Articles

Finding the Blight That's Right for California Redevelopment Law

by
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Introdnction

For over half a century federal and most state laws empowering local governments to act as urban redevelopers have attempted to confine such activity to blighted areas. Nowhere have the statutory definitions of blight, and judicial enforcement of those standards, been more restrictive than in California. In two recent cases, *Diamond Bar*[1] and *Mammoth Lakes*[2], appellate courts struck down redevelopment proposals for crossing the blight line. This Article describes those cases in light of the blight standard successfully championed in Sacramento in 1993 by the pro-redevelopment lobby to head off more restrictive legislation. Undercutting the tougher definition was, predictably, spotty enforcement. In rejecting administrative oversight at the state level, the legislature left ample room for cities and counties to adopt redevelopment projects in flagrant disregard of the 1993 law. Some cities and counties have done so and have gotten away with it.

This Article describes the evolution of the blight standard, then concludes that the definition of blight ought to be relaxed to

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1. Beach-Courchesne v. City of Diamond Bar, 95 Cal. Rptr. 2d 265 (Ct. App. 2000).

2. Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency, 98 Cal. Rptr. 2d 334 (Ct. App. 2000).

accommodate redevelopment projects undertaken to achieve sound planning objectives of the sort mandated by state planning legislation. In this way, local governments won't have to risk defying the law and playing development litigation roulette as a pre-condition to using redevelopment powers to improve their communities. More than ever, broad redevelopment powers can be useful in the revival of some declining inner suburbs built thirty to fifty years ago and instrumental, as well, in coaxing higher densities of development into the cores of rapidly expanding areas to slowdown "sprawl," facilitate the use of public transport, and reduce infrastructure costs.

I. The Origin of the Blight Requirement in Federal Redevelopment Law

Proponents of the first federal urban redevelopment law[3] were concerned that federal courts might declare redevelopment unconstitutional for violating the Fifth Amendment's implicit requirement that private property be taken only for a public use ("nor shall private property be taken for public use without just compensation"[4]). Most redevelopment projects seemed vulnerable to "public use" attacks because they involved the condemnation of private property for eventual sale or lease to another private owner. To qualify these takings of private property as public uses, proponents sought to justify redevelopment in the well-established police power prerogatives of state and local governments, relying particularly on their unquestioned authority to safeguard "health and safety." Blight removal brought redevelopment well within the ambit of "health and safety" since policy makers at that time were convinced that overcrowding in low income areas contributed to the spread of disease and crime. Because government programs to achieve health and safety goals clearly qualified as a public use,[5]

3. The federal redevelopment law was enacted, and early redevelopment projects fostered, largely through the efforts of a coalition of central city business and industrial leaders (predominantly Republicans) and big city mayors (often Democrats). *See* ROBERT A. DAHL, WHO GOVERNS? 115-40 (1961). The statute is Housing Act of 1949, ch. 338, § 105(a), 63 Stat. 413, 416-17 (1949) (originally codified at 42 U.S.C. § 1460 (1988)), omitted by Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, 652 (1974).

4. U.S. CONST. amend. V.

5. New York City Hous. Auth. v. Muller, 1 N.E.2d 153 (N.Y. 1936) (upholding condemnation of private property for public housing on the theory that eliminating the "inherent evil" of slums constituted a public use). This opinion presaged the "public use" rationale, which the *Berman* court ultimately adopted, that if a menace was serious enough to justify government action at all, and the government action taken was

condemnation incidental to such programs would pass constitutional muster as well. By tying the legitimacy of redevelopment to slum clearance or blight removal,[6] courts extended only slightly the power local governments had long possessed to demolish dangerously dilapidated housing upon the neglect or refusal of private owners to do so.[7]

When the constitutionality of using eminent domain for redevelopment reached the U.S. Supreme Court in the 1954 landmark case of *Berman v. Parker*,[8] these constitutional worries proved needless[9] and the "blight" requirement became redundant. In *Berman*, the Supreme Court eliminated any meaningful judicial review of government programs challenged solely on public use grounds. "Public use" would henceforth be taken to mean nothing more than "coterminous with the scope of a sovereign's police powers."[10] After *Berman v. Parker*, federal courts have never rejected a condemnation of private property for want of a public use, nor have most state courts.[11] When petitioned to strike down a redevelopment scheme for lacking the requisite "public use," federal courts decline to second-guess local legislative definitions of blight and don't insist blight be present to justify a redevelopment taking.[12] A few state courts have imposed stringent "public use" tests, invoking

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reasonably calculated to attack the menace, it was constitutionally immaterial whether the government deployed its powers of taxation, police power, or eminent domain.

6. In current everyday usage, "slums" and "blighted areas" are often treated as synonyms. But from Justice Douglas' opinion in *Berman v. Parker*, it appears that slums were regarded as worse than blighted areas: "We think the standards prescribed were adequate for executing the plan to eliminate not only slums as narrowly defined by the District Court but also the blighted areas that tend to produce slums." 348 U.S. 26, 35 (1954).

7. Central Sav. Bank v. City of New York, 5 N.Y.S.2d 451 (App. Div. 1938) (upholding law entitling city to lien apartment houses for making needed repairs which the owner failed to make).

8. 348 U.S. 26 (1954).

9. *See supra* notes 4-5.

10. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

11. In a study of all state and federal "public use" cases decided since 1954, all federal cases found for public use, as did 85% of all state cases. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

12. *See, e.g.*, Guam v. Moylan, 407 F.2d 567 (9th Cir. 1969) (holding that condemnation as part of renewal program to facilitate re-plating of Agana, Guam, to "bring order out of chaos" constituted a public purpose regardless of whether Agana was blighted). Most courts uphold the use of redevelopment powers, including eminent domain, to advance economic development objectives even in areas that are manifestly not blighted. Daniel R. Mandelker, *Public Entrepreneurship: A Legal Primer*, 15 REAL EST. L.J. 3, 8-9 (1986).

provisions of their respective state constitutions.[13] But most state courts have followed the federal lead and uniformly rejected "public use" challenges to redevelopment laws whether based on federal or state constitutional provisions.

Under the federal redevelopment statute, Congress could have created a private right of action empowering citizens to challenge "blight" findings as a pre-condition to federal funding. But Congress did not. Instead, although the statute specified that federal funds were to be used only for a "slum area or a blighted, deteriorated, or deteriorating area," it explicitly left to the federal administrator any determination of whether an area qualified.[14] Congress implicitly expanded the administrator's discretion in the 1954 amendments to the original 1949 legislation. Instead of reserving renewal funds for areas so bad that blight could only be eliminated by massive demolition (slum clearance), the 1954 Act encouraged conservation and rehabilitation of declining areas *before* they became blighted to prevent their becoming so.[15] In addition, the federal urban renewal administrator deferred to the blight determinations of local renewal directors since strict adherence to federal regulations targeting the most unlivable areas for clearance conflicted with other rules mandating the re-building of cleared sites to be carried out by private developers. City renewal directors quickly learned there was no realistic chance that private builders could be drawn to developing commercial projects in hopelessly blighted areas.[16]

As city renewal directors came to accept the fact that private developers had no capacity to re-build in the worst parts of cities,

13. *See, e.g.*, Mayor & Aldermen of Vicksburg v. Thomas, 645 So. 2d 940 (Miss. 1994) (holding that redevelopment agency failed to establish public use in attempted condemnation of private property for conveyance to Harrah's for land based river boat gaming because redevelopment plan detailed no specific use); Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 104 (N.J. Super. Ct. Law Div. 1998) (Attempt by redevelopment agency to condemn private land for future expansion of Trump Casino Court held not a public purpose because agency specified no time period within which development had to occur. In New Jersey, public purpose "may turn upon an assessment of the consequences and effects of the proposed project." Without a detailed, time-bound development plan such an assessment would be conjectural at best.).

14. The administrator was given absolute discretion to determine whether an area was "appropriate for an urban renewal project." Housing Act of 1949, ch. 338, § 110, 63 Stat. 413, 420-21 (1949) (codified at 42 U.S.C. § 1441 (1967)).

15. *See generally* Charles J. Orlebeke, *The Evolution of Low-Income Housing Policy, 1949 to 1999*, 11 HOUSING POL'Y DEBATE 489 (2000); Ashley A. Foard & Hilbert Fefferman, *Federal Urban Renewal Legislation, in* URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 96 (James Q. Wilson ed., 1966).

16. BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC. HOW AMERICA REBUILDS CITIES 23 (1990).

they searched for "the blight that's right"—places just bad enough to clear but good enough to attract developers.[17] When program administrators couldn't legitimately find blight in areas with good prospects for redevelopment, they fabricated it. Under the leadership of Robert Moses,[18] a majority of early renewal funds were spent in New York City,[19] and New York City set the precedent of designating redevelopment sites for acquisition and clearance that were not blighted by any reasonable definition.[20] New York courts refused to intervene, following the lead of the 1954 U.S. Supreme Court opinion in *Berman v. Parker*.[21]

II. The Emergence of Locally Financed Redevelopment Throngh Tax Increment Financing (TIF)

Although the federal redevelopment program ended in 1974,[22] California, forty-four other states, and the District of Columbia,[23]

17. *Id.*

18. *See generally* ROBERT A. CARO, THE POWER BROKER (1974) (biography of Robert Moses, who held unprecedented authority over public works in New York City for decades).

19. Ian S. Tattenbaum, Note, *Renewal for the 1990s: An Analysis of New York City Redevelopment Programs in Light of Title I of the Housing Act of 1949*, 6 N.Y.U. ENVTL. L.J. 220, 230 (1997).

20. *Id.*

21. Kaskel v. Impellitteri, 115 N.E.2d 659 (N.Y. 1953); N.Y. GEN. MUN. LAWS § 970-C (McKinney 1999).

22. The elimination of urban renewal accompanied the Nixon Administration's housing subsidy reforms. Orlebeke, *supra* note 15, at 500-01.

23. ALA. CODE § 11-99-2 (1994); ALASKA STAT. § 29.47.460 (Michie 2000); ARIZ. REV. STAT. ANN § 36-1471 (West 1993 & Supp. 2000); ARK. CODE ANN. § 14-168-203 (Michie 1998); CAL. HEALTH & SAFETY CODE § 33670 (West 1999); COLO. REV. STAT. ANN. § 31-25-107 (West 1990 & Supp. 2000); CONN. GEN. STAT. ANN. § 7-485 (West 1999); FLA. STA. ANN § 163.335 (West 2000); GA. CODE ANN. § 36-44-20 (2000); HAW. REV. STAT. ANN. § 46-103 (Michie 1993); IDAHO CODE § 50-2008 (Michie 2000); 65 ILL. COMP. STAT. ANN. § 5/11-74.4-2 (West 1993); IND. CODE ANN. § 36-7-26-25 (West 1997); IOWA CODE ANN. § 403.2 (West 1999); KAN. STAT. ANN. § 12-1770 (Supp. 2000); KY. REV. STAT. ANN. § 65.491 (Michie Supp. 2000); LA. REV. STAT. ANN. § 9032 (West 1998 & Supp. 2001); ME. REV. STAT. ANN. tit. 30 § 5203 (West 1998); MD. ANN. CODE art. 41, § 14-206 (1997); MASS GEN. LAWS ANN. chap. 23A, § 3E (West 1994); MICH. COMP. LAWS ANN. § 207.655 (1998); MINN. STAT. ANN. § 469.012 (West 1994 & Supp. 2001); MISS. CODE ANN. § 21-45-11 (1999); MO. ANN. STAT. § 99.810 (West 1998 & Supp. 2001); MONT. CODE ANN. § 7-15-4301 (2000); NEB. REV. STAT. § 18-2147 (1997); NEV. STAT. ANN. § 279.676 (Michie 1997); N.H. REV. STAT. ANN. § 162-K:8 (1994 & Supp. 2000); N.M. STAT. ANN. § 3-46-35 (Michie 1978); N.Y. GEN. MUN. LAW § 970-o (McKinney 1999); N.D. CENT. CODE § 40-58-20 (Supp 1997); OHIO REV. CODE ANN. § 725.07 (West 1994); 62 OKLA. STAT. ANN. § 861 (West 1997 & Supp. 2001); OR. REV. STAT. § 457.420 (1992); PA. STAT. ANN. tit. 53 § 6930.2(A)(3) (West 1997); R.I. GEN. LAWS § 45-33.2-3(7) (1999); S.C. CODE ANN. § 6-33-20(A)(1) (Law. Co-op. Supp. 1999); S.D. CODIFIED LAWS

continue to authorize redevelopment funded by tax increment financing (TIF), which allows redevelopment agencies to receive and spend the property taxes derived each year from increased assessed values in the redevelopment project area. Redevelopment activity is supposed to be self-financed from the increased property tax revenue it produces. Tax increment financing was first used as a means for cities to meet their matching share to qualify for grants under the federal renewal program.[24] It has since become the primary means of local governments financing redevelopment on their own.[25]

A. The Allocation of TIF

Under TIF, any increase in property taxes collected in the redevelopment project area is reserved to pay redevelopment expenses. Redevelopment agencies obtain capital by borrowing against future tax increments. Until the redevelopment bondholders and other redevelopment creditors are repaid, tax increases that would have been shared by the city with other taxing entities—school districts, counties, and special districts—are siphoned into repayment of redevelopment agency obligations.[26] The other taxing entities continue receiving a share of property tax revenues from the redevelopment project area based on pre-redevelopment assessed valuations. But they forfeit revenues from the enhanced tax base

§ 11-9-2(3) (Michie 1995); TENN. CODE ANN. § 13-20-205(a) (1999); TEX. LOC. GOV'T. CODE ANN. § 374.032 (1999); UTAH CODE ANN. § 17A-2-1247 (Supp. 2000); VT. STAT. ANN. tit. 24, § 1893 (1992); VA. CODE ANN. § 58.1-3245.2 (Michie 2000); W. VA. CODE § 7-11B-4 (Michie 2000); WIS. STAT. ANN. § 66.1105 (West 1999 & Supp. 2000). The states without TIF, as far as we could tell, were Delaware, New Jersey, North Carolina, Washington, and Wyoming.

