# LAND USE SUPPLEMENTAL MATERIALS

## *Coastal and Wetlands Issues*

A good way to find information about the Coastal Commission and the Water Boards is to access their websites:

The State Water Resources Control Board's website is
**http://www.swrcb.ca.gov/**

The San Francisco Bay Regional Water Quality Control Board's website is
**http://www.swrcb.ca.gov/rwqcb2/**

The California Coastal Commission's website is
**http://www.coastal.ca.gov/**

*Note: In addition to the following cases, you may also want to look again at the Lucas decision of United States Supreme Court. The attached decision of the State Water Board, In the Matter of the Petition of Double Wood Investment provides an example of the work of California Regional Water Quality Boards.*

### Bolsa Chica Land Trust et al., Petitioners v. Superior Court

71 Cal.App.4th 493 (4th Dist. 1999)

Benke, J.

This case concerns development plans for a large tract of land in southern Orange County known as Bolsa Chica. Although the California Coastal Commission (Commission) approved a local coastal program (LCP) for Bolsa Chica, the trial court found defects in the program and remanded it to Commission for further proceedings. In this court both the opponents and proponents of the LCP contend that the trial court erred.

The opponents of the LCP contend the trial court erred in finding a planned relocation of a bird habitat was permissible under the Coastal Act. The proponents CP contend the trial court erred in preventing residential development of a wetlands area and in requiring preservation of a pond that would have been eliminated under the LCP in order to make room for a street widening. The proponents also attack the trial court's award of attorney fees to the opponents of the LCP.

We find the trial court erred with respect to relocation of the bird habitat. The Coastal Act does not permit destruction of an environmentally sensitive habitat area (ESHA) simply because the destruction is mitigated offsite. At the very least, there must be some showing the destruction is needed to serve some other environmental or economic interest recognized by the act.

We agree with the trial court's rulings as to the two substantive issues raised by the proponents of the LCP: on the record developed by Commission, neither residential development in the wetlands nor destruction of

the pond is permissible. With respect to the trial court's award of attorney fees, we find no abuse of discretion.

## Factual Background

Bolsa Chica is a 1,588-acre area of undeveloped wetlands and coastal mesas. Urban development surrounds Bolsa Chica on three sides. On the fourth side is the Pacific Ocean, separated from Bolsa Chica by a narrow strip of beach, coastal dunes and coastal bluffs.

Approximately 1,300 acres of Bolsa Chica consist of lowlands ranging from fully submerged saltwater in Bolsa Bay to areas of freshwater and saltwater wetlands and islands of slightly raised dry lands used by local wildlife for nesting and foraging. However, a large part of the lowlands is devoted to an active oil field and at one time the area was farmed.

The lowlands are flanked by two mesas, the Bolsa Chica Mesa on the north and the Huntington Mesa on the south. The Bolsa Chica Mesa consists of 215 acres of uplands hosting a variety of habitat areas. Although much of Huntington Mesa is developed, a long narrow undeveloped strip of the mesa abutting the lowlands is the planned site of a public park.

In 1973 the State of California acquired 310 contiguous acres of the Bolsa Chica lowlands in settlement of a dispute over its ownership of several separate lowland parcels and the existence of a public trust easement over other lowland areas.

In 1985 the County of Orange and Commission approved a land use plan for Bolsa Chica which contemplated fairly intense development. The 1985 plan allowed development of 5,700 residential units, a 75-acre marina and a 600- foot-wide navigable ocean channel and breakwater.

By 1988 substantial concerns had been raised with respect to the environmental impacts of the proposed marina and navigable ocean channel. Accordingly, a developer which owned a large portion of Bolsa Chica, a group of concerned citizens, the State Lands Commission, the County of Orange and the City of Huntington Beach formed the Bolsa Chica Planning Coalition (coalition). The coalition in turn developed an LCP for Bolsa Chica which substantially reduced the intensity of development. The coalition's LCP was eventually adopted by the Orange County Board of Supervisors. Commission approved the LCP with suggested modifications which were adopted by the board of supervisors.

As approved by Commission, the LCP eliminated the planned marina and navigable ocean channel, eliminated 3 major roads, reduced residential development from a total of 5,700 homes to 2,500 homes on Bolsa Chica Mesa and 900 homes in the lowlands and expanded planned open space and wetlands restoration to 1,300 EP The material features of the LCP which are in dispute here are: the replacement of a degraded eucalyptus grove on Bolsa Chica Mesa with a new raptor habitat consisting of nesting poles, native trees and other native vegetation on Huntington Mesa at the sight of the planned public park; the residential development in the lowland area which the LCP permits as a means of financing restoration of substantially degraded wetlands; and the elimination of Warner Pond on Bolsa Chica Mesa in order to accommodate the widening of Warner Avenue.

Throughout the approval process several interested parties and public interest groups, including the Bolsa Chica Land Trust, Huntington Beach Tomorrow, Shoshone-Gabrieleno Nation, Sierra Club and Surfrider Foundation (collectively the trust) objected to these and other portions of the LCP.

## Procedural History

On March 6, 1996, the trust filed a timely petition for a writ of mandate challenging the LCP. In addition to Commission, the petition named two local agencies, the County of Orange and the Orange County Flood Control District, as real parties in interest. The petition also named a number of landowners as real parties in interest. Of those landowners, only real parties in interest Koll Real Estate Group (Koll) and Fieldstone Company (Fieldstone) actively participated in the litigation.

On April 16, 1997, before the matter could be heard on the merits, Commission made a motion to have the LCP remanded to it so that Commission could reconsider the plan in light of the state's recent acquisition of

Koll's lowland property and the state's adoption of an independent plan to fund restoration of degraded portions of the lowlands.[1] All the other parties in the litigation opposed Commission's motion to remand. The trial court deferred ruling on the state's motion until it conducted a hearing on the merits. * * * * *

II. Standards of Review

The standards which govern our review of the trial court's decision are set forth in our opinion in *Sierra Club v. California Coastal Com.* (1993) 19 Cal.App.4th 547, 556-557 [23 Cal.Rptr.2d 534] (*Batiquitos Lagoon*): "Because this matter came to the trial court on a petition for a writ of mandate under Code of Civil Procedure section 1094.5, the trial court was obligated to determine 'both whether substantial evidence supports the administrative agency's findings and *whether the findings support the agency's decision*.' [Citation.] * * * * *

III. Administrative Interpretations

A recurring dispute among the parties concerns the level of deference which we must accord Commission's interpretation of the Coastal Act. The Supreme Court recently discussed the role of administrative interpretation at some length. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-13 [78 Cal.Rptr.2d 1, 960 P.2d 1031].) * * * * *

IV. Eucalyptus Grove

A. *History and Condition of the Grove*

The LCP would permit residential development over five acres of a six- and-one-half-acre eucalyptus grove on Bolsa Chica Mesa. The five acres where development would be permitted is owned by Koll; the remainder of the grove is owned by the state.

The eucalyptus grove is not native to the area and was planted almost 100 years ago by a hunting club which owned large portions of Bolsa Chica. Since the time of its planting, the original 20-acre grove has diminished considerably because of development in the area and the lack of any effort to preserve it. Indeed, although the eucalyptus grove was nine and two-tenths acres large as recently as 1989, it had shrunk to no more than six and one-half acres by 1994 and portions of it were under severe stress. According to expert testimony submitted to Commission, the grove is probably shrinking because of increased salinity in the soil.

Notwithstanding its current diminished and deteriorating condition, Commission identified the grove as an ESHA within the meaning of Public Resources Code section 30107.5.[2] The ESHA identification was based on the fact the grove provided the only significant locally available roosting and nesting habitat for birds of prey (raptors) in the Bolsa Chica area. At least 11 species of raptors have been identified as utilizing the site, including the white-tailed kite, marsh hawk, sharp skinned hawk, Cooper's hawk and osprey. According to Commission, a number of the raptors are dependent upon the adjacent lowland wetlands for food and the eucalyptus grove provides an ideal nearby lookout location as well as a refuge and nesting site.

B. *Section 30240*

Under the Coastal Act, Commission is required to protect the coastal zone's delicately balanced ecosystem. (§§ 30001, subds. (a)-(c), 30001.5, subd. (a); *City of San Diego v. California Coastal Com.* (1981) 119 Cal.App.3d 228, 233 [174 Cal.Rptr. 5]; *Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, 611 [15 Cal.Rptr.2d 779] (*Pygmy Forest*).) Thus in reviewing all programs and projects governed by the Coastal

---

[1]Financing for the state's acquisition of Koll's lowland holdings as well as its restoration plan was provided by the Ports of Los Angeles and Long Beach as mitigation for the dredging and expansion that the ports planned.

[2]All statutory references are to the Public Resources Code unless otherwise indicated.

Act, Commission must consider the effect of proposed development on the environment of the coast. (See *City of San Diego v. California Coastal Com., supra*, 119 Cal.App.3d at p. 234.)

In terms of the general protection the Coastal Act provides for the coastal environment, we have analogized it to the California Environmental Quality Act (CEQA) (§§ 21000-21174). (*Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Com.* (1976) 55 Cal.App.3d 525, 537 [127 Cal.Rptr. 775].) We have found that under both the Coastal Act and CEQA: " 'The courts are enjoined to construe the statute liberally in light of its beneficient purposes. [Citation.] The highest priority must be given to environmental onsideration in interpreting the statute [citation].' " (*Ibid.*)

In addition to the protection afforded by the requirement that Commission consider the environmental impact of all its decisions, the Coastal Act provides heightened protection to ESHA's. (*Pygmy Forest, supra*, 12 Cal.App.4th at p. 611.) Section 30107.5 identifies an ESHA as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." "The consequences of ESHA status are delineated in section 30240: '(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas. [¶] (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with continuance of those habitat and recreation areas.' Thus development in ESHA areas themselves is limited to uses dependent on those resources, and development in adjacent areas must carefully safeguard their preservation." (*Pygmy Forest, supra*, 12 Cal.App.4th at p. 611.)

Commission found that residential development in the eucalyptus grove was permissible under section 30240 because the LCP required that an alternate raptor habitat be developed on Huntington Mesa. Commission reasoned that section 30240 only requires that "habitat values" be protected and that given the deteriorating condition of the grove, creation of a new raptor habitat on Huntington Mesa was the best way to promote the "habitat values" of the eucalyptus grove.

The reasoning Commission employed is seductive but, in the end, unpersuasive. First, contrary to Koll's argument, we are not required to give great weight to the interpretation of section 30240 set forth by Commission in its findings approving the LCP. The interpretation was not contemporaneous with enactment of section 30240 or the result of any considered official interpretative effort and it did not carry any other of the indicia of reliability which normally requires deference to an administrative interpretation. (See *Yamaha Corp. of America v. State Bd. of Equalization, supra*, 19 Cal.4th at pp. 12- 13.)

Secondly, the language of section 30240 does not permit a process by which the habitat values of an ESHA can be isolated and then recreated in another location. Rather, a literal reading of the statute protects *the area* of an ESHA from uses which threaten the habitat values which exist in the ESHA. Importantly, while the obvious goal of section 30240 is to protect habitat values, the express terms of the statute do not provide that protection by treating those values as intangibles which can be moved from place to place to the needs of development. Rather, the terms of the statute protect habitat values by placing strict limits on the uses which may occur in an ESHA and by carefully controlling the manner uses in the area around the ESHA are developed. (*Pygmy Forest, supra*, 12 Cal.App.4th at p. 611.)

Thirdly, contrary to Commission's reasoning, section 30240 does not permit its restrictions to be ignored based on the threatened or deteriorating condition of a particular ESHA. We do not doubt that in deciding whether a particular area is an ESHA within the meaning of section 30107.5, Commission may consider, among other matters, its viability. (See *Pygmy Forest, supra*, 12 Cal.App.4th at pp. 614-615.) However, where, as is the case here, Commission has decided that an area is an ESHA, section 30240 does not itself provide Commission power to alter its strict limitations. (12 Cal.App.4th at p. 617.) There is simply no reference in section 30240 which can be interpreted as diminishing the level of protection an ESHA receives based on its viability. Rather, under the statutory scheme, ESHA's, whether they are pristine and growing or fouled and threatened, receive uniform treatment and protection. (See *Pygmy Forest, supra*, 12 Cal.App.4th at p. 617.)

In this regard we agree with the trust that Commission's interpretation of section 30240 would pose a

threat to ESHA's. As the trust points out, if, even though an ESHA meets the requirements of section 30107.5, application of section 30240's otherwise strict limitations also depends on the relative viability of an ESHA, developers will be encouraged to find threats and hazards to all ESHA's located in economically inconvenient locations. The pursuit of such hazards would in turn only promote the isolation and transfer of ESHA habitat values to more economically convenient locations. Such a system of isolation and transfer based on economic convenience would of course be completely contrary to the goal of the Coastal Act, which is to protect *all* coastal zone resources and provide heightened protection to ESHA's. (§§ 30001, subds. (a)-(c), 30001.5, subd. (a); *Pygmy Forest, supra*, 12 Cal.App.4th at p. 613.)

In short, while compromise and balancing in light of existing conditions is appropriate and indeed encouraged under *other* applicable portions of the Coastal Act, the power to balance and compromise conflicting interests cannot be found in section 30240.

C. *Section 30007.5*

Koll argues that even if transfer of habitat values was not permissible under section 30240, such a transfer was permissible under the provisions of section 30007.5 and our holding in *Batiquitos Lagoon*. Section 30007.5 states: "The Legislature further finds and recognizes that conflicts may occur between one or more policies of the [Coastal Act]. The Legislatre therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner which on balance is the most protective of significant coastal resources. In this context, the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies."

In *Batiquitos Lagoon* we were confronted with "the conflicting interests of fish and fowl." (*Batiquitos Lagoon, supra*, 19 Cal.App.4th at p. 550.) Each interest was protected by a specific provision of the Coastal Act: The fish were protected by section 30230 which directed that marine resources be preserved and, where feasible, restored; the fowl were protected by the requirement of section 30233, subdivision (b), that the very substantial dredging needed to restore the fish habitat avoid significant disruption of the bird habitat. We found that under section 30007.5, Commission could resolve these conflicting policy interests by favoring long-term restoration of the fish habitat over the short-term, but significant, disruption of the bird habitat. (19 Cal.App.4th at p. 562.)

Here, in contrast to the situation in *Batiquitos Lagoon*, the record at this point will not support application of the balancing power provided by section 30007.5. Unlike the record in that case, here our review of the proceedings before Commission does not disclose any policy or interest which directly conflicts with application of section 30240 to the eucalyptus grove. (See *Pygmy Forest, supra*, 12 Cal.App.4th at p. 620.)

Although the Coastal Act itself recognizes the value and need for residential development (see §§ 30001.5, subd. (b), 30007), nothing in the record or the briefs of the parties suggests there is such an acute need for development of residential housing in and around the eucalyptus grove that it cannot be accommodated elsewhere. (Cf. *Pygmy Forest, supra*, 12 Cal.App.4th at p. 620 [no showing residential development needed in ESHA's].) Rather, the only articulated interests which the proposed transfer of the "habitat values" serves is Commission's expressed desire to preserve the raptor habitat values over the long term and Commission's subsidiary interest in replacing nonnative eucalyptus with native vegetation. However, as the trust points out, there is no evidence in the record that destruction of the grove is a prerequisite to creation of the proposed Huntington Mesa habitat. In the absence of evidence as to why preservation of the raptor habitat at its current location is unworkable, we cannot reasonably conclude that any genuine conflict between long-term and short-term goals exists.

