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The eminent domain debate: Californians losing homes, businesses to development

By Claire Cooper -- Bee Legal Affairs Writer

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Some experts say it can't happen in California, but the homeowners' nightmare spotlighted by a recent U.S. Supreme Court decision already is happening here in one city after another.

Homes, as well as small businesses and some fairly big ones, are condemned by public redevelopment agencies, and the land is sold to other private parties.

State laws restricting these land grabs to blighted urban property are porous and hard to enforce.

Ask the people who live in the Naglee Park section of San Jose.

Under the city's Strong Neighborhoods Initiative Redevelopment Project, Naglee Park and about 20 other downtown areas have been declared blighted and, therefore, potential targets for the wrecking ball.

Forget the million-dollar home values in this lovingly tended section of Victorians and Craftsman bungalows. Forget the value of neighbors who know each others' kids and dogs.

An auto mall or big-box store would have tax value for a redevelopment agency. Or, as seems more likely in the case of Naglee Park, a high-density housing complex.

"As downtown grows, there is a clear and a stated desire by the city to have much denser housing in the downtown area," says neighborhood association president Beth Shafran-Mukai.

Although the city denies any present intention to bulldoze Naglee Park, the Supreme Court ruling has heightened anxieties. It "undermines established neighborhoods and takes the power away from people who are working themselves and with their neighborhoods to create a vital community," says Shafran-Mukai.

The decision - now simply referred to as "Kelo" - was announced June 23 in the case of New London, Conn. homeowner Susette Kelo. The struggling coastal city condemned her tidy Victorian to make room for a waterfront complex that promises tax revenue and jobs, and the Supreme Court upheld the condemnation.

Ruling 5-4, the court said government agencies may take private land in viable neighborhoods as part of an "integrated development plan" - and then sell the land to other private parties. The opinion said judges normally must defer to a city's determination of what will benefit the public, such as New London's finding that it needs "a program of economic rejuvenation."

The ruling was based on the 5th Amendment but not the 5th Amendment envisioned by the framers. The traditional purpose of the constitutional provision was to enable road building and other public works projects. The genesis was an ancient power known as eminent domain - the power of the sovereign to appropriate property. The 5th Amendment says only that private land may be taken for "public use" upon payment of "just compensation."

Through statutes and judicial interpretations over the past half century, though, modern eminent domain includes the right to take property if the taking serves a public purpose, such as redevelopment, regardless of the ultimate ownership. It also includes the right to take viable property where necessary for the effective redevelopment of a larger area.

In other words, "public use" has come to mean "public benefit," which can mean almost anything. The transformation has paved the way for privately owned enterprises such as hotels and chain stores to replace homes and small businesses in many cities.

Because of the legal precedents, eminent domain experts weren't surprised at the Kelo decision.

Yet Kelo touched a public nerve like no previous case, says McGeorge School of Law professor John Sprankling, because it relates to "the special place that our home has occupied in our social and legal culture."

Widely quoted was a dissenting opinion by Justice Sandra Day O'Connor, warning that "any home" now can be replaced "with a shopping mall."

The majority opinion seems narrower. It was based on an unusual Connecticut law, one that California doesn't have. Connecticut permits property to be taken for the sole purpose of economic development. In California, as the Kelo opinion pointed out, redevelopment can be used only to eliminate blight. Court precedents here also say property can't be declared blighted just because there's a better potential use for it.

Some experts downplay Kelo's significance in California for those reasons.

Others disagree, saying change is inevitable because of the backlash Kelo has created.

The public will insist, says Pepperdine University law professor Douglas Kmiec, "that officeholders reassure them that this opinion will not be a license to take homes on a large-scale basis. I don't think it ever was, frankly, as a practical matter. But as a political matter it now has to be addressed."

State constitutional amendments already have been introduced to shore up homeowner protections, and officials at all levels have been voicing concern.

Last month, state Attorney General Bill Lockyer jumped into the redevelopment controversy, opposing California City's designation of 15,000 vacant acres of the Mojave Desert as "urban blight" so the land could be redeveloped as an auto test track.

It's "all too tempting," says Lockyer's brief, for government to take private property "simply to entice businesses to a region rather than to remedy true urban blight."

Last week, the Senate Local Government Committee convened a special hearing, the first of several that are planned. The focus was on amending the state's laws to insulate Californians from Kelo-like incursions.

Several prominent redevelopment lawyers, however, argue that California's laws aren't the problem. The problem, they say, is enforcement, and that may prove harder to fix.

Cities play "catch me if you can, the reward being significant if they're not caught," says Bruce Tepper, a Los Angeles lawyer who has represented both property owners and redevelopment agencies in some of California's biggest cases.

For the redevelopment agency, the reward is exclusive use of new property tax revenue generated in the project area.

A report by Municipal Officials for Redevelopment Reform - a statewide organization of city council members and other elected and appointed officials - says \$2.8 billion in property taxes was diverted to redevelopment agencies in 2003.

The report says communities lose libraries, police and fire protection that would be supported by routine growth and assessment increases. They gain hotels, auto malls and the other big businesses that flock to redevelopment zones, often attracted by tax rebates, free land and other incentives.

