

By Bruce Tepper

Federal Court Limitations on Redevelopment Agencies

The definition of public use may hinge on a parcel-specific finding of blight

For 50 years federal and California courts have authorized public entities to take private property by eminent domain for urban redevelopment purposes.¹ Under the rubric of redevelopment, public entities have regularly expanded the concept of public use to include transfers of property from one private entity to another private entity to accomplish the “development” portion of “redevelopment.” Recent federal cases suggest that there may be limitations to taking property for redevelopment purposes and transferring it to private entities.²

These federal cases—each admittedly based on an extreme factual situation—appear to impose new parcel-specific determinations of blight for each state law eminent domain filing, conclusive pre-sumptions notwithstanding.³ In addition, the federal cases postulate a definition of “public use” that is significantly at variance with that of state law.⁴ These cases, in sum, pose a significant threat to California redevelopment agencies that pre-

sume to exercise condemnation powers.

The Fifth Amendment to the U.S. Constitution proscribes the “taking” of private property “for public use without just compensation.” The public use requirement is an explicit limitation on the power of government to take private property because, as the U.S. Supreme Court has long recognized, a taking—even if for just compensation—must serve a legitimate public purpose.⁵ A taking for purely private use is unconstitutional, no matter what the amount of just compensation.⁶ “A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”⁷

To satisfy the public use clause, a taking need only be “rationally related to a conceivable public purpose.”⁸ Moreover,

“[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”⁹ Under the “reasonable relationship” standard articulated by the U.S. Supreme Court in *Berman v. Parker* and in *Hawaii Housing Authority v. Midkiff*, a court must ac-

cept the avowed public purpose of the condemnor’s condemnation efforts unless the public use findings are “palpably without reasonable foundation.”¹⁰ Indeed, ever since the Supreme Court’s decision in *Berman* in 1954, the

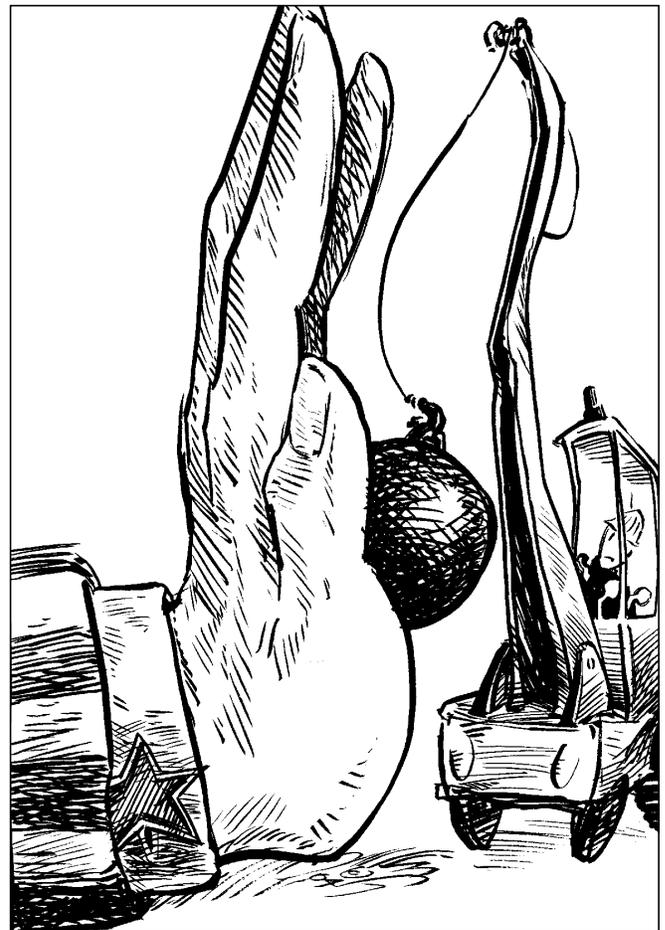
redevelopment of urban areas has been authorized by federal courts as a public use under the Fifth Amendment.¹¹

Even under such a deferential standard, however, public use is not established as a matter of law whenever a legislative body acts to define it.¹² While the scope of judicial scrutiny is narrow, “there is, of course, a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use.”¹³ No judicial deference is required, for instance, “where the ostensibly public uses are demonstrably

pretextual.”¹⁴ According to the Ninth Circuit in *Armendariz v. Penman*:

