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LAND ASSEMBLY IN A CHANGING ENVIRONMENT OF EMINENT DOMAIN

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Redevelopment Law in Transition

In 2005, the U.S. Supreme Court, in the case of *Kelo v. City of New London*, upheld the use of a city's eminent domain power to condemn a private residence to pave the way for a commercial development project. Although the *Kelo* decision was based upon a unique set of facts, and Connecticut law which allows more liberal use of eminent domain powers than California law, the *Kelo* decision triggered a legal backlash against the use of eminent domain to condemn private property for other than public purposes (e.g., streets, parks and libraries).

In California, much of the anti-*Kelo* sentiment culminated in Proposition 90 which would have barred state and local governments in California from condemning private property for private purposes. Despite Proposition 90's narrow defeat at the ballot box in November 2006 (by less than a 5 percent margin), the public debate over Proposition 90 invigorated lawmakers to pass a number of new laws constraining the use of eminent domain in California.

Today, the handwriting is on the wall that public agencies will have less authority in the future to wield eminent domain powers to assist private developers to assemble parcels of land for private development. As a result, developers will need to creatively use private sector tools to assemble land, without the assistance of public intervention.

Carlsbad Village as a Case Study

In 1981, the Carlsbad City Council adopted the Carlsbad Village Redevelopment Plan to revitalize the Carlsbad Village area. However, when adopting the Village Plan, the City of Carlsbad did not authorize the Carlsbad Redevelopment Agency (RDA) to use the power of eminent domain to acquire property within the Village Plan area. Therefore, present and future redevelopment activities within Carlsbad Village are an interesting case study as to how public and private interests must work together to create incentives for redevelopment, absent the threat of condemnation.

Public Incentives

Most redevelopment agencies have at their disposal a variety of tools (e.g., state/federal funds, sales tax, tax increment financing, tax allocation bonds, etc.) to generate income in order to acquire and improve properties, or to provide public subsidies to developers within redevelopment areas. Over the years, the Carlsbad RDA has utilized many of these tools to improve conditions in the Village, and to stimulate economic growth. More recently, the city has commissioned a marketing study to better identify the future of the Village, and announced that the city might relax zoning laws to encourage redevelopment of

individual parcels within the Village. While vigilant to maintain controls over the aesthetic character of the Village, the city appears to be implementing a well thought-out plan to create the right types of public incentives to attract new businesses to Carlsbad's downtown core.

Private Incentives

An equally important component to successful redevelopment is to foster private incentives which motivate individual landowners to assemble parcels and pursue development opportunities where the combination of parcels is "greater than the sum of its parts." This private-sector land assembly process allows individual property owners to share up-front entitlement costs, benefit from greater borrowing power, reduce development risk, improve tenant quality and mix, enjoy economies of scale, and ultimately create higher land values for their property and a higher tax base for the local economy.

Private land assembly is typically accomplished through formal joint venture arrangements where individual landowners share equitably in risks, profits, losses and decision making, where separate property holdings are merged for the greater good, and where relocation rights of existing owners and tenants are respected. All joint venture agreements need to be carefully prepared by legal and tax advisors to safeguard economic expectations, maximize tax benefits and foster effective decision making in the redevelopment process.

With the right mix of leadership, vision and public-private incentives, Carlsbad could accomplish for the Village the very best of urban planning with upscale retail establishments, restaurants, businesses, public transportation and affordable housing. In the process, Carlsbad may also be viewed as a pioneer in establishing urban redevelopment incentives in a new era of limited government powers of eminent domain.

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