

MEMORANDUM

To: Members of the Government Efficiency and Openness Committee

From: Karen R. Frostrom
Thorsnes Bartolotta McGuire
619-236-9363

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Re: Statement Outlining September 12, 2005 Presentation Contemplated

The California legislature enacted the Community Redevelopment Law, currently Health & Safety Code §§ 33000 – 33013, in 1951 to provide a structure under which governmental agencies could engage in redevelopment planning. The social climate at the time was such that concerns centered around *true slum* conditions whereby absentee landlords were permitting inner city properties to fall into disrepair, infesting cities with crime and dangerous conditions. Unfortunately, this concern allowed private property rights to be eroded without appreciation of the extent to which that erosion would be permitted. Today, homeowners and small business owners are being eviscerated in the name of community redevelopment.

The beginning of the erosion was a “true slum” case, Berman v. Parker, 348 U.S. 26 (1954). In Berman, the United States Supreme Court ruled that eminent domain could be used to further redevelopment where conditions were so bad that public health and safety were truly threatened:

Surveys revealed that in Area B, 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had

no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating.

Berman, 348 U.S. at 30. Unfortunately, the Berman case set a precedent for a disastrous line of cases that led to the recent decision in Kelo v. City of New London, 125 S.Ct. 2655 (2005), wherein the Court approved the use of eminent domain for redevelopment in a residential neighborhood without a showing of true slum – or indeed any slum – conditions. Legislative action is therefore necessary to restore the property rights granted under the California Constitution.

I. History:

The power of eminent domain can be traced back to Roman times when private land was taken to provide for road and aqueduct construction. This power was also used in England, where the King perceived the land as belonging to the Crown first and to the private landowner second. Like many other facets of English society, the founders of the United States of America disavowed the arbitrary practice of eminent domain and chose to include protections against arbitrary eminent domain use in the Fifth Amendment of the Constitution. The Fifth Amendment requires that land condemned *must* be taken for a “public use” and that “just compensation” must be paid.

The founders recognized the importance of land ownership to the American dream:

§ “Government is instituted no less for the protection of property than of the persons of the individuals.” The Federalist No. 54 at 370 (Jacob E. Cooke ed., 1961)(James Madison).

§ “Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a just government, which impartially secures to every

man, whatever is his own.” 14 The Papers of James Madison 266 (Robert Rutland, et al. eds., 1983)

§ “The right of property is a guardian of every other right, and to deprive a people of this is in fact to deprive them of their liberty. Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* (4th Ed., New York, 1775).

Colonial America used eminent domain to build roads, drainage systems, schools, government buildings, other traditional public purposes. The first “non-traditional” use of the condemnation power in America was during the industrial revolution. During that time, the need for mills expanded beyond the capability of the private sector. Mills Acts were passed to condemn land to accommodate this public need. While perhaps seemingly innocuous at the time – and generally unopposed by the landowners who saw a real need – those Mills Acts may have set a precedent that has now rendered the Fifth Amendment void.

California determined that the right to protect private property rights was important enough to also include in its own Constitution. See Cal. Const. Art. I, § 19. Initially, California courts interpreted both the federal takings clause and the state takings clause *so as to protect private property rights* from abuse by private developers. The courts drastically changed course in 2001, indicating a need for legislative action.

II. Development of Case Law in California:

The first California Supreme Court redevelopment case favored private landowners. In City and County of San Francisco v. Ross, 44 Cal.2d 52 (1955), the California Supreme Court considered, as a matter of first impression, whether private property could be taken for naked transfer to another private party. There, the question was whether the city could condemn a

privately owned parcel for use as a parking lot, which parking lot would be operated by another private party. While the Court acknowledged that the law provided that property could be condemned for the purpose of providing off-street parking, it also found:

The Constitution does not contemplate that the exercise of the power of eminent domain shall secure to private activities the means to carry on a private business whose primary objective and purpose is private gain and not public need.

Id. at 59. The Ross case expressly considered the application of Berman v. Parker, 348 U.S. 26 (1945), a leading “redevelopment” case, to these facts and found that the public interest – elimination of *true slum conditions* pursuant to a land use plan generated by the city alone – presented in Berman did not exist in Ross. The property owner won.

While Ross was the California Supreme Court’s first consideration of redevelopment condemnation, an appellate court case decided the year before also resulted in a finding in favor of the private landowner. In Redevelopment Agency v. Hayes, 122 Cal. App. 2d 777, 793 (1954), while the ultimate decision was on a demurrer, not the final issue, the court stated its ultimate position as follows:

Public agencies and courts both should be chary of the use of the act unless, as here, there is a situation where the blight is such that it constitutes a real hindrance to the development of the city and cannot be eliminated or improved without public assistance. It never can be used just because the public agency considers that it can make a better use or planning of an area than its present use or plan.

Id. at 812.

