Citizens for East Shore Parks

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January 2, 2014

City of Alameda
Mayor Marie Gilmore and City Councilmembers
2263 Santa Clara Avenue
Alameda, CA 94501

Re: Improper Use of Eminent Domain at Robert W. Crown Memorial State Beach

Dear Mayor Gilmore and City Councilmembers:

Citizens for East Shore Parks (CESP) is an East Bay conservation organization, working to protect and preserve the East Bay shoreline. We write to ask your help in opposing a plan by the General Services Administration (GSA) to use its powers of eminent domain to take an Alameda street owned by the State of California so that the GSA may sell surplus property to a housing developer. For years, the State has pursued plans to acquire this federal land in order to expand Robert W. Crown Memorial State Beach, a state park on the Alameda shoreline that is part of a San Francisco Bay Plan Priority Use Area. The GSA's ill-advised decision to accept a higher bid from the developer over a fair market value bid from the East Bay Regional Park District (EBRPD) is threatening the use and enjoyment of this property by all Bay Area residents, but the sale can be stopped if GSA cannot constitutionally acquire the street that provides road and utility access to the land. Your attention to this matter is of utmost importance. Here are the background facts:

Fifty years ago the federal government gave the State of California land that became Robert W. Crown Memorial State Beach in Alameda, operated by the EBRPD. Part of the land is being used for an access road to the beach -- McKay Avenue -- over which the federal government has easement rights for contiguous property used for government offices. The federal government vacated some of those offices and declared the land on which the buildings stood, now called "Neptune Pointe," as surplus in 2006. In anticipation of the land disposal, voters in Alameda and Contra Costa Counties overwhelming approved funding in 2008 for EBRPD to acquire Neptune Pointe and expand the park.

Ignoring its own guidelines for disposal of surplus federal property, which state that property should be sold at auction only "if state and local governments or other eligible nonprofits do not wish to acquire the property," the GSA refused EBRPD's request for a public conveyance of Neptune Pointe and its offer to purchase it at fair market value, and instead opted to sell at a public auction. Constrained by the existing zoning on the land, EBRPD's bid at appraised fair market value was rejected by the GSA in favor of a higher bid from a private housing developer.

Although the developer's offer was accepted in 2011, the sale has not yet closed. The sale and the developer's project application with the City of Alameda is being held up because the California Department of Parks and Recreation has confirmed that it will not grant utility easement rights on McKay Avenue to a private developer. (This condition was contained in the preliminary title report available to all bidders at the GSA auction.)

GSA announced in August 2013 that it plans to use eminent domain to seize the street. Once the federal government gets title to the land, GSA says, McKay Avenue will be "modernized and new infrastructure installed." In addition, federal ownership will "allow proper management of an antiquated and out-of-compliance storm drainage system," "comply with regulatory standards for operating sanitary sewer systems," and "permit installation of appropriate security improvements" for remaining federal buildings behind the surplus land.

GSA's press releases obviously are designed to set up an argument that acquisition of McKay Avenue through eminent domain is needed to achieve a "public purpose." In an eminent domain action, the government condemns property owned by one party and either keeps title itself or transfers it to another party. Such seizures are constitutionally permissible under the Takings Clause only if (1) the taking is done for a "public use" and (2) the government pays "just compensation" to the property owner.

The phrase "public use" has been interpreted to mean something other than "use by the public." Under the current regime set forth by the Supreme Court in *Kelo v. City of New London*, the basic rules are:

1. The government may not take property owned by one party for the "sole purpose" of transferring it to another party; but
2. The government *may* take property owned by one party and transfer it to another party in order to serve a "public purpose"; and
3. If such a "public purpose" exists, the taking will not be invalidated simply because the transfer also benefits a private party; but
4. The government may not take property under the "mere pretext" of a "public purpose" when its "actual purpose" was to "bestow a private benefit."

Here, it is plain that GSA's plan should be disallowed as a mere pretext:

- The GSA has never asked the East Bay Regional Park District to upgrade McKay Avenue in order to modernize, upgrade and manage the allegedly antiquated infrastructure.
- EBRPD prepared preliminary plans for exactly such improvements several years ago, but they were shelved when GSA would not negotiate a direct conveyance to EBRPD.
- While the Supreme Court has approved a taking of land through eminent domain when it is done to further a "program of economic rejuvenation," the developer in this case has proposed no such comprehensive plan; it merely wants to build 48 luxury houses.
- The "upgrade" rationale for condemning McKay Avenue is so flimsy that it becomes clear that the real purpose for the condemnation is to enable the GSA to give the developer the easement it needs to make its housing development fly (and thereby to get the $3.075 million the developer has agreed to pay for the Neptune Point parcel). But increasing the sale price of the land to put more money in the federal coffers does not make for a "public use" under even the most generous reading of the takings clause.
- Would the GSA have condemned McKay Avenue in order to "modernize" the street and "install new infrastructure" under the street if GSA had never entered into a contract to sell Neptune Pointe to a developer? Not likely, since the GSA currently possesses the right to improve infrastructure serving its property. And if they wouldn't have done so absent the sale, the primary purpose for condemning the property would seem to be to benefit the developer, not the public, especially since the advantages for the public are so attenuated and those for the developer so clear. According to Supreme Court Justice Anthony Kennedy, that is a taking the courts

should strike down because it "is intended to favor a particular private party, with only incidental or pretextual public benefit. . . ."

- Most tellingly, a letter to California Attorney General Kamala Harris from Andrew M. Goldfrank, Chief of the Land Acquisition Section of the Environmental and Natural Resources Division of the Department of Justice, acknowledges that the real purpose of the eminent domain is to clear a "cloud on title" so that GSA may consummate the sale it has arranged.

Attorney General Harris responded to Mr. Goldfrank's letter on November 7, 2013, stating that the California Department of Parks & Recreation would oppose any eminent domain action by the GSA on the grounds, among others, that taking of State of California property for the sole purpose of facilitating the sale of land to a private developer is not a permissible "public use" under the Constitution. The Attorney General's letter is attached.

In addition, GSA's taking of McKay Avenue to enable a private housing development would compromise the public's access to the shoreline and is inconsistent with the San Francisco Bay Plan, which lists Robert W. Crown Memorial State Beach as a Priority Use Area. EBRPD's park expansion plan would be consistent with the Bay Plan.

For more information, visit the website of the local support group Friends of Crown Beach http://friendsofcrownbeach.com/ for background documents and news accounts. There is no community support group for the housing development.

We request that you join Attorney General Harris, CESP, the Sierra Club, Friends of Crown Beach, and many concerned voters in Alameda and state your opposition to the GSA eminent domain action along with sending a letter to Mr. Goldfrank, expressing support for the position of the State of California. We would be delighted to discuss this matter further to explore additional ways in which we can protect this important public shoreline park from unnecessary development pressures.

Sincerely yours,

Executive Director
Citizens for East Shore Parks

cc: CA Assemblyman Rob Bonta; U.S. Senator Barbara Boxer; Robert Cheasty, President CESP; U.S. Senator Dianne Feinstein; CA Senator Loni Hancock; CA Attorney General Kamala Harris; U.S. Congresswoman Barbara Lee; CA Assemblywoman Nancy Skinner; BCDC; East Bay Regional Park District; Sierra Club; Sierra Club