



Office of the City Manager

INFORMATION CALENDAR
May 16, 2017

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Zach Cowan, City Attorney

Subject: Referral Response: Limited Use of Eminent Domain on Vacant and Blighted Properties

INTRODUCTION

The City has the power of eminent domain – to take private property for public use upon payment of just compensation. This information report addresses limitations on the exercise of that power with respect to vacant and blighted properties.

CURRENT SITUATION AND ITS EFFECTS

This report responds to a referral that originally appeared on the agenda of the June 14, 2016, Council meeting and was sponsored by Councilmember Capitelli.

This memorandum responds to the Council’s referral, subject to two limitations. First, it does not address condemnation of *occupied* residential properties and relocation requirements. Second it does not address the issues raised by taking property from one party *in order to convey it to another*. Rather, this memorandum assumes that any property taken would be retained by the City, although it might be managed by third parties.

BACKGROUND

State law authorizes cities to condemn property necessary to carry out their municipal duties and functions. Gov. Code § 37350.5. That power must be exercised pursuant to Part 3, Title 7 of the California Code of Civil Procedure or some other statute. Code Civ. Proc. (“CCP”) § 1230.020. (“Statute” means a constitutional provision or statute, but does not include a charter provision or ordinance. CCP § 1235.210.)

Public agencies may condemn property only for a public use. CCP § 1240.010; see also U.S. Const. Amends. 5 & 14. In order to do so, the agency must adopt a resolution of necessity as set forth in CCP §§ 1245.210 *et seq.*, which includes detailed procedural and substantive requirements. Most importantly for purposes of the referral, the agency must establish all of the following:

- The public interest and necessity require the project.
- The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

- The property in question is necessary for the project.

CCP § 1240.040; *Council of San Benito County Governments v. Hollister Inn, Inc.* (2012) 209 Cal.App. 4th 473, 484.

The Legislature has not expressly provided that a city can use eminent domain to acquire affordable housing sites (this is in contrast to housing authorities, see Health & Safety Code § 34315(d) and *Housing Authority of the City of Oakland v. Forbes* (1942) 51 Cal.App.2d 1). However, cities are permitted to use their eminent domain powers for purposes beyond those that the Legislature has expressly identified as public purposes. See *City of Oakland v. Oakland Raiders* (1982) 32 Cal. 60, 69. As stated by the California Supreme Court in the *Oakland Raiders* case:

We have defined “public use” as “a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government.” (*Bauer v. County of Ventura* [1955] 45 Cal.2d 276, 284, 289 P.2d 1.) On the other hand, “It is not essential that the entire community, or even any considerable portion thereof, shall directly enjoy or participate in an improvement in order to constitute a public use.” (*Fallbrook Irrigation District v. Bradley* [1896] 164 U.S. 112, 161–162, 17 S.Ct. 56, 64, 41 L.Ed. 369; accord *University of So. California v. Robbins* [1934] 1 Cal.App.2d 523, 527–528, 37 P.2d 163.) Further, while the Legislature may statutorily declare a given “use, purpose, object or function” to be a “public use” (§ 1240.010), such statutory declarations do not purport to be exclusive.

Id. See also, *Berman v. Parker* (1954) 348 U.S. 26, 32-34; *Hawaii Hous. Auth. v. Midkiff* (1984) 467 U.S. 229, 239.

One might debate whether creating affordable housing units benefits the public or merely the individual residents of those units. However, given the many State laws and policies regarding the need for affordable housing, as well as the fact that governments at all levels spend significant sums of public funds on providing such housing without any challenge that this is not a public use, we conclude that providing affordable housing for those who cannot afford market rate housing is a “public use” for purposes of eminent domain. See e.g. *Berman v. Parker* (1954) 348 U.S. 26, 32-34.

With respect to open space, it has long been generally recognized that providing open space is a public purpose. “[T]he condemnation of lands for public parks is now universally recognized as a taking for public use.” *Shoemaker v. United States* (1893) 147 U. S. 282, 297, quoted in *Rindge Co. v. Los Angeles Cty.* (1923) 262 U.S. 700, 707-08.

Similarly, it is axiomatic that acquiring property to provide public services, such as courthouses and municipal buildings, is also a valid public purpose. Accordingly, the

use of eminent domain to acquire land for other public services, such as public health or homeless services, is appropriate.

In sum, the City may use its power of eminent domain to acquire property for public services and buildings, affordable housing and open spaces.

A note of caution is in order. A city does not have the broad eminent domain powers formerly granted to redevelopment agencies. See *City of Stockton v. Marina Towers* (2009) 171 Cal.App.4th 93. If the City decides to move forward, the burden would be on the City Council to carefully explain in its resolution of necessity why the “public interest and necessity require the particular project” to be developed on the land to be acquired, why the project is “planned or located in the manner that will be most compatible with the greatest public good and the least private injury”, and that the property to be acquired “is necessary for the project”. These may not be general or *pro forma* statements; they must be specific to the land to be acquired and the project to be developed. *Id.*, at 108-09.