24. Eugene B. Jacobs & Jack G. Levine, *Redevelopment: Making Misused and Disused Land Available and Useable*, 8 HASTINGS L.J. 241, 262-63 (1957).

25. STATE OF CA CONTROLLER, ANNUAL REPORT OF THE COMMUNITY REDEVELOPMENT AGENCIES FOR FISCAL YEAR 1998-99 at ix (2000), *available at* http://www.sco.ca.gov/ard/local/locrep/redevelop/98-99/ [hereinafter ANNUAL REPORT]. About 40% of agency revenue comes from taxes. The next most important sources of revenue are proceeds of long-term indebtedness (18.7%) and proceeds of refunding bonds (18.4%).

26. In California, redevelopment agencies can retain tax increments only for repayment of obligations. CAL. HEALTH & SAFETY CODE § 33670(b) (West 1999). Obligations include loans and advances from the city or county, tax allocation bonds, lease-purchase agreements, reimbursement agreements with the city or county, disposition and development agreements with the city, county or outside developers, owner participation agreements, bank loans, and any contracts that could result in damage or other liabilities for breach. Marek v. Napa Cmty. Redevelopment Agency, 761 P.2d 701, 251 (Cal. 1988) (holding that redevelopment agency's executory financial obligation under DDA counted as "indebtedness" under Community Redevelopment Law, entitling agency to honor contract by using tax increment funds for it).

until the redevelopment bonds are paid, usually a period of 20 to 40 years.[27]

Other taxing entities are expected to benefit from redevelopment reviving dormant or declining property tax bases. Once an area is successfully redeveloped, the theory goes, other tax entities should experience reduced public service costs associated with lower crime rates, higher employment, and fewer injuries and illnesses due to intolerable housing conditions and poverty. To the extent that redevelopment stimulates activity outside the project boundary, all the increased property tax goes to the other taxing entities since the redevelopment agency has no claim to taxes generated outside the project area.

The efficiency justification for TIF is weakened when the project would have been built anyway somewhere within the boundaries of the school district or county. Redevelopment proponents admit this possibility but contend that without their efforts poor areas would continue deteriorating while rich areas prosper.

Many state statutes, including California's, describe redevelopment as a last resort, only appropriate to alleviate the conditions of blight "which cannot reasonably be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment."[28] Yet, much of the tax increment in redevelopment areas appears to come from projects built entirely independent of the redevelopment effort. For instance, a 1998 study compared thirty-eight redevelopment project areas and thirty-eight similar urban districts in three California counties. It concluded that although redevelopment does seem to stimulate a disproportionate increase in assessed property value, the increment only covered an estimated 51% of the tax increment revenues the counties received in fiscal year 1994-1995. The rest of the tax increment subsidy to redevelopment agencies came from property value increases that were likely to have occurred in any event.[29] Unfortunately, the study is seriously flawed, but it is the most comprehensive effort undertaken to date to assess whether tax increment funded redevelopment truly pays its own way.[30]

27. CAL. HEALTH & SAFETY CODE § 33333.6 (West 1999).

28. CAL. HEALTH & SAFETY CODE § 33030(b)(1) (West 1999).

29. MICHAEL DARDIA, SUBSIDIZING REDEVELOPMENT IN CALIFORNIA xiii (Public Policy Institute of California 1998).

30. Cal Hollis mentions one methodology problem: *residential* census data were used to select control areas even though patently inapplicable to many of the paired *commercial* redevelopment areas. Email from Cal Hollis (Dec. 20, 2000) (on file with author).

B. The Fiscal Impact of TIF on Cities, Counties, and School Districts

In general, cities with active redevelopment agencies are the main TIF winners, and counties[31] and the state are the primary TIF losers. These losses would be offset, though, to the extent redevelopment activity increases jobs, incomes, and retail sales, all of which spawn fiscal benefits to the state or counties through increased business, income, property, and sales taxes. Such secondary benefits offset state and county losses from TIF. Although most observers would concede that redevelopment, starting with the Bunker Hill project, has changed the face of downtown Los Angeles, it would be difficult to assess how much of that development would eventually have been built elsewhere within Los Angeles county in the absence of redevelopment. Similarly, it is difficult to know how much of the development in Yerba Buena, South of Market, Diamond Heights, or Western Addition would have occurred there or elsewhere in San Francisco without redevelopment.

Regardless of the impacts on other taxing entities, the use of tax increment financing has proven irresistibly attractive to California's cities and counties short of cash and looking for added revenues.[32] Statewide, redevelopment agencies have more than tripled their property tax revenues from about half a billion dollars in 1985-86 to nearly $1.8 billion in 1998-99.[33] TIF-based redevelopment projects are not limited to California's biggest and oldest cities. Four-fifths of California's 472 cities had authorized the creation of a redevelopment agency by 1998-99, and in cities with populations exceeding 50,001, over 90% of those agencies are actively working on projects.[34]

When California cities divert funds from counties, they jeopardize counties' abilities to provide vital services. Formally,

31. Except for the coterminous City and County of San Francisco, counties risk losing property tax revenue through city-formed redevelopment areas located within the county.

32. The state has never managed to dedicate revenue sources for local governments sufficient to cover the gap left by Proposition 13, or returned property tax revenues the state siphoned from local governments to cover the state deficit during the recession years of the early 1990s.

33. The California Redevelopment Association compiled these numbers from the State Controller's Community Redevelopment Agencies Annual Report. The actual numbers are $531,838,652 in 1985-86 to $1,761,991,000 in 1998-99.

34. Of the 25 inactive agencies, 84% were in cities with populations of fewer than 25,001. ANNUAL REPORT, *supra* note 25, at xx. To students of the history of redevelopment, there is nothing surprising in the widespread use of redevelopment by smaller communities. For instance, by 1964, 70% of the 800 cities carrying out 1600 federally-assisted urban renewal projects had populations of less than 50,000. LAWRENCE M. FRIEDMAN, GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION 170 (1968).

counties are administrative units of state government. But counties have substantial responsibility as providers of last resort for welfare, indigent health care, roads, tax collection, the court system, and sanitation. Counties also provide a full range of municipal services for residents in unincorporated areas, and to smaller cities by contract. Redevelopment agencies have cut sizably into property tax revenues that would otherwise have been distributed to the county and other taxing entities. During fiscal year 1998-99, for instance, Los Angeles County received 19% of property tax revenues while schools received 37%, cities 18%, redevelopment agencies 8%, with the balance going to numerous special districts.[35] That 8%—over $500,000,000—would have been available for schools and county services had there been no TIF, assuming that all of these projects would have been built somewhere in the county even without redevelopment.

The impact of TIF on California schools depends entirely on the state's fiscal decisions. The state constitution allocates a large portion of state revenue to education[36] to make sure disparities in property tax bases do not result in unequal education spending per pupil.[37] Thus, where cities and counties shift property taxes from schools to redevelopment projects, the state must make up the difference—though not necessarily out of taxes it has levied directly. The state has the option of filling its fiscal holes by dipping into redevelopment

35. LOS ANGELES COUNTY, TAXPAYER'S GUIDE FOR FISCAL YEAR 1998-99.

36. Proposition 98 (1988) and Proposition 111 (1990) provide a minimum funding guarantee for school districts, community college districts, and other state agencies offering direct K-14 instruction. According to a formula specified in these initiatives, based on cost-of-living, population, local property tax proceeds, and other factors, the state is obligated to spend a certain portion of its revenues on education. In the most recent fiscal year, for instance, for every $100,000,000 increase in the state General Fund, $60,000,000 would have to be spent on education. CA DEPT. OF FINANCE, BUDGET FAQS, *available at* http://www.dof.ca.gov/html/bud_docs/question.htm (last visited Mar. 12, 2001).

37. California courts held in the 1970s that the state's equal protection clause precluded sole reliance on the property tax for school funding because of tax base disparities among school districts. Serrano v. Priest, 557 P.2d 929, 950 (Cal. 1976). A study of school spending in five of the six states imposing equality norms showed mixed results. Disparities between rich and poor school districts narrowed somewhat while such disparities remained unchanged elsewhere in the nation. But per pupil expenditures in four of the five states grew at rates below the national average. Bradley W. Joondeph, *The Good, The Bad, and the Ugly: An Empirical Analysis of Litigation-Prompted School Finance Reform*, 35 SANTA CLARA L. REV. 763 (1995).

and county property tax revenues to finance schools, an option it exercised when the state was running at a deficit from 1992 to 1994.[38]

Until 1993, counties and school districts possessed a right to fiscal review and protest of redevelopment proposals which they sometimes used to extract concessions from redevelopment agencies regardless of a project's intrinsic merit.[39] Those concessions usually took the form of redevelopment agency agreements to relinquish a piece of the increment to the protesting entity.[40] In 1993, the state legislature replaced the protest statute with a law directing redevelopment agencies to pay affected taxing entities a fixed share of the increment but no more. These sums are more modest than the deals some school districts and counties were negotiating for themselves in exchange for waiving their now repealed right of protest.[41]

The legislature hoped counties would review city redevelopment proposals more critically after the state outlawed "sweetheart" deals between redevelopment agencies and counties.[42] To encourage scrutiny of new TIF-based redevelopment projects, state law requires redevelopment agencies to prepare a preliminary report for the other affected taxing entities.[43] In that report, the agency is required to

38. Payments were made to the Educational Revenue Augmentation Fund (ERAF). BEATTY, COOMES, JR., ET AL., REDEVELOPMENT IN CALIFORNIA 196-98 (2d ed. 1995). CAL. HEALTH AND SAFETY CODE § 33681 (West 1999). *See* County of Sonoma v. Comm'n on State Mandates, 101 Cal. Rptr. 2d 784 (Ct. App. 2000) (Court upheld the right of the state to shift property tax revenues to education without making up the revenue loss to the counties. Education was not a program funded entirely by the state before the enactment of the constitutional amendment requiring the state to fund new programs it imposed upon local governments.).

39. "The Legislature finds and declares... negotiated agreements between redevelopment agencies and counties... often led to redevelopment project areas that were not truly blighted...." A.B. 1424, 1995-96 Leg., Reg. Sess. (Cal. 1995).

40. *See, e.g.*, Meany v. Sacramento Hous. & Redevelopment Agency, 16 Cal. Rptr. 2d 589 (Ct. App. 1993) (school district challenged redevelopment agency's agreement with county to set aside from the tax increment the amount the county would have received in property taxes from the project area for construction of a new county courthouse).

41. For instance, less than a month before the anti-pass through law became effective, the City of San Jacinto and the City of Los Angeles signed pass through agreements giving their counties 20 to 50% more revenue than they otherwise would have received from redevelopment project areas. LEGISLATIVE ANALYST'S OFFICE, REPORT ON REDEVELOPMENT AFTER REFORM: A PRELIMINARY LOOK 6-7 (1994), *available at* http://www.lao.ca.gov/redevelopment_after_reform.html (last visited Mar. 12, 2001) [hereinafter PRELIMINARY LOOK].

42. As the Legislative Analyst explained: "Local taxing agencies, therefore, will have a greater fiscal interest to review the merits of a proposed redevelopment plan." *Id.* at 11. The legislative goal may not have been achieved because few redevelopment projects are ever challenged by anyone, and the mandated remuneration for counties in itself discourages county challenges.

43. CAL. HEALTH & SAFETY CODE § 33344.5 (West 1999).

describe both the specific projects proposed and the ways in which those projects "will improve or alleviate" the physical and economic blighting conditions cited in the preliminary report.[44]

Counties and school districts still have the opportunity to extract "hold out" contributions from city redevelopment agencies. Affected taxing entities are empowered to launch or join legal challenges to redevelopment projects for violating blight and other statutory requisites.[45] To placate counties, determined city and redevelopment officials find ways to avoid the anti-pass through statute.[46] For instance, a city redevelopment agency could agree to construct public facilities such as police or fire stations[47] that the county would otherwise have had to build to serve unincorporated areas or "contract" cities.[48] The 1993 anti-pass through statute imposed no ceiling on the value of infrastructure cities could pass through to counties.[49]

C. State Mandated Affordable Housing and Relocation Assistance

The right to utilize tax increments doesn't come free to cities and counties from the state legislature. Responding to years of criticism that redevelopment destroyed more affordable housing than it built,[50]

44. CAL. HEALTH & SAFETY CODE § 33344.5 (e)-(f) (West 1999).

45. *See, e.g.*, Brief for Amicus Curiae Del Norte County et al., Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency, 98 Cal. Rptr. 2d 334 (Ct. App. 2000) (No. C031043).

