The Heavy Hand of Redevelopment

*By M. David Stirling**

In late 2002, Elaine Evans, together with business and residential owners of 22,883 other parcels in over twenty separate neighborhoods of San Jose, were notified by the local redevelopment agency (RDA) that their properties were "blighted." Neither the 120 property owners who opposed the designation at the agency's public hearing, nor the 1,422 who protested in writing, nor the several thousand whose properties were not – except perhaps in a most technical sense – blighted, nor Elaine Evans' court challenge, were successful in derailing this eventual massive government condemnation of their properties.

It's happened regularly in California and around the country for several decades: homeowners and small business owners in older sections of a community are informed that their property has been found to be "blighted;" that the local RDA is prepared to acquire their property through eminent domain, if necessary; and that an appraiser will be recommending a price the RDA will offer them for their property, should they prefer to take the money and leave. Whichever route they choose, the RDA's ultimate success is rarely in doubt.

The harsh reality is that people who have lived and/or conducted business in the same location – perhaps for a generation or more – are forced from their homes and businesses by a little known local government body with a better use in mind for their property. Invariably, that better use is calculated to generate substantially greater revenues for the RDA than the existing property owners are.

Variations on this scenario have played out thousands of times in California since the state's redevelopment law was enacted over a half -century ago While the original purpose of this expanded use of eminent domain was to provide an expedient remedy to city neighborhoods plagued by boarded-up warehouses, abandoned gas stations, flop-houses, alcoholics and prostitutes, redevelopment planners quickly discovered they also could utilize eminent domain on residents and small businesses in older, modest, yet still viable neighborhoods of the community.

With the vast financial incentives redevelopment provides – power to condemn private property and give it to other private parties; power to give developers public money to develop projects; sole use of all property tax increases generated over the life of the project (often 30 years); and authority to sell bonds to raise revenue to fund the project, all without a vote of affected property owners or local residents – RDAs almost overnight became the state's most powerful and least accountable political subdivisions. Today, 400 of California's 478 incorporated cities have active redevelopment agencies. [1]

Few can reasonably deny local government the tools necessary to "redevelop" the decrepit, crime-infested, and virtually hopeless areas so familiar to many large cities. Even moderate-sized communities have effectively utilized RDAs to create clean, productive, and people-friendly neighborhoods where once urban-like wastelands lay. But as often as not, redevelopment law in California and in other parts of the country has been misused – some would say abused – over the past half-century.

Of redevelopment's several controversial elements, two in particular stand out as the most vulnerable to misuse. The first is the lack of clear definition – and RDAs' selective application – of redevelopment's triggering mechanism, the designation of "blight." The second is the expanded interpretation of the term "public use," as contained in the Fifth Amendment of the Constitution. [2]

The original definition of "blight" in California law was taken from the federal government's urban renewal statute of 1949. Instead of Congress defining blight in clear and unambiguous language, the statute provided federal funds for a "slum area or a *blighted*, deteriorated, or deteriorating area." By granting the urban renewal administrator unfettered discretion to decide what property-characteristics fit within the statute's purpose, Congress effectively set the future course for blight designation. As a result, the U.S. Supreme Court's controlling precedent essentially accepted blight to be in the eye of the beholder. [3]

Following Congress' lead, mid-century California legislators created a definition of blight as amorphous as the federal statute. Over the years, as political columnist, Dan Walters, recently wrote, "local officials stretched the definition to ludicrous lengths. One city even declared unoccupied, undeveloped marshland to be 'blighted' because it was subject to periodic flooding." Walters observed that blight was misused to make way for "shopping centers, auto malls, big-box retailers and other projects" – primarily for the purpose of generating additional sales-tax revenues to make up for property tax revenues lost to redevelopment projects.[4]

Although 1993 legislative amendments to the redevelopment statute purported to – and did to a degree – make blight designations more difficult to impose, in practice, and with relatively few exceptions, any city lured by redevelopment's economic incentives can still find and declare blight without fear of its designation being challenged, much less set aside.

