

Courts Conflict on Requiring 'Public Use' to Support Taking

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Redevelopment in California has affected urban landscapes radically. Since the Legislature enacted the Community Redevelopment Law (Health & Safety Code Section 33000 et seq.) in 1952, communities, through their local redevelopment agencies, have revitalized their urban centers by eliminating blighted and dilapidated areas and replacing them with vibrant commercial and residential centers. One need only look at Horton Plaza in San Diego and Sacramento's Downtown Plaza to recognize the significant positive impact of redevelopment.

While redevelopment's laudatory accomplishments are well-known, it has controversial aspects. Many times, redevelopment projects require the forced taking of private property from a private landowner so that it can be transferred to a developer for development. Redevelopment agencies typically enter into disposition and development agreements with private developers that contemplate such transfers. Often, the property being taken is economically viable but is located in an area that was found blighted long ago. Sometimes, mom and pop businesses, serving neighborhood needs, are located on the targeted property and must be removed to make way for the proposed development. These situations often culminate in battles pitting constitutional protection for private property rights against the public interest in removing urban blight.

The state courts have construed the Community Redevelopment Law broadly, in favor of redevelopment agencies' actions. State courts have given great deference to the agency's blight findings and rarely conclude that a redevelopment agency lacks the right to take property it has determined is blighted. By contrast, some federal courts recently have demonstrated concern over condemnation for purposes of strictly economic redevelopment. Those courts have been more willing to scrutinize an agency's reasons for taking property; the federal courts' focus has been on the "public use" requirement under the Fifth Amendment to the United States Constitution.

In *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (2001), the U.S. District Court for the Central District concluded that a redevelopment agency's efforts to take property were directed toward a private rather than public use, in violation of the federal "public use" requirement, and thus the court enjoined the taking.

In 1983, the Lancaster Redevelopment Agency adopted a redevelopment plan to revitalize its Amargosa area, finding that the area was "blighted." In 1988, the agency began redeveloping this area by constructing the Valley's Central Shopping Center, which had a Costco as its anchor tenant. In 1998, 99 Cents Stores moved into property next to Costco under a five-year lease with an option for a 15-year extension. The 99 Cents store was very successful; indeed, the agency admittedly "loved" the 99 Cents store because of the significant tax revenues it was generating.

Shortly after 99 Cents opened, Costco told the redevelopment agency that it needed to expand its site and threatened to relocate to another city unless the agency gave it more space, namely the 99 Cents store space. Concerned it would lose Costco, the redevelopment agency tried to buy the 99 Cents store property from its landlord. The agency also entered into a disposition and development agreement with Costco, which included the relocation of the 99 Cents store business. The 99 Cents store landlord and the agency were unable to negotiate a deal, and the agency opted to condemn the property. The city adopted a resolution of necessity (a precursor to takings by redevelopment agencies) authorizing the taking of the property, but the resolution contained no new blight findings and apparently relied solely on the blight findings made many years earlier when the redevelopment plan was adopted.

99 Cents Stores sued the redevelopment agency in federal court challenging the resolution, claiming it violated the Fifth Amendment to the United States Constitution, specifically its proscription against the taking of private property for anything but a public use. 99 Cents Stores moved for summary judgment and for a permanent injunction, and the court granted both.

The court analyzed the public-use requirement under federal law, concluding that the taking of property for a purely private use is unconstitutional, no matter the amount of just compensation paid. The requirement is typically met where the taking is "rationally related to a conceivable public purpose." But, as the court noted, "[a] purely private taking could not withstand the scrutiny of the public use requirements; it would serve no legitimate purpose of government and would thus be void." The court found that "the very reason that Lancaster decided to condemn 99 Cents' leasehold interest was to appease Costco." The court said, "Such conduct amounts to an unconstitutional taking for purely private purposes."

The redevelopment agency also argued that, if Costco were to leave, blight would be re-established in the shopping center. The court found that argument to be speculative. The court also rejected the notion that preventing future blight is an adequate public use and further found no support in state redevelopment law for such a position.

A federal court similarly enjoined a redevelopment agency's effort to take property (also involving Costco) in *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D. Cal. 2002). In that case, the city of Cypress attempted to take property bought by the Cottonwood Christian Center for the construction of a church. The agency had concluded years earlier that the property was blighted, but it had made no effort to develop the property. The owner, Cottonwood, was the only party with redevelopment plans at the time, but it planned to build a church, a use unlikely to generate significant tax revenues. Then Costco expressed interest in the property.

The city denied Cottonwood's planning applications, and Cottonwood, believing the denials were pretextual, filed a lawsuit to enjoin condemnation of the property. The federal court held that the condemnation violated the Fifth Amendment public-use requirement. According to the court, condemning the church's property to turn it over to Costco was not a public use. Since the Cottonwood property involved a church, the court applied a strict-scrutiny analysis; the court found that strict scrutiny was appropriate because "there was strong evidence that [the agency's] actions [were] not neutral, but instead specifically aimed at discriminating against Cottonwood's religious uses."

Other courts recently have shown similar concerns. In *County of Wayne v. Hathcock*, 2004 WL 1714875 (Mich. 2004), the Michigan Supreme Court held that Wayne County's efforts to condemn a thousand acres of property to transfer to a private developer for construction of a business park were unconstitutional under state law. The court focused on the public-use requirement of Michigan's constitution, which is similar to those under California and federal law. The court concluded that the condemnation was not necessary for development to occur, that the project lacked public oversight and that nothing about the condemnation served the public good.

Closer to home, Judge Quentin Kopp of the San Mateo Superior Court recently nixed efforts by Redwood City to condemn property for what the court concluded was a purely private use. *City of Redwood City v. Celotti*, CIV-429510 (San Mateo Super. Ct.). The city's redevelopment agency planned to condemn property to build an underground parking garage as part of a larger project for a private multiscreen retail development. After receiving several legal challenges to the parking garage aspect, the agency ceased its efforts to take the property directly and had the city condemn the property. The city tried to justify the condemnation as being necessary for public parking, but the court found the justification to be transparent. The court concluded that the city was really trying to take the property to benefit a purely private use, the retail cinema project, in violation of the public-use requirement.

Likewise, in *San Jose Parking Inc. v. Superior Court*, 110 Cal.App.4th 1321 (2003), the 6th District Court of Appeal granted San Jose Parking's petition for a writ of mandate directing the trial court to find that the San Jose Redevelopment Agency did not have the right to take San Jose Parking's proprietary and contractual right in an exclusive negotiating and operating agreement between the parties. The case was not based on the "public use" requirement, but it stands as another recent example of a court's policing redevelopment agency action.

These cases evince an increasing willingness of courts, especially some federal courts, to scrutinize

redevelopment agency actions. Whether this is a trend that will spread to the state appellate courts remains to be seen. Historically, they have offered little resistance to condemnation for redevelopment purposes.

In any event, redevelopment agencies would be wise to comply with the "public use" requirement in the federal and state constitutions by ensuring that evidence in the record clearly supports the proposition that property taken for redevelopment is being taken for the public good, not private gain.

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