46. CAL. HEALTH & SAFETY CODE § 33607.5(f)(1)(B)(2) (West 1999).

47. The Mammoth Lakes case can be viewed as an example of a city offering a county more than it could refuse. According to the Appellant's Opening Brief at 8 n.11, Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency, 98 Cal. Rptr. 2d 334 (Ct. App. 2000) (No. C031043):

> [T]he Redevelopment Plan authorizes creation of a community library at the estimated cost of $200,000, construction of a performing arts theater in conjunction with the local Community College at an estimated cost of $3 million, construction of school facilities enhancements including a gymnasium and an aquatics center at a total cost of $5 million, construction of improvements at Mammoth Hospital at a cost of $410,000, miscellaneous improvements to increase water capacity at a cost of $2.9 million, miscellaneous utilities improvements at a combined cost of $7,550,000. As a result, these taxing entities entered into cooperation agreements with the Town and not surprisingly expressed support for the Redevelopment Plan.

48. In California, cities have the option of contracting with counties for public services such as libraries, police, and fire.

49. PRELIMINARY LOOK, *supra* note 41, at 10.

50. A 1984 survey found that redevelopment projects had increased the supply of housing for market rate and low income units but decreased the supply of very low income units. CA DEBT ADVISORY COMMISSION, USE OF REDEVELOPMENT AND TAX INCREMENT FINANCING (1984).

the California legislature now requires one-for-one replacement of all affordable housing units destroyed by redevelopment.[51] Further, the state requires redevelopment agencies to spend 20% of the tax increment for affordable housiug[52]—$275,000,000 in 1998-99.[53] Utilizing the mandated 20% "set aside," redevelopment agencies assisted about 80,000 affordable housing units over the last four years,[54] and are a major source of direct housing subsidies in California. But for the fact that redevelopment is funded by TIF, the state would probably lack authority under the California constitution to impose such an obligation.[55]

In addition to the constitutional mandate to pay "just compensation" for property taken, redevelopment agencies have a financial obligation to make relocation payments to the residents and businesses they displace.[56] At a minimum, residents and businesses are entitled by statute to moving costs when ordered out following redevelopment agency acquisition of their homes or places of business.[57] In addition, residents are eligible to receive for up to

51. Redevelopment plans contemplating the destruction or removal of dwellings units from the low and moderate income housing stock must promulgate a replacement housing plan within 30 days prior to executing any agreement that could lead to loss of housing units. The plan must show replacement on a one-for-one basis. CAL. HEALTH & SAFETY CODE § 33413.5 (West 1999). For units destroyed or removed after September 1, 1989 as a result of agency action, 75% of the replacement units must be affordable to individuals with the same income levels as had occupied the housing destroyed or removed. CAL. HEALTH & SAFETY CODE § 33413(a) (West 1999).

52. CAL. HEALTH & SAFETY CODE §§ 33334.2, 33334.3 (West 1999).

53. Chart prepared by California Redevelopment Association from State Controller's Community Redevelopment Agencies Annual Report (on file with author).

54. *Id.*

55. The state is not supposed to mandate local governments to use tax proceeds for new programs or higher levels of service without making reimbursement in full according to CA CONST. art. XIIIB, § 6. The idea was to prevent state officials from reaping political gains during the taxpayer revolts of the late 1970s by shifting the state's own program responsibilities to local governments so that they would have to take the heat for raising taxes. In *Redevelopment Agency v. Commission on State Mandates*, 64 Cal. Rptr. 2d 270 (Ct. App. 1997), a California appellate court upheld a determination by the California Commission on State Mandates that redevelopment agencies don't spend "proceeds of taxes." Nor do they raise "general revenues for the local entity." Further, the state isn't transferring the cost of a state program because the affordable housing subsidy requirement doesn't displace a prior state program.

56. Section 6038, State Guidelines, requires agencies to prepare specific and detailed relocation plans, to be submitted to the State Department of Housing and Community Development 30 days prior to submission to the local legislative body for approval. BEATTY, *supra* note 38, at 110.

57. *Id.* at 113-14 (citing CAL. GOV'T CODE § 7260(c)(3)(B)(ü) (West 1995 & Supp. 2001)). Agencies are also obligated to make relocation payments to those who are displaced "as a result of an owner participation agreement or an acquisition carried out by

forty-two months replacement housing payments equal to the difference between the lesser of existing rent or 30 percent of the tenant's income and the cost of renting comparable housing.[58] Businesses employing 500 or fewer employees can receive compensation up to $20,000 upon convincing the agency that they cannot be relocated without substantial loss of patronage.[59]

III. The Practical and Policy Limits of the Blight Requirement

A. The Inherent Contradiction Between Reliance on TIF and Blight Removal

Despite formal legal requirements, there is usually only a weak connection between an area's TIF potential and its blight. A redevelopment agency with a strong survival instinct needs to produce tax increments starting in the year after the redevelopment project boundaries are set. Otherwise, redevelopment agency employees must be paid from local general funds. Instead of running a profit center which enhances the local tax base, redevelopment agencies would become just another public agency vying for an appropriation. To succeed in California, a redevelopment agency depends on there being new construction or a change in ownership within project area boundaries since California's property tax regime allows for assessments to current market value only upon a change in ownership or new construction.[60]

The ideal site for the production of a big tax increment is either vacant when declared a redevelopment project area or easily cleared.[61] It must also be a site upon which private redevelopers are

a private person for or in connection with a public use, where the public entity is otherwise empowered to acquire the property to carry out the public use."

58. CAL. GOV'T CODE § 7260(i)(3) (West 1995 & Supp. 2001).

59. CAL. GOV'T CODE § 7262(c) (West 1995).

60. After the enactment of Proposition 13, the tax base was frozen and could only be increased 2% a year for inflation, and upon new construction or a change in ownership. CAL. CONST. art. XIIIA, § 2(b). For plans adopted before January 1, 1994, the other taxing entities were entitled to receive their proportionate share of the two percent annual increase. CAL. HEALTH & SAFETY CODE § 33676 (West 1999). Also, when voters approve bonded indebtedness for other taxing entities, those entities are entitled to the tax increment attributable to the increased tax rate. CAL. CONST. art. XVI, § 16.

61. The state legislature recognized the irresistible attraction for redevelopment agencies to lure big, tax-generating uses to vacant sites, blighted or not. To remove this temptation, the legislature banned automobile dealerships in redevelopment project areas from being located on land never previously developed for urban uses. CAL. HEALTH & SAFETY CODE § 33426.5(a) (West 1999). The legislature also banned development that would generate sales taxes from being located on a parcel of land five acres or larger,

ready to build immediately. This usually precludes redevelopment of the most crime-ridden and poverty-stricken sites in town because there is simply no alternate market for them. Densely built, rundown areas filled with marginal businesses and low income residents are only good candidates for TIF-funded redevelopment if located where there is strong potential demand for "higher and better" uses. Even then, the arduous, often contentious task of clearing heavily populated areas is expensive, takes time, and absorbs political capital as well. It is not surprising, then, that commercial and industrial projects outnumber residential by about two-to-one, or that new construction outpaces rehabilitation by a margin of about eight-to-one.[62]

Cities and counties hope to ensure the requisite tax increments by delineating project boundaries to encompass enormous areas, hundreds or thousands of acres.[63] In good times, such areas generate increments automatically as owners embark upon new construction in the normal course of business or homeownership.[64] Sometimes, land developers who own large, vacant tracts work with redevelopment agencies to offset infrastructure costs with subsidies taken from the tax increment the project will yield.

The realities of TIF contradict the premise, embodied in many state redevelopment enabling laws,[65] that redevelopment powers should be reserved exclusively for projects which private developers wouldn't have built on their own. This premise is beside the point to redevelopment officials single-mindedly following the money. For this reason, a much favored strategy is to include within newly established redevelopment project area boundaries major private projects already scheduled for construction. Though patently illegal because these projects would have been built even in the absence of

unless the principal permitted use was office, hotel, manufacturing, or industrial. CAL. HEALTH & SAFETY CODE § 33426.5 (b) (West 1999).

62. ANNUAL REPORT, *supra* note 25, at xxi, xxii.

63. *Id.* at xxi. Of 823 projects in 1998-99, 30% consisted of projects 101-500 acres, and 3% of projects 501-2500 acres.

64. Following the enactment of Proposition 13, which slashed property tax revenues, new redevelopment project areas became larger. Project areas established before 1979 averaged 481 acres. Project areas established between 1978 and 1984 averaged 811 acres. BEATTY, *supra* note 38, at 110.

65. *E.g.*, ALA. CODE § 11-99-4(5)(a) (1975) ("it is not reasonable to anticipate that the land in the district will be developed without the adoption of the project plan"); MO. ANN. STAT. § 99.810(1) (West 1998) ("would not reasonably be anticipated to be developed without the adoption of tax increment financing"); PA. STAT. ANN. tit. 53, § 6930.5(a)(6)(iv)(D) (West 1997) ("would not reasonably be anticipated to be adequately developed or further developed without the adoption of the plan").

redevelopment,[66] the ensuing tax increment jump-starts the rest of the redevelopment effort.

In fairness, redevelopment activity is not inevitably a mad dash for tax increments at any price. Many redevelopment projects originate in blighted areas. Some projects contemplate *spending* the tax increment garnered from successful commercial renewal projects in upgrading declining residential areas. For instauce, redevelopment agencies arrange home improvement loans and fill big gaps in the local infrastructure which contributed to neighborhood decline.[67] Such projects upgrade residential areas without displacing residents and almost always fall well within the statutory blight definition. Even in close cases, courts tend to favor redevelopment agencies in these neighborhood improvement situations.[68]

B. Definitions of Blight Poorly Serve the Purposes Usually Ascribed to Them

There are those who contend that an exacting definition of blight should be required to validate the use of redevelopment because of three extraordinary powers conferred upon redevelopment agencies:[69] (1) redevelopment diverts property taxes that otherwise would have been allocated to other public agencies; (2)

66. *E.g.*, Regus v. City of Baldwin Park, 139 Cal. Rptr. 196, 201-04 (Ct. App. 1977) (striking down redevelopment project area formed to nurture retail and hotel uses, and which combined two separate areas within one project, an area arguably blighted, and another, totally devoid of blight characteristics, located one mile away across a freeway, which contained parcels already acquired by United Parcel Service, Nichols Lumber, and other private firms for imminent development); *see also* Leach v. City of San Marcos, 261 Cal. Rptr. 805, 810 (Ct. App. 1989) (rejecting agency's inclusion for the tax increment of non-contiguous, non-blighted property about to be developed.).

67. *E.g.*, *Project of the Month: Clovis–Music Avenue Project,* REDEVELOPMENT J. Aug. 2000, at 4-5 (A neighborhood of modest rental homes and apartments was long burdened by periodic flooding and with long, narrow lots with inaccessible back yards, whose deep interiors were filled with debris, junked cars, and weeds. This project brought new streets to service the rear portion of the lots so they could be subdivided, along with storm drains, channeling a creek, and utilities among various housing subsidies.).

68. Nat'l City Bus. Ass'n v. City of Nat'l City, 194 Cal. Rptr. 707, 712-13 (Ct. App. 1983) ("Blight in the neighborhood improvement areas is a closer question .... the social makeup of the area shows a need for redevelopment .... The propriety of inclusion of the neighborhood improvement areas in the redevelopment plan is also supported by the likelihood of continued deterioration of the areas absent redevelopment due to the low incomes of the residents and the already faulty public improvements.").

69. These are listed as the extraordinary powers justifying the "ever-tightening restriction of the definitions of blight [the jurisdictional basis for invoking redevelopment]" in the Appellant's Opening Brief at 13 n.11, Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency, 98 Cal Rptr. 2d 334 (Ct. App. 2000) (No. C031043).

redevelopment agencies can use public funds to subsidize private enterprise; (3) redevelopment agencies possess the power of eminent domain. Of course, a project that is blocked because it was scheduled for an unblighted area would not divert tax increment, result in an unfair deal with private developers, or involve eminent domain. But even a project located in an indisputably blighted area could call for an unwarranted diversion of tax increment or lead to a bad deal for the public agency. Both of these concerns are better addressed directly rather than circuitously through definitions of blight.