In sum then the trial court erred in sustaining that portion of the LCP which permitted development of the eucalyptus grove.

V. Lowland Wetlands[3] [FN3]

The Coastal Act provides a srate protection regime for wetlands. Under section 30121: " 'Wetland' means lands within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens."

Section 30233, subdivision (a), protects wetlands by providing: "The diking, filling, or dredging of ... wetlands ... shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

"(1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.

"(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

"(3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. The size of the wetland area used for boating facilities, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities shall not exceed 25 percent of the degraded wetland.

"(4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

"(5) Incidental public service purposes, including, but not limited to, burying cables and pipes or inspection of pier and maintenance of existing and outfall lines.

"(6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.

"(7) Restoration purposes.

"(8) Nature study, aquaculture, or similar resource-dependent activities."

Although section 30233, subdivision (a), permits development of wetland areas when needed as a means of accommodating a whole host of varied uses, residential development is not a use permitted in wetlands. Nonetheless Commission found that residential development of portions of the Bolsa Chica lowlands was permissible, even though it would require destruction of otherwise protected wetlands, because the development would be usece needed restoration of other degraded portions of the wetlands.

Commission reasoned that, although section 30233, subdivision (b), does not expressly permit residential development of wetlands, authority for such development can be found in the related provisions of section 30411, subdivision (b). Section 30411, subdivision (b), states: "The Department of Fish and Game, in consultation with the commission and the Department of Boating and Waterways, may study degraded wetlands and identify those which can most feasibly be restored in conjunction with development of a boating facility as provided in subdivision (a) of Section 30233. Any such study shall include consideration of all of the following:

"(1) Whether the wetland is so severely degraded and its natural processes so substantially impaired that it is not capable of recovering and maintaining a high level of biological productivity without major restoration activities.

"(2) Whether a substantial portion of the degraded wetland, but in no event less than 75 percent, can be

---

[3] Commission contends the propriety of the trial court's rulings on the lowland wetlands and the Warner Avenue Pond issues are moot in light of the acquisition of the lowland wetlands by the state and Koll's agreement to limit development on Bolsa Chica Mesa. However, the propriety of the trial court's award of attorney fees depends in part on the propriety of its ruling on these issues, and thus we are required to consider them on the merits. (See *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1751 [12 Cal.Rptr.2d 308].)

restored and maintained as a highly productive wetland in conjunction with a boating facilities project.

"(3) Whether restoration of the wetland's natural values, including its biological productivity and wildlife habitat features, can most feasibly be achieved and maintained in conjunction with a boating facility or whether there are other feasible ways to achieve such values."

Commission found that section 30411, subdivision (b)(3), permits wetland restoration to be achieved by way of any means which are more feasible than development of boating facilities. Because the county had previously found that development of a marina at Bolsa Chica was not feasible, Commission further reasoned that "residential development qualifies as a more feasible method of achieving restoration ... since the construction and sale of the Lowland residential units would fund the restoration program and allow it to be implemented."

The trial court rejected Commission's reasoning. The trial court stated: "Section 30411 [, subdivision (b),] also does not authorize residential development. Rather, it authorizes the Department of Fish and Game to study and identify which degraded wetlands can feasibly be restored in conjunction with the development of a boating facility. In conducting its study, the Department of Fish and Game must consider whether the restoration of the wetlands' values can be achieved and maintained in conjunction with a boating facility 'or whether there are other feasible ways to achieve such values.' The most logical interpretation of the quoted language, construed in light of the Coastal Act as a whole, requires the Department of Fish and Game to consider whether alternatives less intrusive than developing a boating facility are feasible. The Commission's interpretation would open the door to any type of development in a wetland whenever a finding could be made that funds were otherwise unavailable to restore degraded wetlands." We agree with the trial court.

First, we note the trial court's interpretation comports with the plain meaning of section 30411, subdivision (b), which expressly limits the power of the Department of Fish and Game to the *study* of boating projects authorized by section 30233233, subdivision (a). There is nothing on the face of section 30411, subdivision (b), which *authorizes* the development of residential projects in wetland areas or for that matter authorizes any development which is not permitted by section 30233.

Moreover, the alternative analysis required by section 30411, subdivision (b)(3), cannot be read to inferentially permit the development of facilities which are not otherwise permitted by section 30233, subdivision (a). By its terms section 30233, subdivision (a), purports to set forth the purposes, in their entirety, for which coastal wetlands can be developed. If the Legislature intended that residential development of wetlands was to be permitted, logic would suggest that such a use be set forth unambiguously on the face of section 30233, subdivision (a), rather than as an implied power under section 30411, subdivision (b)(3).

Another difficulty with Commission's interpretation of section 30411 is that the power to study the feasibility of boating facilities rests with the Department of Fish and Game, not Commission. We think it would be somewhat incongruous to provide the Department of Fish and Game with the power to determine, by way of a study, when residential development may occur in a coastal wetland. That power, it would seem, would be more appropriately directly exercised by Commission. Indeed section 30411, subdivision (a), provides, in pertinent part: "The Department of Fish and Game and the Fish and Game Commission are the principal state agencies responsible for *the establishment and control of wildlife and fishery management programs.*" (Italics added.) There is nothing in the Coastal Act or any other provision of law, which suggests the Department of Fish and Game has any expertise with respect to the need for or impacts of residential development in the coastal zone.

We are also unpersuaded by the fact that Commission's interpretation has been set forth in interpretative guidelines it adopted pursuant to authority granted to Commission under section 30620, subdivision (b). (See *California Coastal Com. v. Office of Admin. Law* (1989) 210 Cal.App.3d 758, 761-762 [258 Cal.Rptr. 560].) Although, because the guidelines were subject to a formal review and adoption process analogous to the Administrative Procedure Act (Gov. Code, § 11340 et seq.) and for that reason are entitled to great weight (*Coronado Yacht Club v. California Coastal Com.* (1993) 13 Cal.App.4th 860, 868 [17 Cal.Rptr.2d 10]), here the guidelines themselves obliquely recognize that Commission's interpretation expands the uses and processes contemplated by sections 30233 and 30411. The guidelines describe a process under which developers, agencies

and Commission, rather than the Department of Fish and Game, consider alternatives to boating facilities. Importantly, however, the guidelines conc "The Coastal Act does not require the Department of Fish and Game to undertake studies which would set the process described in this section in motion.... This section is, however, included to describe, clarify, and encourage, public and private agencies to formulate innovative restoration projects to accomplish the legislative goals and objectives described earlier." In light of the express limitation which appears on the face of section 30233 and the express delegation of responsibility to the Department of Fish and Game under section 30411, Commission's admittedly innovative interpretation cannot be sustained.

In short, the trial court's interpretation is supported by the plain language of the statute, the need to give significance to every word and phrase of the statute and the requirement that "statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67, 743 P.2d 1323].) Thus we find no error in the trial court's finding that residential development of the lowland wetlands was not permitted.

VI. Warner Avenue Pond

The parties agree Warner Avenue Pond, which is located on Bolsa Chica Mesa, is both an ESHA within the meaning of section 30107.5 and a wetland within the meaning of section 30121. As we have noted under section 30240, the habitat values in an ESHA may not be significantly disrupted and no use of an ESHA may occur which is not dependent on resources which exist in the ESHA. As we have also noted under section 30233, subdivision (a), wetlands are protected by specific limitations with respect to uses which may occur in a wetland and by the requirement that there be no feasible less environmentally damaging alternative to diking, filling or dredging of a wetland.

In approving the LCP, Commission found Warner Avenue Pond could be filled to permit the widening of Warner Avenue and that the filling could be mitigated by offsite restoration of other wetlands on a ratio of four to one. Commission found that widening of the road was an "[i]ncidental public service" within the meaning of section 30233, subdivision (a)(5), and therefore a permissible use of the wetland. Commission's findings do not discuss the pond's status as an ESHA.

The trial court found Commission's findings were inadequate. The trial court reasoned that in this instance the protection provided by section 30240 to ESHA's and the development permitted by section 30233, subdivision (a)(5), were conflicting policies within the meaning of section 30007.5 which empowered Commission to resolve such policy conflicts in a manner which is "most protective of coastal resources." (§ 30007.5, *Batiquitos Lagoon, supra*, 19 Cal.App.4th at pp. 562-563.) However the trial court further found that in order to exercise its power under section 30007.5, Commission was required by section 30200, subdivision (b), to make findingsch identified and resolved the policy conflict. The trial court concluded Commission's findings did not meet these requirements.

We agree with the trial court that Commission's findings were inadequate with respect to Warner Avenue Pond. However, we reach that conclusion by way of a somewhat different analytical path. In particular, we do not believe the policies embodied in sections 30240 and 30233 are in direct conflict necessitating resort to the power provided by section 30007.5. Rather, in this instance we agree with Commission's guidelines that the ESHA protections provided by section 30240 are more general provisions and the wetland protections provided by section 30233 are more specific and controlling when a wetland area is also an ESHA. The guidelines state: "The Commission generally considers wetlands, estuaries, streams, riparian habitats, lakes and portions of open coastal waters to be environmentally sensitive habitat areas because of the especially valuable role of these habitat areas in maintaining the natural ecological functioning of many coastal habitat areas and because these areas are easily degraded by human developments. In acting on an application for development [of] one of these areas, the Commission considers all relevant information. The following specific policies apply to these areas: Sections 30230; 30231; 30233; and 30236. Section 30240, a more general policy, also applies, but the more specific language in the former sections is controlling where conflicts exist with general provisions of Section

30240 (e.g., port facilities may be permitted in wetlands under Section 30233 even though they may not be resource dependent). This guideline addresses wet environmentally sensitive habitat areas only. The discussion in this section and in section VII is not intended to describe or include all environmentally sensitive habitat areas which may fall under Section 30240 of the Coastal Act."

The guidelines go on to provide: "Of all the environmentally sensitive habitat areas mentioned specifically in the Coastal Act, wetlands and estuaries are afforded the most stringent protection. In order to approve a project involving the diking, filling, or dredging of a wetland or estuary, the Commission must first find that the project is one of the specific, enumerated uses set forth in Section 30233 of the Act (these developments and activities are listed in section A. and B. below). The Commission must then find that the project meets all three requirements of Section 30233 of the Act (see pp. 14-17). In addition, permitted development in these areas must meet the requirements of other applicable provisions of the Coastal Act.

"A. *Developments and Activities Permitted in Wetlands and Estuaries*

"1. Port facilities.

. . . . . .

"5. Incidental public service purposes *which temporarily impact the resources of the area,* which include, but are not limiturying cables and pipes, inspection of piers, and maintenance of existing intake and outfall lines (*roads do not qualify*)." (Italics added, fns. omitted.)

Significantly, by way of a footnote Commission explains that "incidental services" may include, under certain circumstances, road expansion: "When no other alternative exists, and when consistent with the other provisions of this section, limited expansion of roadbeds and bridges necessary to maintain existing traffic capacity may be permitted."

We agree with these aspects of Commission's guidelines. We note Commission's determination that section 30233, subdivision (a), was meant to supplant the provisions of section 30240 is supported by section 30233, subdivision (a)(6), which permits mineral development in wetlands "*except in environmentally sensitive areas.*" (Italics added.) Because none of the other permitted wetland uses set forth in section 30233, subdivision (a), have such an express exception for ESHA's, the inference arises that had the drafters intended the uses permitted by section 30233, subdivision (a), to be subject to ESHA protection, they would have made their intention explicit.

In addition to the inferential support found by reference to section 30233, subdivision (a)(6), Commission's interpretation is also supported by a broader view of the statutory scheme. Wetland ESHA's are unique in that although like all ESHA's they need extraordinary protection, there are important activities such as fishing, boating, shipbuilding and other commercial and industrial activities which of necessity may occur on or near wetland areas. Importantly, the value of such activities is specifically recognized by the act and Commission is empowered to permit them to occur notwithstanding their adverse impact on coastal resources. (See §§ 30001.2, 30708.)

The activities which may occur in wetland areas are, as Commission noted, set forth with great specificity and detailed limitation in section 30233, subdivision (a). Such specificity and detail does not occur either in the general provisions accommodating industrial and commercial uses (see §§ 30001.2, 30708) or in the limitation on ESHA development set forth in section 30240. Given that section 30233, subdivision (a), provides specific and detailed limitation on the uses permitted in wetland areas, we believe it was reasonable for Commission to conclude that with respect to wetland ESHA's, section 30233, subdivision (a), is a more specific guideline for what may occur in a wetland ESHA than either the accommodation of development expressed in sections 30001.2 and 30708 or the more general limitation set forth in section 30240.

Practicality, as well as the need to maintain a consistent level of wetland protection, suggests that development of wetland ESHA's is governed by the very specific and uniform limitations set forth in section 30233, subdivision (a), rather than by way of the essentially ad hoc balancing process permitted by section 30007.5. Given the myriad of wetland areas which exist in the coaste inherent conflict between the permissive policy expressed in sections 30001.2 and 30708 and the restrictive policy of section 30240, in the absence of the limitation set forth in section 30233, subdivision (a), case-by-case balancing of interests under section 30007.5

would be repeatedly required.

Although we accept Commission's interpretation of sections 30233 and 30240, we do not accept Commission's application of that interpretation to Warner Avenue Pond. In particular we note that under Commission's interpretation, incidental public services are limited to temporary disruptions and do not usually include permanent roadway expansions. Roadway expansions are permitted only when no other alternative exists and the expansion is necessary to maintain existing traffic capacity. As the trust points out, Commission found that the widening of Warner Avenue was needed to accommodate future traffic created by local and regional development in the area. Contrary to Koll's argument, this limited exception cannot be extended by finding that a roadway expansion is permissible when, although it increases the vehicle capacity of a roadway, it is designed to maintain an existing level of traffic service. Such an interpretation of the exception would entirely consume the limitation Commission has put on the incidental public services otherwise permitted by section 30233, subdivision (a)(2).

In sum then, like the trial court we find that the LCP is defective insofar as it approves the filling of Warner Avenue Pond.

* * * * *

Disposition

The trust's petition is granted in part and the superior court is directed to grant the trust's administrative mandamus petition with respect to the eucalyptus grove; in all other respects, the parties' petitions are denied. Trust to recover its costs.

Work, Acting P. J., and Huffman, J., concurred.

**Sierra Club v.California Coastal Commission**
**County of Mendocino,Real Party in Interest**
12 Cal.App.4th 602 (1993)

SMITH, J.

The Sierra Club petitioned the superior court for a writ of mandate (Code Civ. Proc., § 1094.5) against a decision of the California Coastal Commission (Commission) approving and certifying a land- use plan (LUP) of real party in interest, the County of Mendocino (County), as consistent with the California Coastal Act of 1976 (Coastal Act or Act) (Pub. Resources Code, § 30000 et seq.).[1] The Commission and County appeal from the court's issuance of a peremptory writ commanding the Commission to set aside its approval for failure to confer environmentally sensitive habitat area (ESHA) status (§§ 30107.5, 30240) on pygmy forest areas. We affirm.