If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a “public use,” and if those officials could later justify their decisions in court merely by positing “a conceivable public purpose” to which the taking is rationally related, the “public use” provision of

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could be blighted under state law and not blighted under federal law for the purpose of establishing a constitutionally permissible public use:

Lancaster must present a valid public use within the meaning of the Takings Clause supporting its decision to condemn 99 Cents property interest. Lancaster's failure to show that 99 Cents' leased property was blighted at the time of its attempted condemnation is determinative of 99 Cents' federal takings claim only. Its significance under California law is an issue the Court need not resolve.⁴³

Leading to the unusual circumstances of the case is the fact that in a 1997 Plan Amendment renewing the Redevelopment Agency's eminent domain authority, Lancaster did not make a new determination of blight regarding the project area but instead relied only on its 1983 finding of blight. Thus Lancaster contended before the court that the "loss of Costco" would cause what it described as "future blight." According to the court, however, prevention of future blight was an inadequate public use within the meaning of the taking clause.⁴⁴ The court noted that "[t]he concept of future blight" has long been rejected by California courts.⁴⁵

The *99 Cents Only Stores* court was the first federal court to set a boundary on the motives allowed by the lenient reasonable relationship standard for public use established in *Berman* and *Midkiff*. On appeal, the Ninth Circuit, in an unpublished decision, returned the matter to the district court for consideration of the injunction in view of Lancaster's decision to sell Costco a less encumbered property.

Cottonwood Christian Center v. Cypress Redevelopment Agency, issued in 2001, is another Central District decision. Cottonwood Christian Center owned an 18-acre parcel at a commercially significant intersection in the city of Cypress. Cottonwood was pursuing a conditional use permit (CUP) to build a church facility, including a 4,700-seat auditorium. Cottonwood's property was located in the Los Alamitos Race Track and Golf Course Redevelopment Project. In the 12-year period between the adoption of the redevelopment plan and the filing of the lawsuit, Cypress had proposed at least four different designs for the area surrounding the property. None of these designs evolved beyond the concept stage.

Ultimately, Cypress rejected Cottonwood's CUP application, choosing instead to allow Costco to place one of its stores on Cottonwood's property. In response to the denial of its CUP, Cottonwood filed an action in federal court, alleging violations of the

U.S. and California Constitutions, along with various state statutes. The redevelopment agency, in turn, initiated a condemnation action after the adoption of a resolution of necessity, seeking to condemn the Cottonwood property for "redevelopment purposes." Cottonwood sought a preliminary injunction from the district court to halt the condemnation proceedings.

The district court, in assessing the viability of an injunction, applied a strict scrutiny standard (unlike the court in *99 Cents Only Stores*) in light of the recently enacted Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).⁴⁶ Cypress asserted two interests for refusing to grant Cottonwood's CUP and condemning its property: "blight and generating revenue for the City."⁴⁷ The district court held that "[n]either interest is sufficiently compelling to justify burdening Cottonwood's religious exercise."⁴⁸

Examining the viability of Cypress's blight defense, the district court was not impressed: Moreover, it is evident that the refusal to grant Cottonwood's application for CUP was not at all premised on blight. The construction of a church on the Cottonwood Property would eliminate the blight.⁴⁹

Cypress asserted the conclusive presumption of blight that is afforded to redevelopment agencies under the Community Redevelopment Law.⁵⁰ In response, the court held that "examination of local laws under the strict scrutiny analysis requires not only that the government's stated purpose is [a] compelling interest, but it is also a genuinely-held purpose."⁵¹ Cypress's finding of blight was even more suspect because "it did not compel the City to take action until after Cottonwood purchased the Cottonwood Property."⁵²

In assessing Cottonwood's likelihood of success on the merits, the district court again used the strict scrutiny standard while adopting the approach of the district court in *99 Cents Only Stores*:

Defendants' planning efforts here appear to consist of finding a potential landowner for property that they did not own, and then designing a development plan around that new user.... Although that conclusion is not clear from the record in this case, there is strong evidence that Costco could locate on property adjacent to Cottonwood Property, perhaps even on their remaining 18 to 28 acres that were initially part of the Town Center project. If Defendants' taking decision was made in order to "appease Costco," the exercise of eminent domain is not for a "public use."⁵³

AND ASSOCIATES

Cypress had once again asserted the conclusive presumption of blight afforded California redevelopment agencies⁵⁴ in its response to Cottonwood's likelihood of success on the merits. The district court again drew on the opinion in *99 Cents Only Stores*, which differentiated findings of blight under the Fifth Amendment of the U.S. Constitution from those made under California law. With that, the court issued the injunction.