Having determined to take private property for public use, the City must pay the fair market value of the property to be taken (*i.e.*, “just compensation”). CCP § 1263.310. Code of Civil Procedure section 1263.320(a) defines fair market value as:

... the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

In eminent domain cases, the jury determines the fair market value of the property based on the highest and best use for which the property is geographically and economically adaptable. *San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 925. A “determination of the property’s highest and best use is not necessarily limited to the current zoning or land use restrictions imposed on the property; the property owner ‘is entitled to show a reasonable probability of a zoning [or other change] in the near future and thus to establish such use as the highest and best use of the property.’” *City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1028 [citations omitted].

“The highest and best use is defined as ‘that use, among the possible alternative uses, that is physically practical, legally permissible, market supportable, and most economically feasible....’” *San Diego Gas & Elec. Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1289.

The highest and best use for which the property is adaptable might not be its current use. [Citations omitted.] “The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.”

Olson v. United States (1934) 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236.

Thus, the fact that a property that is taken is not being used for its most profitable use is irrelevant to the compensation that must be paid. *People ex rel. Dept. of Transp. v. Woodson* (2001) 93 Cal.App.4th 954 (present market value of land taken by eminent domain must ordinarily be determined by consideration only of the uses for which the land is adapted and for which it is available); *City of Stockton v. Ellingwood* (1929) 96 Cal.App. 708 (that owner of property sought to be condemned is making only minor use of it cannot deprive him of higher market value for major use).

In sum, the fair market value of private property that is taken by eminent domain is its highest and best use, to the extent the market will support a price based on that use.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the subject of this report.

POSSIBLE FUTURE ACTION

None recommended.

FISCAL IMPACTS OF RECOMMENDATION:

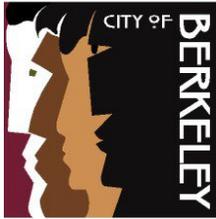
None.

CONTACT PERSON

Zach Cowan, City Attorney, 981-6950

Attachment:

- 1: June 14, 2016 Council item, “Limited Use of Eminent Domain on Vacant and Blighted Properties “



Berkeley City Council
Laurie Capitelli, District 5

CONSENT CALENDAR
June 14, 2016

To: Honorable Mayor and Members of the City Council
From: Councilmember Laurie Capitelli and Councilmember Darryl Moore
Subject: Limited Use of Eminent Domain on Vacant and Blighted Properties

RECOMMENDATION

Referral to the City Manager to report to Council on the feasibility of using eminent domain to enable the City to purchase vacant and/or blighted properties (both residential and commercial properties, and on vacant lands). The report should identify the scope of public use, including but not limited to: the development of affordable housing, public open space, and/or providing city services for our homeless population.

Consideration should be limited to:

1. Vacant, derelict or abandoned properties in commercial districts.
2. Vacant multi-unit residential buildings.

FINANCIAL IMPLICATIONS

Staff time.

BACKGROUND

It is estimated that over 100 residential buildings are vacant in our City. Commercial districts have numerous vacant commercial units that have languished for years negatively impacting entire business districts and City revenues.

Eminent domain is the power of the government to purchase private property for a "public use" so long as the property owner is paid "just compensation."¹ In *Kelo v. New London*, the Supreme Court allowed the use of eminent domain to facilitate the city's redevelopment and community enhancement efforts.² In *Hawaii Housing Authority v. Midkiff*, eminent domain was used to break up land oligopolies, again in the interest of serving the community.³ Finally, in *Berman v. Parker*, the Court upheld Congress' directive to redevelop parts of DC to enhance the conditions of those living in

¹[https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Documents-\(1\)/Eminent-Domain-Information-Pamphlet.aspx](https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Documents-(1)/Eminent-Domain-Information-Pamphlet.aspx)

² *Kelo et al. v. City Of New London et al.* <https://www.law.cornell.edu/supct/html/04-108.ZS.html>

³ *Hawaii Housing Auth. v. Midkiff* <https://supreme.justia.com/cases/federal/us/467/229/case.html>

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substandard housing.⁴ While this strategy has not been readily employed by many cities, there are significant precedent setting cases to justify the City of Berkeley considering this option as a way to acquire needed land to serve the public.

Berkeley and the Bay Area are experiencing a housing shortage and affordability crisis resulting in an increasingly urgent need for additional community services and amenities. While we are in the process of creating additional housing and programs, these gains are still insufficient to address the continually rising demands of our city, particularly for those residents most in need of housing, jobs, and education.

Social service programs and housing developments require adequate land which, in Berkeley, is in short supply. Our publically owned land is scarce. This referral requests that staff explore the possibility, in a very limited manner, of using eminent domain as a way to both acquire and convert vacant and blighted properties into public amenities, and to incentivize property owners to maintain their parcels. In either case, we would be serving Berkeley residents by using the property for much needed public benefits.

CONTACT PERSON

Councilmember Laurie Capitelli, District 5 (510) 981-7150

⁴ Berman v parker <https://supreme.justia.com/cases/federal/us/348/26/case.html>