Subsequent California redevelopment cases were also positive. In Sweetwater Valley

Civic Assn. v. City of National City, 18 Cal.3d 270, 278 (1976), the court refused to allow the agency to designate a certain area as blighted because it was not a harm to the neighborhood. In Regus v. City of Baldwin Park, 70 Cal. App. 3d 968, 981-983 (1977), the court found that a private/private condemnation required a showing that an entire area was blighted and that the lack of such a showing required invalidation of the entire plan. In Redevelopment Agency v. Norm's Slausen, 173 Cal.App.3d 1121 (1985), the court held the agency's feet to the fire, requiring it to prove that the condemnation was not a foregone conclusion at the time the owner was contacted. When the agency failed to meet that burden, the court invalidated the taking. In Gonzalez v. City of Santa Ana, 12 Cal.App.4th 1335 (1993), the court rejected a redevelopment plan due to an inadequate showing of blight. In Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency, 82 Cal. App. 4th 511 (2000), the court rejected a redevelopment plan due to an inadequate showing of blight. The same was true in Beach-Courchesne v. City of Diamond Bar, 80 Cal. App. 4th 388, 407 (2000). In 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), the court forbade condemnation of a 99 Cents Store where the only possible grounds was prevention of "future blight." In Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002), the court refused to allow Costco to obtain condemnation of a church property so that it could expand its facility. Against such a positive backdrop, it was impossible to believe that a California landowner would be subjected to the abuse that has been reported nationwide. Then the issue came before the Fourth District Court of Appeals.

In Redevelopment Agency v. Rados Bros., 95 Cal.App.4th 309 (2001), the agency sought

to condemn a small business in order to make way for a larger business. The small business challenged the taking of its non-blighted land and won at the superior court level. However, on appeal, the superior court decision was reversed:

[B]light in the Bayfront Project area is conclusively established, and unblighted property within the redevelopment district may be taken to further the objectives of the redevelopment plan. (Citation.) Although blight on a particular parcel may justify a taking, it is not necessarily a prerequisite. In an analogous context, the United States Supreme Court has held that “[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for the [redevelopment] project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.” [Citations.] “If owner after owner were permitted to resist . . . redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. . . . [C]ommunity redevelopment programs need not . . . be on a piecemeal basis-lot by lot, building by building.”

Id. at 318. Following Rados Bros., and until the California Supreme Court or the legislature speaks on this issue, the rule of law is that if an individual landowner does not challenge the blight designation within sixty days, he or she for twelve years loses the ability to do so and the utmost deference will be accorded to the agency’s process. This is an abusive and unfair process, particularly given the lack of actual notice that landowners have of the timing of blight designations and the true impact of such a designation.

III. The Process:

Under current law, various cities have developed a process to be used when a developer requests that the city or its delegatee use the power of eminent domain against a private property owner. The processes vary somewhat but, from anecdotal evidence, seem to largely be

consistent one with another.

In San Diego, the process generally begins in one of two ways. Either the redevelopment agency determines that it needs to build a project at a certain location (as an example, the San Diego ballpark) or the developer approaches the agency with a project proposal (as an example, the construction of a hotel). Eventually, whichever approach is used, the targeted property owner is sent a notice of the initiation of the “owner participation process” related to his or her property. From the agency’s perspective, this is intended to permit the owner the rights required by the CRL to participate in community redevelopment. Owners are not offered the right to redevelopment their own individual parcel if the developer has proposed to develop a larger area. The owners generally interpret the notice as advising them to put a new coat of paint on their building. The notices are generally very ambiguous as to the scope of the project about which owner participation is sought.

Those owners who gain an understanding of the true impact of an owner participation notice generally realize after a few contacts with the agency that unless they can finance a large development project, they will not be permitted to participate and have no choice but to sell their land or submit to the eminent domain process. The agency does not accept a proposal for that individual piece of land but requires the owner to submit a proposal for developing the entire parcel contemplated by the land developer.

Following “consideration” of the various proposals, the agency makes a determination as to which proposal it will support, most often the large developer’s proposal. The developer and the agency then enter into negotiations to execute a Disposition and Development Agreement

("DDA"). This negotiation process can take years. While the negotiations are ongoing, the small property owner will not be invited to participate in them and will not be provided information as to the status of negotiations. The negotiations take place behind closed doors. It is possible for an owner to form a belief that, given the long period of silence, the developer has gone away. Until the agency votes on approving the DDA, the owner receives no other notices about the project.

Once the DDA is approved, the agency appraises the property, makes a take-it-or-leave-it offer to the owner and begins condemnation proceedings against the property. Legally, the agency is *required to negotiate* with the property owner, rather than just making an offer and filing a lawsuit. In reality, however, this requirement is not enforced and there are no penalties to an agency which fails to do this.