For the typical property owner wanting to take a redevelopment agency to court, says Pasadena lawyer Chris Sutton, the costs run to \$40,000 or so "just to play." The result, he says, is that homeowners and small-business owners give in to lawyers' pressure to settle for increased compensation - and the lawyers may take up to 40 percent of the increase.

"What just happened to me?" asks John Revelli, 65, still reeling from the July 1 eviction of Revelli Tire Co., an Oakland business bought by his father in 1949.

The company was forced out by the Uptown Project, Oakland's plan to bring thousands of residents and "neighborhood-serving" businesses to the moribund city core. Among the properties to be demolished is a low-income residential hotel.

Revelli says he planned to challenge the condemnation in court, but Kelo "blew the wind out of the sails on that one." He'll sue over the compensation, though. He won't disclose what he's been offered but says it isn't enough to relocate in today's real estate market - a common complaint among those who are forced to move.

Similar suits over compensation were filed half a century ago when redevelopment arrived in downtown Sacramento. The Bee reported the displacement of thousands of residents - homeowners, renters and transients. The hundreds of demolished businesses included grocery stores, an appliance store, a florist, as well as dozens of bars and flophouses that catered to a population of farmhands and service workers.

The first business to move in on the cleared land was Macy's. Its 1963 opening reportedly was the first by any major department store in a California city's downtown area in over a decade.

"Sacramento and the other major cities in California faced a severe decline as a result of the growth of the suburbs and the loss of major retailing, which left downtown and followed the growth," says Joe Coomes, who was the redevelopment lawyer during negotiations for the Capital Mall Project. "Without the use of redevelopment and eminent domain to clear slum and deteriorated properties in the central cities, they would never have been able to recover."

Two blocks east of Macy's the same kinds of issues are playing out today, as rival developers -some already controlling property and others hoping to displace them - advance competing plans for redeveloping the 700 and 800 blocks of K Street.

And, to this day, experts are debating whether redevelopment has been good or bad overall for California.

It's "a tool that is effective to remedy blight but has a lot of temptation to it," says Sacramento redevelopment lawyer Nancy Miller.

A study done at the Center for Economic Development at California State University, Chico, based on 2002-03, found that redevelopment agencies had generated billions of dollars in economic activity and construction and had created 310,000 full-and part-time jobs.

On the other hand, a 1998 report by the Public Policy Institute of California, comparing 114 redevelopment project areas with similar non-redevelopment areas over the course of 13 years, concluded that redevelopment was a net drain on public resources.

For better or worse, redevelopment marches on.

Drawing its data from news reports, mostly about court cases, the Institute for Justice, which represented Susette Kelo before the Supreme Court, counted at least 223 properties condemned in California for private use and 635 others threatened between 1998 and 2002.

In San Bernardino, 433 acres of homes reportedly were targeted for possible redevelopment in 2004.

In San Diego, Ahmad Mesdaq was evicted in June, just 15 months after opening his trendy Gran Havana Cigar & Coffee Lounge, to make way for a hotel. Mesdaq learned of the hotel plan during escrow but says he didn't believe it would go forward. Now, he says, he's left with a huge cigar inventory, no income and a family to feed.

He wants the hotel to build around him.

"I asked them, 'Can't I have a little place?' They said, 'No, you cannot have a place. We demolish you and that's it,' " says Mesdaq, a native of Afghanistan who's suing for the right "to live my American dream."

San Jose's Naglee Park residents also are hoping for a pass from the Strong

Neighborhoods redevelopment project. They say they already have a strong neighborhood. They say they made a formal exemption request to the San Jose City Council about three years ago. The city hasn't acted on it.

Shafran-Mukai's little nine-color Victorian with its stained glass windows and decorative woodwork is fairly typical of the neighborhood. Unmown lawns and "for sale" signs are rare. Painters and roofers are busy on almost every street.

"The architecture is beautiful, but it's the people who really make Naglee Park special," says Shafran-Mukai, who also chairs Bark in the Park, the neighborhood's yearly festival for people and their dogs.

Harry Mavrogenes, executive director of the San Jose Redevelopment Agency, says the people of Naglee Park will be invited to participate in choosing the projects undertaken in the neighborhood. Most Strong Neighborhoods projects so far have been public facilities, and eminent domain has been used rarely if ever, he says. He also says there's been "nothing official" from the neighborhood association requesting an exemption.

Timothy Sandefur, a Pacific Legal Foundation expert on eminent domain, calls San Jose "probably the most abusive" of California's cities in exceeding its legal powers. He says more than a third of the city has been declared blighted, and Mavrogenes doesn't dispute that figure.

"Significantly blighted" or "substantially blighted," said the surveyors who drove through Naglee Park, rating it block by block.

The survey sheet has one mark for "excessive front yard paving," two for "overgrown vegetation," and so forth. The report doesn't identify the offending properties, though it does note leaves on the tennis court at Democratic Rep. Zoe Lofgren's home.

The consulting firm that conducted the blight survey, Keyser Marston Associates, publishes a long list of clients that includes Oakland and San Diego - as well as the cities or redevelopment agencies of Sacramento, West Sacramento, Davis, Woodland, Roseville, Lincoln and Placerville.

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