*Background*

The Coastal Act requires a coastal county to have a local coastal program (LCP), including an LUP, which meets the requirements of, and implements the provisions and policies of, the Coastal Act at the local level. (§§ 30108.6, 30100.5.)

A county may ask the Commission to prepare all or part of an LCP (§ 30500, subd. (a)), and that happened here. The County in 1978 asked the Commission to draft a coastal LUP (the coastal element of its general plan), and the Commission, after public hearings and input from staff and citizen advisory committees, produced a consultant-prepared draft in November 1980 (augmented with staff and committee comments in April 1981) for County review.

The draft in part identified 'pygmy' and 'pygmy-type' vegetation in the coastal zone, noting that its preservation was threatened: 'Two types of pygmy vegetation exist along the Mendocino coast. Both are characterized by stunted trees but have different soil and vegetation types. True pygmy forests are valuable to scientists because they are probably the best example of a living community in balance with its ecosystem. Pygmy forest vegetation covers about 1,050 acres in the coastal zone, including areas in public ownership at Jughandle State Reserve and Van Damme State Park. Pygmy-type forest accounts for about 1,120 acres, mainly between Pt. Arena and Haven's Neck. Because pygmy vegetation is found in a section of the coast experiencing development pressures and because it yields no revenue from agriculture or timber, its preservation has become an issue. An immediate environmental concern is the ability of pygmy soils to provide satisfactory leaching fields for septic systems. Five acres per dwelling unit appears to be the maximum satisfactory density in pygmy soils, and an even lower density may be necessary in some areas. ...'

The draft did not mention ESHA status for those areas but included a policy limiting density to one housing unit every five acres and addressing the perceived leach-field problem.[1]

The County held its own public hearings on the draft, and its planning commission and board of

---

[1]All undesignated section references are to the Public Resources Code.

[1]'3.1-20 Development within areas of pygmy and pygmy-type vegetation shall be limited to one housing unit per five acres and shall be approved only upon demonstration that two satisfactory septic system leach fields exist. Parcels shall not be divided in a manner that would create building sites or leach fields in areas of pygmy vegetation. This policy shall take precedence over parcel size and density standards specified by the land use classification shown on the Land Use Plan map.'

The draft also contained these definitions: 'Pygmy Vegetation A stunted forest, 2-12 feet in height occurring on soils allowing little vegetation growth, such as Noyo or Blacklock soils, and characterized by cypresses, hairy Manzanita, beach pines, and pygmy Mendocino bishop pines. [¶] Pygmy- type Vegetation. A forest occurring south of the Navarro River, mainly on Gualala series soils, characterized by stunted vegetation on sites with low commercial timber value. Plant species include knobcone pines and manzanita.'

supervisors adopted it with various revisions, none of which conferred ESHA status on the pygmy areas. The draft was referred by resolution to the Commission for certification consideration in late 1983.

The Commission held a public hearing on the adopted LUP on May 8, 1985, and found substantial issue as to Coastal Act consistency. The Commission unanimously denied certification of the LUP as submitted, in part due to concern that ESHA designation was not given to pygmy forests.[2]

The County had requested suggestions for curative modifications should certification be denied (§ 30512, subd. (b)), and the Commission continued the matter for alternatives to be worked out. The County proposed mitigation measures short of ESHA designation (except where endangered species might be found), but a September 12, 1985, Commission staff report adhered to the need for ESHA status for pygmy forests plus greater protection of pygmy and pygmy- type vegetation generally, including supporting soils.[3] The County responded formally, standing by its mitigation measures in lieu of ESHA designation.

The Commission reopened consideration of the suggested modifications and took additional testimony at a lengthy hearing on September 26. At its conclusion, a divided Commission voted to approve the LUP as amended to include the County's mitigating measures rather than the staff proposals for ESHA designation.

The approved LUP regulated 'pygmy vegetation,' limited to 'stunted forest' and excluding pygmy-type vegetation or mere pygmy soils.[4] It denied ESHA status to regulated forests unless they contained rare or endangered plant species. However, development of pygmy vegetation land was limited to 'low density (defined as 2 to 5 acres),' consistent with County water-quality and ecosystem regulations, with further study of environmental impacts to follow. Parcels 'entirely within' pygmy vegetation areas required planned development

---

[2] A Commission staff report prepared for the May 8 hearing recommended increasing protection for pygmy and pygmy-type vegetation by tightening the language of LUP policy numbers 3.1-20 (fn. 2, ante) and 3.1-21. It also recommended modifying 3.1-21 to give ESHA status to actual pygmy forests by the following language (proposed changes indicated by strike-overs and italics): 'Pygmy forests are unique ecosystems which may contain species of rare or endangered plants and are environmentally sensitive habitat areas.'

[3] The September 12 staff report said of pygmy forests: 'Extensive input was received at the May 8 hearing about the uniqueness and value of this ecosystem. Additional correspondence was received after the hearing which substantiates the Commission's finding that the pygmy forest is an ESHA as defined in Section 30107.5 of the Coastal Act. ... The policy which the County has proposed in their response to the suggested modifications (Policy 3.1-21) does not recognize the pygmy forest ecosystem as an ESHA, as their definition limits the ESHA to that with rare or endangered species. If the suggested modification [in this report] is adopted, the pygmy forest would be recognized as an ESHA as defined in Section 30107.5 of the Coastal Act. Thus, appropriate protection would be provided to this ecosystem by preventing developments which are not dependent upon the resources[,] consistent with Section 30240 of the Coastal Act.'

The report urged revising policy number 3.1-20 to restrict development on pygmy and pygmy-type soils. Policy 3.1-21 would read in part 'Pygmy forests are unique ecosystems with a very limited distribution, which can be easily degraded by human activities and therefore are environmentally sensitive habitat area. These pygmy forests may also contain species of rare or endangered plants. ...'

[4]The definition reads (changes shown): 'Pygmy Vegetation. A stunted forest, with mature vegetation the majority of which is approximately 2-12 feet in height occurring on soils with conditions which severely limit the growth of vegetation such as Blacklock soils, and characterized by Mendocino cypresses, Fort Bragg Manzanita, Bolander pines, and pygmy Mendocino bishop pines.'

New Policy 3.1-21 reads in part (revisions noted): 'Pygmy forests are unique ecosystems which may contain species of rare or endangered plants and if they do they are environmentally sensitive habitat areas. Other pygmy forest areas that do not contain species of rare or endangered plants will not be included in the environmentally sensitive habitat areas.

'New development on parcels with pygmy vegetation shall be located in the least environmentally damaging locations and shall minimize the removal of native vegetation and alteration of natural landforms. Within two years or sooner after certification the Local Coastal Plan, Mendocino County shall correct review and evaluate the Land Use and Habitat/Resource Maps to reflect those specific habitat areas of pygmy forest for habitat protection. Because of the quality of habitat, suitability for scientific and educational study, or presence on rare and/or endangered plants, additional protection may or may not be required. ...'

(PD) with measures designed to mitigate adverse environmental and septic concerns.[5]

After formal adoption of the modified LUP by the County's board of supervisors, the Commission on November 20, 1985, certified it and on February 7, 1986, adopted supporting findings.

The Sierra Club meanwhile filed this action for writ of mandate in superior court two days after the November 1985 certification. The petition challenged in part the Commission's failure to require ESHA status for pygmy forest habitat. Due to the County's party status, venue was transferred by stipulation to Marin County (see § 30806, subd. (a)), where the court heard the matter in 1991, confined by then to the ESHA issue.

The court by a written decision concluded that the Commission's decision to certify the LUP without designating and treating the pygmy forest as an ESHA was not supported by substantial evidence in light of the whole record (Code Civ. Proc., § 1094.5, subd. (c)). The court ordered the issuance of a peremptory writ commanding the Commission to set aside its findings and order regarding pygmy forests, to set aside that part of the County LCP and to reconsider its action on remand.

*Discussion*

* * * * *

II

At issue is whether substantial evidence supports the Commission's decision to deny ESHA status to pygmy forests. Section 30107.5 provides this two-part test for ESHA status (numbering ours): ' 'Environmentally sensitive area' means any area [1] in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and [2] which could be easily disturbed or degraded by human activities and developments.'

The consequences of ESHA status are delineated in section 30240: '(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas. [¶] (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.' Thus development in ESHA areas themselves is limited to uses dependent on those resources, and development in adjacent areas must carefully safeguard their preservation.

The Commission ultimately decided that pygmy forests do not require ESHA designation. Its findings

---

[5]Policy 3.1-20 reads (changes noted): 'Soil constraints to conventional septic tank and leach field systems such as those on Noyo and Blacklock soils and similar soils shall be recognized and the use of alternative systems shall be encouraged. Water quality control regulations shall be enforced. Mendocino County Department of Environmental Health shall be directed to assess the ability of Noyo/Blacklock soils and soils with similar development constraints to accommodate new development, without adverse impacts, to either the ecosystem or water quality affecting existing residents. Mendocino County Department of Environmental Health shall use the available U.S.D.A. SCS Soils Maps and the Water Quality Control Board documents to assess the cumulative impacts of sewage disposal systems in evaluating these development constraints.

'Limit new development on soil types characterized by pygmy type vegetation to a low density (defined as 2 to 5 acres) as consistent with County Department of Environmental Health recommendations. Within two years of the certification of the Local Coastal Plan and, at regular intervals thereafter, the Mendocino County Department of Environmental Health shall report any adverse impacts from new development in areas of pygmy vegetation. If adverse impacts have occurred, further limits on new development shall be imposed pending mitigation measures.

'Parcels entirely within areas of pygmy vegetation shall be designated Planned Development (PD). Such parcels shall be allowed to develop consistent with all applicable policies of this plan if mitigation measures are adopted and implemented to prevent or avoid impacts such as: erosion, surface-groundwater contamination, extensive vegetation removal and other related concerns. The County shall request that the U.S.D.A. SCS Soils mapping project be completed as soon as possible which will identify parcels that may be removed from the PD requirement. Parcels containing pygmy vegetation shall be allowed to divide only if each new parcel being created has an adequate area available for a residence with a conventional septic system allowing for a 100% back-up area for an alternate leach field.'

acknowledge the unique qualities and value of pygmy forests and that adverse impacts can be expected from development. However, the findings also cite the facts that some pygmy forests along the coast are already protected and that the remainder, while not given full ESHA protection, will be partially protected through mitigation measures prescribed in the LUP, particularly the PD process, so as to minimize adverse impacts.[6] The Commission thus concluded that controls short of ESHA protection satisfy the Coastal Act.

*Rare or valuable habitat*

Our review of the record shows that the pygmy forest is a rare or valuable habitat qualifying for protection under ESHA's first prong (§ 30107.5). There is no substantial evidence to the contrary and no dispute about what characterizes the habitat.

Pygmy forest features severely stunted vegetation, with mature tree growth reaching just two to twelve feet. This is caused by a combination of highly acidic and nutrient-starved soils, cramped root growth, and winter flooding. It is an ecosystem dependent on that peculiar confluence of conditions and has evolved over the millennia on a series of rising, step-like marine terraces, each representing about 100,000 years of plant-soil succession. The surface soils, originally formed of beach deposits, allow rains to leach the soil of nutrients, while a layer of dense hardpan lying just beneath the surface traps water, allowing it to stand. Horizontal layers of bedrock some 10 to 30 feet down aggravate the effect. During winter months of heavy rains, this creates prolonged flood-like conditions, a shallow water table just beneath the surface. On the upper terraces, the hardpan is also impenetrable to roots, creating a natural bonsai-like condition which, together with the poor soil nutrients, stunts growth. Trees like the Mendocino cypress and Bolander pine are among those which have managed to adapt in the hostile habitat.

The record conclusively shows pygmy forest to be a rare and valuable habitat. The Commission's own findings call it 'a unique ecosystem' (fn. 8, ante) and echo expert testimony that it 'allow[s] scientists to review 'the longest and most complete record of geological plant succession know[n]-between one-half and one million years.' ' The habitat is the subject of worldwide scientific interest and study, plus lay interest, drawing 45,000 visitors yearly to stands of pygmy forest in the Jughandle State Reserve alone. The habitat is unique in the world

---

[6]'1. Much of the pygmy forest is in public ownership: Jughandle State Reserve, Van Damme State Park and Jackson State Forest, all including Pygmy forest areas, are already protected.

'2. The Commission, since its creation, has never designated pygmy forest as an ESHA, nor [do] the Commission's 'Statewide Interpretive Guidelines' descriptions of ESHA include pygmy forest.

'3. No past Commission permit decisions have recognized pygmy forests as being ESHA.

'4. The pygmy forest area has already been extensively developed as a residential area.

'5. The ESHA designation of an entire parcel would prohibit the development of a single family residence or any other use which is not dependent on the resource (i.e. scientific study).

'6. Although the County's adopted policy section 3.1-20 states that parcel sizes in pygmy forest areas can be 2 and 5 acres, the impact of this is minimal: the only RR-2 and RR-5 pygmy areas are those already divided into small parcels. Other pygmy areas are designated as low density RR-10, RMR- 20, RMR-40 and FL-160. With these densities, approximately 12 parcels can be created, and this would have minimal impact to the area.

'7. The County's proposed modifications to Policies 3.1-20 and 3.1-21 recognize pygmy forest as a unique ecosystem with the potential of being adversely impacted by development unless strict controls are applied. ...

'8. The County recognizes that pygmy forests which contain a species of rare or endangered plants are to be accorded ESHA status and that the protections of Section 30240(a) would apply to those areas. Based upon the above considerations, the Commission finds no compelling reasons to extend the ESHA designation in the [LUP] to pygmy forest areas generally at this time. ... [T]he Commission adopts the County's proposed modifications of policies 3.1-20 and 3.1-21. ... Acceptance by the County of these recommended modifications would provide adequate protection for those pygmy forest areas which may qualify for ESHA status and satisfy the requirements of Section 30240(a) of the Act, as well as extending extra protection to those areas of pygmy forest not designated ESHA, but which because of their unique place in the ecosystem require extra development controls. Although some adverse impacts on pygmy forest resources can be expected with implementation of these policies, these impacts will not be substantial enough to warran[t] adoption of alternatives or further mitigation.'

and is found almost exclusively within Mendocino County. (The record indicates that some areas of pygmy soils have been identified in Sonoma County, where they are protected against all development.) The County has 1,050 acres of it, some amount of that being not in the coastal zone, but further inland.

Arguing against the rare-or-valuable-habitat prong, the County and Commission point to evidence and findings that significant portions of pygmy forest are already preserved in Jughandle State Reserve, Van Damme State Park and Russian Gulch State Park. However, this hurts more than helps them. The fact that, as the Commission found, the Pygmy Forest Reserve in Jughandle State Reserve 'was designated as a National Registered Natural Landmark' in 1969, hardly justifies the denial of ESHA status to the few pygmy forest habitats existing elsewhere in the county. Nothing in the Coastal Act allows denial of ESHA status to rare or valuable habitats just because they are partially protected outside the aegis of the Act. The Act demands the permanent protection and maintenance of coastal zone resources (§§ 30001, subds. (a)-(c), 30001.5, subd. (a)), with heightened protections for ESHA's (§ 30240). To allow the destruction of ESHA areas through development simply because some of the habitat is preserved in parks would undermine the protective goal. It would relegate parts of rare habitat to parks and hasten the same habitat's loss elsewhere. We reject that view of the Act.

