provide that the prospective buyer, by its agreement with the city, will effectuate and maintain these purposes. The public purposes must form part of the consideration when the property is conveyed for less than fair market value; the same holds true when conveying real property to another subdivision for a public purpose, or to a university for educational purposes:

Local Government Code section 272.001(l): Selling to Another Political Subdivision

> (l) The notice and bidding requirements provided by Subsection (a) do not apply to a donation or sale made under this subsection. A political subdivision may donate or sell for less than fair market value a designated parcel of land or an interest in real property to another political subdivision if:
>
> (1) the land or interest will be used by the political subdivision to which it is donated or sold in carrying out a purpose that benefits the public interest of the donating or selling political subdivision;
>
> (2) the donation or sale of the land or interest is made under terms that effect and maintain the public purpose for which the donation or sale is made; and
>
> (3) the title and right to possession of the land or interest revert to the donating or selling political subdivision if the acquiring political subdivision ceases to use the land or interest in carrying out the public purpose.

[9]Tex. Loc. Gov't Code Ann. § 272.001

Local Government Code section 272.001(j): Selling to an Institution of Higher Education

> (j) A political subdivision may donate, exchange, convey, sell, or lease land, improvements, or any other interest in real property to an institution of higher education, as that term is defined by Section 61.003, Education Code, to promote a public purpose related to higher education. The political subdivision shall determine the terms and conditions of the transaction so as to effectuate and maintain the public purpose. A political subdivision may donate, exchange, convey, sell, or lease the real property interest for less than its fair market value and without complying with the notice and bidding requirements of Subsection (a).[10]

A conveyance to a university must be pursuant to the public educational purposes of the *city*—the university may have some stated purposes of its own, but it is important that the city purposes are adopted by the governing body and stated in the real estate documents. A simple way to accomplish this is, when taking the sale to the governing body for approval, include both the findings and public purpose as well as the terms authorizing the sale of the property in the same resolution or ordinance. The title company handling the closing will appreciate that, too.

These three types of conveyances also mean that the reverter clauses from law school days will become necessary to protect the city's future interests and keep the proceedings legally sound. Two basic types which may bring back youthful memories are (1) the fee simple determinable, which provides a possibility of a reverter if the buyer ceases to use the property for the public purposes; and (2) the fee simple subject to condition subsequent, where, unlike the fee simple determinable, the seller has to exercise its right of reentry in order to exercise its reversionary interests—it does not happen automatically. Buyers typically like the latter option; sellers the former. Either option works; however, it must provide that in the event the buyer ceases to use the property for affordable housing, city educational purposes, or other public purposes, the city can get the property back.

Just Park it

Public parks have special requirements—it is essential to ascertain whether the land the city intends to convey is "owned, held, or claimed" as a park (among other things). In order for a city to sell one of its parks, the voters have to approve it first:

[10] Tex. Loc. Gov't Code Ann. § 272.001

Local Government Code section 253.001: Sale of Park Land, Municipal Building Site, Or Abandoned Roadway

> (b) Land owned, held, or claimed as a public square or park may not be sold unless the issue of the sale is submitted to the qualified voters of the municipality at an election and is approved by a majority of the votes received at the election; provided, however, this provision shall not apply to the sale of land or right-of-way for drainage purposes to a district, county, or corporation acting on behalf of a county or district.[11]

So, what is a park, anyway, for purposes of selling? There is no statutory answer, but caselaw has provided some clues which belie the archetypical image of green grass, picnic tables, and jungle gyms—while those can be reliable indicia, park purposes also can include land "ornamented and improved as a place of resort for the public, for recreation and amusement of the public. The construction and maintenance of a building for museums, art galleries, botanical and zoological gardens, and many other purposes, for the public benefit, are recognized as legitimate [park] purposes…"[12]

Predictably, then, what constitutes a park is fact-specific. A few things to consider:

(1) What is the current use—does the public use it for recreation, exercise, or enjoyment?

(2) How was the land acquired—was it purchased with park bonds, or does the deed contain any restrictive covenants requiring the land to be used only as a park?

