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RECENT ACTIVITY ON EMINENT DOMAIN AND REDEVELOPMENT

The issues of eminent domain and redevelopment continue to be debated in the State Legislature and Congress as a result of the Untied States Supreme Court's decision in Kelo v. City of New London which upheld the authority of local government to use eminent domain for private development. The State Legislature is pursuing a variety of approaches that could either limit the scope of eminent domain or strengthen redevelopment law by tightening the definition of blight. Congress is considering legislation which generally bans the use of eminent domain for economic development by state and local agencies using Federal economic funds. In addition, an initiative entitled "The Protect Our Homes Act" (POHA) is in circulation for the November 2006 election. This memo provides additional information on eminent domain and redevelopment issues and discusses POHA and recent State and Federal legislation.

Previously, your Board directed the Chief Administrative Office and County Counsel to review the Kelo v. City of New London (Kelo) decision. A Board memo dated August 15, 2005 concluded that the Kelo case does not alter eminent domain in California because Kelo is primarily related to condemnation of private property for economic development unrelated to blight. Two other Board memos, dated August 15 and August 25, 2005, dealt with an Agenda item on SCA 15 (McClintock), which would limit the use of eminent domain to a stated public purpose. These memos concluded

that the County would be best served by a tightening of the definitions of blight outlined in AB 1290 (Isenberg), Chapter 942, Statutes of 1993 limiting the use of eminent domain in non-blighted areas, and requiring a finding of blight for projects where an agency seeks to reinstate or extend the time limit for the use of eminent domain.

The Protect Our Homes Act

The Protect Our Homes Act introduces a new question into the eminent domain-redevelopment discussion: whether limitations or prohibitions on eminent domain should be extended into the realm of regulatory actions. Under POHA, property owners would have to be compensated for these regulatory actions such as re-zoning which could reduce property values even though no property is physically acquired. Thus, public agency decisions on certain business, environmental, and land use regulatory actions could lead to compensable damages. There is no State or Federal County policy on this subject and no legislation that deals with this area.

Narrows the Meaning of Public Use. The Protect Our Homes Act would prohibit government from using eminent domain to effect the transfer of property from one private owner to another. The initiative requires public agencies to specify a public use before a property is taken or damaged, retain ownership of property taken by eminent domain, and ensure that the property is used for its stated public use. Public use is given a narrower meaning than public purpose and essentially corresponds to physical use by the public. Public use is specifically defined to exclude the uses of eminent domain that result in "transfers to non-governmental owners for economic development or tax revenue enhancement or for any other uses that are not public in fact even if legitimate public purposes are served." If a public agency ceases to use property taken by eminent domain for its stated public use, the agency must offer the property to the former owner or their heirs at the current market value.

Includes Regulatory Actions Under Eminent Domain. POHA also would expand the definition of damaged to encompass laws and activities by public agencies that result in substantial economic loss to private property, such as down zoning of private property, elimination of any access to private property, and limitation on the use of private air space. Thus, POHA would bring regulatory actions under eminent domain and require the same payment for them as is required for physical takings. According to an analysis by the Legislative Analyst's Office (LAO), certain business, environmental, land use, and other regulatory actions could result in compensable damages. The Community Development Commission and County Counsel indicate that if a government agency's regulations regarding land use, building, and traffic for example, restrict the use of private property, it sets up the possibility of litigation against the agency from private property owners that are affected by such regulations even though no property has been acquired by the government agency.

The Department of Public Works indicates that POHA would significantly increase the cost of planning, design, acquisition, and litigation associated with a project; increase the difficulty of being able to effectively acquire property through negotiations; and, according to County Counsel, preclude the ability to remedy potential severance damages to a property by limiting the County's ability to mitigate damages through eminent domain. POHA could also impact projects that involve the exchange or transfer of rights to private property owners and requirements imposed on subdividers for the construction of off-site improvements.

Furthermore, POHA requires blight determinations to be made on a parcel by parcel basis. Current law requires a project area to be blighted before eminent domain can be used, but it does not require every parcel in the area to be blighted.

A recent press release indicates that the Protect Our Homes Coalition intends to turn in one million signatures to county registrars this week.