We are also not persuaded that the existence of pygmy forest areas outside the coastal zone allowed the Commission to discount the overall habitat's special value or rarity. The Commission, noting some uncertainty about existing inventories and mapping of pygmy forest areas, found that there were about 1,050 acres of it situated on sea-cut terraces 'in and out' of the coastal zone between Fortt Bragg and the Navarro River, some found in 'scattered patches.'[7] The Commission did not find how much acreage is outside the coastal zone. However, it is clear from all record descriptions of the habitat (i.e., that they were formed from beach soils on marine terraces along the coast) that the areas lying outside the coastal zone are near it. The habitat is a coastal phenomenon, but the Act's exacting definition of 'coastal zone' (§ 30103, subd. (a) [inland 1,000 yards from the mean tide line or, in some areas, the lesser of 5 miles or the distance to the first major ridgeline]) will often arbitrarily divide such a habitat.

The point here is that pygmy forest appears from the record to be a uniquely coastal habitat. The fact that 'some' undetermined part of it extends over the coastal zone boundary cannot excuse the Commission's failure to find it a rare or especially valuable habitat meriting ESHA status. There is no merit to the suggestion in the Commission's briefing that ESHA status is reserved for 'a unique, rare ecosystem found only in the coastal zone' (italics ours). The existence of a habitat throughout a county would obviously affect whether that habitat, as found in the coastal zone, is rare or valuable. However, our record merely shows a coastline habitat which in places extends over the coastal zone line.

The Commission and County cite testimony by landowner Jacques Helfer: '[T]he Pygmy Forest is not one forest. It's a scattered patch of pieces of Pygmy Forest. The very best corridor with large segments of each of the five terraces is that transect at Jug Handle Creek and that has been preserved. [¶] There are in addition significant patches of Pygmy Forest in Russian Gulch State Park and in Van Damme State Park, completely protected. It is not necessary to protect every last patch of Pygmy Forest. ...'

A recurrent theme in the briefing is that given the Commission's supported findings that pygmy forest existed in 'scattered patches' and that significant patches were already protected (fn. 9, ante), the Commission was entitled to conclude that not 'all' patches of pygmy forest had to be given ESHA protection.

The trouble with the argument, however, is that the Commission refused to give ESHA status to any pygmy forest. The Commission and County are caught up in hyperbole, accusing their opponent of wanting all pygmy forest protected, regardless of how scattered or transitional the patches. The court's judgment ordered no

---

[7]"The pygmy forest, a stunted forest area two to twelve feet in height and underlain by a hardpan layer which accounts for the area's poor drainage, occupies approximately 1,050 acres in central Mendocino County. Some of it is outside the coastal zone. There is some uncertainty about the accuracy of existing inventories and mapping of this resource area. The pygmy forest ecosystem is found along the Mendocino County coast in scattered patches on the higher sea-cut terraces situated in and out of the coastal zone between Fort Bragg and the Navarro River. ...

such thing. The court used the term 'pygmy forest,' which has been used in this litigation and most of the administrative proceedings to denote full pygmy forest, not mere pygmy-type vegetation or soils (see fns. 2 and 9, ante). The court did not direct which areas must be designated pygmy forest or what criteria best defined those areas. The court simply found no substantial evidence for, and therefore reversed, a 'decision to certify the [LUP] without designation and treatment of the pygmy forest as [an ESHA].' It did not pass on the question whether ESHA status had to be conferred on 'pygmy- type' areas or what lesser protections for them might be consistent with the Act. Those issues are likewise not before us here. The judgment reversed and remanded for further Commission proceedings, carefully preserving agency discretion.[8]

We agree that there is no substantial evidence to support denying ESHA status to pygmy forest on the rare-or-valuable element of the statutory definition.[9]

*Degradation by development*

We also agree that no substantial evidence exists to rebut the showing below that pygmy forest is 'easily disturbed or degraded by human activities and development' (§ 30107.5), the second statutory element.

Abundant expert testimony attests to the habitat's easy degradation by development. Most obviously, vegetation removal directly destroys it, but there are insidious hidden effects. Botanist Robert E. Sholars, a noted authority on the habitat, summarized the problems: 'Roads, ditches, wells, and septic systems further chop up and degrade the habitat. ... This plant community that has been remarkably stable for hundreds of thousands of years is extremely vulnerable to erosion following vegetation removal, and to the lowering of the water table by wells, diversions, and drainage. The nutrient-laden discharge from septic systems undoes in years many millennia of natural leaching. ...' Sholars had seen pygmy forest destruction 'at an alarming rate.' While the forest had once occupied about 4,000 acres at 28 locations, an inventory he helped take of those sites in 1983 revealed that 14 were 'either destroyed or severely degraded. None were entirely undisturbed. ...'

Those views were shared by retired Professor Hans Jenny, who had taught in the plant and soil biology department at the University of California, Berkeley, and had published several papers on the pygmy forest. He testified having 'observed its destruction by the indiscriminate construction of buildings and homes' and possessing 'documentation that leach lines from septic tanks alter the composition of the Forest by enriching it in nitrogen and phosphorus which eventually will destroy its character.' Retired soils morphologist Rodney Arkley explained that the limited depth of the soils causes polluted water to collect and work its way down stepwise, from terrace to terrace toward the sea.

Slides presented by Dr. Sholars showed disruption from drainage installed to permanently lower the water table for house construction. Mendocino cypresses growing in septic effluent for only five years had grown to triple the height of their sixty-year-old counterparts several hundred feet away. He described a 'long term ecosystem that is changing rapidly' due to development pressures. Other speakers and writers mirrored those

---

[8] 'You are hereby commanded immediately on receipt of this writ to set aside your findings and order of January 22, 1986 which approved Policies 20 and 21 of the Mendocino County Local Coastal Plan and any other portions of said plan dealing with pygmy forests and to set aside said portion of the Mendocino County Coastal Plan. [¶] Said proceedings are hereby remanded to you, to reconsider your action in the light of this court's judgment and to take any further actions specially enjoined upon you by law, but nothing in this writ shall limit or control in any way the discretion legally vested in you ....'

[9]Except as already discussed, the findings below (see fn. 8, ante) are both undefended and indefensible. No one argues, for example, that lack of Commission precedent for treating pygmy forest as an ESHA (findings Nos. 2 and 3) is germane, we cannot tell whether ESHA status was ever considered before or, if it was, why it was withheld. The finding that pygmy forest 'has already been extensively developed as a residential area' (No. 4) is a reason to grant ESHA status, not deny it. (Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Com. (1976) 55 Cal.App.3d 525, 538 [127 Cal.Rptr. 775] [construing the predecessor Coastal Zone Preservation Act, former § 27000 et seq.].) The finding that ESHA status would restrict development mainly to scientific study (No. 5) adds nothing; the Act demands that protection as an overriding policy (§ 30240, subd. (a)). Finally, giving ESHA status only to areas having rare or endangered plant species (finding No. 8) ignores the pygmy forest habitat itself as rare or valuable.

concerns.

Some arguably contrary views were voiced, but they lack substantiality for the speakers' apparent lack of training or other qualifications. A County supervisor, for example, revealed no basis for his view that development would not harm 'the soils themselves. Nutrients are rapidly passed through to only that foliage in close proximity ....'

The County and Commission attack the expert testimony as relating only to degradation by indiscriminate, uncontrolled development. The pertinent question, in their view, is whether pygmy forests would be easily degraded by development as limited in the LUP through the PD process and other controls. They note testimony that development so limited would protect pygmy forest against significant degradation. The Commission made a finding (No. 8) to that effect, anticipating 'adverse impacts' but none 'substantial enough' to warrant ESHA protection unless rare or endangered plant species were present (fn. 8, ante).

We hold that to reformulate the easy-degradation element in that way violates the Coastal Act intent. Habitat which is both (1) 'rare or especially valuable' and (2) 'easily disturbed or degraded by human activities and developments' is an ESHA (§ 30107.5). An ESHA 'shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas' (§ 30240, subd. (a)). Converting the phrase 'easily disturbed or degraded by ... developments' into 'easily disturbed or degraded by [well-controlled] developments,' as the Commission would have it, distorts the plain language of the Act.

Moreover, it halves the Act's protections ESHA status demands (1) protection against significant disruption of habitat values and (2) allowance of resource- dependent uses only (§ 30240, subd. (a)). If ESHA status could be avoided by having only 'well-controlled' development-which in essence protects against significant disruption (i.e., protection (1))-the habitat would never be restricted to resource-dependent uses (i.e., protection (2)). That violates the Act, which in demanding protection against 'significant disruption' assumes that this protection is in addition to the use limitation. The LUP in this case, for example, may provide significant habitat protection, but it allows non-resource-dependent (residential) development in violation of the Act.

Finally, allowing ESHA status to depend on the degree of development protection found in an LUP could result in a habitat enjoying ESHA status in one part of a county coastal zone (e.g., where strict PD controls exist) and not in others. This would be a curious result for a statutory scheme which appears to demand uniform treatment and protections for all ESHA's.

*'Taking' concerns*

The County contends that the Commission was entitled to balance concerns that granting ESHA status might constitute a prohibited taking of private property without just compensation (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 19) and withhold ESHA designation on that basis. Ironically, the Commission itself does not advance this argument. In fact, it urged in the court below that development restrictions were proper concerns but agreed that no taking had yet occurred and that such issues were not ripe, i.e., could not be determined until actual permit applications were made.

We agree that there were no actual takings concerns for the Commission to have 'balanced' at the ESHA-designation stage. The County relies on section 30010, which expresses a legislative intent that the Coastal Act not grant the Commission or any county the 'power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. ...' However, that does not support the anticipatory sort of takings balancing advocated by the County. The section appears designed to foreclose any claim that the Coastal Act authorizes takings without compensation, a construction which would leave the Act open to a facial challenge. (Southern Pacific v. City of Los Angeles (9th Cir. 1990) 922 F.2d 498, 505-507; cf. Williamson Planning Comm'n v. Hamilton Bank (1985) 473 U.S. 172, 194-195 [87 L.Ed.2d 126, 143-144, 105 S.Ct. 3108].) It does not ask the Commission to balance takings concerns in ESHA decisions.

Further defeating the County's construction, section 30010 speaks of permit- stage actions, not LUP or LCP approvals. (6) This is consonant with the judicial view that takings decisions must await as- applied

challenges and are usually not ripe until the permit stage. '[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.' (Williamson Planning Comm'n v. Hamilton Bank, supra, 473 U.S. 172, 195 [87 L.Ed.2d 126, 144]; see also First Lutheran Church v. Los Angeles County (1987) 482 U.S. 304, 312, fn. 6 [96 L.Ed.2d 250, 261-262, 107 S.Ct. 2378].) Both the overregulation and just- compensation components of a regulatory taking claim generally require final administrative action as to specific land. (McDonald, Sommer & Frates v. Yolo County (1986) 477 U.S. 340, 348-350 [91 L.Ed.2d 285, 293-295, 106 S.Ct. 2561].) If vague, anticipatory takings concerns guided ESHA determinations at the LUP- approval stage, then sections 30107.5 and 30240 might never have force.

Finally, the takings concerns cited by the County are not manifested in the record. The Commission made no findings on point. It observed that ESHA development would be limited to resource-dependent uses (§ 30240, subd. (a)), but it did not articulate actual concern over takings. Findings to support such concerns are therefore lacking. (See fn. 8, ante.)

There was some discussion at the September 1985 hearing about the feasibility of using transferred development credits (TDC's) to offset development restrictions, implying a general concern about takings, but the exchange was narrowly focused. When Steven Horn of the State Coastal Conservancy testified that 'density transfer' programs were a 'difficult and uncertain' approach due to difficulty in finding receiver sites, he was addressing specific density transfers being proposed for other aspects of the LUP. Commission staff analyst Woodruff later clarified that the State Coastal Conservancy had not been invited to consider a program for pygmy forests. A second staff analyst, plus two commissioners, then expressed optimism that a program could be worked out for pygmy areas.

The record strongly suggests, moreover, that a program could be of relatively modest scope for pygmy areas. A limited amount of acreage in the coastal zone is involved, and most of it, according to a County supervisor, is held in small parcels, the largest being about 100 acres. Staff analyst Woodruff estimated that there may be fewer than 10 parcels 'entirely within pygmy soil' as mapped. He also noted that pygmy areas years ago had been deemed 'uninhabitable and sold at the lowest prices in small acreages,' at $500 to $1,000 an acre, to people who could not afford to buy elsewhere. Botanist Robert Sholars concurred, calling those areas formerly the 'least desirable residential' ones. He elaborated that 'because of severe soil problems in-cluding protracted flooding of a soil during the winter it's an absolutely terrible location for development.' Commissioner Wornum called pygmy 'in the past the most least [sic] regarded of land,' noting the irony of current interest in ESHA status. The scant record we have thus does not suggest high investment expectations or real threatened takings claims by pygmy forest landowners.

Accordingly, we reject 'taking' concerns as not relied upon, unripe for decision and undeveloped in the record.

*Coastal development needs*

The County invokes what it asserts is statutory authority to balance coastal development needs against the need for ESHA designation. It relies on statements in the Coastal Act that its goals are to protect and maintain the coastal zone environment 'where feasible' (§ 30001.5, subd. (a)), to assure 'balanced utilization' of its resources 'taking into account the social and economic needs of the people of the state' (id., subd. (b)) and to have conflicts between policies resolved 'in a manner which on balance is the most protective of significant coastal resources' (§ 30007.5, italics added).

The trial court reasoned that the specific two-part test of section 30107.5 left no room for 'balancing' economic and environmental interests. However, we need not go so far to uphold the judgment. We can assume arguendo that some such balancing, while usually undertaken at the permit/project stage (e.g. Gherini v. California Coastal Com. (1988) 204 Cal.App.3d 699, 708 [251 Cal.Rptr. 426]; City of Chula Vista v. Superior Court (1982) 133 Cal.App.3d 472, 496 [183 Cal.Rptr. 909]; City of San Diego v. California Coastal Com. (1981) 119 Cal.App.3d 228, 233-234 [174 Cal.Rptr. 5]; Bel Mar Estates v. California Coastal Com. (1981) 115

Cal.App.3d 936, 942 [171 Cal.Rptr. 773]), might extend to ESHA decisions at the LUP- approval stage. Generally, the Commission must consider the basic goals of section 30001.5 when deciding whether to certify an LUP. (§ 30512.2, subd. (b); City of Chula Vista v. Superior Court, supra, 133 Cal.App.3d at p. 481, fn. 3.)

Still, there is nothing in this record showing a particular need to allow coastal development on pygmy forest acreage. Without such evidence, the County is elevating broad policy criteria into specific justification for a particular ESHA decision. The only economic 'evidence' cited, in fact, is what the County cites to support the asserted takings concerns, which we have rejected as insubstantial and unripe for serious consideration. Also, the Commission made no finding that the public welfare demands development of pygmy forest areas in the coastal zone (see fn. 8, ante), and its decision not to grant ESHA status to any such areas would have required a supporting determination that all such areas required development, an idea which even the County does not advance. The Commission's action is thus unsupported by findings or evidence, even if economic need was in theory a valid consideration in the ESHA decision.

