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SOME RECENT DEVELOPMENTS IN COMMUNITY REDEVELOPMENT LAWS

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There is no longer room for doubt that Community Redevelopment Laws occupy a substantial place in our law They have been enacted by at least thirty-four states and four territories.[1] These laws seek by use of the police power and/or the power of eminent domain to remove blighted areas from the community, substituting in their place a master plan of redevelopment.[2] The problem which faces the lawyer or judge when dealing with Community Redevelopment Laws is in keeping the power exercised by the government within well defined constitutional limits. It is the possibility of the state taking private property in derogation of the private right, which causes the greatest trouble.

Source of the States Power.

Community Redevelopment Laws seek to assert the collective right against the individual right. They are framed in words of police power and authorize condemnation by eminent domain.

What is the police power? It is a sovereign's inherent power to provide for the health, safety, morals, and welfare of the people. Through this power the government may destroy or regulate the use of property in order to promote the health, morals, safety, and welfare of the community The police power may be exercised without making compensation for the impaired value or use of the property [3]

Eminent domain is the power of a sovereign to take land for a public use, and is essential to the continued existence of a government.[4] The only limits on it are that the land be taken for a public use and that the condemnee to be justly compensated.[5]

The basic difference between the police power and the power of eminent domain is that the former has primarily a negative regulatory aspect, while eminent domain has an aspect of later application to a different and public use.[6] The police power regulates through destruction of or interference with detrimental uses of property Eminent domain operates by taking the fee to make some positive use of the property for the public. Some well settled examples are acquiring land for a park, highway, or government building.

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[1] Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, Wisconsin, Alaska, Hawaii, Puerto Rico, Virgin Islands.

[2] For example: LAWS OF PENNSYLVANIA 991 (1945).

[3] Adams v. Housing Authority of Daytona Beach, ——Fla.——, 60 So.2d 663 (1952).

[4] U.S. v Carmack, 329 U.S. 230, 236, 237 (1946), Kohl v U.S., 91 U.S. 367 (1875), Harding v. Goodlett, 3 Yerg. 41 (Tenn. 1832).

[5] U.S. CONST. AMEND. V

[6] Nashville Housing Authority v. City of Nashville, 192 Tenn. 103, 237 S.W.2d 946 (1951), Illinois Central Railroad Co. v Moriarity, 135 Tenn. 446, 459, 186 S.W 1053 (1916).

Community Redevelopment Laws recite that the legislature has found to exist certain blighted areas which are detrimental to the public health, safety, morals, and welfare.[7] Normally, they then provide for the creation of agencies, which are to work with local planning commissions in alleviating these conditions. The agencies are empowered, *inter alia,* to acquire land by gift, devise, purchase, or eminent domain.[8]

Redevelopment Laws and the Dual Area Problem.

Most of the Community Redevelopment Laws cover two types of blighted areas. For convenience these will be referred to as "slum" on the one hand and "deteriorated" on the other. A fundamental difference exists between these two and it must be kept in mind when characterizing the legal problems presented by each.[9]

A slum is a district, generally located within large cities, where crowded buildings stand in great disrepair. Overcrowded rooms, inhabited by rats, fleas, and lice render living conditions unhealthful. There is an abnormally high incidence of disease, crime, juvenile delinquency, and immorality.[10]

On the other hand, the deteriorated area is predominantly vacant land. Faulty planning and irregular layout make lots and streets unusable. Streets are laid without regard to land contours. Its great fault is that it is an economic drag on the community and the taxpayer.[11] It represents a block to active economic expansion deemed good for the general welfare,[12] and it absorbs tax funds greater than the wealth it produces.[13] However economically undesirable it may be, the deteriorated area cannot be said to breed crime, disease, juvenile delinquency, or immorality.[14]

The importance in recognizing the inherent differences between the two areas is made apparent by the nature of the powers asserted by the state. Under the police power the slum may be said to be detrimental to the public health, safety, morals, and general welfare. But what is the deteriorated area, which is not detrimental to health, safety, or morals? To sustain the Community Redevelopment Laws as applied to the deteriorated area it must be found that the application falls within the police power to regulate for the general welfare alone.