Recent State Legislation Affecting Redevelopment and Eminent Domain

A number of bills and Constitutional amendments are still under consideration in the Legislature. Some would make procedural changes to the redevelopment process including certain kinds of disclosure or time limit extensions for notification by redevelopment agencies, others seek to limit the scope of eminent domain by barring its use for economic development or revenue enhancement, or by restricting the uses of redevelopment tax increment funds, while a third category of bills attempts to redefine and strengthen the requirements for a finding of blight and make it more difficult for a redevelopment agency to extend the life of a project, or to merge projects. These bills are discussed briefly below.

Procedural Changes. **AB 773 (Mullin)**, as amended on January 4, 2006, would increase from 30 days to 90 days, the period following adoption of a redevelopment agency ordinance during which voters in cities and counties with a population of less than 500,000 may gather signatures to challenge the ordinance via referendum. The bill was referred to the Senate Committee on Local Government on February 2, 2006. **AB 782 (Mullin)**, as amended on January 4, 2006, would require that blight based on lots "irregular in form and shape" and "inadequate size for proper usefulness" also be located in a "predominantly urbanized area," a test from which it is now excepted. The bill was referred to the Senate Committee on Local Government on January 26, 2006. **AB 2610 (Keene)**, as amended on May 15, 2006, extends legal immunity to any person who acquires property from a redevelopment agency if the agency completes a clean-up of hazardous materials. The bill was placed on the Assembly Consent Calendar on May 16, 2006.

Limitations on Eminent Domain. Legislation specifically targeted to eminent domain includes **AB 1162 (Mullin)**, as amended on September 2, 2005, which would place a

two-year moratorium until January 1, 2008 on the ability of redevelopment agencies, commissions or joint power authorities to acquire owner-occupied residential property for transfer to a private party. AB 1162 was assigned to the Senate Rules Committee on September 6, 2005. **AB 1893 (Salinas)**, as introduced, bars the use of redevelopment agency tax increment for land acquisition, site clearance, or design costs of a building to be used as a city hall or county administration building. The bill was referred to the Senate Committee on Local Government on May 4, 2006. **AB 1990 (Walters)**, as amended on April 3, 2006, would prohibit any city, county, school district, special district, or community development agency from the use of eminent domain to acquire real property if it is to be transferred to a private party or entity. The bill failed passage on April 26, 2006 in the Assembly Committee on Housing and Community Development, but it was granted reconsideration. **SB 53 (Kehoe)**, as amended on August 15, 2005, would require redevelopment plans to contain a description of the agency's program to acquire real property by eminent domain including any prohibitions on its use, and a time limit for the beginning of eminent domain actions. It was referred to the Assembly Committee on Local Government on August 15, 2005. **SB 1809 (Machado)**, as amended on April 19, 2006, would require a statement of disclosure during the transfer of property ownership that indicates whether the property is in a redevelopment agency, and whether it may be subject to eminent domain proceedings. SB 1809 is in the Assembly awaiting referral to a committee as of May 11, 2006. **AB 2197 (DeVore)** as introduced, would have required county board of supervisors approval of a redevelopment plan adoption, amendment or merger. As amended on April 19, 2006, the bill requires the California Research Bureau of the State Library to submit a report to the Legislature by July 1, 2007 on the powers of oversight, review, or plan approval exercised by any state or local government outside of California on redevelopment agency plan adoptions, amendments, or mergers. It was referred to the Assembly Committee on Local Government on April 26, 2006.

Redevelopment and Blight. Specific legislative attempts to link redevelopment, blight, and eminent domain include **SB 1210 (Torlakson)**, as amended on May 2, 2006, which would require a redevelopment agency seeking to extend the deadline for using eminent domain to adopt a resolution of necessity and make two findings: 1) substantial blight still exists in the project area, and 2) a parcel's acquisition is necessary because it will directly assist in eradicating remaining blight. SB 1210 also contains conflict of interest provisions and incorporates a recent Court of Appeals ruling that blight findings are a prerequisite to the use and extension of redevelopment agencies' eminent domain authority. SB 1210 was referred to the Senate Appropriations Committee on May 2, 2006. **SB 1650 (Kehoe)**, as amended on May 2, 2006, would require public entity governing bodies to adopt a new resolution of necessity before the property may be used, in whole or in part, for a public use that is different from the original purpose for which the property was acquired. In addition, the bill would require that property subject to the new resolution procedure be offered back to the original owner(s) of the property, if the public entity fails to adopt a new resolution, and the property is not developed for the public use stated in the original resolution of necessity, or a new resolution

authorizing a different use, between the time of the property's acquisition and the time of the public entity's failure to adopt a new resolution. The bill was referred to the Senate Committee on Appropriations on May 2, 2006 and a hearing is scheduled for May 22, 2006.