(3) Is it listed as a park on the city website, or part of a park system? Held out to the public as a park?

And, to further complicate things, the sale of a park not only must be taken to the voters but is also subject to public hearings requirements provided by Chapter 26 of the Texas Parks and Wildlife Code:

> (a) A department, agency, political subdivision, county, or municipality of this state may not approve any program or project that requires the use or taking of any public land designated and used prior to the arrangement of the program or project as a park, recreation area, scientific area, wildlife refuge, or historic site, unless the

[11] Tex. Loc. Gov't Code Ann. § 253.001

[12] *King v. City of Dallas*, 374 S.W.2d 707, 710 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.)

department, agency, political subdivision, county, or municipality, acting through its duly authorized governing body or officer, determines that:

(1) there is no feasible and prudent alternative to the use or taking of such land; and

(2) the program or project includes all reasonable planning to minimize harm to the land, as a park, recreation area, scientific area, wildlife refuge, or historic site, resulting from the use or taking.

(b) A finding required by Subsection (a) of this section may be made only after notice and a hearing as required by this chapter.[13]

The notice and public hearing requirements are outlined further in Chapter 26. Simplified, all of the steps taken together may look like this:

(1) Publish notice. At least thirty days ahead, advertise the date of the meeting of the governing body containing the public hearing;

(2) Hold the meeting. Place the public hearing on the agenda before the agenda item where the governing body acts on the findings--that there is no feasible and prudent alternative for the land use and the project has included all reasonable planning to minimize harm to the land as a park or recreation area;

(3) Act on the sale. Have the governing body approve the sale after the public hearing and findings at the same meeting, via an action item or by resolution; and

(4) Order an election for the sale of the park land. This can be done as a special election at the same time as a regular election to save money.

If the voters approve the sale, proceed under the appropriate legal authority.

The Paper Chase

Once the law governing the sale is pinned down and any preliminary issues such as those required for a park are squared away, the negotiations and document drafting can commence. Sales of real property are subject to the statute of frauds—to be enforceable, contracts for the conveyance of real estate interests in land for a term longer than one year must be in writing.[14] There is no one standard

[13] Tex. Parks & Wild. Code Ann. § 26.001

[14] Tex. Prop. Code § 5.021; Tex. Bus. & Com. Code § 26.01.

form to use for these contracts; plenty of templates are readily available from different sources. The State Bar of Texas Real Estate Manual has an ample assortment of purchase and sale agreements (as well as deeds and other documents); an attorney can tailor these for the specifics of the transaction at hand. The Texas Real Estate Commission and the Texas Association of Realtors also provides an assortment of forms.

A few tips:

1. The property description. To be enforceable, a contract for the sale of real property must have an accurate description of the property to be sold—a description that has enough certainty that it can be readily identified from the description. A street address by itself is not sufficient! And, the description must be identical in all of the paperwork involved in the sale—the deeds, purchase and sale agreements, and closing documents. Correct and current metes and bounds or the reference to a recorded plat (lot and block, along with recording number) should work just fine—the street address and legal description can be added to this information if needed to help identify with certainty the land subject to the sale.

2. When writing a monetary amount, write the amount in capital letters before the numerical amount, which is placed in parentheses—for example, SEVENTY-TWO THOUSAND AND NO/100 DOLLARS ($72,000.00). If there is a discrepancy between the two, the written words control.[15]

3. Consideration. The contract can contain the consideration as a stated sum of cash spelled out as above; it can define the consideration as a certain amount per square feet or acre; or the consideration can be, in circumstances where the property is being conveyed for a public use for less than fair market value, the requirement that the public purpose be met and maintained in the manner provided in the contract.

Deeds

The conveyance of an interest in land that lasts longer than one year in duration must be in writing, subscribed, and delivered by the grantor to the grantee.[16] Indeed, this means a deed.

There are several kinds of deeds; three common ones are the (1) general warranty deed, (2) special warranty deed, and (3) the deed without warranty, or "no-warranty deed."