## Disposition

The judgment is affirmed. Our record shows that the Sierra Club moved concurrently with the judgment for an award of attorney fees (Code Civ. Proc., § 1021.5) and costs, and the parties advise us that they subsequently entered a stipulated judgment for that purpose on November 15, 1991, with this appeal to determine the prevailing party. Having now confirmed Sierra Club's prevailing-party status, we direct the superior court to proceed consistently with the stipulation below and to determine and make an additional award for the successful defense of the judgment on this appeal (cf. Citizens Against Rent Control v. City of Berkeley (1986) 181 Cal.App.3d 213, 236 [226 Cal.Rptr. 265]).

Kline, P. J., and Benson, J., concurred.

[A petition for a rehearing was denied February 16, 1993, and the petition of real party in interest for review by the Supreme Court was denied April 1, 1993.]

**In the Matter of the Petition of Double Wood Investment, Inc.**
2000 WL 1099122 (Cal.St.Wat.Res.Bd.) (June 15, 2000)

For Reconsideration of the Executive Director's Denial of Water Quality Certification For Double Wood Golf Course.

BY THE BOARD:

On March 5, 1999, the Executive Director of the State Water Resources Control Board (State Water Board) denied water quality certification for the proposed Double Wood Golf Course. Double Wood Investment, Inc., (petitioner) filed a timely petition for reconsideration of the denial with the State Water Board. For the reasons contained herein, the State Water Board hereby issues a conditional water quality certification for the Double Wood Golf Course.

## I. BACKGROUND

The proposed Double Wood, Golf Course (project) is located in Fremont, California, on 396 acres of open space area east of Interstate 680, north and west of the recently-constructed Avalon Homes residential subdivision and its access road, and south of an established residential subdivision. The terrain is characterized by fairly steep hills that support non-native grasslands, and the area has historically been used for livestock grazing. Four seasonal watercourses run through the project area, including Toroges Creek, Arroyo Agua Fria Creek, Creek B, and Tributary B. These watercourses are tributary to Coyote Creek, and eventually to the San Francisco Bay. The project design requires over two million cubic yards of cut and fill in order to create a suitable playing surface area. The project design also includes impacts to all four drainages, including the addition of fill to approximately 2,900 linear feet of Toroges Creek, to a maximum depth of 75 feet. Because of these proposed discharges of fill material, the project applicant was required to obtain a Clean Water Act section 404 dredge or fill permit from the United States Army Corps of Engineers (U.S. Army Corps). (33 U.S.C. s 1344.)

Applicants for federal permits to conduct activities that may result in a discharge to waters of the United States are required to obtain state water quality certification pursuant to Clean Water Act section 401. (33 U.S.C. s 1341.) Water quality certification is a determination that a proposed project complies with the applicable provisions of section 301, 302, 303, 306 and 307 of the Clean Water Act and any other appropriate requirements of state law. (Ibid.) In California, the State Water Board is authorized to issue water quality certifications. (Wat. Code s 13160.) Generally speaking, in order to issue water quality certification, the State Water Board must find that there is a reasonable assurance that the project will comply with water quality standards, including the designated beneficial uses of the affected water bodies, the water quality objectives established to protect those beneficial uses, and State Water Board Resolution 68-16 ("Policy with Respect to Maintaining High Quality Waters in California"), which serves as the state's anti-degradation policy, and any other relevant provisions contained in State Water Board and Regional Water Board Water Quality Control Plans and Policies. The State Water Board has given the Executive Director the authority to issue or deny water quality certification. (Cal. Code Regs., tit. 23, s 3838.) If the Executive Director denies water quality certification, the applicant may petition for reconsideration by the State Water Board. (Cal. Code Regs., tit. 23, s 3867.)

Petitioner's quest to obtain water quality certification has been a long and complex effort. Pursuant to California's existing regulations governing section 401 water quality certification, [FN1] petitioner filed an application for certification with the San Francisco Bay Regional Water Quality Cooard (Regional Water Board, or SFBRWQCB) on August 27, 1996. Staff of the Regional Water Board, on several occasions, met with and corresponded with petitioner to attempt to resolve their concerns with the project. Unable to resolve those

concerns, the staff recommended to the Regional Water Board on January 21, 1998, that it recommend that the Executive Director deny water quality certification for the project. After a lengthy discussion, the Regional Water Board was unable to muster a majority vote on either of two competing motions to recommend issuance or denial of water quality certification. Therefore, the project was forwarded to the Executive Director without a recommendation from the Regional Water Board.

The Executive Director conducted a public meeting in Fremont to take public comment on the project. On May 28, 1998, the Executive Director denied water quality certification for the project without prejudice. In his denial, the Executive Director focused primarily on what he determined to be a lack of adequate mitigation for the impacts to the watercourses. The petitioner requested and was granted an opportunity to revise its mitigation proposal. Then ensued an extended series of communications between the Executive Director and the petitioner, concluding with another denial of water quality certification on March 5, 1999. The Executive Director cited several reasons for this denial, including the continuing inadequacy of the revised mitigation proposal, the potential need for further review of the project pursuant to the California Environmental Quality Act (CEQA) (Pub. Resources Code s 21000 et seq.), concerns about removing riprap from Arroyo Agua Fria Creek, and other project design issues.

Following the Executive Director's March 5, 1999, denial of water quality certification, petitioner filed the instant petition for reconsideration with the State Water Board. In addition to filing the petition, petitioner also requested that the State Water Board refer the matter to alternative dispute resolution, [FN2] and hold the petition in abeyance during the pendency of the alternative dispute resolution. The State Water Board first designated four parties for the purpose of determining whether to refer the matter to mediation: the petitioner, the Executive Director, the City of Fremont, and the Citizens Committee to Complete the Refuge, a local environmental group that had been involved with the project for several years. The staff of the Regional Water Board was also asked to act as a designated party, but declined. [FN3] Upon receiving the consent of the designated parties, the State Water Board referred the petition to mediation. The mediation included three public sessions, and culminated with the mediator issuing a report on March 24, 2000. [FN4] According to the mediator's report, the parties were able to identify the key areas of contention, but were unable to reach a consensus on any of the substantive issues.

Once the mediation was concluded, petitioner reactivated its petition for reconsideration before the State Water Board. Due to the impending retirement of the Executive Director, the State Water Board scheduled a workshop to receive the mediator's report and take brief comments from the Executive Director and the public. At the workshop, the Executive Director indicated that the current project addresses his concerns regarding adequate mitigation. Following the workshop, the State Water Board scheduled and conducted an evidentiary hearing on the petition. Many issues have been raised by the parties and interested persons with respect to the project; this order attempts to address those issues that are most directly relevant to water quality certification.

## II. ISSUES AND FINDINGS

A. Whether the applicant has demonstrated that there is no practicable alternative to the project.

The Regional Water Board's Water Quality Control Plan has provisions that apply specifically to the filling of wetlands. These provisions incorporate by reference the United States Environmental Protection Agency's (U.S. EPA) section 404(b)(1) "Guidelines for Specification of Disposal Sites for Dredge or Fill Material." (See 40 C.F.R. s 230 (1999).) [FN5] Pursuant to the guidelines, the petitioner is required to show that there is "no practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."

Finding: The petitioner has conducted an adequate analysis to demonstrate that there is no practicable alternative to the proposed project that avoids or further minimizes impacts to aquatic resources. The City of Fremont, as lead agency under CEQA, analyzed several project alternatives, both offsite and onsite. The project

was also revised several times to reduce its impacts on aquatic resources. In addition, in the course of the mediation, the petitioner analyzed another onsite alternative. None of the alternatives that achieved the overall project purpose appear to have lesser impacts on aquatic resources without causing other significant adverse impacts to the environment.

B. Whether the project will protect the beneficial uses of the affected watercourses.

The Regional Water Board's Water Quality Control Plan identifies beneficial uses for Coyote Creek. The Water Quality Control Plan also provides that "[t]he beneficial uses of any specifically identified water body generally apply to all its tributaries. In some cases a beneficial use may not be applicable to the entire body of water, such as navigation in Calabazas Creek or shellfish harvesting in the Pacific Ocean. In these cases, the Regional Water Board's judgment regarding water quality control measures necessary to protect beneficial uses will be applied." (SFBRWQCB Water Quality Control Plan at 2-5.) The Regional Water Board staff have identified wildlife habitat and preservation of rare and endangered species as the most significant beneficial uses for these tributaries to Coyote Creek.

Finding: Because of the unique characteristics of the project area, the project, including its mitigation components, adequately protects the beneficial uses of the affected waterbodies. The project involves the fill of a total of 4,580 linear feet, or 1.03 acres, of the watercourses, and impacts to approximately 0.92 acres of riparian habitat. The most significant impact is to Toroges Creek, which will be filled to a maximum depth of 75 feet, with the creek re-created on top of the fill. A concrete spillway will be used to bring the re-created creek down to the natural gradient of the creek at the downstream end of the fill. On the face of it, it appears that such a project would seriously affect the beneficial uses of Toroges Creek, at least with respect to the movement of aquatic species through the spillway. However, the setting for this project is unique. The project area is very unstable, and is dominated by landslides, soil erosion, and debris and silt stream flows. The watercourses are subject to erosion and heavy sedimentation, and are of very poor quality in the vast majority of the project area. (There are some higher quality areas of Toroges Creek in the upstream portion of the project area, and the project has been revised to avoid placing fill there.) The sedimentation is also adversely affecting downstream portions of the watercourses. Although there is evidence in the record that the watercourses in the project area maible to restoration, there have been no specific proposals to address the instability of the project area or restore the watercourses, and no substantial likelihood that any such proposals might be forthcoming in the absence of the project. Nor has the Regional Water Board indicated that it has attempted to require the property owner to control the portion of the impacts in the overall project area that is attributable to anthropogenic causes. [FN6] In fact, there is a consensus among the experts that it would be necessary to place a substantial amount of fill in Toroges Creek simply to restore it.

Immediately downstream of the project site, the watercourses flow through culverts and under a major freeway. From there, they are confined to narrow flood control channels for a significant distance. Immediately upstream from the project area, the watercourses are confined by existing development. In short, the watercourses in the project area are in very poor condition and very likely to remain that way. [FN7] The beneficial uses of the watercourses in the project area have been severely compromised. As is discussed below, conditions are being imposed to protect the beneficial uses of the water bodies that are downstream of the project area. Therefore, the project as a whole, including mitigation, adequately protects and should enhance the beneficial uses of the watercourses.

C. Whether mitigation for the impacts to water quality is sufficient.

Petitioner has submitted many different mitigation proposals and refinements to those proposals. [FN8] The State Water Board concurs with the previous denials of water quality certification by the Executive Director, in which he disallowed any mitigation credit for the re-creation of Toroges Creek on top of the fill. [FN9] Petitioner submitted another mitigation proposal during the pendency of the mediation.

Finding: The mitigation proposal, as supplemented by petitioner's January 19, 2000 submittal, is now sufficient. Without including the re-created Toroges Creek on top of the fill, the mitigation for impacts to 0.92 acres of riparian areas and 1.03 acres of jurisdictional waters now includes the creation of 2.0 acres of riparian areas upstream of the fill areas on Toroges Creek, the creation of 4.0 acres of riparian areas on Arroyo Agua Fria Creek, the planting of 0.4 acres of willows in Creek B, the creation of 0.37 acres of jurisdictional waters in Arroyo Agua Fria Creek, and the creation of 0.11 acres of seasonal ponds. Further, the mitigation proposals are now fully defined, unlike the previous conceptual proposals.

D. Whether further CEQA analysis is required.

As lead agency, the City of Fremont approved an Environmental Impact Report (EIR) for the Avalon Homes Subdivision in 1991, a Subsequent EIR for the Double Wood Golf Course in 1996, and an EIR Addendum on April 17, 2000.

Finding: The State Water Board has considered the EIR, Subsequent EIR, and EIR Addendum, and accepts the City of Fremont's analysis that further review pursuant to CEQA is not warranted. The City of Fremont has not identified any significant effects on the environment of the project that fall within the jurisdiction of the State Water Board. All of the conditions imposed herein are designed to assist in the prevention of water quality impacts.

E. Whether the mitigation performance bond is adequate.

The Executive Director required that the petitioner secure the performance of the proposed mitigation measures with a bond. Agreement between the Executive Director and the petitioner on most of the details of the bond are memorialized in the mediator's report.

Finding: The substantive details of the proposed $1,000,000 mit performance bond, as memorialized in the mediator's report, are sufficient. The final bond remains to be submitted. The State Water Board accepts the City of Fremont's offer to hold, and, if necessary, enforce the bond. As a condition of water quality certification, the petitioner shall, within three months of the date of this order, submit a final bond for the State Water Board Executive Director's approval consistent with the terms memorialized in the mediator's report. The petitioner shall also send a copy to the Regional Water Board. The mediator's report provides for future reductions of the amount of the bond as the mitigation is demonstrated to be successful. According to the mediator's report, those reductions were to be conditioned upon the concurrence of the State Water Board. As the Regional Water Board has greater expertise and ability to monitor the mitigation performance than the State Water Board, however, the bond shall require that the City of Fremont obtain the Regional Water Board's written concurrence prior to approving future reductions of the bond.

F. Whether approval of an Integrated Pest Management Plan should be required.

One of the conditions of approval imposed by the City of Fremont for the project was the development of an Integrated Pest Management (IPM) Plan. The City's condition requires that the IPM Plan be submitted prior to operations. The City of Fremont has agreed to give the public an opportunity to comment on the IPM Plan prior to approving it.

Finding: The IPM Plan is a critical component for ensuring that the project does not result in discharges of pollutants that could further impair the water quality onsite and downstream. As a condition of water quality certification, the use of Diazinon, which has been listed as impairing the water quality of the lower San Francisco Bay, is prohibited. As a further condition of water quality certification, petitioner shall submit a proposed IPM Plan, which shall contain best management practices designed to eliminate any discharge of pesticides (including insecticides) to waters of the state, to the City of Fremont and the Regional Water Board forired.

Although it is not clearly required as one of the City of Fremont's conditions of approval, both petitioner

and the City of Fremont have pledged to put a water quality monitoring plan in place. This monitoring plan is to monitor for pollutants discharging from the ongoing operations of the project, and is therefore distinct from the required mitigation monitoring plan.

Finding: As conditions of water quality certification, petitioner shall submit a proposed water quality monitoring plan for the project to the Regional Water Board at the same time it submits the IPM Plan. Upon its approval, the Regional Water Board shall issue a water quality monitoring program to the petitioner for the project. The monitoring program shall include monitoring to address the use of pesticides, herbicides, insecticides, nutrients, and recycled water, and may also include monitoring to determine the success of the mitigation. The cost of the monitoring program shall bear a reasonable relationship to the benefits to be obtained from the monitoring program. The Regional Water Board is also authorized to issue waste discharge requirements if it determines, based on the monitoring program, that discharges of pollutants from the project area are occurring.

H. Whether ongoing stabilization work on Creek B by the developers of the Avalon Homes subdivision must be considered in issuing water quality certification.

The Avalon Homes subdivision is experiencing ongoing instabilities that threaten several non-residential structures adjacent to Creek Bpe of the project area. The developers of the Avalon Homes are attempting to receive approval for work to stabilize that section of Creek B.