(1) Blight Definitions as Budget Savers

When the state last tightened its blight standard in 1993, it was struggling with rapidly declining state tax revenues.[70] The state Department of Finance joined the effort to tighten the blight standard as a way of limiting the loss of property tax revenues to school districts and counties. While new tax increment climbed very slowly in the first four years following the 1993 blight reformulation, and bounded up sharply in the most recent fiscal year, it isn't easy to tell whether any of this is attributable to the legislation. In those first four years California was in the midst of its worst real estate recession since the Great Depression. Assessed values are just now returning to pre-1994 levels.[71]

In an ideal world, the state would limit redevelopment's diversion of property tax revenues from counties and schools to the present value of all benefits received by counties and schools from redevelopment. Short of that, the state could protect county and school tax revenue either by enacting a TIF cap[72] or increasing the share of the increment to which other taxing entities would become automatically entitled.

70. In fiscal year 1991-1992, the state General Fund showed a negative balance of approximately $3.3 billion, of $2.2 billion in 1992-93, and $1 billion in 1993-94. Annual Reports of the State of California, Office of State at pages A-16, A14, and A-16, respectively.

71. From 1993-94 to 1997-98, tax increment increased only 2.5% over the four year period. In the 1998-99 fiscal year, tax increment revenues amounted to $1.8 billion, an increase of 8.5% over the preceding fiscal year. But this was due in large part to the real estate recovery. ANNUAL REPORT, *supra* note *25*, at viii.

72. South Dakota, for instance, limits local governments to including within tax increment districts no more than ten percent of the total assessed value of taxable property in the municipality. S.D. CODIFIED LAWS § 11-9-7 (Michie 1995).

(2) Blight Definitions to Limit Inter-Municipal Bidding Wars

Taxpayers are understandably chagrined when municipalities try to lure private developers away from each other with tax dollars. The temptation is always present and often proves irresistible when most of the funding comes from taxing entities other than the one extending the subsidy.[73]

A California appellate court described the issue aptly decades ago:

> By misemploying the extraordinary powers of urban renewal a redevelopment agency captures pending tax revenues which it can then use as a grubstake to subsidize commercial development within the project area in the hope of striking it rich. Such schemes contemplate borrowing money by issuing bonds on the strength of assured future tax revenues, money which is then used to acquire, improve, and resell property within the project area at a loss as an inducement to business enterprises... to locate within the project area rather than in neighboring communities. In essence, tax revenues are used as subsidies to attract new business. The immediate gainers are the subsidized businesses. The immediate losers are the taxpayers and government entities outside the project area, who are required to pay the normal running expenses of government operation without the assistance of new tax revenues from the project area.[74]

However, it makes no sense to rely on a definition of blight to deter destructive competition among cities. There is no subsidy to private developers inherent in tax increment financing. The owners of private property are taxed on precisely the same basis whether their properties lie within or outside of redevelopment project boundaries.[75] Developers receive subsidies through the deals they strike with redevelopment authorities. Whether a developer negotiated too rich a deal for itself can only be determined by scrutinizing the terms of the particular deal and does not depend on

73. "An observer of the California system has noted that while cities are in total control of their redevelopment projects, their portion of property taxes collected is generally less than one-quarter of the total tax collected. The remaining three-quarters are captured by another taxing agency that has no control over the project. In other words, cities using tax increment financing are free to gamble with the future tax bases of other taxing entities within their purview." George Lefcoe, *When Governments Become Land Developers: Notes on the Public-Sector Experience in the Netherlands and California,* 51 SO. CAL. L. REV. 165, 258 (1978).

74. Regus v. City of Baldwin Park, 139 Cal. Rptr. 196, 204-05 (Ct. App. 1977).

75. This is why tax increment financing is usually held not to violate the uniformity of taxation provisions of state constitutions. *See, e.g.*, Richards v. City of Muscatine, 237 N.W.2d 48, 61 (Iowa 1975).

whether the site was truly blighted before the agency acquired it. Under the current regime, courts seldom accept plaintiffs' invitations to calculate whether the government got fair value in its dealings with private developers, as long as there was some *quid pro quo.*[76]

The best way for cities to avoid being short-changed is by hiring as financial advisors competent staff and consultants, and accepting their advice. It isn't easy for public officials to hang tough when critics are complaining that the redevelopment site has remained vacant far too long, the next election is imminent, and the city has committed itself to a developer who demands too much. Nonetheless, a city's best protection against bad deals is best sought not in definitions of blight but at the bargaining table.

(3) Blight Definitions as Curbs on the Use of Condemnation Powers

The use of eminent domain for redevelopment has always been controversial.[77] Many redevelopment plans eschew the use of eminent domain to calm homeowners' fears of displacement. But local governments should be prepared to pay a premium for properties acquired without the threat of eminent domain. Ever since *Berman*, the courts have rejected the notion that a property owner could halt a redevelopment project because it involves taking private property from one owner for transfer to another. Yet, restrictive definitions of blight endow property owners with a *de facto* veto of some redevelopment projects, enabling them to extract far more than "just compensation" in negotiating sales of their properties to redevelopment agencies.

76. *See* Joshua P. Rubin, Note, *Take the Money and Stay: Industrial Location Incentives and Relational Contracting*, 70 N.Y.U. L. REV. 1277 (1995); Charter Township v. Gen. Motors Corp., 506 N.W.2d 556, 559-60 (Mich. Ct. App. 1993) (GM closed a plant after pocketing substantial tax abatements that the township had granted GM for job retention and creation. Appellate court held the plant closing justified no cause of action because GM had never made a promise of continued employment.); Adam M. Lett, Note, *Tax Abatements and Promissory Estoppel: A Match Not Made in Ypsilanti*, 44 DEPAUL L. REV. 1301, 1332-33 (1995).

77. "Suppose that the government decided that jalopies were a menace to public safety and a blight on the beauty of our highways, and therefore took them away from their drivers. Suppose, then, that to replenish the supply of automobiles, it gave these drivers a hundred dollars each to buy a good used car and also made special grants to General Motors, Ford, and Chrysler to lower the cost—although not necessarily the price—of Cadillacs, Lincolns, and Imperials by a few hundred dollars. Absurd as this may sound, change the jalopies into slum housing, and I have described, with only slight poetic license, the first fifteen years of a federal program called urban renewal." Herbert J. Gans, *The Failure of Urban Renewal, in* URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 537 (James Q. Wilson ed., 1966).

IV. Defining Blight

A. The 1993 California Legislation Redefining Blight

Redevelopment law was made more restrictive in 1993.[78] Changes were made pertinent to findings of blight in order to cut back on the use of redevelopment in unbuilt or vacant areas.[79] The full text of those statutes is reprinted in the appendix. Although prior law confined redevelopment to predominantly urban areas, the changes tightened the definition of "predominantly urban" to preclude cities from establishing new project areas except in areas surrounded by urban uses.[80] Blight within the project area must be so substantial and pervasive it burdens, physically and economically, other parts of the community outside the project area.[81] Also, findings of blight are to be supported by at least one physical *as well as* one economic blighting condition listed in the statute.[82] Prior law had only required proof of physical, economic, or social conditions.[83]

In the 1993 law, the four indicia of physical blight are listed as: (1) Buildings unsafe or unhealthy for persons to live or work in.[84] (2) Factors preventing or hindering economically viable use, caused by substandard design, inadequate size given present standards and market conditions, lack of parking, or other similar factors.[85] (3) Incompatible adjacent uses which prevent economic development of the affected parcels.[86] (4) Lots made undevelopable or useless due to their irregular form and shape, inadequate size or their being held in multiple ownership.[87] The statute declares this fourth physical blighting condition sufficient standing alone to justify a finding of blight.

78. CAL. HEALTH & SAFETY CODE § 33031 (West 1999).

79. The legislative history shows that the League of California Cities and the California Redevelopment Association (CRA) were among those supporting the legislation. Leading the opposition were the California State Association of Counties, the California Firefighters, and the Association of California Water Agencies. The CRA sponsored the bill (1290), citing project areas that never end, project areas that contain too much vacant land, project areas that involve the construction of a locality's administration buildings, projects that give major retailers subsidies from tax dollars, and project areas that contain a significant amount of unspent housing funds. 1993 Cal. Legis. Serv. Ch. 942.

80. CAL. HEALTH & SAFETY CODE § 33320.1.

81. *Id.* at § 33031(a)(2).

82. CAL. HEALTH & SAFETY CODE § 33031.

83. CAL. HEALTH & SAFETY CODE § 33030 (repealed 1993).

84. CAL. HEALTH & SAFETY CODE § 33031(a)(1).

85. *Id.* at § 33031(a)(2).

86. *Id.* at § 33031(a)(3).

87. *Id.* at § 33031(a)(4).

Five economic blighting conditions are listed in the statute: (1) stagnant property values, (2) in developed urban areas, abnormally high vacancies, or vacant or abandoned lots, (3) a lack of necessary commercial facilities (grocery or drug stores, banks), (4) residential overcrowding or an excess of liquor stores, bars, or "adult" businesses, leading to safety or welfare problems, or (5) high crime rates.[88]

With minor changes in wording, these conditions were carried forward from earlier redevelopment statutes and regrouped under two headings (physical or economic) instead of three (physical, economic, social). The only former blighting condition omitted in 1993 referenced "ill health, transmission of disease, infant mortality, and juvenile delinquency."

B. The Standard of Judicial Review for Local Findings of Blight

State courts have selected among five standards for reviewing municipal findings of blight. (1) The most frequent test used by reviewing courts is whether the administrative determination was arbitrary and capricious—made without any evidentiary support.[89] (2) Under the next most commonly used test, courts will only overturn local findings of blight for "fraud, bad faith, abuse of discretion."[90] (3) In California, based solely on the administrative record, courts will overturn a local government's finding of blight, or a trial court's affirmation of such a finding, for want of substantial evidence supporting the decision.[91] (4) In selecting any of the standards just mentioned, courts are rejecting the independent judgment test by which the court substitutes its view of the facts for that of municipal decision-makers. (5) A few jurisdictions have closed the door almost entirely to the usual run of challenges to redevelopment agency resolutions.[92] California has done this with regard to findings of necessity made by government agencies to justify eminent domain.[93]

While all California courts claim to apply the substantial evidence test in blight challenges, a close examination of the cases shows a range of approaches. Courts writing some opinions seem to

88. *Id.* at § 33031(b)(1)-(5).

89. *E.g.*, Miller v. City of Tacoma, 378 P.2d 464, 474-75 (Wash. 1963).

90. Urban Renewal Agency v. Decker, 415 P.2d 373, 377 (Kan. 1966).

91. Fosselman's, Inc. v. City of Alhambra, 224 Cal. Rptr. 361, 363-64 (Ct. App. 1986).

92. Allen v. City Council, 113 S.E.2d 621, 623-24 (Ga. 1960) (based on wording of a state constitutional amendment).

93. People v. Chevalier, 340 P.2d 598, 603 (Cal. 1959).

have been leaning towards the permissive "abuse of discretion" standard.[94] Other opinions tilt in the opposite direction, nearly touching the "independent judgment" test.[95] Decades of overreaching by redevelopment agencies have led some courts to scrutinize blight claims with deep skepticism,[96] as amply evidenced in the *Diamond Bar* and *Mammoth Lake* opinions.[97]

V. The Recent California "Blight" Cases Applying the 1993 Statute

A. The Diamond Bar Case

(1) Diamond Bar Depicted

Diamond Bar is an affluent community, mostly residential, at the southeastern border of Los Angeles County, "with a median income of about $66,000, average home prices of $300,000, and a relatively low crime rate."[98] The city incorporated in 1989, mainly to exercise greater control over land use decisions previously made by the county government.[99] To the casual visitor, this newly-built suburban,

94. Morgan v. Community Redevelopment Agency, 284 Cal. Rptr. 745, 752 (Ct. App. 1991) ("As to the quasi-legislative acts of administrative agencies, judicial review is limited to an examination of the proceedings before the officer to determine whether his action has been arbitrary, capricious, or entirely lacking in evidentiary support." (quoting Pitts v. Perluss, 377 P.2d 83, 88 (Cal. 1962) (internal quotes omitted)).

95. County of Riverside v. City of Murrieta, 76 Cal. Rptr. 2d 606, 608 (Ct. App. 1998) ("The ultimate determination is whether a *reasonable* trier of fact could have found for the respondents [City] based on the *whole* record." (quoting Kuhn v. Dept. of Gen. Servs., 29 Cal. Rptr. 2d 191, 194 (Ct. App. 1994)).

96. Amicus Brief on Behalf of Three California Cities and One Redevelopment Agency in Support of Defendants and Respondents at 2, Friends of Mammoth v. Town of Mammoth Lakes, 98 Cal. Rptr. 2d 334 (Ct. App. 2000) (No. C031043).

97. *Friends of Mammoth,* 98 Cal. Rptr. 2d at 350 ("If the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously, the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (quoting Estate of Teed, 247 P.2d 54, 58 (Cal. Ct. App. 1952)); Beach-Courchesne v. City of Diamond Bar, 95 Cal. Rptr. 2d 265, 270 (Ct. App. 2000) ("The Supreme Court has cautioned that '[public agencies and courts both should be chary of the use of the [redevelopment] act unless . . . 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.'" (quoting Sweetwater Valley Civic Assn. v. City of Nat'l City, 555 P.2d 1099, 1103 (Cal. 1976)).

98. *City of Diamond Bar*, 95 Cal. Rptr. 2d at 268.