A third federal case, *Aaron v. Target Corporation*, is proof that these types of parcel-specific decisions are not unique to Costco and/or the Central District of California. Target operated a retail store in South St. Louis, Missouri, pursuant to a long-term lease in which the plaintiff was the lessor. Target wanted to tear down its 30-year-old store and build a new one. In the course of negotiating a new lease with the plaintiff, Target could not agree on the terms.⁵⁵ Without the plaintiff's knowledge, Target and the city of St. Louis entered into an agreement in which the city would find the property to be blighted and in need of redevelopment and would condemn the property, and Target would be a redeveloper of the property. Target and St. Louis jointly funded and participated in the blight analysis, after which the city found that the plaintiff's property was blighted and adopted a redevelopment plan around it.⁵⁶ The city authorized Target to serve as the redeveloper and authorized condemnation of the plaintiff's property. Prior to the city's filing of a condemnation complaint, the plaintiff filed a suit in federal court seeking to enjoin state court condemnation proceedings on federal constitutional grounds.

The district court first rebuffed the city's *Younger* abstention claims by finding the city's conduct to be "one of the rare cases" in which possible "bad faith, harassment, or other extraordinary circumstances makes abstention inappropriate."⁵⁷ In assessing the challenge to public use, the district court invoked passages from both *99 Cents Only Stores* and *Cottonwood*. The court noted that in order to satisfy the public use clause, a taking need only be "rationally related to a conceivable public purpose."⁵⁸ However, like the district court in *99 Cents Only Stores*, the *Target* district court noted that "courts must look beyond the government's purported public use to determine whether that is a genuine reason or if it is merely pretext."⁵⁹

The district court concluded by adopting a recent holding of the Illinois Supreme Court,⁶⁰ in which a taking of a recycling facility's property to convey to a race track for the purpose of expanding the race track's parking lot was found unconstitutional as a public use:

Nonetheless, the City may not use its

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power of eminent domain in the manner of a "default broker of land" [citation omitted], to allow tenants to wrest property from their landlords merely to enable the tenant to maximize its profits. As plaintiffs suggest, this "will magnify the financial risk of investing in core City neighborhoods, and thereby strongly discourage private investments in those areas."⁶¹

St. Louis and Target immediately sought an expedited appeal⁶² of the injunction issued by the district court. On February 3, 2004, the Eighth Circuit Court of Appeals reversed the district court, principally on *Younger* abstention grounds, and dissolved the injunction.⁶³

The Future of the Public Use Doctrine

Based on *99 Cents Only Stores, Cottonwood*, and *Target*, it appears that some federal courts no longer accept redevelopment as a public use without further scrutiny. Indeed, a state finding of public use is no longer conclusively presumed in the absence of an examination of the factual context in which the power of eminent domain is being exercised.

The effect of federal courts' applying this new standard of public use in state court condemnation actions for redevelopment purposes poses enormous consequences for redevelopment agencies. If redevelopment agencies must face federal actions challenging the constitutionality of their condemnation actions every time the agencies move to condemn property for a proposed development, redevelopment will be jeopardized. Developers and lenders will be leery of advancing funds in such an uncertain climate. Also, the real danger lies in the possibility of redevelopment condemnees filing reflexive federal actions based on factual circumstances that, unlike the factual settings in the three federal cases, are not extraordinary.

On the other hand, three federal district court opinions do not a trend make. It is clear, however, that federal and state courts differ over the meaning of the standards of public use. Certain legislative presumptions concerning blight and public use that exist in state court may not exist in federal court. When the "ostensible public use is demonstrably pretextual,"⁶⁴ state court condemnation proceedings are going to be closely scrutinized by a federal court no matter what standard of review is involved.