[15] *Guthrie v. National Homes Corp.*, 394 S.W.2d 494, 495 (Tex. 1965)
[16] Tex. Prop. Code § 5.021

A "warranty" is an implied covenant that promises certain things related to the status of the title. In the case of a general warranty deed, two implied covenants are given by the seller (grantor) to the buyer (grantee) by language that states the deed "grants" or "conveys." By using either of those words, the grantor covenants that (1) before the execution of the conveyance, the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee; and (2) at the time of the execution of the conveyance, the estate is free from encumbrances.[17] So, by selling or otherwise conveying property through a general warranty deed, the city is obligated to indemnify the grantee against any loss resulting from a title defect or from any encumbrances that arose before the conveyance, and that the city will restore the purchase price to the grantee if the property is lost.[18] This is the greatest protection a buyer can have from defects of title. Municipal lawyers are well aware of the constitutional restrictions on debt and indemnification. Even if it were feasible, think about it—the city would have to promise good and marketable title dating all the way back to the time of the Spanish land grants. That's a daunting proposition to say the least and obviously not a liability exposure you want to take on.

The special warranty deed, on the other hand, covenants that the estate is free from encumbrances beginning from the time the grantor became owner of the property. By converting the general warranty to a special warranty, the grantor warrants to defend the title conveyed to the grantee only to the extent that claims are made by, through, or under the grantor.[19] So, that's the express language to include in your deed to convert it into a special warranty deed—"by, through, or under". This way, the grantor is still promising no defects in title, but only after it became the grantor's in the first place.

The deed without warranty (or "no-warranty deed") doesn't promise much of anything—only that the grantor has title to sell. It makes no warranties as to any defects or encumbrances or problems that took place either before or after the grantor owned the property. However, it is distinguishable from that non-deed deed I describe next as it actually does constitute an instrument of conveyance which will transfer title, although it can be difficult for a buyer to obtain a title insurance policy with a deed like this in the chain of title.

Then there's the quitclaim deed—which actually not a deed at all. It does not even promise that the grantor holds title to the property. Instead, the quitclaim at best offers the grantee a *chance* at title—whatever interests the grantor has (with no promises on that from the grantor), the grantee

---

[17] Tex. Prop. Code § 5.023

[18] *City of Beaumont v. Moore*, 202 S.W.2d 448, 453 (Tex. 1947).

[19] *Munawar v. Cadle Co.*, 2 S.W.3d 12, 16 (Tex. App.—Corpus Christi 1999, pet. denied)

gets through the quitclaim. Title companies generally do not issue title policies with a quitclaim in the chain of title, either.

A couple of points:

1. A common practice in the private sector is when the parties prefer not to show the amount of cash paid in a deed that ultimately becomes a public record upon filing with the county. Instead, the deed might state as consideration either "cash" or a nominal amount plus "other consideration." This is not such an issue with cities given that these are generally public documents subject to the Texas Public Information Act; but it is still an option if so desired.

2. Instruments may be recorded only if they have been acknowledged, proved, or sworn to according to law. County clerks may record an instrument only if it contains original signatures that are duly acknowledged, sworn to with a proper jurat, or otherwise proved in compliance with applicable law.[20]

Sales Contracts

Although only a deed is needed to legally transfer property, a purchase and sale agreement is crucial in the event of a conveyance to a university or other non-profit for public purposes. To be enforceable, a contract for the sale of real property must have an accurate description of the property to be sold—a description that has enough certainty that it can be readily identified from the description. Additionally, the description must be identical in all of the paperwork involved in the sale—such as the deeds, the purchase and sale agreement, the survey, and the closing documents. In fact, a description can make reference to the metes and bounds provided in a survey and have that description included as an exhibit to the documents.

Earnest money is a percentage of the sales price paid early in the process, and it needs to be in an amount adequate to compensate the seller while the property is off the market as the sale negotiations progress, the prospective buyer undertakes the typical due diligence period, and other activities. The earnest money is usually tendered upon signing of the purchase and sale agreement or a couple of days thereafter, and held in escrow (sometimes an interest-bearing account) until closing. A typical amount is 3-5% of the sale price.