99. Appellants' Opening Brief at 13 n.13, *City of Diamond Bar* (No. B130244) (Council member Werner complained about lack of proper planning when the county

community, set amidst rolling hills and valleys at the junction of two major freeways, may appear close to picture-perfect. Only about 20% of the city's land area is nonresidential and much of that is dedicated to schools and parkland.[100] But the city of Diamond Bar was a fiscal loser.

Because California cities depend heavily on sales taxes as a revenue source, Diamond Bar officials weren't pleased to learn from a 1995 survey of 400 residents that 86% of them "most often purchase their retail merchandise outside of the City of Diamond Bar."[101] From 1991 to 1994, seven of the eight surrounding communities, many with successful redevelopment programs of their own, experienced increased taxable retail sales while Diamond Bar's taxable sales decreased by almost five percent.[102]

Only about 2% of Diamond Bar's land is dedicated to commercial uses.[103] Most of Diamond Bar's retail centers were built in the 1970s and 1980s and had become obsolete by the mid-1990s.[104] They generally consisted of strip retail centers and small shopping centers conspicuously devoid of anchors (big retailers like department stores, whose presence draws shoppers), short on parking and 24% vacant.[105]

Other types of real estate were not faring much better. Office vacancy rates in Diamond Bar ran from 20 to 40%, and its industrial

controlled land use decisions in the area but observed that redevelopment was necessary to "take control over the land use and planning decisions that are helping make this community as nice as it is.").

100. *City of Diamond Bar*, 95 Cal. Rptr. 2d at 268.

101. Respondents' Brief at 24, *City of Diamond Bar* (No. B130244). The city's consumer survey didn't help as much as the city might have hoped. From appellants' brief:

> The Survey undercuts any possible finding of economic blight in the Project Area because:
>
> 1. Fewer than 1 out of 4 Diamond Bar residents think their retail shopping areas are 'unattractive'.
>
> 2. Only 8% of Diamond Bar residents feel that the appearance or services of the Diamond Bar retail businesses need improvement.
>
> 3. Only 6% of Diamond Bar residents feel any need to improve traffic control.

The court mentions the third of these survey results in footnote 7. *City of Diamond Bar*, 95 Cal. Rptr. 2d at 275 n.7.

102. Appellants' Opening Brief at 37 (citing Administrative Record VII:110:1962). Appellants pointed out that the city's consultant neglected to include the positive sales tax data for 1995-96, and that sales taxes had increased 2.65% in 1994. Appellants' Opening Brief at 37 (citing Administrative Record X:170:2811).

103. *City of Diamond Bar*, 95 Cal. Rptr. 2d at 268.

104. *Id.* at 274.

105. Respondents' Brief at 25 (citing Administrative Record VII:110:1965-66).

vacancy rate stood at 16%.[106] Owners of sites in planned industrial and office subdivisions desperately sought solutions. Southern California was in the midst of a real estate recession, but values were receding faster in Diamond Bar's commercial and industrial areas than elsewhere in Los Angeles county, registering an 11% decrease at a time when county values were down a comparatively enviable 1.78%.

Diamond Bar officials came to realize that only the most expensive housing ($500,000 and up) would yield sufficient property taxes to offset the cost of municipal services and support the quality of public improvements that affluent residents desired.[107] Diamond Bar had to choose between restricting housing development to pricey gated communities and nurturing better use of the commercial and industrial land within its turf. It chose the latter.

Seven years after incorporation, the city council commissioned an initial study to explore the feasibility of redevelopment and adopted a redevelopment plan in 1997.[108] The council placed virtually all of the city's commercial and industrial land into the redevelopment project area.[109] Improving the city's tax base was high on its redevelopment agenda.[110] Diamond Bar planned to enhance its tax base by using tax increments to lure new business, subsidize the rehabilitation of existing ones, improve roads, upgrade schools and parks, install streetscaping to create a pedestrian-friendly retail environment, and provide other public amenities.

On behalf of a dozen Diamond Bar residents, one of California's leading redevelopment attorneys, Murray O. Kane, and his law partners successfully intercepted the plan. Though the challengers lost at trial, they won on appeal when a unanimous three judge appellate panel overturned the trial court's determination, finding no substantial evidence of the requisite blight in Diamond Bar.[111]

106. *Id.*

107. The Diamond Bar General Plan listed (and rejected) as an option driving home prices above the $500,000 to increase property taxes sufficient to support city services. Appellants' Opening Brief at 6-7 (citing Administrative Record XI:196:3058).

108. Respondents' Brief at 9, 13 (citing Administrative Record I:5:173-75).

109. *See* Appellants' Opening Brief at 8 (citing Administrative Record I:1:78-89).

110. Appellants' Opening Brief at 6-7 (citing Administrative Record XI:196:3058). Anticipating that demands for municipal services would outpace municipal revenues, the city recognized the need to utilize redevelopment in order to upgrade its commercial core.

111. *City of Diamond Bar*, 95 Cal. Rptr. 2d at 279.

(2) Framing Diamond Bar as Blight Free

At some point, the appellate court became convinced Diamond Bar had no blight and had chosen redevelopment as "simply a vehicle . . . to finance community improvements."[112]

For starters, the court emphasized the specific wording of the 1993 statute which required proof of both physical and economic blight within the project area so serious as to burden the community as a whole.[113] To demonstrate that the proposed redevelopment area could have had no such impact, Murray O. Kane videotaped a 28 minute tour of the designated project area. The appellate court summarized what it saw on the tape as follows: "This court feels compelled to comment that it viewed the plaintiffs' videotapes in their entirety and did not perceive anything remotely resembling blight. The videotapes depicted modern, well-maintained, retail and office structures, amidst ample landscaping and open space, in a partially rustic setting."[114]

The court also cited language from Diamond Bar's 1995 General Plan that signaled the potential establishment of a redevelopment agency as a vehicle to fund the city's infrastructure budget.[115] Without a word about physical or economic blight to eradicate, the General Plan acknowledged that the city had a "fairly new infrastructure system" but needed "to plan now for the anticipated increase in traffic, the maintenance of existing facilities, to fund new facilities, and to support future services to enhance the quality of life in Diamond Bar."[116]

(3) Parsing the Blight Statute

How, then, did Diamond Bar—its consultants, legal advisors, and a majority of the city council—go wrong? For one thing, they emphasized different aspects of the blight-defining statutes than did Murray O. Kane and the appellate court. Counsel for the city stressed that the statute required no more of the agency than that it show the presence of one of four enumerated physical blighting conditions and one of five enumerated economic blighting factors which, in combination, demonstrate the need for redevelopment. The

112. *Id.* The General Plan had described redevelopment as a way "to facilitate the mitigation of traffic and circulation deficiencies, the financing of public improvements and other similar tasks." *Id.* at 269.

113. *Id.* at 271.

114. *Id.* at 270 n.4.

115. *Id.* at 268.

116. *Id.* at 278.

protestors pointed to statutory language specifying that the agency must prove more than simply a single type of physical and a single type of economic blight.[117] Blight in the proposed project area must be so serious as to burden the rest of the community.[118]

(4) No Physical Blight in Diamond Bar

Because the appellate court flunked Diamond Bar for not fitting its project within the statutory conditions defining *physical* blight, the court never reached the sub-section of the statute defining *economic* blighting conditions.

As mentioned earlier, the first of four physical blighting conditions concerns unfit buildings. The appellate court concluded that Diamond Bar had abandoned at trial any effort to prove the project area contained buildings unsafe or unhealthy for living or working. Although Diamond Bar's attorneys did not intend this result,[119] they did acknowledge some difficulty satisfying this condition. Counsel for Diamond Bar believed that they didn't have to demonstrate the presence of dilapidated buildings because that was but one of four possible ways to demonstrate physical blight.

The statute's second blighting physical condition mixes physical components such as inadequate lot size and lack of parking with economic loss, including loss from difficulties in making economically viable use of land.[120] The court faulted the city for failing to "identify a single building" as suffering from inadequate vehicular access, substandard building materials, or inadequate loading areas.[121] Even if it had identified such a building, the city would then have had to show how these deficiencies "hindered the economically viable use" of the identified property and how the redevelopment plan would solve the problem. The redevelopment agency believed it met its burden when it pointed to parking and loading area deficiencies in the project area which would be alleviated through the agency's plans to lure new firms and subsidize upgrades to existing retail facilities. It

117. CAL. HEALTH & SAFETY CODE § 33030(b)(2)(A).

118. CAL. HEALTH & SAFETY CODE § 33030(b)(1).

119. Counsel for Diamond Bar believed the record supported a claim under this category, and simply chose to let the record speak for itself at trial as a strategic choice, not a withdrawal of the claim. Petition for Review for Respondents City of Diamond Bar and Diamond Bar Redevelopment Agency.

120. R. Bruce Tepper, *Establishing Blight in the Plan Adoption Process: Have California Courts Raised the Bar?*, Presentation for California Redevelopment Association Legal Issue Symposium, Aug. 9-10, 2000, at 6 (on file with author). Much of the statutory analysis in the text is drawn from this paper.

121. *City of Diamond Bar*, 95 Cal. Rptr. 2d at 274-75.

hadn't anticipated having to provide a building-by-building analysis or having to show how particular physical deficiencies had caused specific firms to become unprofitable.[122]

Incompatible land uses are at the core of the third physical blighting condition. This condition also has both a physical ("adjacent or nearby uses that are incompatible with each other") and an economic component ("prevent[s] the economic development of those parcels or other portions of the project area").[123]

To make its case on this point, the city cited as evidence of incompatible uses some industrial areas located near schools. It mentioned specifically the "potential hazard to children" exacerbated by the absence of a traffic signal at a busy intersection separating the school from many industrial uses.[124] But this evidence did not help. Diamond Bar neglected to show any connection between the redevelopment plan and the alleged incompatibility. Even if the industrial uses were harmful to the school, the city had no intention of acquiring and relocating the school or eliminating the industrial uses.[125] Although respondents' brief alluded to vacancy rates as high as 50% in some of the industrial and commercial buildings near the school,[126] the city offered no plausible explanation of how proximity to the school had led to the high industrial vacancy rate or prevented the economic development of the industrial parcels.[127]

To meet the fourth physical blight condition concerning irregularly shaped or useless small lots in multiple ownership, the city had pointed to 48 parcels, including 10 of the city's 15 retail shopping centers, held in multiple ownership. In response, the court advanced this point from Appellants' Brief: "The mere fact of multiple ownership does not establish blight. Otherwise, a condominium development by definition would be blighted."[128]

The city's consultants contended that its retail areas were too small and poorly configured to accommodate large scale "power centers" and "big box" type retailers.[129] There were two problems with the city's embracing its consultant's analysis on this point. First, the city had banned "big box" retailing through its general plan.

122. Respondents' Petition for Rehearing at 3-6, *City of Diamond Bar* (No. B130244).
123. CAL. HEALTH & SAFETY CODE § 33031(a)(3) (West 1999).
124. Respondents' Brief at 26 (citing Administrative Record VII:110:1965-66).
125. *City of Diamond Bar*, 95 Cal. Rptr. 2d at 277 n.10.
126. Respondents' Brief at 26 (citing Administrative Record VII:110:1965-66).
127. *City of Diamond Bar*, 95 Cal. Rptr. 2d at 276-77.
128. *Id.*
129. *Id.* at 275-76.

Second, a number of undeveloped parcels existed within the project area, including parcels of 47, 41, 36, 35, and 24 acres that were large enough for such retailing.

In sum, the appellate court opinion held out little hope that Diamond Bar could ever fashion a lawful redevelopment project along the lines of the proposal it had been advancing.

B. The Mammoth Lakes Case

(1) The Setting

Mammoth Lakes is a small community of approximately 24 square miles, on the eastern side of the Sierra Nevada Mountain range. It is surrounded by national forest land and includes the Mammoth Mountain Ski Area, one of the largest in the United States. Founded on ski-based tourism, the town grew rapidly in the 1960s and '70s and incorporated in 1984. Half of Mono County's 10,900 residents live in the town. The California real estate recession of the 1990's hit the area hard as evidenced by a stark 50% decline in ski ticket sales, which fell precipitously from 1.4 million per year in the mid-1980s to about 730,000 in 1997.[130]

According to its 1992 general plan, the Town of Mammoth Lakes aspired to become a "unique, high-quality destination resort community with year-round recreational opportunities."[131] But its modest airport lacked a jet runway, and the town had no luxury resorts or upscale retail. Although the town had granted land use approvals to several promising mixed use projects, all of these projects were stalled in the recession.[132] In 1996 the town council instructed its redevelopment staff to begin the studies necessary to form a project area. To fulfill its mission, the staff worked with a private developer, Infrawest, which had acquired the approved but as yet unbuilt sites. Together they developed a plan to use TIF as a means of subsidizing new tourist facilities and funding the requisite public infrastructure, from parking and snow storage areas to the creation of a viable downtown village center.[133]

130. Mr. Gregory, CEO, Mammoth Mountain Ski Area, at the June 4, 1997 meeting of the Redevelopment Agency Board of Directors Special Meeting. Respondents' Brief at 61, Friends of Mammoth v. Town of Mammoth Lakes, 98 Cal. Rptr. 2d 334 (Ct. App. 2000) (No. C031043).