Finding: Both the 1991 Avalon Homes EIR and the 1996 Double Wood Supplemental EIR recognized that portions of the area were unstable. Therefore, this is not a new cumulative effect that must be analyzed. The Regional Water Board will likely require mitigation for the impacts to Creek B resulting from Avalon Homes developer's stabilization project. If there are no mitigation opportunities remaining on Creek B due to the existence of the Double Wood project, the Regional Water Board can require offsite mitigation. Conversely, if the stabilization efforts render petitioner's mitigation efforts in the downstream section Creek B unsuccessful, the Regional Water Board can require remedial measures, including different mitigation if necessary, under the mitigation performance bond.

I. Whether other conditions are appropriate.

The State Water Board frequently includes other, non-project specific, conditions to water quality certification, in order to protect water quality.

Finding: Petitioner shall comply with the following additional conditions. Petitioner shall conduct its activities in accordance with its application for water quality certification, as amended. Petitioner shall comply with the State Water Board's General Permit for Storm Water Discharges Associated with Construction Activity, Water Quality Order 99-08-DWQ. Petitioner shall comply with all streambed alteration agreements issued by the Department of Fish and Game for this project. Petitioner shall comply with all water quality-related conditions of approval imposed by the City of Fremont. This certification is subject to modification or revocation upon judicial review.

## III. ORDER

IT IS HEREBY ORDERED that water quality certification, subject to the conditions contained herein, is issued.

IT IS FURTHER ORDERED that all actions by the Regional Water Board with respect to this project shall be fully consistent with this issuance of water quality certification and the conditions thereto.

AYE:

Arthur G. Baggett, Jr.

Mary Jane Forster
John W. Brown
Peter S. Sliva

NO:

None

ABSENT:

None

ABSTAIN:

None

FN1. (Cal. Code Regs., tit. 23, s 3855.) Under the existing regulations, the Regional Water Quality Control Boards review applications for state water quality certification, but only make recommendations to the State Water Board's Executive Director to issue or deny water quality certification. The State Water Board recently adopted significant revisions to its water quality certification regulations. Among other things, the revisions delegate the authority to make final water quality certification decisions to the Regional Water Quality Control Boards. It is expected that the process for issuing or denying water quality certification will be improved once these revisions become effective.

FN2. Although seldom utilized, the State Water Board's regulations provide that the State Water Board may refer disputes in adjudicative proceedings to mediation or nonbinding arbitration. (Cal. Code Regs., tit. 23, s 648.6.) The State Water Board is required to obtain the consent of all of the parties prior to referring any matter to alternative dispute resolution. (Gov. Code s 11420.10.) The process for designating parties is specified at Title 23, California Code of Regulations, section 648.1.

FN3. The Regional Water Board staff's involvement in the project has been a recurring, and sometimes troubling, theme. As explained above, the Regional Water Board failed to take a position when it had the opportunity to a recommendation to the Executive Director. At the invitation of the State Water Board and the designated parties, the Regional Water Board staff did participate in the mediation, although not as a party. The Regional Water Board staff was also designated as a party for the purposes of the subsequent hearing before the State Water Board. During the hearing, the Regional Water Board staff strongly urged the State Water Board to remand the project to the Regional Water Board. Such a position appears to be inconsistent with the lack of a decision by the Regional Water Board itself. Because the Regional Water Board had failed to take a position when it had previously considered the project, it was (continued) incumbent upon the staff to ensure that the staff position to remand was one that the Regional Water Board would support. It is not clear from the record whether this occurred.

FN4. Due to the laws regarding the admissibility of communications during mediation, the State Water Board has considered only the mediator's report, which was a consensus document produced by all of the parties, and other documents that were submitted to the State Water Board by the prepares of those documents that did not reveal any inadmissible mediation discussions. (See Evid. Code ss 1119, 1122.) Counsel for the State Water Board did attend the mediation sessions in order to ensure that the State Water Board's procedural requirements were complied with, but did not reveal any of the inadmissible discussions to the State Water Board.

FN5. The State Water Board approved this incorporation of the federal guidelines by the Regional Water Board. Nonetheless, the State Water Board is concerned about the potential conflicts inherent in having a Regional Water Board interpret and apply the same guidelines concurrently with the U.S. EPA and U.S. Army Corps. While the protection and enhancement of wetlands are of paramount importance to the state (see, e.g., Governor's Exec. Order No. W-59- 93 (August 23, 1993)), the State Water Board strongly encourages the Regional Water Board to review this Water Quality Control Plan provision in order to determine whether it

could be more specifically tailored to the state's interests and the Regional Water Board's jurisdiction. In this regard, the State Water Board's Executive Director is instructed to write a memorandum to the Regional Water Board asking for a reevaluation of the incorporation of the federal guidelines.

FN6. Had either of these efforts been underway, it is not likely that the State Water Board would be considering issuing water quality certification for the project. In light of our decision today to issue water quality certification for the project, however, any new effort by the Regional Water Board to require the current property owner to control all of the ongoing erosion in the project area would be inappropriate so long as the project is moving forward in a timely fashion. The Regional Water Board should, however, exercise its authority to ensure that petitioner controls future erosion in the project area, as provided for in Section G, below.

FN7. In marked contrast, the portions of the watercourses that run through the 1,100 acres of open space upslope of the Avalon Homes development are in much better condition than the portions of the watercourses that are in the project area. The same project, were it to be situated in the upper watershed, almost certainly would not quality for water quality certification. This example should prove to be academic, as the City of Fremont, who owns the open space land, testified that they had no plans to allow development upon it.

FN8. The changing nature of these mitigation proposals was a major contributing factor in the length of time that it h to obtain water quality certification.

FN9. The petitioner's primary purpose for depositing the fill in Toroges Creek is to construct a golf course, rather than restore the creek.

---

# CONDEMNATION:
# The Right to Take Under the Power of Eminent Domain

## Berman v. Parker
## 348 U.S. 26 1954

Mr. Justice DOUGLAS delivered the opinion of the Court.

This is an appeal, 28 U.S.C. s 1253, 28 U.S.C.A. s 1253, from the judgment of a three-judge District Court which dismissed a complaint seeking to enjoin the condemnation of appellants' property under the District of Columbia Redevelopment Act of 1945, 60 Stat. 790, D.C.Code 1951, ss 5--701 to 5-- 719. The challenge was to the constitutionality of the Act, particularly as applied to the taking of appellants' property. The District Court sustained the constitutionality of the Act. 117 F.Supp. 705.

By § 2 of the Act, Congress made a 'legislative determination' that 'owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare, and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose'.[1]

[1]The Act does not define either 'slums' or 'blighted areas.' Section 3(r), however, states:
"Substandard housing conditions' means the conditions obtaining in connection with the existence of any dwelling, or dwellings, or housing accommodations for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of

Section 2 goes on to declare that acquisition of property is necessary to eliminate these housing conditions.

Congress further finds in § 2 that these ends cannot be attained 'by the ordinary operations of private enterprise alone without public participation'; that 'the sound replanning and redevelopment of an obsolescent or obsolescing portion' of the District 'cannot be accomplished unless it be done in the light of comprehensive and coordinated planning of the whole of the territory of the District of Columbia and its environs'; and that 'the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan * * * is hereby declared to be a public use.'

Section 4 creates the District of Columbia Redevelopment Land Agency (hereinafter called the Agency), composed of five members, which is granted power by s 5(a) to acquire and assemble, by eminent domain and otherwise, real property for 'the redevelopment of blighted territory in the District of Columbia and the prevention, reduction, or elimination of blighting factors or causes of blight'.

Section 6(a) of the Act directs the National Capital Planning Commission (hereinafter called the Planning Commission) to make and develop 'a comprehensive or general plan' of the District, including 'a land-use plan' which designates land for use for 'housing, business, industry, recreation, education, public buildings, public reservations, and other general categories of public and private uses of the land.' Section 6(b) authorizes the Planning Commission to adopt redevelopment plans for specific project areas. These plans are subject to the approval of the District Commissioners after a public hearing; and they prescribe the various public and private land uses for the respective areas, the 'standards of population density and building intensity', and 'the amount or character or class of any low-rent housing'. § 6(b).

Once the Planning Commission adopts a plan and that plan is approved by the Commissioners, the Planning Commission certifies it to the Agency. § 6(d). At that point, the Agency is authorized to acquire and assemble the real property in the area. Id.

After the real estate has been assembled, the Agency is authorized to transfer to public agencies the land to be devoted to such public purposes as streets, utilities, recreational facilities, and schools, § 7(a), and to lease or sell the remainder as an entirety or in parts to a redevelopment company, individual, or partnership. § 7(b), (f). The leases or sales must provide that the lessees or purchasers will carry out the redevelopment plan and that 'no use shall be made of any land or real property included in the lease or sale nor any building or structure erected thereon' which does not conform to the plan. ss 7(d), 11. Preference is to be given to private enterprise over public agencies in executing the redevelopment plan. § 7(g).

The first project undertaken under the Act relates to Project Area B in Southwest Washington, D.C. In 1950 the Planning Commission prepared and published a comprehensive plan for the District. Surveys revealed that in Area B, 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating. In the judgment of the District's Director of Health it was necessary to redevelop Area B in the interests of public health. The population of Area B amounted to 5,012 persons, of whom 97.5% were Negroes.

The plan for Area B specifies the boundaries and allocates the use of the land for various purposes. It makes detailed provisions for types of dwelling units and provides that at least one-third of them are to be low-rent housing with a maximum rental of $17 per room per month.

er a public hearing, the Commissioners approved the plan and the Planning Commission certified it to the Agency for execution. The Agency undertook the preliminary steps for redevelopment of the area when this suit was brought.

Appellants own property in Area B at 712 Fourth Street, S.W. It is not used as a dwelling or place of habitation. A department store is located on it. Appellants object to the appropriation of this property for the purposes of the project. They claim that their property may not to taken constitutionally for this project. It is

---

dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is in the opinion of the Commissioners detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia.'

commercial, not residential property; it is not slum housing; it will be put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use. That is the argument; and the contention is that appellants' private property is being taken contrary to two mandates of the Fifth Amendment--(1) 'No person shall * * * be deprived of * * * property, without due process of law'; (2) 'nor shall private property be taken for public use, without just compensation.' To take for the purpose of ridding the area of slums is one thing; it is quite another, the argument goes, to take a man's property merely to develop a better balanced, more attractive community. The District Court, while agreeing in general with that argument, saved the Act by construing it to mean that the Agency could condemn property only for the reasonable necessities of slum clearance and prevention, its concept of 'slum' being the existence of conditions 'injurious to the public health, safety, morals and welfare.' 117 F.Supp. 705, 724--725.

The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs. See District of Columbia v. John R. Thompson Co., 346 U.S. 100, 108, 73 S.Ct. 1007, 1011, 97 L.Ed. 1480. We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia, see Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, or the States legislating concerning local affairs. See Olsen v. State of Nebraska, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305; Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Co., 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212; California State Ass'n Inter-Ins. Bureau v. Maloney, 341 U.S. 105, 71 S.Ct. 601, 95 L.Ed. 788. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. See Old Dominion Land Co. v. United States, 269 U.S. 55, 66, 46 St. 39, 40, 70 L.Ed. 162; United States ex rel. Tennessee Valley Authority v. Welch, 327 U.S. 546, 552, 66 S.Ct. 715, 718, 90 L.Ed. 843.

Public safety, public health, morality, peace and quiet, law and order--these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. See Noble State Bank v. Haskell, 219 U.S. 104, 111, 31 S.Ct. 186, 188, 55 L.Ed. 112. Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. See Day-Brite Lighting, Inc. v. State of Missouri, 342 U.S. 421, 424, 72 S.Ct. 405, 407, 96 L.Ed. 469. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. See Luxton v. North River Bridge Co., 153 U.S. 525, 529--530, 14 S.Ct. 891, 892, 38 L.Ed. 808; United States v. Gettysburg Electric R. Co., 160 U.S. 668, 679, 16 S.Ct. 427, 429, 40 L.Ed. 576. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from

one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. See Luxton v. North River Bridge Co., supra; cf. Highland v. Russell Car Co., 279 U.S. 253, 49 S.Ct. 314, 73 L.Ed. 688. The public end may be as well or better served through an agency of private enterprise than through a department of government--or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects. What we have said also disposes of any contention concerning the fact that certain property owners in the area may be permitted to repurchase their properties for redevelopment in harmony with the overall plan. That, too, is a legitimate means which Congress and its agencies may adopt, if they choose.

In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis. That, too, is opposed by appellants. They maintain that since their building does not imperil health or safety nor contribute to the making of a slum or a blighted area, it cannot be swept into a redevelopment plan by the mere dictum of the Planning Commission or the Commissioners. The particular uses to be made of the land in the project were determined with regard to the needs of the particular community. The experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums-- the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. Cf. Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 141--144, 104 A.2d 365, 368--370; Hunter v. Norfolk Redevelopment Authority, 195 Va. 326, 338--339, 78 S.E.2d 893, 900--901. Such diversification in future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power.

The District Court below suggested that, if such a broad scope were intended for the statute, the standards contained in the Act would not be sufficiently definite to sustain the delegation of authority. 117 F.Supp. 705, 721. We do not agree. We think the standards prescribed were adequate for executing the plan to eliminate not only slums as narrowly defined by the District Court but also the blighted areas that tend to produce slums. Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. Bs we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis--lot by lot, building by building.

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. See Shoemaker v. United States, 147 U.S. 282, 298, 13 S.Ct. 361, 390, 37 L.Ed. 170; United States ex rel. Tennessee Valley Authority v. Welch, supra, 327 U.S. at page 554, 66 S.Ct. at page 718; United States v. Carmack, 329 U.S. 230, 247, 67 S.Ct. 252, 260, 91 L.Ed. 209.

The District Court indicated grave doubts concerning the Agency's right to take full title to the land as distinguished from the objectionable buildings located on it. 117 F.Supp. 705, 715--719. We do not share those doubts. If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful

consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.

The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.

The judgment of the District Court, as modified by this opinion, is affirmed.

Affirmed.

◆ ◆ ◆ ◆ ◆

## Housing Authority v. Dockweiler
## 14 Cal.2d 437, 94 P.2d 794 (1939)

SHENK, J.

In this proceeding for a writ of *mandamus,* petitioner, The Housing Authority of the County of Los Angeles, seeks to compel the respondent, its chairman, to perform certain duties alleged to be enjoined upon him by law. The cause is presented on general demurrer, respondent basing his refusal to act upon the asserted unconstitutionality of the statute under and by virtue of the provisions of which the petitioner was created and vested with power.