SB 1206 (Kehoe), as amended on April 18, 2006 is a comprehensive attempt to deal with most of the subject matter discussed above by focusing on the concept of blight. It contains among its many provisions substantial portions of AB 773 (Mullin), AB 782 (Mullin), and AB 1893 (Salinas), and parts of SB 1210 (Torlakson) and SB 1650 (Kehoe). The bill attempts to narrow the descriptions of the conditions which underlie blight and require specified statistical showings (metrics) to justify a finding of blight. The bill would reemphasize an existing prohibition by specifying that a non-blighted parcel may not be included in a redevelopment project area when the only substantial justification for its inclusion is to obtain the allocation of taxes from the area. Under SB 1206, tax increment funds could not be used for land acquisition, related site clearance, and the design costs of a city hall or county administration building.

SB 1206 also would ban a redevelopment agency from incurring new bonded indebtedness on redevelopment plans after ten years, or merging project areas for two or more redevelopment plans without new legislative findings of significant blight, and that the blight cannot be eliminated without a merger of the areas and the receipt of property taxes. The bill would make it easier for the State to oversee and participate in legal challenges. It would extend the statute of limitations from 60 days to 90 days for challenges to a redevelopment plan or bond. A party suing a redevelopment agency must furnish initial pleadings to the State Attorney General. In addition, the Attorney General is allowed to intervene in validation actions against redevelopment agencies.

The County took an oppose unless amended position on an earlier version of SB 1206 out of concern for its use of metrics to define blight and its treatment of project mergers. For example, SB 1206, as a measure of economic blight, would deem project area property values depreciated or stagnant if the annual rate of increase in the assessed valuation of real property within the project area is less than 50 percent of the annual rate of increase in either the community or the county in seven out of the ten previous fiscal years. This would allow redevelopment agencies to claim that areas experiencing positive growth are stagnant. This type of standard may make it easier for wealthier suburban cities to qualify projects, or to impose redevelopment on areas that are merely less prosperous than the city average. The bill also injects non-compliance with present general plan and zoning standards and marketing conditions into one of the physical standards of blight. Thus, property could be treated as blighted if it was not put to its best use.

SB 1206, as amended on May 9, 2006, removes all references to metrics and adds specific requirements and findings to be included in the report that accompanies redevelopment plans submitted for approval to the legislative body of a local agency.

The redevelopment agency's description of the physical and economic conditions that cause blight must contain specific, quantifiable evidence to document their existence and demonstrate: 1) that each of the physical and economic conditions is so prevalent and substantial that collectively they seriously harm the entire project area; 2) that each of the described physical and economic conditions is significantly worse than the physical and economic conditions that exist in the rest of the community outside of the project area; and 3) that collectively, the physical and economic conditions constitute dire inner-city slum conditions or equivalently degraded inner-city business conditions. The bill would also require that these findings shall be based on clear and convincing evidence, and that implementation of the redevelopment plan will improve the physical and economic conditions of blight in the project area. Based on these provisions and existing County policy, the County took a support position in a May 11, 2006 Sacramento Update.

ACA 15 (Mullin and Nation), as amended on August 23, 2005 would modify the State Constitution to prohibit a redevelopment agency from acquiring property through eminent domain unless it first makes a written finding that the property contains conditions of both physical and economic blight. ACA 15 was referred to the Assembly Committee on Governmental Organization on August 24, 2005. **ACA 22 (La Malfa)**, as amended on January 26, 2006, **SCA 15 (McClintock)**, as amended on August 23, 2005, and **SCA 20 (McClintock)** as introduced, generally also would require that the property be owned and occupied by the condemner, except as specified, and used only for the stated public use. Private property could be taken or damaged only for a stated public use and only with the consent of the owner for purposes of economic development, increasing tax revenue, or any other private use. If the property ceases to be used for the stated public use, the former owner would have the right to reacquire the property for its fair market value. ACA 22 failed adoption in the Assembly Committee on Housing and Community Development on May 10, 2005. SCA 15 was referred to the Senate Committee on Elections, Reapportionment and Constitutional Amendments on August 30, 2005. SCA 20 failed passage in the Senate Judiciary Committee on April 25, 2006.