131. Opening Brief of Plaintiffs and Appellants at 1, *Friends of Mammoth* (citing Administrative Record 13:1938).

132. *Id.* at 5.

133.

(2) The Bases for Legal Challenge

As in Diamond Bar, Murray O. Kane and his law partners represented the challengers. Here, again, they lost at trial and prevailed on appeal. They succeeded in persuading the appellate court that the redevelopment project area failed to qualify as predominantly urbanized, nor was it physically blighted.

(3) Absence of Physical Blight

The discussion of physical blight in the Mammoth Lakes appellate opinion paralleled the discussion in the Diamond Bar case. Where the statute had called for evidence of buildings "unsafe or unhealthy for persons to live or work in," the city council had relied on a consultant's building conditions survey that had failed to identify even one building meeting that criteria. The survey had characterized some buildings as dilapidated or deteriorated but had neglected to distinguish between trivial and serious defects. From the survey it wasn't possible to tell whether a building had been regarded as dilapidated because of a collapsing foundation or peeling paint, a perilously sagging roof or sloppy maintenance.[134]

The statute described as physically blighted a building or lot that was not economically viable due to substandard design, lack of parking, or other similar conditions.[135] To qualify under this standard, the town had identified many properties short of parking and snow storage areas. But it could not prove definitively that any of them were unprofitable specifically due to these inadequacies.[136] Likewise, in treating incompatible uses, the town failed to cite even a single instance of total prevention of economic development due to

> The purposes of the Redevelopment Plan were to spur economic growth while providing more affordable housing, thereby improving employment opportunities and increasing tax revenues to fund infrastructure improvements, provide financial assistance for development of new tourism facilities, remove hazardous wastes and blighted structures and sites, provide public parking and snow storage areas, facade improvements in commercial areas, and better land utilization and land use planning. Principal projects were to include affordable housing programs; revitalizing Main Street and Old Mammoth Road commercial properties; creating a downtown village center; adding parking, sidewalks, shopping, and lodging facilities; various improved community and tourist service facilities; and improving many aesthetic aspects of the Project Area.

Petition for Review, Attorneys for Town of Mammoth Lakes and Mammoth Lakes Redevelopment Agency at 5-6, Friends of Mammoth v. Town of Mammoth Lakes, 98 Cal. Rptr. 2d 334, 360 (Ct. App. 2000) (No. C031043).

134. *Friends of Mammoth*, 98 Cal. Rptr. 2d at 360.

135. CAL. HEALTH & SAFETY CODE § 33031(a)(2).

136. *Friends of Mammoth*, 98 Cal. Rptr. 2d at 362.

the alleged incompatibilities. The town's attorneys could find nothing in the statute requiring a "quantification of the impact on economic viability," "much less on an individual parcel basis,"[137] but this is precisely what the appellate court was looking for.

(4) Redevelopment Reserved for Areas Predominantly Urbanized

By statute, redevelopment is deemed appropriate only for "predominantly urbanized" areas.[138] The statute defines a predominantly urbanized area as one where not less than 80% of the land is developed for urban uses or is an integral part of a developed urban area, itself surrounded by other developed urban uses.[139] To comply with this requirement, redevelopment agencies need a survey to determine which developed sites qualify as urban. The survey must classify each vacant site as either an integral part of the urban fabric or as non-urban. No vacant site can be called urban unless it is surrounded by urban development.[140]

The appellate court concluded that the Town of Mammoth Lakes erred in tallying the urban portions of its project area. Under the court's recalculations, the town[141] had a project less than 80% urbanized. The town had counted as urban several sites that were partly built and developed consistent with zoning but largely vacant. Of these sites, the largest were being used for the airport, a college, and a golf course. The 84-acre golf course site had been included as part of an approved master plan for a 222-acre mixed use, destination resort project. Because only a club house and parking lot had been built thus far, the appellate court classified all the greens as non-urban, explaining:

> The mere fact that land is developed as a golf course does not conclusively render the use an urban use for purposes of redevelopment. Here, this golf course is designed as a "mountain

137. Brief for Appellants at 27, *Friends of Mammoth.*

138. CAL. HEALTH & SAFETY CODE § 33030(b)(1) (West 1999).

139. CAL. HEALTH & SAFETY CODE § 33320.1 (West 1999).

140. R. Bruce Tepper, Presentation for California Redevelopment Association Legal Issue Symposium, *Establishing Blight in the Plan Adoption Process: Have California Courts Raised the Bar?*, Aug. 9-10, 2000, at 10 (on file with author).

141. Although the text treats the town as synonymous with the redevelopment agency, California cities and their redevelopment agencies are legally autonomous. California cities and counties have the option under state law of designating themselves to be the redevelopment agency board. But even when they do, under California law the redevelopment agency and the community are regarded as distinct entities. One consequence is that cities are not responsible for the debts of their redevelopment agencies and vice versa. *See generally* Pac. States Enters. v. City of Coachella, 17 Cal. Rptr. 2d 68 (Ct. App. 1993).

> course" with significant amounts of natural and preserved forest lands and water features interspersed throughout the course. Further, the course was developed on what was otherwise undeveloped forest land, and continues to be surrounded by undeveloped forest land. The characteristics of this golf course can hardly be related to or characteristic of a city or a densely populated area. We conclude there is no substantial evidence on which the Town Council could determine the Lodestar golf course was an urban use.[142]

Similarly, the court found no evidence to justify the inclusion of the vacant portions of the airport as urban.[143] This struck the Mammoth redevelopment agency's attorneys as evidence the court was discriminating against small town redevelopment because the court would never have claimed that any portions of LAX were non-urban.[144] Also classified as non-urban were 74 of the 76 acres reserved for expansion of a community college. Eventually, the college planned to build out most of its property. But because the only college building presently in place occupied a two-acre parcel, just those two acres could qualify as urban, according to the appellate court.[145]

Understandably, the Town had included all these sites within its redevelopment project boundaries hoping to offer Infrawest incentives to develop its properties in ways that would most benefit the entire town. Mammoth officials were particularly eager to induce Infrawest to locate and design its commercial hub to complement instead of obliterate the already fragile town center. The rejuvenated airport offered an especially promising source of local tax revenue.

142. *Friends of Mammoth*, 98 Cal. Rptr. 2d at 335.

143. *Id.* at 356-57.

144.

> It is clear just from the maps that almost all of the land in these two parcels is already occupied by runways, buildings, and other development. From the table and the maps, the Town calculates that the land occupied by the facilities alone totals at least 130 acres, excluding setbacks, safety zones, and the areas between buildings. It is obvious that the Airport is fully urbanized. The Court of Appeal, however, refused to consider as urbanized any part of the airport not reduced to a measurement, stating "the Town's calculations admit all 202 acres of the airport land are not developed for urban uses." An airport in a Los Angeles redevelopment project would never be subject to this level of scrutiny. The Court of Appeal went out of its way to ignore the inferences logically and reasonably drawn from the evidence before the Town Council and instead adopted an interpretation of Section 33320.1 that is hostile to small communities.

Brief for Appellants at 24, *Friends of Mammoth*. But, then, LAX isn't surrounded by national forests.

145. *Friends of Mammoth*, 98 Cal. Rptr. 2d at 356.

Now the Town is left with the unhappy choice of revising its plan to encompass a much reduced project area or abandoning its redevelopment program entirely.

C. Did *Diamond Bar* and *Mammoth Lakes* Make New Law?

In one respect, these two cases have made new law by requiring an exacting level of documentation for redevelopment agencies to surmount the "physical blight" and "predominantly urbanized" bars the 1993 legislation set in place. But the California Supreme Court with its 1976 opinion in *Sweetwater Valley Civic Association v. City of National City*[146] had already set a high standard.

In *Sweetwater*, the California Supreme Court reversed both a trial and an appellate court[147] in ruling against a redevelopment project designed to facilitate the conversion of a marginal golf course into a regional shopping mall. For 18 years, the Bonita Golf Course had been operated in an area subject to periodic flooding. Then, a freeway extension opened the possibility of putting the site to the intense commercial use for which it had been re-zoned four years earlier. Eager to sell the site to the city or a shopping center developer, the owner sought city funding of the public infrastructure necessary to make the site fully developable.[148]

The redevelopment agency's prospects for clearing the blight standard of the day were promising. At the time, blight could be found in "an economic dislocation . . . resulting from faulty planning."[149] The Bonita site was only 57% as valuable as comparable sites in town, and its relatively low property value could be seen as having resulted from faulty planning because water run-off inundated the site with mud and debris for periods of up to two weeks at a time.

To the California Supreme Court, the statutory reference to economic dislocation did not justify the city trying to increase its tax yield by replacing the golf course with a shopping mall. Rather, the court believed that a finding of economic dislocation could only be supported by proof that the site had no economically viable use. That simply wasn't true as the record showed "the golf course is at least

146. 555 P.2d 1099 (Cal. 1976).

147. Sweetwater Valley Civic Ass'n v. City of Nat'l City, 126 Cal. Rptr. 591, 595 (Ct. App. 1976) [hereinafter *Sweetwater*].

148. *Id.* at 594.

149. CAL. HEALTH & SAFETY CODE § 33031(a) (amended 1993) (quoted in *Sweetwater*, 126 Cal. Rptr. at 595).

marginally profitable."[150] The Court also noted that "the maintenance of open space land for recreational purposes is in the public interest," citing the Open-Space Lands Act, which discouraged premature conversion of open space lands to urban uses.[151] As the California Supreme Court explained, the city had come to view the site as a liability not because of how it was being used but because of its unrealized potential.[152]

Following the lead of the California Supreme Court, appellate courts have rejected both redevelopment plans designed to facilitate the conversion of vacant lands into urban uses[153] and project areas which have counted low density development as urban.[154]

VI. The Limited Utility of Looking to Courts to Police the Blight Statute

Despite *Sweetwater*, *Diamond Bar*, and the 1993 statutory revisions, some cities continue to deploy redevelopment solely for the tax dollars it can bring.

Consider Maywood, a town about 10 miles southeast of downtown Los Angeles and California's most densely populated city, with 40,000 residents crowding 1.14 square miles.[155] This small, working-class, immigrant-friendly town suffers terribly from outdated infrastructure including overburdened sewers, a water system run by three struggling ratepayer-owned companies with water pressure so

150. *Sweetwater Valley Civic Ass'n*, 555 P.2d at 1104.

151. *Id.*

152. *Id.* at 1103-04. Eventually, a regional mall, the Bonita Plaza, was constructed on the site, to which the city contributed a multi-level parking structure.

153. Emmington v. Solano County Redevelopment Agency, 237 Cal. Rptr. 636, 642 (Ct. App. 1987) (County's redevelopment plan rejected for conversion of 10,350 acres, mostly agricultural, into water-dependent industrial uses. Project contemplated possible construction of an industrial road, a rail line, shipping berths and water-oriented commercial recreation facilities. County failed to prove blight. Occasional flooding and lack of infrastructure did not hinder productive use of land for agriculture. Nor was there any evidence that agricultural uses burdened the community or region. "Instead, respondents have admitted forthrightly that the redevelopment plan was devised and adopted as a funding mechanism to 'implement' the area plan after anticipated industrial developed failed to occur.").

154. County of Riverside v. City of Murietta, 76 Cal. Rptr. 2d 606 (Ct. App. 1998) (Redevelopment plan for over 3,500 acres rejected for including rural-residential and equestrian-residential properties with minimum lot sizes of 2.5 and .5 acres respectively, and minimal "true" blight, best evidenced by slum conditions—decrepit housing, high crime rates, and cost of municipal services far exceeding revenue generated from project area. The City of Murietta cited no such conditions.).

155. James Ricci, *Metropolis: Snapshots From the Center of the Universe*, L.A. TIMES, Jan. 28, 2001 (Magazine), at 5.

low the county Fire Department won't approve high-rise housing, and twenty-eight miles of roadway the mayor describes as being "more potholes than original paving material".

In its preliminary redevelopment plan, Maywood's redevelopment agency explains that the town's average household size of 4.565 persons per household, among the highest in the county, "has undoubtedly contributed to the accelerated deterioration of much of the city's housing stock and local infrastructure systems through over-use."[156] "It's just a never-ending battle going after the converted garages, the inhabited laundry rooms, the single-family dwellings that have been divided two and three times," says David Mango, the city's building and planning director.[157] Nearly half of Maywood's apartments are overcrowded.[158] With the town and its environs fully built-out, there are few opportunities for new construction.

With the high level of "sales tax leakage" to surrounding communities a by-product of Maywood's limited and declining commercial and industrial area and only modest residential uses to tax, the town has lately turned to redevelopment to finance sewer, drainage, water, park, and road improvements.[159] By placing the entire community within a redevelopment project area, the town anticipates receiving any future increases in property tax revenue. Under Proposition 13, this channeling of tax increment will occur independent of any redevelopment effort as properties are assessed at market value upon sale and as assessments are increased to reflect the value added by new construction.[160] In addition, Los Angeles County will be obliged to pass forward to the city redevelopment agency the property tax proceeds from Proposition 13's allowable annual inflation factor of 2%.