In order to properly consider and determine the issues involved in this proceeding it is necessary that some reference be made to the legislative background to which the petitioning authority traces its existence. It appears that congress enacted what is known as the United States Housing Act of 1937 (42 U. S. C. A., secs. 1401-1430) and declared therein that it is "the policy of the United States to promote the general welfare of the nation by employing its funds and credit, as provided in this chapter, to assist the several states and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation." Pursuant to this declaration of policy, the remaining sections of the chapter set up a plan or method of slum clearance and erection of low-rent dwellings in their place and stead. Generally, the act provides that dwellings in low-rent housing projects shall be available solely for families whose net income at the time of admission thereto does not exceed five times the rental thereof, including the value or cost to them of heat, light, water and cooking fuel, except that in families with three or more minor dependents, such ratio shall not exceed six to one. To accomplish the announced objective there is set up in the department of interior a body corporate of perpetual duration to be known as the United States Housing Authority, which is declared to be an agency and instrumentality of the United States. T authority so created is authorized to make loans to public-housing agencies of the several states or their political subdivisions with a view to assisting in the development, acquisition or administration of low-rent housing or slum-clearance projects. In no event shall such loans exceed ninety per cent of the development or acquisition cost of a project. It is provided that annual contributions, authorized for the purpose of assisting local public-housing agencies in achieving and maintaining the low- rent character of projects, shall not be made available to a project "unless and until the state, city, county, or other political subdivision in which such project is situated shall contribute, in the form of cash or tax remissions, general or special, or tax exemptions, at least 20 per centum of the annual contributions ..." The act provides for a contract guaranteeing payment of such annual contributions over a fixed period but precludes such contributions or execution of a contract guaranteeing same in the case of a low-rent-housing or slum-clearance project calling for the construction of new dwellings "unless the project includes the elimination by demolition, condemnation, and effective closing, or the compulsory repair or improvement of unsafe or insanitary dwellings situated in the locality, or metropolitan area, substantially equal in number to the number of newly constructed dwellings provided by the project", except that such elimination may be deferred where there is an acute shortage

of livable dwellings. Such annual contributions are to be applied first toward payment of the principal or interest on any loan due to the authority by the local housing agency. If shown to be better suited to a project than annual contributions thereto, an alternative method of assistance is provided in the form of capital grants which are not to exceed 25 per cent of the development or acquisition cost of a project and which are not to be made unless and until provision is made substantially as already mentioned by the political subdivision wherein the project is situated for demolition, etc., of an equal number of unsafe and insanitary dwellings and for the granting by the political subdivision of cash, land, or the value of community services or facilities for which a charge is usually made, or tax remissions or exemptions in an amount not less than 20 per cent of the development or acquisition cost of the project. In order to insure the low-rent character of the project it is provided, among other things, that no contract for any loan, annual contribution or capital grant shall be entered into with respect to any project costing more than $4,000 per family-dwelling-unit or more than $1,000 a room (excluding land, demolition and nondwelling facilities). In the case of cities with a population in excess of 500,000 the amounts are fixed at $5,000 per family-dwelling-unit or $1250 a room. To achieve the purpose of the act the authority is authorized to issue obligations in the form of notes or bonds in an amount not to exceed $800,000,000 and maturing not to exceed sixty years from date of issuance.

In order to make the benefits of the federal statute available to this state and its political subdivisions and in order to eliminate, wherever possible, insanitary and unsafe dwelling accommodations and to replace them with modern and livable low-rent dwellings, the legislature of this state at the special session of 1938 enacted what is known as the Housing Authorities Law. (2 Deering's Gen. Laws Supp., Act 3483.) In its early provisions there appears a declaration of the existence in this state of insanitary and unsafe dwelling accommodations in which those of low income are required to reside because of a shortage of livable low-rent dwellings. Such condition, with its consequent overcrowding and congestion, is declared to cause an increase in and spread of disease and crime which, in turn, are declared to constitute a menace to the health, safety, morals and welfare of the residents of the state necessitating excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety. It is also declared that the clearance, replanning and reconstruction of such areas are public or governmental uses and purposes for which public money may be spent and that the same is not competitive with private enterprise because of the latter's inability to cope with or to overcome such conditions.

To accomplish its objective, the act thereupon creates in each city and in each county of the state "a public body corporate and politic to be known as the 'housing authority' of the city or county" which authority, however, is not to transact any business or exercise the powers granted to it under the act unless and until the governing body of the city or county, as the case may be, by proper resolution declares the need for such an authority to function therein. Upon the adoption of such resolution by a city, it is provided that the mayor shall appoint five persons as commissioners of the authority who serve without compensation and receive only their expenses in connection therewith. In the case of a county resolution declaring the necessity for a housing authority, the governing body or board of supervisors shall appoint the five commissioners. An authority so created is given power to investigate living conditions in its area; to sue and be sued; to prepare and carry out, acquire, lease, operate, construct, reconstruct, improve, repair, or alter housing projects within its area of operation; to arrange or contract for the furnishing by any person or agency of services, works or facilities for or in connection with a housing project; to provide in any contract for compliance with any conditions which the federal government may have attached to its financial aid of the project; and to own, hold, lease and improve real and personal property. It is declared that projects are not to be operated for profit and the rents are to be fixed at the lowest possible figure consistent with the furnishing of decent, safe and sanitary dwellings. In conformity with the federal act, it is provided that such low-rent dwellings may be rented only to persons of low income and whose annual income does not exceed five times the annual rental of the dwelling, including in the latter the annual average cost of heat, water, electricity, gas and other necessary facilities. As to families having three or more minor dependents, the ratio is increased to six to one, as authorized in the federal act. The act confers upon local housing authorities the right to acquire by eminent domain such property as is necessary to their low-rent dwelling projects. All of the property of such authorities is made subject to the planning, zoning, sanitary and

building laws applicable to the particular locality.

Section 14 of the act confers upon the authorities therein created the right to issue bonds and refunding bonds from time to time in their discretion for any of their corporate purposes. Bonds so issued may be of the type on which the principal and interest are payable (a) exclusively from the income and revenues of the housing project financed with the proceeds of such bonds or with such bond proceeds and a grant of federal aid; or (b) exclusively from the income and revenues tain housing projects whether financed by said bonds or not; or (c) from the authority's revenues generally. It is also provided that such bonds may be additionally secured by a pledge of any revenues or a mortgage of one or more projects or other property of the authority. It is declared that neither the commissioners nor any person executing the bonds shall be personally liable thereon. It is further provided that the bonds and other obligations of an authority (and they shall so declare on their face) shall not be a debt of the city, the county, the state or any political subdivision thereof and none of such entities shall be liable thereon, the same being payable only out of the funds or property of the authority issuing them. The act unequivocally declares that such bonds shall not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction. The issuance of bonds may be authorized by resolution of the authority and may be issued in one or more series and have such dates, denominations, maturity, interest rate (not to exceed 4 1/2 per cent), priority, and may be payable in such manner or medium as the resolution, trust indenture or mortgage may provide. They are declared to be fully negotiable and may be sold at public sale, after publication, at not less than par, except that they may be sold to the federal government at not less than par at private sale without prior publication. The act declares that in any suit involving the validity or enforceability of any bond, a recital therein that it was issued to aid in financing a housing project shall give rise to a conclusive presumption that the bond had been issued for said purpose and it shall be conclusively presumed that the project was planned, located and constructed in accordance with the provisions of the act. . . . . .

To foster the purposes of the foregoing act, the legislature at the same session enacted the Housing Cooperation Law (2 Deering's Gen. Laws Supp., Act 3484) wherein it is declared that it is a proper public purpose for any state public body to aid any housing authority operating within its boundaries or jurisdiction and that in furtherance of such aid any public body may upon such terms, with or without consideration, as it may determine, dedicate, sell, convey or lease any of its property to a housing authority or the federal government; furnish facilities (water, recreational, etc.) otherwise furnished by it; dedicate, pave, zone and rezone streets; purchase or invest in housing authority bonds; and may appropriate as a loan or donation the money necessary for the administrative expense of the authority during the first year of its existence.

There was also enacted by the legislature at the same session an act (Deering's Gen. Laws Supp., Act 3485) which, after proclaiming the existence of unsafe and insanitary dwellings and the public purpose underlying their elimination as contemplated in the preceding two acts, declared that all property of housing authorities "shall be exempt from all taxes and special assessments" of the state or of any political subdivision thereof, provided, however, "that in lieu of such taxes or special assessments a housing authority may agree to make payments [to any political subdivision] for services, improvements or facilities furnished [by such political subdivision] for the benefit of a housing project owned by the housing authority", not to exceed the estimated cost of such services, improvements or facilities. The act also provides that "the bonds of a housing authority are declared to be issued for an essential public and governmental purpose and, together with interest thereon and income therefrom, shall be exempt from all taxes".

In concluding the legislative history underlying this litigation, it is well to point out that the legislature at the same special session also amended section 1238 of the Code of Civil Procedure by adding thereto subdivision 21 which enumerates the erection of housing projects as a purpose for which the power of eminent domain may be exercised.

The Housing Authority of the County of Los Angeles, petitioner herein, was created and authorized to transact business in compliance with the provisions of the state statute. In this connection, it should be stated that the fact that its right to transact business and to exercise the powers granted to it under the statute were dependent upon action of the county board of supervisors, is not fatal to its existence. It has been recognized that the local operation of an act of general state-wide scope may be made contingent upon determination by the

local authorities that conditions there require its acceptance and operation. (*Board of Law Lib. Trustees v. Board of Supervisors*, 99 Cal. 571, 573 [34 Pac. 244]; *Davis v. County of Los Angeles*, 12 Cal. (2d) 412 [84 Pac. (2d) 1034].) In discharge of its functions and on September 6, 1938, petitioner entered into a contract with the county whereby the latter agreed to eliminate unsafe and insanitary dwellings at least equal to the number of new dwellings to be provided in the low-rent housing projects to be developed by petitioner. At its regular meeting held on December 14, 1938, the petitioner by the affirmative vote of four of its five members, one being absent, adopted a resolution approving a loan contract between it and the United States Housing Authority and authorizing and directing its chairman, respondent herein, to execute the same on its behalf. Among other things, the contract, as amended, provided that the United States Housing Authority agreed to assist the petitioner in the development of a described low-rent housing project in the county of Los Angeles consisting of substantially 606 dwelling units by purchasing bonds of the petitioner, which the latter agreed to sell, in the aggregate principal amount of $2,331,000, but not to exceed in any event 90 per cent of the development cost of the project. The contract further provided that upon request of the petitioner, and upon a satisfactory showing of the necessity therefor, the United States Housing Authority for certain preliminary expenses incidental to the project might make advances on account of the agreed loan upon receipt from petitioner of evidences of indebtedness exchangeable for an equal principal amount of bonds when issued by petitioner. In due course, this contract was executed by the United States Housing Authority and The Housing Authority of the County of Los Angeles, petitioner herein. Thereafter, however, the respondent, as chairman of petitioner, refused to execute a duly authorized note which, pursuant to the terms of the aforesaid loan contract, was intended to serve as evidence of petitioner's indebtedness to the United States Housing Authority for certain advances on the loan contemplated by said contract, and which advances were essential to carry on certain preliminary work of the proposed project. The note was a demand note in the principal amount of $10,000, bearing interest at 3 per cent. It provided that the holder thereof could demand payment in cash or could accept, in exchange therefor, an aggregate principal amount of definitive bonds of the petitioner when issued. On its face the note indicated that it was issued in furtherance of a low-rent housing project of petitioner and it expressly declared, in conformity with the statute, that it was not a debt of the county of Los Angeles or of the State of California or of any political subdivision thereof and that said entities should not be liable thereon. It was further declared that in any event the note should not be payable out of any funds or property other than those of the petitioning housing authority, a first lien therefor being impressed upon all of petitioner's revenues. Also in conformity with the provisions of the statute, the note was declared not to be an indebtedness "within the meaning of any constitutional or statutory debt limitations or restrictions".

As stated at the beginning of this opinion, respondent's refusal, as chairman, to execute this note for and on behalf of petitioner was based solely upon the asserted unconstitutionality of our statutes, *supra*, which created and empowered petitioner and other similar local housing authorities for the purpose of slum-clearance and construction of safe and sanitary low-rent dwellings for persons of low income. Respondent's attack upon said statutes is many-sided and, in the main, follows closely the assaults that have been made in other jurisdictions upon statutes of similar import and purpose. In this connection, it is interesting to note that thirty-two states, desiring to avail themselves of the aid proffered by the federal statute, *supra*, have enacted legislation substantially identical with ours. It is also of significance that whenever and wherever such statutes have been challenged (thirteen or fourteen jurisdictions in all) they have been fully sustained as against onslaughts similar in character to those here urged. Such statutes have been held to be constitutional in the following jurisdictions: . . . .

It must be admitted that the questions involved in this litigation are of great public concern and importance. While there are a number of issues presented, the one of fundamental importance, and upon the determination of which several of the lesser and incidental issues will turn, is whether slum clearance and public housing projects for low-income families are public uses and purposes for which public money may be expended and private property acquired. Preliminarily, it should be recalled that the federal statute and our state statutes are premised upon the expressly declared policy that elimination of substandard dwellings and the providing in their place and stead of safe and sanitary dwellings of low rental for those otherwise required by lack of income

to remain in the substandard dwellings are public uses and purposes and are governmental functions of state concern. (3) While such a declaration of policy by the legislative branch of the government is not necessarily binding or conclusive upon the courts, it is entitled to great weight and it is not the duty or prerogative of the courts to interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable foundation. (*Levy Leasing Co. v. Siegel,* 258 U. S. 242, 246 [42 Sup. Ct. 289, 66 L. Ed. 595]; *Block v. Hirsh,* 256 U. S. 135, 154 [41 Sup. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165]; *Oklahoma City v. Sanders,* 94 Fed. (2d) 323, 326 [115 A. L. R. 363]; *McNulty v. Owens, supra,* 428; *Spahn v. Stewart, supra,* 656; *N. Y. City Hsg. Auth. v. Mueller, supra; Rutherford v. City of Great Falls, supra,* 658. However, aside from the respect to be accorded the legislative declaration of the public purpose underlying the statutes here challenged, it is our view, and we are satisfied that both reason and authority support us, that the proposed elimination of slums and the erection of safe and sanitary low-rent dwelling units for persons of the prescribed restricted income will do much to advance the public welfare and to protect the public safety and morals and are in fact and law public purposes. Through the projects contemplated by the above statutes elimination of insanitary and unhealthful conditions is brought about by clearing premises of unfit dwelling buildings, and removing the degrading and unwholesome conditions existing in such surroundings, thereby reducing or preventing disease and crime and aiding and benefiting the health, morals and safety of the community. The United States Supreme Court in *Rindge Co. v. County of Los Angeles,* 262 U. S. 700 [43 Sup. Ct. 689, 67 L. Ed. 1186], declared that "Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment".

In our determination that the type of statute here involved concerns a public purpose, we find support not only in the authorities of other jurisdictions but also in *Willmon v. Powell,* 91 Cal. App. 1 [266 Pac. 1029], wherein in 1928, long prior to the enactment of the legislation involved in the present case, it was held that the creation of a municipal housing commission for the purpose of eliminating overcrowded tenements, unhealthful slums and congested areas, thereby tending to ward off disease and preserve the public health, constituted a public purpose and municipal affair. There, as here, it was substantially urged, but without avail, that the undertaking resembled a commercial enterprise rather than a public use or function. Among other things, it was there stated that "The fact that in the course of administration of the commission, private persons will receive benefit, as tenants or otherwise, of houses constructed by the commission, is not sufficient to take away from the enterprise the characteristics of a public purpose". (See, also, *Veterans' Welfare Board v. Jordan,* 189 Cal. 124, 145 [208 Pac. 284, 22 A. L. R. 1515].)