When property owners in modest neighborhoods are told that their properties have been designated as blighted, virtually none realize the impact that designation has on their property. No one unfamiliar with redevelopment law – in other words, 99.9 per cent of the population – understands how the initial blight determination is made. In practice, the city (or county) contracts with and pays a consultant with past experience in making blight determinations. In the earlier-mentioned San Jose Redevelopment Project case, Elaine Evans' court brief showed the consultant's blight-bias by

revealing that the agency contracted to pay the consultant $338,080.00, in return for which it would "produce a blight analysis to be used by the agency . . . to demonstrate that all or part of the Survey Area is blighted . . . in order to justify the inclusion of that geographic area within a proposed redevelopment project area." When the process is understood, what targeted property owners are up against becomes all too clear. For consultants in the business of doing blight assessments, not finding blight is not in their economic best interest.

The term "public use," contained in the Fifth Amendment, was intended to limit government's ability to seize private property through eminent domain, the process used by RDAs to acquire "the project area." What historically was considered a "public use" – and what most people even today readily accept as a public use, i.e., building a highway, constructing a school, a jail, a post office, and the like – only raises the question of how much money the government will pay the owner for his property. Over the past several decades, however, as modern, more ambitious planners came to regard the traditional notion of public use as too confining, the term was mutated into the almost limitless standard of "public benefit." This resulted in what is now routine practice: if the RDA makes a plausible showing that its seizure of the property will benefit the public sooner or later, reviewing courts generally uphold the taking.

Invariably, the public benefit standard – as compared with the public use limitation – promotes the RDA practice of taking one private party's property to give to another private party. In Chula Vista, for example, the RDA utilized eminent domain to take a privately-owned 3.2 acre parcel with an old building and give it to a major corporation at a below-market-value price, in order to build a parking lot. In exchange, the corporation agreed that within six years it would develop the adjacent property it already owned. The RDA justified taking the previous owner's land on the basis that the increased business activity and employment at the corporation's new facility would generate greater tax revenues for the city, and that would benefit the public.

In Cypress, the Cottonwood Christian Center applied for a permit to build a $50 million worship center on the 15-acre parcel it had owned for several years. The city council, however, preferring Costco's proposal to build a big retail store on the property, created an RDA to simply seize the land. The city went so far as to assert that Cottonwood's proposed religious center would itself constitute "blight' and a "public nuisance." Again, the justification for using eminent domain was the public benefit Costco's big retail store would provide by way of increased business activity, local employment, and sales tax revenues, compared with a religious center. Countless government take-overs of private property for public benefit have occurred throughout California, and around the nation, and they continue.

One other redevelopment concern that deserves mention is the revenue-generating incentive called "tax increment financing" (TIF). Most often, TIF explains why so many communities establish and promote active RDAs. Once a redevelopment project is established, property values within the project area appreciate, in turn generating increased property tax revenues. 100 per cent of those revenues remain with the RDA to spend at will and without citizen oversight; and not just for a limited time, but for the life of the project – often 30 years or more. Not one penny of the RDA's increased property tax revenues flow to overlapping local government agencies, including the local school district, to pay for the increased services those entities are required to provide to the project area. This is but one of the several bizarre characteristics of redevelopment law.

Thomas Jefferson observed, "The natural progress of things is for liberty to yield and government to gain ground." One of the surest ways for a citizenry to lose its liberties is to idly sit by while ever-more overreaching government planners devise complicated programs to extinguish our fundamental right to own and use private property. The onerous burden of eminent domain in the redevelopment context falls almost entirely on modest neighborhoods, where homes and businesses are peopled not by the financially, legally, or politically connected, but by those with little resources to resist. With California's median-priced home values making home ownership affordable to fewer households daily, and small businesses struggling ever harder to compete, it is critical that local government's vast power of eminent domain be used with care. While redevelopment has its legitimate uses, it also uproots and disperses families and destroys mom-and-pop type businesses. Instead of growing government intrusiveness, it would be much more constructive to grow the notion of community pride and individual responsibility, whereby all small property owners and business people can strive for a piece of the American dream.

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Footnotes

[1] Nearly all states have adopted redevelopment laws modeled largely after California's.

[2] "nor shall private property be taken for public use, without just compensation."

[3] Berman v. Parker, 1954

[4] Sacramento Bee, June 15, 2004.