An examination of Maywood's redevelopment plan reveals no specific projects to alleviate blight despite the statutory requirement to describe both the specific projects proposed and how those projects "will improve or alleviate" the physical and economic blighting

156. MAYWOOD REDEVELOPMENT AGENCY, PRELIMINARY PLAN, CITY-WIDE REDEVELOPMENT PROJECT, May 2, 2000, at 1.

157. *Id.*

158. As defined by Maywood, an overcrowded unit is one occupied by more than 1.5 persons per room.

159. MAYWOOD REDEVELOPMENT AGENCY, REDEVELOPMENT PLAN FOR THE CITY-WIDE REDEVELOPMENT PROJECT, Nov. 29, 2000, at 18-19.

160. CAL. CONST. art XIII.

conditions cited in the preliminary report.[161] Nothing in Maywood's redevelopment documentation even approximates the level of detail found in the plans of Diamond Bar or Town of Mammoth Lakes. Apparently, Maywood could afford only the "boiler-plate" redevelopment plans that Maywood's redevelopment consultants provided. Challengers could have proved this was just the sort of naked grab for tax increment revenue to fund infrastructure improvements that state law clearly prohibited.[162] But the Maywood redevelopment proceeded unchallenged.[163]

Courts are not a reliable source for ensuring compliance with statutory blight standards because many of the nonconforming redevelopment plans, like Maywood's, will never be challenged in court. For one thing, these lawsuits are quite expensive. Although judicial review is based on the administrative record, rather than a new trial on the facts,[164] that record can often be extensive. In *Diamond Bar* the record consisted of 11 volumes, 3000 pages; in *Mammoth Lakes*, 65 volumes, 10,000 pages. A redevelopment challenger would want to shape the record by participating directly in the lengthy administrative process, possibly by paying for the testimony of its own experts before the redevelopment board and city

161. CAL. HEALTH & SAFETY CODE § 33344.5 (e)-(f) (West 1999).

162. The statutory concept is that the redevelopment project is needed to eliminate blight, not that the redevelopment project area occasions a tax increment windfall usable to upgrade infrastructure. "A blighted area also may be one that contains the conditions described in subdivision (b) [defining blight] and *is, in addition, characterized by the existence of inadequate public improvements, parking facilities, or utilities.*" CAL. HEALTH & SAFETY CODE § 33030 (West 1999) (emphasis added).
Further, a literal reading suggests that the state redevelopment law prohibits the placement of an entire community within redevelopment project boundaries. Blight must be found to be "so prevalent and so substantial that it causes a reduction of, or lack of, proper utilization of the area to such an extent that it constitutes a serious physical and economic burden on the community...." CAL. HEALTH & SAFETY CODE § 33030. Hence, the blighted area must be impacting parts of town that are not blighted. Under this reading, redevelopment is barred if there are no good parts of town susceptible of being harmed from adjoining blighted areas.

163. Maywood is not the only city flaunting state redevelopment law unchallenged by placing itself entirely within a redevelopment project area solely to rake in tax increment funds to supplement the city's infrastructure budget. *See* WESTMINSTER REDEVELOPMENT AGENCY, REDEVELOPMENT PLAN FOR THE WESTMINSTER INFRASTRUCTURE REVITALIZATION PROJECT, July 12, 2000. The same consultants prepared both the Maywood and Westminster plans.

164. A modest exception: challengers could introduce at trial evidence of fraud, bad faith, or abuse of discretion in the way the administrative record had been put together. *In re* Redevelopment Plan for Bunker Hill, 389 P.2d 538, 551-52 (Cal. 1964) (as interpreted by Fosselman's, Inc. v. City of Alhambra, 224 Cal. Rptr. 361, 363 (Ct. App. 1986)).

council. No redevelopment opponent can safely enjoy the option of waiting until the city council has voted to approve the project before deciding whether to take the city to court. To be considered in court, evidence that the project area is not blighted must have been part of the administrative record establishing the redevelopment plan.[165]

What's more, the California legislature has set a short time limit for bringing suits challenging the validity of agency action: sixty days after adoption of the redevelopment project boundary.[166] A challenger would need to master the voluminous administrative record within two months to meet the deadline. Besides, challengers need to be prepared to fund appeals. Trial courts, as in *Diamond Bar* and *Mammoth Lakes*, have tended to side with local governments. Victories upholding the statutory blight requirement are often achieved only at the appellate level.

The attorneys and consultants in the best position to bring challenges within the sixty-day window are those who specialize in redevelopment law. But they normally earn their livelihoods working *for* redevelopment agencies, not against them. Still, there are principled "insider" challengers. Murray O. Kane explained why he took on the Diamond Bar case:

> If Diamond Bar gets away with it, then California's reform legislation is greatly weakened, and a legislative backlash could go beyond stopping redevelopment abuse, and will also hurt redevelopment in truly blighted areas where redevelopment is really needed.[167]

However, the public-spirited inclination of firms specializing in redevelopment to undertake these cases will often be overcome by their need to appease other redevelopment agency clients not thrilled to see their attorneys embroiled in suits against sister agencies.

To be sure, there are "outside" challengers—counties, school districts, and principled or ideologically motivated "public interest" advocates. There may also be aggrieved property owners within proposed project boundaries. Some may want more money for their land than the agency wishes to pay. Other owners may seek just to stay put, and possibly benefit from the renewal uplift. Finally, there

165. *Fosselman's, Inc.*, 224 Cal. Rptr. at 363-64 (Court declined protestor's invitation to tour the project area so as to "take judicial notice that the area . . . is not a blighted area." Challengers are admonished to include all evidence in the administrative proceedings leading to enactment of the redevelopment plan.).

166. CAL. CIV. PROC. §§ 860 *et seq.* (West 2000).

167. *Did Diamond Bar Conduct a $450 Million Raid on School Funds?*, DIAMOND BAR/WALNUT NEWS GAZETTE, May 1, 1999.

are property owners such as retailers and movie theater owners outside the redevelopment plan boundaries trying to block what they regard as unfair competition.

None of these present the reliable and consistent challenges necessary to police the blight requirement. Not long after the enactment of the 1993 legislation, the Legislative Analyst's Office examined redevelopment activity from January 1993 to August 1994, and found "no evidence that redevelopment project areas established in 1994 are smaller in size or more focused on eliminating urban blight than project areas adopted in earlier years," "contrary to predictions by redevelopment officials."[168] The three large projects the Legislative Analyst's Office questioned consisted of 3500, 2207, and 925 acres, and were located within the cities of Murrieta and Perris and the City and County of Sacramento, respectively. A court order halted the first,[169] and the other two were modified to conform to the statute, according to the California Redevelopment Association, a voluntary trade group which counts 300 redevelopment agencies as members.[170] Nonetheless, the Legislative Analyst's Office remains skeptical that anyone will consistently enforce local agency compliance with redevelopment law.

As the Legislative Analyst's Office noted:

> [F]ew residents or businesses pursued their redevelopment challenge in court or through the reference process. For example, despite considerable local opposition to the redevelopment project area near San Diego State University, local residents and business officials did not commence a lawsuit or referendum challenging the plan adoption, citing the high cost of such actions.[171]

Further, some aggrieved property owners may decide their long-term interests are best served by not suing an agency in a city from which they could someday be seeking zone changes, subdivision approvals, or conditional use or building permits.

The Legislative Analyst's Office explained why other taxing entities were not reliable redevelopment project challengers:

> School funding is essentially guaranteed by state school financing formulas—and special district property tax revenues are not significantly affected by the creation of redevelopment projects due to their low overall share of the property tax base. Thus, in many

168. PRELIMINARY LOOK, *supra* note 41, at 1.

169. County of Riverside v. City of Murietta, 76 Cal. Rptr. 2d 606, 614 (Ct. App. 1998).

170. COMMUNITY REDEVELOPMENT ASSOCIATION, UPDATE ON THE IMPACT OF AB 1290 (unpublished, undated manuscript on file with author).

171. PRELIMINARY LOOK, *supra* note 41, at 12-13.

> cases, the only entity which will perceive a fiscal incentive to expand their CRL [Community Redevelopment Law] oversight efforts will be the county, because its share of the local property tax is generally a significant portion of their revenue base.

The 1993 legislation may have compromised the role of counties as challengers of city redevelopment proposals by entitling them automatically to a share of the increment and prohibiting pass-through settlements.[172] County supervisors need to calculate whether the chance of persuading the courts to invalidate the project justifies the costs and political risks of a legal challenge.

Many counties now have active redevelopment authorities.[173] Because county projects don't divert tax revenues from cities, just from school and special districts, cities aren't likely to challenge county projects in the way counties sometimes protest city ones. To stop counties from violating the blight statute, this leaves only special districts, angry residents, and individuals fronting for businesses trying to head off competition from redevelopment projects.

Concluding that some illegal projects would almost certainly go unchallenged, the Legislative Analyst's Office recommended establishing a state redevelopment review authority within the office of the state Attorney General and funded by fees charged to local redevelopment agencies.[174] Under this proposal, all new redevelopment projects would have been subject to the costs and delays of state-level administrative review by the Attorney General, who would also have had legal standing to challenge any redevelopment activities that were contrary to state law. The proposal was never enacted.[175]

VII. The Case for a Planning-Inspired Relaxation of the Definition of Blight

Cities and counties cannot attain a full array of land use planning goals by utilizing only their traditional land use powers. Once a site or an area is fully developed, the owners' rights "vest" against changed land use controls except for a narrow range of regulations

172. CAL. HEALTH & SAFETY CODE § 33607.5.

173. Eighteen counties have active agencies currently working on 55 projects. ANNUAL REPORT, *supra* note 25, fig. 20 at xx.

174. PRELIMINARY LOOK, *supra* note 41, at 13.

175. However, the Department of Finance was specifically designated as an interested party in any action brought regarding the validity of an ordinance adopting a redevelopment plan. CAL. HEALTH & SAFETY CODE § 33501(b).

enacted for health or safety reasons.[176] Local governments have limited tools for modifying areas that are already developed unless property owners seek to redevelop on their own. Although cities can be quite inventive in wielding their land use powers to secure a range of public benefits when developers seek permits, in the end, land use controls amount to nothing more than the right of a city council to "just say no" to development proposals.

Redevelopment, as Charles Abrams observed over three decades ago, "supplies a multipurpose opportunity in place of the piecemeal efforts to correct traffic problems, provide playgrounds and open spaces, provide neighborhood amenities, and new housing, public and private."[177] Without such pro-active powers, cities and counties must remain largely passive players in shaping the use of land within their boundaries, even when the private sector isn't fulfilling community planning aspirations. Why shouldn't redevelopment agencies be empowered to re-plan developed urban areas so as to improve traffic flow, the mix of land uses, or the quality of open space?[178] A recent national survey of blight laws demonstrated that no jurisdiction has ever attempted to enforce a blight test as stringent as California's.[179] Perhaps we should consider relaxing the definition of blight to legitimize a broader use of redevelopment as means of affirmative planning.

A. The Olivette Town Center Example

Consider this example from the town of Olivette, population 7438, one of the 90 cities within metropolitan St. Louis.[180] After two years of negotiation, the city reached a deal with a mid-Western shopping center developer. The developer would acquire all of the

176. Sunset Amusement Co. v. Bd. of Police Comm'rs, 496 P.2d 840 (1972); City of Dublin v. Finkes, 615 N.E.2d 690 (Ohio Ct. App. 1992); Rhod-A-Zalea & 35th, Inc. v. County of San Diego, 56 Cal. Rptr. 2d 617 (Ct. App. 1996).

177. Charles Abrams, *Some Blessing of Urban Renewal, in* FEDERAL URBAN RENEWAL LEGISLATION, URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 560 (James Q. Wilson. ed., 1966).

178. Janice C. Griffith, *The Preservation of Community Green Space: Is Georgia Ready to Combat Sprawl with Smart Growth?*, 35 WAKE FOREST L. REV. 563, 592-94, 569-70 (2000) (recommending use of tax increment financing for green space, bicycle paths, pedestrian walks or greenways, and lauding the Atlantic Steel redevelopment project, which calls for the renovation of a 136-acre soil-contaminated site into a mixed use community with a bridge over an interstate highway and a walkway to a subway station).

179. Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 477 (2000).

180. Information about the Olivette Town Center comes from an interview with Timothy G. Pickering, Olivette City Manager (Apr. 2, 2001).

homes in an older neighborhood of modest homes called Hilltop and replace them with a regional mall at the intersection of Interstate 170 and Olive Boulevard, to be called the Olivette Town Center. That project would be anchored by a Wal-Mart, a Home Depot, and other "big box" retailers. Estimated project costs exceeded $110,000,000.

To cover part of the site acquisition cost, the town agreed to rebate the developer nearly $40 million in tax increment to offset the developer's cost of acquiring the 150 homes in Hilltop without resort to eminent domain by offering homeowners 2 to 2.5 times market value. Owners of $70,000 homes could anticipate offers of $150,000 and up. The city council concluded the area was blighted although none of the homes had been condemned or even cited for health code violations.