These differences are also important in applying the power of eminent domain. The elimination of slums has been held to be a public use.[15] The case of *Schneider v. District of Columbia Redevelopment Agency et al.*[16]

[7] CALIF. HEALTH AND SAFETY CODE §§ 33040, 33045.

[8] CALIF. HEALTH AND SAFETY CODE § 33267(a), (b).

[9] Schneider v. District of Columbia Redevelopment Agency, 117 F.Supp. 705 (1953), Redevelopment Agency of San Francisco v. Hayes, 122 Cal.App.2d 777, 266 P.2d 105 (1954).

[10] CALIF. HEALTH AND SAFETY CODE § 33041.

[11] CALIF. HEALTH AND SAFETY CODE § 34042, Redevelopment Agency of San Francisco v. Hayes, *supra* note 9.

[12] CALIF. HEALTH AND SAFETY CODE § 33044(a).

[13] CALIF. HEALTH AND SAFETY CODE §§ 33043, 33044(b).

[14] Schneider v. District of Columbia Redevelopment Agency, *supra* note 9.

[15] See note 14 *supra.*

[16] See note 14 *supra.*

indicated that the elimination of deteriorated areas would not be a public use. What is a public use is a question that has faced many judges and is by its nature impossible of precise definition.

Eminent Domain: What is a Public Use?

Two views have evolved from the decisions as to what does or does not constitute a public use within the constitutional limitation on the power of eminent domain. The more limited view is that "public use" means actual use by the public, *i.e.*, that for a taking to be within the power of eminent domain some further use by the public other than the purpose which motivates the taking must be contemplated.[17] The more liberal view is that public use means only that some utility or benefit to the public must result from the taking.[18] These two views and the reasons behind them may best be illustrated by contrasting the following statements:

> "From the nature of the cases there can be no precise line. The power requires a degree of elasticity to be capable of meeting new conditions and improvement, and the ever increasing necessities of society The sole dependence must be upon the presumed wisdom of the sovereign authority, supervised and, in cases of gross error or extreme wrong, controlled by the dispassionate judgment of the courts."[19]

Criticizing this view is the statement by Lewis cited with approval in *Arnsperger v. Crawford*.[20]

> "Public use means use by the public It accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for a public use, in vogue when the phrase was employed in the earlier constitutions; and, third, it is the only view which gives these words any force as a limitation or renders them capable of any definite and practical application."

Yet, in *Olmstead v. Camp*[21] it is further stated.

> "The defendant insists that in favor of private rights, the construction should be strict, and that the term 'public use' means possession, occupation, direct enjoyment, by the public. Or in other words that the property must literally be taken by the public as a body into its direct possession and for its actual use, as in the instances of a state-house, a court house, a fort, an arsenal, a park, etc.
>
> "It seems to us that such a limitation of the intent of this important clause would be entirely different from its accepted interpretation, and

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[17] Housing Authority of Atlanta v. Johnson, 209 Ga. 560, 74 S.E.2d 891 (1953), Jordon v. Woodward, 40 Me. 317 (1855), Pennsylvania Mutual Life Ins. Co. v. Philadelphia, 242 Pa. 47, 88 Atl. 904 (1913).

[18] Schneider v. District of Columbia Redevelopment Agency, *supra* note 9; Olmstead v. Camp, 33 Conn. 532 (1866).

[19] Olmstdead v. Camp, *supra* note 18.

[20] 101 Md. 247, 253, 61 Atl. 413, 415 (1905).

[21] 33 Conn. 532 (1866).

would prove as unfortunate as novel. One of the most common meanings of the word 'use' and defined by Webster, is 'usefulness, utility, advantage, productive of benefit.' 'Public use' may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for the purposes of great advantage to the community, is taking for a public use."[22]

It can be seen from the above citations that there exists and has existed for some time a clear-cut divergence of opinion as to what public use means within the power of eminent domain. *Olmstead v. Camp,* supra, takes an elastic viewpoint, which permits current concepts of general public welfare to control the meaning of public use. The *Arnsperger* case takes a narrow, strictly confined attitude, which sacrifices elasticity for definiteness. This view requires actual physical use to be made by the public in the future. Recent authority favors the *Olmstead* view.