Pending Federal Legislation

The House of Representatives passed **H.R. 4128 (Sensenbrenner, R-WI)**, the Private Property Rights Protection Act of 2005, by a vote of 376 to 38 on November 3, 2005. On November 4, 2005, it was referred to the Senate Committee on the Judiciary. A similar bill, **S. 1313 (Cornyn)**, was referred to the Senate Judiciary Committee on June 27, 2005 and a hearing was held on September 20, 2005. All other Federal legislation on this subject was referred to committees or subcommittees with little or no action taken.

H.R. 4128 prohibits the Federal government from exercising its power of eminent domain for economic development. It also forbids any state or political subdivision from

exercising its eminent domain power for economic development if the state or political subdivision receives Federal economic development funds during the fiscal year. Economic development is defined as taking private property and conveying or leasing it to a private entity for commercial enterprise carried on for profit or to increase tax revenue, the tax base, employment, or general economic health. Economic development, however, does not include: 1) conveying private property to public ownership, such as for a road, hospital, or a military base, or to an entity, such as a common carrier, that makes the property available for use by the general public as of right, such as a railroad, or public facility, or for use as a right-of-way, aqueduct, pipeline, or similar use; 2) removing harmful uses of land provided such uses constitute an immediate threat to public health and safety; 3) leasing property to a private person or entity that occupies an incidental part of public property or a public facility, such as a retail establishment on the ground floor of a public building; 4) acquiring abandoned property; and 5) taking private property for use by a public utility.

Any state or political subdivision that violates this prohibition is ineligible for any Federal economic development funds for two fiscal years. Federal economic development funds are any Federal funds distributed to or through states or political subdivisions of states under Federal laws designed to improve or increase the size of the economies of states or political subdivisions of states. However, a state or political subdivision may regain its eligibility if it returns all real property that was improperly taken and replaces or repairs any property that was destroyed or damaged.

H.R. 4128 establishes a private cause of action for any private property owner who suffers injury as a result of a violation of this Act. It provides that a state is not immune from any such action in a Federal or State court. The bill places the burden on the defendant to show by clear and convincing evidence that the taking is not for economic development and sets the statute of limitations for such an action at seven years. It also allows the prevailing plaintiff's attorney to obtain reasonable fees for attorneys and experts.

The Attorney General is required to: (1) compile a list of the Federal laws under which Federal economic development funds are distributed; (2) provide to each state and publish on a Department of Justice website the text of this Act, a description of the rights of property owners under this Act, and the compiled list of relevant Federal laws; and (3) publish the text and description in the Federal Register. The Attorney General also must submit an annual report to the House and Senate Judiciary Committees identifying states or political subdivisions that have used eminent domain in violation of this Act, that have lost Federal economic development funds as a result, and/or that returned property to cure a violation.

Other legislation includes **H.R. 3083 (Rehberg, R-MT)**, the "Protection of Homes, Small Businesses, and Private Property Act of 2005" which would stipulate that eminent domain can only be employed for a public use and the term "public use" excludes

economic development. The bills would apply to all exercise of eminent domain powers by the Federal Government and all exercise of eminent domain powers by state and local governments through the use of Federal funds. H.R. 3083 was referred to the House Judiciary Committee on June 28, 2005. No further action has occurred on the bill. H.R. 3087 (Gingrey, R-GA), a similar bill, was introduced on June 28, 2005 and referred to the House Committee on the Judiciary. No further action has occurred.

H.R. 3315 (Waters, D-CA) and **H.R. 3135 (Sensenbrenner)** the "Private Property Rights Protection Act of 2005" would amend the Housing and Community Development Act of 1974 to withhold Community Development Block Grant (CDBG) funds from states and communities that do not prohibit the use of the power of eminent domain that involves taking of property from private owners for commercial and economic development purposes, and transfer of the property to other private persons. In addition, local agencies will be required to adopt and enforce laws and regulations prohibiting the use of eminent domain in all projects that involve transfer of property to a private party. H.R. 3315 was referred to the Subcommittee on Housing and Community Opportunity on July 29, 2005 and H.R. 3135 was discharged from the Subcommittee on the Constitution on October 21, 2005. There has been no further action on either bill.