In the most egregious factual situations regarding redevelopment, federal notions of ripeness, abstention, mootness, and equity will be ignored to preserve the federal constitutional rights of property owners. Finally, the exercise of the power of eminent domain based on findings of blight that have no rea-

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sonable current viability will be questioned in federal court irrespective of state law presumptions. ■

¹ See, e.g., *Berman v. Parker*, 348 U.S. 26, 31 (1954); *Redevelopment Agency of City and County of San Francisco v. Hayes*, 122 Cal. App. 2d 777 (1954).

² See, e.g., *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003), *reversed*, slip op. (8th Cir. Feb. 3, 2004).

³ See HEALTH & SAFETY CODE §33367.

⁴ See *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001).

⁵ See *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1947).

⁶ *Id.* See also *Armendariz v. Penman*, 75 F. 3d 1311, 1320 (9th Cir. 1996) (en banc).

⁷ *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984).

⁸ *Id.* at 241.

⁹ *Id.* at 240.

¹⁰ *Id.* at 241, *quoted in* *Richardson v. City and County of Honolulu*, 124 F. 3d 1150, 1158 (9th Cir. 1997).

¹¹ *Berman v. Parker*, 348 U.S. 26, 31 (1954).

¹² *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001).

¹³ *Midkiff*, 467 U.S. at 240.

¹⁴ *99 Cents Only Stores*, 237 F. Supp. 2d at 1129. See also *Armendariz v. Penman*, 75 F. 3d 1311, 1321 (9th Cir. 1996).

¹⁵ *Armendariz*, 75 F. 3d at 1521.

¹⁶ See IIA NICHOLS ON EMINENT DOMAIN §7.02(1)(2)(3), at 7-24-7-33 (3d ed. 2003). For a discussion of the historical development of public use, see Errol Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1980) and Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978).

¹⁷ See also *Kennedy v. Ross*, 44 Cal. 2d 52, 55 (1955); *City of Menlo Park v. Artivo*, 154 Cal. App. 2d 261, 268 (1957); CODE CIV. PROC. §§1230.020, 1240.010.

¹⁸ HEALTH & SAFETY CODE §§33000 *et seq.*

¹⁹ HEALTH & SAFETY CODE §33368.

²⁰ *In re Redev. Plan for Bunker Hill*, 61 Cal. 2d 21 (1964); *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777 (1954); *Redevelopment Agency v. Del Camp*, 38 Cal. App. 3d 836 (1974); *Anaheim Redev. Agency v. Dusek*, 193 Cal. App. 3d 249, 263 (1987); *Chula Vista v. Rados Brothers*, 95 Cal. App. 4th 309, 314 (2001).

²¹ See J. Kruckeberg, *Can Government Buy Everything? The Takings Clause and the Erosion of "Public Use" Requirement*, 87 MINN. L. REV. 543, 545 (2002) [hereinafter Kruckeberg].

²² See, e.g., *Friends of Mammoth v. Town of Mammoth Lake Redev. Agency*, 82 Cal. App. 4th 511, 540 (2002).

²³ R. Bruce Tepper, *A Thousand Points of Blight*, LOS ANGELES LAWYER, Mar. 2001, at 34 (2001) [hereinafter Tepper] (quoting H. Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 393 (2000)).

²⁴ See Kruckeberg, *supra* note 21, at 547 n.18.

²⁵ *Id.*

²⁶ See George Lafcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1008 (2001).

²⁷ See Tepper, *supra* note 23, at 36.

²⁸ See HEALTH & SAFETY CODE §33030.

²⁹ See HEALTH & SAFETY CODE §33031.

³⁰ See AB 1290, the Community Redevelopment Reform Act of 1993. See, e.g., HEALTH & SAFETY CODE §33030-33031.



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³¹ See, e.g., Sweetwater Valley Civic Ass'n v. City of Nat'l City, 18 Cal. 3d 270 (1976); Friends of Mammoth v. Town of Mammoth Lake, 82 Cal. 4th 511 (2000); Beach-Courchesne v. City of Diamond Bar, 80 Cal. App. 4th 388 (2000).

³² HEALTH & SAFETY CODE §§33333.2, 33333.4.

³³ See CODE CIV. PROC. §1245.255; Burbank-Glendale-Pasadena Airport Auth. v. Hensler, 233 Cal. App. 3d 577, 589 (1991); Anaheim Redev. Agency v. Dusek, 193 Cal. App. 3d 249, 263 (1987).

³⁴ 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1125-27 (C.D. Cal. 2001).