IV. The Risk of Not Acting:

As Justice Thomas outlined in his dissent to Kelo, there has been proven to be a disparate impact in the use of redevelopment condemnation. Minorities and the poor are often the targets of the wealthy and the politically connected. See Wendell E. Pritchett, "The Public Menace of Blight: Urban Renewal and the Private Uses of Eminent Domain," 21 Yale L. & Pol'y Rev. 1, 6 (2003); see also Brief of *Amici Curiae* National Association for the Advancement of Colored People, et al., filed in Kelo v. City of New London, No. 04-108. We have seen this happen time and again in California. Priority is given to the larger developers at the expense of the individual homeowners and small business owners. No consideration is given to the extent to which the smaller property has been well developed and/or properly used. It is no longer the slum lords

who are being impacted – it is those who were previously victimized by the slum lords, to wit, the less fortunate who have maximized their use of property they and/or their families have owned for years.

Redevelopment condemnation is a failed experiment. For *fifty years*, the government has had the power to condemn private property in the name of redevelopment. Yet, vast areas of California’s major cities remain “blighted” under the statutory definition. It is obvious that the current system simply is not the best way to get the job done. The major problem in relying upon private developers to accomplish public redevelopment is that those developers will always do the job with one eye on the bottom line. They will do whatever they can to maximize the bottom line. If the real estate market is in a trench, developers are unlikely to want to acquire land by condemnation. If the project area is undesirable geographically and an unwise investment – even though it may be sorely in need of redevelopment – developers are unlikely to want to acquire land by condemnation. Time after time, developers in San Diego target up and coming neighborhoods with high-value commercial property, which property is a good investment and subject to a good market. This is not efficient nor is it effective if one truly wishes to accomplish the goals of redevelopment.

There are alternatives which would allow private property rights to remain untouched. Offer incentives to owners, mom and pop shops, who will enter into an agreement to upgrade their property. Upgrade all city fixtures in the neighborhood.¹ Make sure the area has all of the

¹A sad consequence of designating a “project area” is that public resources are pulled

highest quality in electrical wiring, plumbing, cabling, etc. Make sure the streets and sidewalks are pristine. Give the property owners a visual incentive to upgrade their own properties. Use the public facilities to turn the area into a place where people want to be. Purchase a few lots from willing buyers and build parks and other recreational facilities. It is possible to revitalize neighborhoods without sacrificing property rights. Such revitalization would be of greater value in the future because the neighborhood would retain its unique character. Keep the small businesses which have contributed to the neighborhood in the past. Small business owners are more likely to stick with the neighborhood through hard times because they have a loyalty to the area. Big franchise operations will pull out without a second thought if their profits decline.

V. Conclusions

Redevelopment by force has three major consequences.

First, it hides the poor. Rather than helping the less wealthy business owners and homeowners revitalize their neighborhoods and remain part of their neighborhoods, redevelopment by force drives them deeper into the slums where they are less visible in the city's high profile areas. In one bay area case, the developers took a neighborhood of \$50,000 homes and replaced them with \$350,000 homes. The former residents could not possibly purchase one of the new homes with the money they received as "just compensation." Instead, they were

away from the designated project with the assumption that it will eventually be upgraded by the developer, resulting in further deterioration to the area.

driven into unfamiliar territory, into new neighborhoods where homes were still in their price range. What better result would have been seen if the residents were given incentives and public facility upgrades to increase their own property values! They would still have their old friends and neighbors *and* there would still be a neighborhood with increased value.

Second, it merely accomplishes a “Wal-Marting” of formerly unique areas. By driving the mom and pops out of the area in favor of larger, more expensive projects, the result is the only the big franchise organizations remain. San Diego’s Gaslamp is a good example. Grantville is another with which, by contrast, the Gaslamp example becomes even more clear. Ten years ago, the Gaslamp was funky and had a one-of-a-kind flavor. You never knew what type of store you might come across when you turned a corner. Now that all of Fifth Avenue has been taken over by large projects, brand names are the rule and funky side shops are the exception. Walking through the Gaslamp, one could be in any major city in America. It is no longer special, thanks in large part to redevelopment by force. Grantville, which is the newest “redevelopment” area, still retains its unique character. Driving down Mission Gorge Road, an observer will see row after row of thriving business of all shapes and sizes. If you cannot buy it on Mission Gorge Road, it probably doesn’t exist. Certainly, the large franchises are well represented, but so is the little guy. Vacancies are nearly non-existent. Ten years from now, if redevelopment by force becomes the norm in Grantville, those little guys will be gone and Grantville will have become one more mass market driven area with brand name after brand name and little to no character left.

Third, redevelopment by force breaks the sacred contract between a government and its

citizens. Talk to any individual who has been impacted by redevelopment by force and you will find his or her views on the government to be tainted by that experience. Some individuals turn into that which they once hated and begin stalking other property owners in the name of redevelopment. Others stop participating in the political process and avoid government contact in any way, shape, or form. Still others continue to go through the motions but are quick to believe the worst about any alleged governmental conduct – the next confrontation may not be handled as well. It is difficult to recover from discovering that your government will blatantly play favorites and decide that Joe will use your property better than you can. It is somewhat reminiscent of a quote from the book *Animal Farm*: “All animals are equal but some animals are more equal than others.” Having been told that one is “less equal” than another by the government who is paid to protect us, one can never view the government in quite the same light.