

News: A Tale of Two Times – A Brownfield Tragedy

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It is not an original observation to note that cities are like biological organisms. When healthy, they grow and prosper, although growth can be cancerous as well – as many Environmental Justice advocates can tell you.

Unhealthy cities wither and decay, a generic malaise sometimes described as urban blight. The causes of blight can be hard to define and control – but the effort to redevelop brownfields has been one of the most strategic approaches to battling urban blight, and it is a strategy that has been embraced worldwide. There are places where the “brownfield economy” is limping.

Because there is a public benefit to battling urban blight, many cities has agreed to put their public resources to the task. Since the 1950’s the U.S. Supreme Court has opined that state legislatures could empower cities (or other political subdivisions to use the power of eminent domain for the purpose of battling blight, and that clearly, the use of public funds to that end can be constitutional as well.

Many states have since authorized the creation of redevelopment agencies that exist to find ways to help projects that need public assistance to succeed. One of the most controversial of these efforts took place in New London, Conn., when a local agency used the power of eminent domain to try to acquire a small pink house owned by Suzette Kelo.

In 2004, the U.S. Supreme Court upheld a half-century of relatively consistent holdings finding that the state had the power to authorize the action, and that the local agency was not improperly exercising its authority, but that holding was quickly overwhelmed by the strong public outcry that followed. It is the dissent from Justice O’Connor that is remembered – and the tone of that dissent found a receptive audience nationwide.

Many states have turned to finding other ways of supporting the fight to redevelop brownfields. In Connecticut, for example, recent legislation tries to limit a new owner’s liability for historic “legacy” conditions. This can be a valuable tool in the battle against blight – but the big guns in this battle have been quieted. Has enough time passed to reconsider the public benefits from using all the tools the Constitution allows? This article looks at one state where brownfield redevelopment is foundering.

Golden State, Brownfield Implosion

Let’s look at California. Once thought of as a bellwether state - a leader nationally in bold forward thinking steps to address the problems of our modern urban existence, it is now among the least in capacity and commitment to dealing with urban blight.

California had authorized the creation of redevelopment agencies (RDAs) throughout the state – and given them two powerful tools: the ability to use part of the new tax revenue which redevelopment projects created, and the power of eminent domain. In the last decade we have observed these tools and techniques almost disappear from the state’s redevelopment landscape.

The first blow came after the Kelo decision from the US Supreme Court. The California public reacted positively to those who portrayed the use of eminent domain as an assault on property rights - so politicians lost no time in advocating new statutes designed to curtail the power. Within months following the decision it was plain that no RDA was proposing any new condemnation actions. In part, it was because of the uncertainty that changing legislative guidelines created, and in part, it was a reaction of timidity in the face of public opposition.

Eminent domain was the first step in accumulating land for a project, so when the RDAs of California were chilled into inactivity as a result of this political disfavor and uncertainty, it began an economic ebb tide that continues to this day. Of course, the timing for that project slow down coincided, ultimately, with the national recession that began in 2007, so it became yet another factor leading to our economic woes. Sadly, it could have been a factor to help create jobs in a time when they were sorely needed.

Along with a statewide slowdown in new projects, the recession brought with it another dilemma. California was never well known for adopting balanced budgets, but with the loss of so much tax revenue that accompanied the recession, balancing the budget became harder than three dimensional chess. Gov. Jerry Brown needed a source of revenue—and the redevelopment agencies of the state, which had the right to keep a portion of tax money created by the higher tax rates on new redevelopment projects—found themselves in the cross hairs.

As a way of trying to recapture that tax revenue, the Legislature decided to eliminate RDAs—using a complex scheme that gave them a way to continue to exist if they paid sufficient money to the state. Outraged, the RDAs took the state to court—and lost. The California Supreme Court determined that an agency created by the Legislature could be terminated by the Legislature, and in one decision, California lost about 350 redevelopment agencies.

The baby was tossed out with this bathwater, as the state now has no agencies designed to combat urban blight, and no tools with which to do it even assuming they still want to try. Now the state is left with no agency with the power of eminent domain for the purpose of battling blight, no funds to use to do it with (other than that which the federal government might loan or grant), and no political will to do anything at all about it.

Anecdotal experience suggests that this has had a huge impact on the efforts of many municipalities to try and fight blight by working with brownfield redevelopers. Historically there were several brownfield projects ongoing in most California cities. Now, the problem sites still exist, but there are no tools with which to address them.

Urban blight is festering, and the private sector has lost its public partner in the effort. Many in the private sector are holding their breath (and their capital) waiting for the next rising tide to start lifting the boats again. In California, it might prove a long wait.

Richard G. Opper is partner with Opper & Varco LLP, San Diego, which provides clients with a proven track record of experience encompassing municipal finance, real estate development, and many aspects of environmental law—all with the intent to help create viable solutions to the complex regulatory, financial and community issues involved in the process of revitalizing brownfield sites. Opper & Varco LLP has been a member of the California Redevelopment Association since 1999. Reach the attorneys via phone at 619.231-5858 or via web at www.envirolawyer.com