³⁵ See also briefs of parties in connection with the appeal to the Ninth Circuit Court of Appeal.

³⁶ 99 Cents Only Stores, 237 F. Supp. 2d at 1127. The complaint sought equitable relief under 42 U.S.C. §1983.

³⁷ In the face of the federal lawsuit, Lancaster rescinded its resolution of necessity—the statutory step prefatory to filing an eminent domain case. The district court held that Lancaster's refusal to enter into a stipulation "agreeing not to condemn 99 Cents' Leasehold interest at Costco's behalf" weighed "heavily against the finding of mootness." 99 Cents Only Stores, 237 F. Supp. at 1128.

³⁸ The U.S. Supreme Court clearly disfavors federal injunctive relief against state action based on what is informally called "[o]ur federalism." Younger v. Harris, 401 U.S. 37, 41 (1970). See also San Remo Hotel v. San Francisco, 145 F. 3d 1095, 1101 (9th Cir. 1998). However, because Lancaster had not yet initiated a condemnation action, Younger abstention was not directly applicable.

³⁹ See Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 192 (1985) (Governmental action must be in the form of a final decision that inflicts actual, concrete injury in order for the matter to be

ripe.). Because Lancaster had not filed a condemnation case, the city contended the federal action was not ripe for adjudication.

⁴⁰ The court telegraphed its holding when it stated that no "judicial deference is required, for instance, where the ostensible public use is demonstrably pretextual."

99 Cents Only Stores, 237 F. Supp. 2d at 1129.

⁴¹ Id. at 1128.

⁴² Id. at 1130 n.2.

⁴³ Id. at 1130.

⁴⁴ Id.

⁴⁵ See Beach-Courchesne v. City of Diamond Bar, 80 Cal. App. 4th 388, 407 (2000); Friends of Mammoth v. Town of Mammoth Lake, 82 Cal. 4th 511, 553 (2000).

⁴⁶ RLUIPA, 42 U.S.C. §2000 cc-2. RLUIPA prohibits any governmental agency from imposing or implementing:

A land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that the imposition of the burden on that person, assembly, or institution—(A) is in furtherance of the compelling governmental interest; and (B) is the least restricted means of furthering that compelling governmental interest.

The district court also held that the strict scrutiny standard was applicable under the free exercise clause of the First Amendment. Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002).

⁴⁷ Cottonwood, 218 F. Supp. 2d at 1227.

⁴⁸ Id. at 1228.

⁴⁹ Id.

⁵⁰ See HEALTH & SAFETY CODE §§33501, 33368.

⁵¹ Cottonwood, 218 F. Supp. 2d at 1228 (citing Lincoln

Club of Orange County v. City of Irvine, 274 F. 3d 1262, 1269 (9th Cir. 2001), *opinion amended and superceded*, 292 F. 3d 934 (9th Cir. 2002)).

⁵² Id.

⁵³ Id. at 1229-30.

⁵⁴ HEALTH & SAFETY CODE §33368.

⁵⁵ Aaron v. Target Corp., 269 F. Supp. 2d 1162, 1166-68 (E.D. Mo. 2003), *reversed*, slip op. (8th Cir. Feb. 3, 2004).

⁵⁶ See MO. REV. STAT. §99.320 (2000). Ironically, the indicia of blight found by the city included matters uniquely within the control of Target, such as the exterior condition of the property and the condition of the utility systems.

⁵⁷ Target, 269 F. Supp. at 1172 (citing Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 437 (1982)).

⁵⁸ Id. at 1176 (citing Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984)).

⁵⁹ Id. at 1177 (citing Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002); 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001)). The Target court concluded its discussion by referring to the Ninth Circuit's *Armendariz* decision. *Armendariz v. Penman*, 75 F. 3d 1311, 1321 (9th Cir. 1996).

⁶⁰ Southwestern Ill. Devel. Agency v. National City Envtl., L.L.C., 199 Ill. 2d 225 (2002), *cert. denied*, 537 U.S. 380 (2002).

⁶¹ Target, 269 F. Supp. 2d at 1177-78.

⁶² See FED. R. APP. P. 2.

⁶³ Target, 269 F. Supp. 2d 1162, *reversed*, slip op. (8th Cir. Feb. 3, 2004).

⁶⁴ 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001).

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