CDC indicates that these bills would cripple its redevelopment efforts to improve blighted communities. CDC will often purchase property and sell or transfer the property to a private owner to develop and manage the property. CDC will no longer be able to use the possibility of eminent domain to acquire properties geared toward commercial and economic development and it will also have to revamp its eminent domain policies in order to continue to receive CDBG funds. This legislation will also negatively impact the West Altadena and Whiteside Redevelopment Area activities and virtually eliminate any future phases for these projects.

H.R. 3631 (Hefley, R-CO), the "Eminent Domain Limitation Act of 2005," would bar a state from receiving any Federal assistance for any economic development unless the state has in effect a law relating to takings which meets the following criteria: 1) it must prohibit the use of eminent domain for economic development; 2) it must limit the uses for which eminent domain may be used to public health and safety, rights-of-way for public utilities and public highways and parks; and 3) it must require the entity engaging in the taking to demonstrate its necessity and that no reasonable alternatives exist. The bill was referred to the House Subcommittee on Economic Development, Public Buildings and Emergency Management on August 1, 2005.

H.R. 4088 (Pallone, D-NJ), the "Protect Our Homes Act," would bar Federal, state, or local governmental entities from using eminent domain to take private property for economic development purposes unless the entity meets the following conditions: 1) the property that is subject to the taking constitutes a significant public health or safety risk; 2) the entity has examined all reasonable alternatives and has set forth its findings in a series of public hearings; 3) the entity has provided notice of the taking and an

opportunity for public comment; 4) if the property is to be used for residential development, it must include affordable housing for individuals, families, and seniors in an amount proportional to the number of residences condemned; 5) if the property is to be used for commercial development, it must include additional affordable housing for individuals, families, and seniors located in a comparable housing market in an amount proportional to the number of condemned residences; and 6) the entity has provided just compensation for the property reflecting the following: fair market value, relocation costs, projected market value of the property after redevelopment, and it has disclosed its basis for determining the amount of compensation, and established a process by which the affected community may petition to put the proposed development to a ballot initiative at the earliest practicable time.

Failure to comply with these requirements would make a state or local governmental entity ineligible for Federal financial assistance under any program administered by the Department of Housing and Urban Development. H.R. 4088 was referred to the House Subcommittee on Housing and Urban Development on January 4, 2006.

S. 1704 (Dorgan, D-ND), the "Private Property Protection Act of 2005," would prohibit the use of Federal funds for the taking of property by eminent domain for economic development. The bill was introduced on September 14, 2005 and referred to the Senate Committee on the Judiciary.

In addition, an amendment to **H.R. 3058**, the Federal Fiscal Year 2006 Transportation, Treasury, the Judiciary, Housing and Urban Development, and Related Agencies Appropriations Bill, "bars the use of any of the funds made available in the bill from being used to enforce the judgment of the United States Supreme Court in the case of Kelo v. New London." County Counsel advises that it appears to be the intent of the amendment to prevent any Federal funds from being used to pay for any infrastructure improvements which are part of, or which would benefit a private development for which land was acquired by eminent domain. County Counsel also indicates that is questionable as to whether and/or how the language of the amendment will accomplish this purpose.

Conclusion

The County supports SB 1206, as amended on May 9, 2006, and will continue to monitor the other bills affecting redevelopment. The County continues to support legislation which extends the redevelopment law reforms accomplished in AB 1290, and oppose any redevelopment legislation which would cause the County to lose revenues or which would limit or repeal the provisions of AB 1290. It will also continue to support measures to strengthen the blight findings requirement to prevent redevelopment abuse, extension of review periods to allow counties and other parties adequate time to analyze the validity and impact of proposed redevelopment projects, and to close loopholes that allow redevelopment agencies to extend the life of projects beyond the

statutory time frames established in AB 1290. Tightening redevelopment law could reduce the use of eminent domain against non-blighted property, restrict the ability of redevelopment agencies to place non-blighted property in redevelopment projects, and facilitate challenges to questionable projects prompted by fiscal incentives. The County would support legislation that is consistent with these objectives.

DEJ:RGF:GK
ML:cc

c: Executive Officer, Board of Supervisors