Community Redevelopment Laws further complicate the determination of what is a public use within the power of eminent domain by providing for resale of the land to private individuals under proper restrictions for redevelopment along the lines of the master plan.

Community Redevelopment Laws and the Aspect of Resale to Private Individuals for Redevelopment.

The importance of distinguishing between the "actual use by the public" doctrine and the "public benefit" doctrine is made evident by the Community Redevelopment Laws. Since the land acquired may be resold to private individuals or be made available to private enterprise for redevelopment, there is no continuing physical use by the public at large to be made of the areas after the acquisition.

Two sides have been taken on the question of whether or not this contemplated resale to private individuals renders the action unconstitutional. Those in accord with the "use by the public" doctrine hold that this resale to private individuals with the possibility of private gain contaminates the whole project. Hence, it is a private use and unconstitutional.[23] On the other hand, the "public benefit" followers hold that the public use lies in the elimination of slum and deteriorated areas, the reconstruction and rehabilitation of the areas, and the adaption of them to uses which will prevent a recurrence of the conditions.[24] The provision making the land available to private enterprise for redevelopment, which will result in private

[22] *Accord,* ANGELL, WATER COURSES 457 (7th ed. 1877), *Contra,* Arnsperger v. Crawford, *supra* note 20.

[23] Holding Florida and Georgia Laws unconstitutional, see Adams v. Housing Authority of Daytona Beach, *supra* note 3; Housing Authority of Atlanta v. Johnson, *supra* note 17.

[24] Schneider v. District of Columbia Redevelopment Agency, *supra* note 9; Rowe v. Housing Authority of Little Rock, 220 Ark. 698, 249 S.W.2d 551 (1952), Redevelopment Agency of San Francisco v. Hayes, *supra* note 9; Chicago Land Clearance Commission v. White, 411 Ill. 310, 104 N.E.2d 236 (1952), Kaskel v. Impelliteri, 306 N.Y. 73, 115 N.E.2d 659 (1953); Foeller v. Housing Authority of Portland, 198 Ore. 205, 256 P.2d 752 (1953), Oliver v. City of Clairton,

gain, is held to be incidental to the main purpose and, hence, not objectionable.

Two cases have held these laws to be unconstitutional.[25] In each the contemplated private gain contaminated the whole exercise of the power. Naturally, all cases agree that private property may not be taken arbitrarily to be transferred to another private individual for private gain. The divergence of opinion appears in deciding just when this is being done. In both cases the project before the court concerned the redevelopment of slum areas solely for commercial purposes. Some stress is laid on this point by the California court in *Redevelopment Agency of San Francisco et al. v Hayes et al.*,[26] which upheld the validity of the California Redevelopment Law It should be noted that these cases mentioned above not only held the *projects* to be unconstitutional but also the *laws* themselves, which were similar to the California statute.

Another attempt at distinguishing these cases was made with regard to the Community Redevelopment Law of Florida,[27] which recited as one purpose of the law, the acquisition of blighted areas to be made available to private enterprise. However, just such a provision[28] was upheld in a recent Virginia case[29] and is in reality merely a statement of what other Community Redevolpment Laws imply

Housing Authority of Atlanta v. Johnson[30] concludes that the object of these laws is.

> " to clear away slum areas or deteriorated areas and then to have the property redeveloped by private individuals for private purposes in such manner as the city and Housing Authority determine to be best.
>
> "The power of eminent domain is to be exercised to accomplish this result. The property is to be sold to people who could have no interest in acquiring the property other than as a means to make money If the property of one individual can be taken from another for this purpose, where does the power of eminent domain stop?"

Clearly, an answer to the last question put by the court is not easily found!