[20] Tex. Prop. Code §§ 11.004(a)(1), 12.001, 12.0011

Letters of Intent

Another item which often arises very early in the process, and often the client will have already signed one before even seeking legal assistance, is the letter of intent. Letters of intent are generally intended to be non-binding and are so often looked upon as low- or no-risk by clients, but they are a potential pitfall. If the parties are held to have had a meeting of the minds through a signed letter of intent a client can unwittingly become bound to its terms before any meaningful negotiations even begin. If a client insists on some sort of documentation before contract negotiations begin, an unsigned "term sheet" outlining the main points to be negotiated can be helpful in steering future negotiations.

Surveys

An updated or verified survey is crucial. Title companies usually will not issue a title insurance policy based on a survey more than six months old or so. Several categories of surveys exist; however, a comprehensive "1A" survey is the type appropriate for insuring title. It locates boundaries, easements, improvements, and rights of way within or adjacent to the property.

Title Insurance

While it is not required to transfer title, obtaining title insurance is nevertheless essential to protect both the buyer and seller. Remember that the general and special warranty deeds require the seller to indemnify the buyer from defects in title. While title insurance acts to protect the buyer from unforeseen defects in title, like forged deeds in the chain of title, it also shifts the risk from the seller in the warranty deed to the title insurance company. The role of the title company is to indemnify the insured against unknown defects in title. For this reason, it is in the best interests of the city as seller to have a say in which title company is selected for closing the transaction; establishing a long-term relationship with one that understands the extra intricacies inherent with local governments is helpful.

The genesis of a title policy is the title commitment. It sets out the amount of the policy and what the title company will and will not insure. It has four basic sections, or "schedules."

Schedule A contains basic information including the name of the title company, identification of the buyer and seller, the location of the property, with whom title is currently vested in, and the amount of the policy (i.e. the value of the property).

Schedule B contains exceptions to coverage. The title company will not cover the items listed here. The first eight items listed are standard; if there are more beyond those, they are specific

to the property and a buyer who is paying attention will usually file an objection to the title commitment. It is important for the seller to pay attention to schedule B and consider how problematic items might be remedied—for example, when mineral leases are found in schedule B, the owner of the lease can either disclaim or submit an affidavit of non-production to clear up the matter.

Schedule C contains items the city, as the seller, will need to address before the title company will issue the title policy and proceed to closing the transaction. Some of these items may include the proof of satisfaction of judgments, proof of no parties in possession, updated surveys, and payoffs of liens.

At closing, the title company will require proof of authority for the city to enter into the real estate sale. A few options exist; one is to have a standing resolution which authorizes the city manager to sign any conveyance documents after the city council has acted to authorize the sale. Another is to have the city to pass a separate resolution for each and every property sale which spells out the authority to sell and designates signatories (although in home rule cities this is usually addressed in the city charter). Sometimes, even just a copy of the minutes will suffice for this purpose. It really depends on the type of transaction and the title company requirements.

Schedule D contains basic disclosures—such as the identity of the owners of the underwriter and title company, the individual or company responsible for the title examination, and the identity of the entity issuing the policy.

After any issues in the title commitment are finalized, the title company can issue the title policy and the parties can close. The title company will prepare the other documents—including what is commonly referred to as the "HUD"—the U.S. Department of Housing and Urban Development Settlement Statement, which is essentially a ledger of the various closing and other costs as allocated among the buyer and seller. The closing can take place at the title company office or any convenient location for each of the parties. The title company can take care of recording the deeds with the county and provide the city with file-stamped copies.

The Closing

This paper necessarily provides a very basic overview of city sales of real property, and is meant to kick-start city attorneys who generally don't practice real estate in the right direction when questions arise from clients. Every sale situation is different, and there are plenty of laws, documents, and other issues not covered here. And of course, as this is only a guide for non-clients, it does not constitute legal advice. Good luck!