As in California, Missouri remits a portion of the state sales tax to the "point of origin" city.[181] The proposed eighty-acre "big box" shopping mall would produce far greater property, sales, and utility tax revenue and demand far less in the way of public services than the homes it would replace.[182] Of particular relevance to Olivette's fiscal future, Olivette residents would no longer have to spend their sales tax dollars at a year-old competing development, anchored by a Target, located in another city two miles away.

To some this project looked like a naked grab for tax revenues—increased property and sales taxes,[183] accompanied by a bold move by Olivette to rid itself of some of its less affluent residents. Hilltop residents' incomes were below the town median. Correctly observing that Hilltop contained the only affordable homes in town, critics could plausibly predict that displaced homeowners would be forced to move out of Olivette even with their generous sale price premiums.

City officials saw the project as advancing important planning goals while securing Olivette's fiscal future. The low values of the homes to be taken were attributable in large measure to their being wedged in an area between the I-170 freeway and an industrial park, a location less well suited to housing than to retail development. Significantly, the town had bargained for more than the typical "big box" retail center. The developer had agreed to design the mall

181. *See* Missouri Dept. of Revenue, Comprehensive Annual Financial Report for 1998, 68-70, *available at* http://www.dor.state.mo.us.

182. Wal-Mart was promised fifty percent of the city's share of sales and utility tax revenue from the project. Irvin J. Zeid, Editorial, *Olivette Development Should Go Forward*, ST. LOUIS POST-DISPATCH, Aug. 23, 1999, at D16.

183. *See, e.g.*, Julie A. Goshorn, *In a TIF: Why Missouri Needs Tax Increment Financing Reform*, 77 WASH. U. L.Q. 919 (1999).

entrance as a distinctive, inviting gateway to the town itself, promised as tenants a supermarket and other services not presently available in Olivette, and offered major road improvements including a bridge and ramp connection to an adjoining freeway.[184]

In the end, the project was defeated but not by Missouri's redevelopment law. That law has an expansive definition of blight, and Missouri courts apply a redevelopment-friendly standard of judicial review.[185]

Although the city council and Hilltop residents overwhelmingly favored the project, it was narrowly defeated in a referendum the city council reluctantly called mainly to appease vociferous project opponents.[186] The opposition came mostly from homeowners residing south of the proposed project area who feared increased traffic, the "low-end" image, and the undesirable outsiders that Olivette would attract with discount retailing.[187] These residents disbelieved city traffic studies indicating that only four percent of the mall's visitors would traverse the main southerly route, a barely noticeable increase on a road designed to accommodate traffic flows six times greater than that.

Just as Olivette officials could cite planning goals to support their ill-fated Town Center project, so could officials in Diamond Bar and the Town of Mammoth Lakes. They could explain that they were trying both to make their communities more attractive for business and to work their way out of a deep real estate recession that had diminished local tax revenues. Diamond Bar also hoped to spark a retail resurgence. Mammoth Lakes was eager to revive a declining tourist trade. These communities actively sought to achieve the stated goals of California planning law: to meet local infrastructure

184. Interview with Timothy G. Pickering, Olivette City Manager (Apr. 2, 2001).

185. Tierney v. Planned Indus. Expansion Auth., 742 S.W.2d 146, 151 (Mo. 1987) (en banc) ("The concept of urban redevelopment has gone far beyond 'slum clearance,' and the concept of economic under utilization is a valid one."). Missouri courts have adopted the permissive "fraud, collusion, bad faith" standard. W. Scott McBride, *The Use of Eminent Domain Under Missouri's Urban Redevelopment Corporations Law*, 37 WASH. U. J. URB. & CONTEMP. L. 169, 176-77 (1990).

186. *Let the People Decide: Tax-increment Financing*, ST. LOUIS POST-DISPATCH, July 26, 1999, at D16 (beginning with "Here's a radical idea: Give people a voice in deciding whether their tax dollars should be spent to subsidize private developments that will have an irrevocable impact on the character of their communities").

187. Sasha Mastroianni, *Olivette Residents Protest Plan to Finance Wal-Mart*, ST. LOUIS POST-DISPATCH, July 19, 1999, at Local 1.

needs,[188] conserve open space,[189] facilitate economic development,[190] and enhance affordable housing opportunities.[191]

The policy question for California redevelopment law is not whether these proposals make sense in planning terms. That is an issue for local governments to decide within the boundaries set by state planning guidelines. State officials need to ask whether the use of tax increment financing should hinge on whether these project areas are blighted as state law presently defines blight. While the notion of local governments taking a pro-active stance to shape development has its proponents and critics, it is hard to imagine either camp accepting a stringent definition of blight as an appropriate way to resolve their differing views.

B. Suggested Limits to the Expanded Blight Definition

Through its 1993 changes, the legislature attempted to put an end to the use of redevelopment solely as a means of funding public infrastructure. As the Legislative Analyst's Office explained:

> Most cities and counties finance this infrastructure through a combination of local general revenues; Mello-Roos and transportation special tax funds; benefit assessments; developer fees and exactions; and state and federal loans, grants and subventions. While each of these financing sources has limitations, the Legislature has never intended for redevelopment to be used to provide basic municipal infrastructure. Rather, the Legislature has consistently indicated its intent that communities limit the use of redevelopment to the correction of extraordinary conditions of urban decay.[192]

188. California Government Code section 65302 mandates certain elements to be included in each local government general plan, including circulation, land use, housing and conservation elements.

189. CAL. GOV'T CODE §§ 65563, 65564 (authorizing local governments to establish open space goals and action to realize those goals).

190. CAL. GOV'T CODE § 65030.1 (declaring that decisions regarding growth, most of them made at the local level, should be guided by an effective planning process undertaken within the framework of statewide goals and policies directed to "land use, population growth and distribution, development, open space, resource preservation and utilization, air and water quality, and other related physical, social and economic development factors").

191. Local governments are required to adopt general plans, and thereafter to approve no zoning ordinance or subdivision map inconsistent with the plan. Certain plan elements are required (e.g., transportation, housing). General plans must "make adequate provision for the housing needs of all economic segments of the community" while conserving and preserving as much open space as possible. CAL. GOV'T CODE §§ 65860(a) *et seq.*

192. PRELIMINARY LOOK, *supra* note 41, at 10.

Also objectionable is the use of redevelopment to bulldoze perfectly good land uses to make way for others just because they promise bigger tax yields.[193] California law attempts to curb such moves by prohibiting redevelopment agencies from collecting sales taxes directly, although the host city still pockets the local government share of the increased sales taxes.[194] Previously, some agencies had enticed major sales tax producers such as auto malls and big box retailers by agreeing to refund a portion of the sales tax collected from them. This practice led state legislators to conclude that some redevelopment agencies were more dedicated to snaring increased sales tax revenues than eliminating blight.[195] To stop them, the state now bars redevelopment agencies from placing certain types of sales tax-generating businesses on vacant sites that had never before been put to urban uses.[196]

C. The Bottom Line

Communities should be encouraged to redevelop underutilized urban land through a definition of blight specially crafted to their needs, as the legislature has employed in accommodating redevelopment projects involving the re-use of closed military bases[197]

193. Courts differ when it comes to sanctioning redevelopment undertaken in large measure to increase the local tax base. *Compare* City of Minneapolis v. Wurtele, 291 N.W.2d 386, 390 (Minn. 1980) (upholding acquisition of property within a designated development district because area, admittedly not blighted, was currently "stagnant and unproductive", "not contributing to the tax base to their full potential" and "existing buildings and facilities were obsolete"), *with In re* Opinion of the Justices, 783, 126 N.E.2d 795, 803 (Mass. 1955) (in an advisory opinion on legislation authorizing condemnation of nonblighted property for redevelopment, court opined that acquisition to improve tax structure of city is a "kind of indirect public benefit... never been deemed to render a project one for a public purpose").

194. BEATTY, *supra* note 38, at 198-99.

195. Dan Walters, *Cities Playing a Blight Game*, SACRAMENTO BEE, Sept. 7, 2000, *reprinted in* CAL-TAX DIGEST Oct. 2000, at 2; Commentary, *Pacheco Bill Would Resurrect Land Grabs*, ORANGE COUNTY REG., Apr. 5, 2001.

196. BEATTY, *supra* note 38, at 199-200. Auto dealerships were barred from previously undeveloped sites "because there was rarely a connection between the project and the elimination of blight." Development for sales tax-generating uses was also banned on parcels of five acres or larger not previously developed for urban uses, unless the principal permitted use was office, hotel, manufacturing, or industrial. Again, "assistance was being given to large volume retailers on large parcels of vacant land, and the connection between these projects and the elimination of blight was difficult to determine." *Id.*

197. CAL. HEALTH & SAFETY CODE §§ 33492 *et seq.* The legislation establishes a special set of blight conditions—merging, consolidating, and enlarging the pre-existing list—from which two or more must be selected. However, the plan must cap the amount of tax increments an agency is authorized to receive. Also, the agency must make specified payments to school and community college districts after receipt of $100,000 in

or rebuilding in the wake of disasters.[198] The statutory definition of blight should be re-formulated to promote infill—the intensive re-use of developed urban parcels. Then, instead of having to shoehorn planning-motivated redevelopment into the narrow last of the present blight definition, communities would have a choice. While it isn't clear that Diamond Bar or Mammoth Lakes could qualify even under such a re-definition of blight, at least they should be given the chance. Even if they could not qualify, other communities might, which would advance the goals of California land use planning laws.

To soften the impacts on other taxing entities, consider the possibility of allocating to them a larger percentage of the tax increment than *physically* blighted redevelopment projects are made to pay, or reinstating the prerogative of affected taxing entities to negotiate larger sums from redevelopment agencies. Of course, the precise language of the redevelopment law means little to cities prepared to flout it, as some are doing. But cities trying to comply should not be summarily barred from redeveloping infill sites because they cannot find the physically blighting conditions state law presently requires.

tax increments, so that by the fifteenth year after the agency has received this amount, each district will receive annually 100% of its share. Alternately, the agency may enter pass-through agreements with any affected taxing entity, including school districts. CAL. HEALTH & SAFETY CODE §§ 33492.9, 33492.15

198. CAL. HEALTH & SAFETY CODE §§ 34000 *et seq.* Following a major disaster no blight findings are required for a redevelopment plan adopted within six months and completed within 24, provided that all tax increments are used only to repair or replace improvements within the project area that were damaged or destroyed by the disaster.

APPENDIX

CAL. HEALTH & SAFETY CODE § 33030 (1997):

(a) It is found and declared that there exist in many communities blighted areas which constitute physical and economic liabilities, requiring redevelopment in the interest of the health, safety, and general welfare of the people of these communities and of the state.

(b) A blighted area is one that contains both of the following:

(1) An area that is predominantly urbanized . . . and is an area in which the combination of conditions set forth in Section 33031 is so prevalent and so substantial that it causes a reduction of, or lack of, proper utilization of the area to such an extent that it constitutes a serious physical and economic burden on the community which cannot reasonably be expected to be reversed or alleviated by private enterprise or governmental action or both, without redevelopment.

(2) An area that is characterized by either of the following:

(A) One or more conditions set forth in any paragraph of subdivision (a) . . . and one or more conditions set forth in any paragraph of subdivision (b). . . .

(B) The condition described in paragraph (4) of subdivision (a) . . . .

(C) A blighted area also may be one that contains the conditions described in subdivision (b) and is, in addition, characterized by the existence of inadequate public improvements, parking facilities, or utilities.

CAL. HEALTH & SAFETY CODE § 33031 (1997):

(a) This subdivision describes physical conditions that cause blight:

(1) Buildings in which it is unsafe or unhealthy for persons to live or work. These conditions can be caused by serious building code violations, dilapidation and deterioration, defective design or physical construction, faulty or inadequate utilities, or other similar factors.

(2) Factors that prevent or substantially hinder the economically viable use or capacity of buildings or lots. This condition can be caused by a substandard design, inadequate size given present standards and market conditions, lack of parking, or other similar factors.

(3) Adjacent or nearby uses that are incompatible with each other and which prevent the economic development of those parcels or other portions of the project area.

(4) The existence of subdivided lots of irregular form and shape and inadequate size for proper usefulness and development that are in multiple ownership.

(b) This subdivision describes economic conditions that cause blight:

(1) Depreciated or stagnant property values or impaired investments, including, but not necessarily limited to, those properties containing hazardous wastes that require the use of agency authority as specified in Article 12.5 (commencing with Section 33459).

(2) Abnormally high business vacancies, abnormally low lease rates, high turnover rates, abandoned buildings, or excessive vacant lots within an area developed for urban use and served by utilities.

(3) A lack of necessary commercial facilities that are normally found in neighborhoods, including grocery stores, drug stores, and banks and other lending institutions.

(4) Residential overcrowding or an excess of bars, liquor stores, or other businesses that cater exclusively to adults, that has led to problems of public safety and welfare.

(5) A high crime rate that constitutes a serious threat to the public safety and welfare.

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