It should be remembered that Community Redevelopment Laws are not based solely on the power of eminent domain. The next question which becomes important is whether or not these laws may be sustained as a valid use of the police power. The regulation of *slums* falls within traditional

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374 Pa. 333, 98 A.2d 47 (1953), Schenck v. City of Pittsburgh, 364 Pa. 31, 70 A.2d 612 (1950), Belovsky v. Redevelopment Authority of Philadelphia, 357 Pa. 329, 54 A.2d 277 (1947), Ajootian v. Providence Redevelopment Agency. ——R. I.——, 91 A.2d 21 (1952), Nashville Housing Authority v City of Nashville, 192 Tenn. 103, 237 S.W.2d 946 (1951).

[25] See note 23 *supra*.

[26] Redevelopment Agency v Hayes, *supra* note 9.

[27] FLA. ACTS 1945, c. 23077, §§ 167.05, 176.01 *et seq.*

[28] VA. ACTS 1946, c. 185, § 8–b(5), p. 276.

[29] Hunter v. Norfolk Redevelopment and Housing Authority, 195 Va. 326, 78 S.E.2d 893 (1953).

[30] Housing Authority of Atlanta v. Johnson, *supra* note 17

concepts of caring for the public health, safety, morals, and welfare. But the *Schneider* case, noted above, indicated that the regulation of deteriorated areas did not fall within the state's regulatory police power. The court rejected the argument of counsel that the principle of law which sustains zoning laws should sustain the application of Community Redevelopment Laws to deteriorated areas. This argument deserves consideration.

Are Community Redevelopment Laws an Extension of the Principle Behind Zoning Laws?

One extension of the sovereign's police power is the power to enact zoning laws for the general public welfare. The only limit on a zoning regulation is that it bear a substantial relation to the public health, safety, morals, or general welfare.[31] Thus the turning point is the court's definition of general welfare, and whether or not the particular zoning law is substantially related to promoting that welfare.

Assuming that slums fall within the powers of a state to regulate by eminent domain or zoning measures, what about the deteriorated area? Under the general welfare theory is it not logical to extend such powers over the deteriorated area? Suppose that there is a section of a city which consists mostly of hills. Streets have been platted at 90 degree angles, crisscrossing the area. Because of the hills most of these streets if ever built would be unusable. In addition, only a small percentage of the lots have ground which may be occupied. Unable to use their land many taxpayers have let taxes lapse, so that a good portion of the land has large tax deficiences. Of the remaining land only 10% or 15% is occupied beneficially This would be an ideal land for zoning. Streets could be laid out following contours; lots could be set out, which could be beneficially used for homes, industries or parks. Because of the peculiar ownership of the land, resulting from its disuse and layout, ordinary zoning regulations would be, practicably speaking, useless. Yet, it would be within the state's power of protecting the general welfare of the public.

Thus it can be seen that in the deteriorated area there exists a situation which could be zoned against. The only trouble is that due to the inherent nature of the area with its widespread ownership, its land with large tax deficiencies, and its undesirable conditions, zoning in and of itself would not achieve the end sought. But mere zoning laws exempt existing uses from the regulation[32] and it is unlikely that there would be any new purchasers or changed uses of deteriorated land. The greatest benefit would come from zoning an area as a unit and seeing that the new owners of the land keep the regulations. The most practical way of doing this is to get the blighted area under the control of one owner. The Community Redevelopment Agency is that owner. In leasing the land or selling it they can make sure the proper regulations will be imposed and kept. The landowner has the

[31] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).
[32] See Note, 86 A.L.R. 684 (1933), 58 AM. JUR. 1021, *Zoning* § 146.

right to reasonable compensation and the possiblity of participating in the new development.[33]

The two cases, holding Community Redevelopment Laws to be unconstitutional involved a peculiar problem. In each the project was purely along commercial lines. In Atlanta to uphold the project would have displaced a large Negro population occupying low-rent housing No return housing provision was made, so that a large segment of population would suddenly have been left homeless. Rather than aiding the general welfare of the public, a greater problem would have been set loose in the form of a homeless population.

The *Hayes* case involved a deteriorated area known as Diamond Heights. It included 500 lots owned by separate individuals. These lots ranged from 25 feet width to parcels of half an acre. Only 15% of the area was occupied. Faulty street planning was present. The project involved predominantly redevelopment to provide public places, such as schools and parks, and residences of single and multi-family types. By ordinance the County Board of Supervisors declared the existence of a critical need of land for expansion purposes due to the rapid growth of San Francisco and the growing housing shortage.

In the face of these findings it is arguable that Community Redevelopment Laws ought to be upheld as implementing the state's power to zone against conditions which endanger the general welfare of the public. But the *Schneider* case refused to uphold the District of Columbia Redevelopment Law as applied to deteriorated areas on that basis. The court held that zoning laws must be strictly construed and reasoned that the general welfare would not be substantially aided in the case of deteriorated areas. The court warned against an extension by redefinition of "general welfare," so that private rights would be unduly interfered with.

Are Community Redevelopment Laws a Threat to Individual Property Rights.

The ground for attacking Community Redevelopment Laws is that they violate basic property rights. An old New York case on eminent domain discussed at length the individual's property right.[34] Community Redevelopment Laws seek to transfer one individual's property to another. Whether or not this is done arbitrarily is the essence of the question involved. Three cases indicate that Community Redevelopment Laws are a threat to private property rights and ought to be strictly construed.[35]

The *Schneider* case warns against the danger to private rights created by redefinition of "general welfare." Judge Prettyman points out that there is no more subtle way of transforming the basic concepts of our govern-

[33] CALIF. HEALTH AND SAFETY CODE § 33275.

[34] Bloodgood v. The Mohawk and Hudson Railroad Co., 18 Wend. 9 (N.Y. 1837).

[35] Schneider v. District of Columbia Redevelopment Agency, *supra* note 9; Adams v. Housing Authority of Daytona Beach, *supra* note 3, Housing Authority of Atlanta v. Johnson, *supra* note 17

ment, of shifting from the preeminence of individual rights to the preeminence of government objectives. The court was concerned with the distinctions between the slum and the deteriorated area. The court held that the contemplated resale to private individuals did not contaminate the District of Columbia Redevelopment Law[36] when applied to the public purpose of eliminating slums. The court saw an evident evil in the slum and a great necessity to destroy slums for the benefit of the public. But the court refused to see the same necessity or public benefit in eliminating the deteriorated area.

Frankly, the sole fault of the deteriorated area is that it fails to meet modern standards. There is no immediate or threatened harm from the mere fact that an area is not used to its full economic potentiality

> "Let us suppose that it is backward, stagnant, not properly laid out, economically Eighteenth Century—anything except detrimental to the health, safety, or morals. Suppose its owners and occupants like it that way. . The slow, the old, the small in ambition, the devotee of the outmoded have no less right to property than have the quick, the young, the aggressive, and the modernistic or futuristic.
>
> ". . Even if the line between regulation and seizure, between the power to regulate and the power to seize, is not always etched deeply, it is there. And even if we progress in our concepts of the 'general welfare', we are not at liberty to obliterate, the boundary of governmental power fixed by the Constitution."[37]

The weight of authority does not agree with this.[38] It holds that the deteriorated area is a drag on the taxpayer and the economy, consequently detrimental to the general welfare of the public, and should be forcibly eliminated.

Conclusion.

The law as it stands today shows, with three possible exceptions,[39] a very liberal and favorable attitude toward Community Redevelopment Laws. The tendency shown, unless radically diverted, can only lead to the conclusion that each new test of these laws will result in their being held constitutional. The legislatures have determined them to be a necessary element of progress in the modern age, and courts seem to hold this "progress" to be within limits set by the Constitution.[40]

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[36] D.C. CODE 5-701 *et seq.* (1951).

[37] Schneider v. District of Columbia Redevelopment Agency, *supra* note 9.

[38] Chicago Land Clearance Commission v. White, *supra* note 24.

[39] See note 36 *supra.*

[40] The constitutionality of these laws has also been attacked on the basis of denial of equal protection, lending public credit to private individuals and wrongfully delegating legislative functions to administrative agencies. These considerations were outside the scope of this comment, but they should not be entirely ignored. Except for the cases in note 36 *supra* the holdings on these three questions have been uniform. Of particular help are the decisions cited in note 9 *supra.*