Turning now to the decision of other jurisdictions passing upon the validity of statutes creating and empowering housing authorities for purposes of slum- clearance and erection of low-rent dwelling projects, and which statutes are practically identical with those of this state here brought into question, we find that they are in unanimous accord upon the proposition that the purpose underlying such legislation is unquestionably governmental and public in character. These decisions are cited at length above. It would be repetitious to quote from all of them. We quote but two. The views and reasoning underlying all of such cases are reflected in *Spahn v. Stewart, supra,* 657, where in rejecting the assaults of certain taxpayers and owners of rentable property upon the Kentucky statute creating and empowering municipal housing commissions possessing substantially the powers invested in the petitioner here, the court declared that "The use here proposed, as argued by appellee and admitted by appellants, may be more beneficial in the way of direct aid to a particular class, but it also operates to the benefit of the general public and its welfare. The act limits the ultimate use of the improved property to such persons as may be selected to occupy. This does not brand the purpose as class or special legislation. Whether or not the persons chosen to occupy are to be ultimately benefited more than those who are not, is a sociological question because of differing circumstances. Who can say that in the long run those who live in sumptuous residences environed by the elite may not account themselves still more blessed, if by improved conditions of housing in another section they are relieved from the probabilis or possibilities of an epidemic of smallpox, typhoid fever, or other diseases, or that they may sleep more serenely because of a lessened fear of the commission of crime against their persons or property. 'The essential purpose of the legislation is not to benefit that class or any class; it is to protect and safeguard the entire public from the menace of the slums. ... The fact

that all individuals may not be elected to occupy the reconditioned premises is not material. A power plant, because of limited equipment, may not be able at all times to serve all the public but it is none the less rendering public service. It is not essential to the validity of the proposal that all the public reap like direct benefits. ... The fact that those who may ultimately occupy the premises may have a preference is immaterial. ... It is not material that some reap more benefit than others. ... Nor is the government competing with private enterprise ..." To the same effect is *Knoxville Housing Authority v. City of Knoxville, supra,* 1087, wherein it appears: "The courts reason that the primary object of all government is to foster the health, morals and safety of the people. That slum districts with their filthy, congested, weather-exposed living quarters are breeding places of disease, immorality and crime. The character of the houses in such districts make of them a fire hazard. The existence of such districts depresses the taxable value of neighboring property and deprives the state of revenue. The State is also put to great expense in combating disease, crime and conflagration originating in such localities. They menace not only the health, safety and morals of those living therein, but since disease, crime, immorality and fires can with difficulty be confined to points of origin, these districts are a menace to the whole community-indeed, a menace to the State." See, also, *Green v. Frazier,* 253 U. S. 233 [40 Sup. Ct. 499, 64 L. Ed. 878], where, among other things, it is declared that "With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire." As stated, we are satisfied that the statutes of this state creating and empowering housing authorities for the purpose of slum clearance and erection of low- cost housing projects represent the exercise of a proper governmental function for a valid public purpose.

Our determination that the use to which such housing projects are devoted is a public one, necessarily answers the contention addressed to the exercise of the right of eminent domain by the authorities created to carry on such projects. Investing petitioner and similar authorities with the right of eminent domain does no violence to either the state or federal Constitution, assuming just compensation be made to owners. Section 1237 of the Code of Civil Procedure declares that "Eminent domain is the right of the people or government to take private property for public use". The public purpose served by the petitioner and other local housing authorities warrants the grant of such right to them. (*University of So. Cal. v. Robbins,* 1 Cal. App. (2d) 523 [37 Pac. (2d) 163], *certiorari* denied in U. S. Supreme Court, 295 U. S. 738 [55 Sup. Ct. 650, 79 L. Ed. 1685]; *Fallbrook Irr. Dist. v. Bradley,* 164 U. S. 112, 161 [17 Sup. Ct. 56, 41 L. Ed. 369].) is the unanimous holding of the several decisions from other jurisdictions above cited wherein similar housing statutes were involved. The point is succinctly disposed of in *Williamson v. Housing Authority of Augusta, supra,* as follows: "If the use is a public use, the power of eminent domain conferred by the act is legitimate."

[A substantial portion of the opinion is omitted.] . . . . .

What we have said sufficiently disposes of the many contentions urged by respondent in support of his demurrer, including any contentions not expressly mentioned herein. Many of the arguments of *amici curiae* are the same as those advanced by respondent and are answered herein. Contrary to the additional contentions of one of the *amici curiae,* we find no deficiency in the governor's proclamation calling the special session of the legislature at which the statutes here involved were enacted nor in the legislative finding and declaration of the urgency underlying such legislation. Nor do we find any merit in the contention that the legislature has delegated county and municipal functions to special commissions in violation of section 13 of article XI of the Constitution. As already pointed out, an authority created under the act "shall not transact any business or exercise its powers hereunder until or unless the governing body of the city or the county, as the case may be, by proper resolution shall declare at any time hereafter that there is need for an authority to function in such city or county". In view of this provision of the act, it must be concluded that it is the local governing body, and not the legislature, that confers upon the authority the right to exercise its functions.

As this opinion has progressed, it must have been evident that all of the objections here raised against the constitutionality of the slum-clearance and low-rent housing project statutes here involved have been passed upon by the Supreme Courts of other jurisdictions with respect to similar legislation and under substantially

similar constitutional provisions. In every instance the legislation has been upheld. As stated in *Dornan v. Philadelphia Housing Authority, supra,* 836, legislation of this type naturally invites "the attack of those who are inclined to regard all experiments in our social and economic life as presumptively unconstitutional. Such challenges must fail, however, if, upon analysis, it appears that the only novelty in the legislation is that approved principles are applied to new conditions. Neither our state nor our federal Constitution forbids changes, merely because they are such, in the nature or the manner of use of methods designed to enhance the public welfare; they require only that the new weapons employed to combat ancient evils shall be consistent with the fundamental scheme of government of the Commonwealth and the nation; and shall not violate specific constitutional mandates. ... Here ... the construction and the operation of housing projects are merely ancillary to the underlying purpose of slum-clearance. The elimination of unsafe and dilapidated tenements is a legitimate object for the exercise of the police power. Apart from the declarations in the Housing Authorities Law itself, the veriest tyro in the study of social conditions knows that the existence of slums is a menace to the health and happiness of the community in which they exist."

For the foregoing reasons, respondent's demurrer to the petition is overruled. Let a peremptory writ of mandate as prayed.

◆ ◆ ◆ ◆ ◆

## City of Oakland v. Oakland Raiders

32 Cal.3d 60, 646 P.2d 835, 183 Cal.Rptr. 673 (1982)

RICHARDSON, J.

The City of Oakland (City) appeals from a summary judgment dismissing with prejudice its action to acquire by eminent domain the property rights associated with respondent Oakland Raiders' (the Raiders) ownership of a professional football team as a franchise member of the National Football League (NFL). We conclude that the trial court erred in granting the summary judgment and we reverse and remand the case for a full evidentiary trial of the issues on the merits.

The Raiders limited partnership is comprised of two general partners, Allen Davis and Edward W. McGah, and several limited partners, all of whom are individual respondents herein. In 1966 the Raiders and the Oakland-Alameda County Coliseum, Inc., a nonprofit corporation, entered into a five-year licensing agreement for use of the Oakland Coliseum by the Raiders. Having been given five three-year renewal options, the Raiders exercised the first three, and failed to do so for the football season commencing in 1980 when contract negotiations for renewal terminated without agreement. When the Raiders announced its intention to move the football team to Los Angeles, City commenced this action in eminent domain.

The trial court granted summary judgment for all respondents and dismissed the action. The legal confrontation between the parties is sharply defined. City insists that what it seeks to condemn is "property" which is subject to established eminent domain law. City contends that whether it can establish a valid "public use" must await a determination of the court after a full trial at which all relevant facts may be adduced. In answer, respondents argue that the law of eminent domain does not permit the taking of "intangible property not connected with realty," thereby rendering impossible City's condemnation of the football france which respondents describe as a "network of intangible contractual rights." Further, respondents claim that the taking contemplated by City cannot as a matter of law be for any "public use" within City's authority. Thus, two issues are herein presented, the first dealing with the intangible nature of the property proposed to be taken, and the second focusing on the scope of the condemning power as limited by the doctrine of public use. We consider them sequentially after acknowledging some accepted eminent domain principles of broad application.

We have held that "The power of eminent domain is an inherent attribute of sovereignty." (County of San Mateo v. Coburn (1900) 130 Cal. 631, 634 [63 P. 78, 621]; accord City of Anaheim v. Michel (1968) 259

Cal.App.2d 835, 837 [66 Cal.Rptr. 543]; Anaheim Union High Sch. Dist. v. Vieira (1966) 241 Cal.App.2d 169, 171 [51 Cal.Rptr. 94].) This sovereign power has been described as "universally" recognized and "necessary to the very existence of government." (1 Nichols on Eminent Domain (3d ed. 1980) §§ 1.11, 1.14[2], pp. 1-10, 1-22.) When properly exercised, that power affords an orderly compromise between the public good and the protection and indemnification of private citizens whose property is taken to advance that good. That protection is constitutionally ordained by the Fifth Amendment to the United States Constitution, which is made applicable to the states by nature of the Fourteenth Amendment (Chicago, Burlington Sc. R'd. v. Chicago (1897) 166 U.S. 226, 233-241 [41 L.Ed. 979, 983-986, 17 S.Ct. 581]) and by article I, section 19 of the California Constitution.

Because the power to condemn is an inherent attribute of general government, we have observed that "constitutional provisions merely place limitations upon its exercise." (People v. Chevalier (1959) 52 Cal.2d 299, 304 [340 P.2d 598].) The two constitutional restraints are that the taking be for a "public use" and that "just compensation" be paid therefor. (Ibid.; City of Anaheim, supra, 259 Cal.App.2d at p. 837.) No constitutional restriction, federal or state, purports to limit the nature of the property that may be taken by eminent domain. In contrast to the broad powers of general government, however, "a municipal corporation has no inherent power of eminent domain and can exercise it only when expressly authorized by law. (City of Menlo Park v. Artino [1957] 151 Cal.App.2d 261, 266 ....)" (City of Anaheim, supra, at p. 837.) We examine briefly the source of City's statutory power.

In 1975, California's eminent domain statutes received extensive revision and recodification. (See Code Civ. Proc., § 1230.010 et seq.; all further statutory references are to this code unless otherwise indicated; see also, e.g., Gov. Code, § 37350.5.) These changes were recommended by the California Law Revision Commission after it studied our existing eminent domain law and reviewed similar laws of every jurisdiction in the United States, pursuant to legislative direction. (See Eminent Domain Law, 13 Cal. Law Revision Com. Rep. (1975) pp. 1009-1011.) In the words of the commission, the new law was intended "to cover, in a comprehensive ma all aspects of condemnation law and procedure" and to produce "a modern Eminent Domain Law within the existing California statutory framework." (Id., at pp. 1010-1011.)

Certain provisions of the recodified law are particularly relevant to the issues before us. Government Code section 37350.5, as amended, provides: "A city may acquire by eminent domain any property necessary to carry out any of its powers or functions." (Italics added.) As newly defined, "'Property' includes real and personal property and any interest therein." (§ 1235.170.) In implementation of the foregoing right to take, the new code also authorizes any "person" empowered to take property for a particular use to exercise certain additional power to condemn other property "necessary to carry out and make effective the principal purpose involved ...." (Id., § 1240.120, subd. (a); see id., § 1240.110.) Within this context, "person" includes "any public entity" (id., § 1235.160); and "public entity," in turn, includes a "city." (Id., § 1235.190.) The constitutional obligation to pay compensation for property so taken also is codified. (See id., § 1263.010, subd. (a).)

The new law appears to impose no greater restrictions on the exercise of the condemnation power than those which are inherent in the federal and state Constitutions. Further, the power which is statutorily extended to cities is not limited to certain types of property. In discussing the broad scope of property rights which are subject to a public taking under the new law, the Law Revision Commission comment notes that "Section 1235.170 is intended to provide the broadest possible definition of property and to include any type of right, title or interest in property that may be required for public use." (See Cal. Law Revision Com. com. to Code Civ. Proc., § 1235.170, Deering's Ann. Code Civ. Proc. (1981 ed.) p. 20.) To that end the commission eliminated the "duplicative listings of property types and interests subject to condemnation" which had appeared in the earlier eminent domain statutes. (Ibid.)

Despite the apparent lack of any constitutional or statutory restrictions, respondents nonetheless assert that "intangible property" such as the contractual and other rights involved in the instant action never before has been taken by condemnation, and that such taking should not be sanctioned now. . . . . .

While broad, the eminent domain power is not unlimited. Section 1240.010 cautions: "The power of eminent domain may be exercised to acquire property only for a public use." (People v. Chevalier, supra, 52 Cal.2d 299, 304; People v. Nahabedian (1959) 171 Cal.App.2d 302, 308 [340 P.2d 1053].) Further, a public

entity's takingay be challenged on the grounds that it (1) reflects a "gross abuse of discretion" (§ 1245.255, subd. (b)); (2) is arbitrary, capricious, totally lacking in evidentiary support, or in violation of the procedural requirements of the eminent domain law (§ 1245.255, subd. (a); see Cal. Law Revision Com. com. to Code Civ. Proc., § 1245.255, Deering's Ann. Code Civ. Proc. (1981 ed.) pp. 101-102); or (3) was the result of bribery (Code Civ. Proc., § 1245.270). On the other hand, the statutory authorization to utilize the power of eminent domain for a given "use, purpose, object, or function" constitutes a legislative declaration that the exercise is for a "public use." (§ 1240.010.)

Is it possible for City to prove that its attempt to take and operate the Raiders' football franchise is for a valid public use? 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 [41 L.Ed. 369, 389, 17 S.Ct. 56]; 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.

Government Code section 37350.5, for example, authorizes a city to "acquire by eminent domain any property necessary to carry out any of its powers or functions." (See also § 1240.110.) The legislative comment to this section emphasizes that its "purpose is to give a city adequate authority to carry out its municipal functions." (See Cal. Law Revision Com. com. to Gov. Code, § 37350.5, Deering's Ann. Gov. Code (1981 pocket supp.) p. 111.) Under certain circumstances, the governing body of a city may itself establish by resolution that a proposed taking is necessary for a project which is in the public interest. (See §§ 1240.030, 1240.040, 1245.250, subd. (a), 1245.255, subd. (b).) While the full effect of these statutes has yet to be construed judicially, the general statutory scheme would appear to afford cities considerable discretion in identifying and implementing public uses.

The United States Supreme Court established years ago, in another context, that "what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned." (Fallbrook Irrigation District v. Bradley, supra, 164 U.S. at pp. 159-160 [41 L.Ed. at pp. 388-389]; accord University of So. California v. Robbins, supra, 1 Cal.App.2d at pp. 527- 528.) Further, "Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment." (Rindge Co. v. Los Angeles (1923) 262 U.S. 700, 707 [67 L.Ed. 1186, 1193, 43 S.Ct. 689].) We have adopted a similar view. (The Housing Authority v. Dockweiler (1939) 14 Cal.2d 437, 450 [94 P.2d 794].) . . . . .

While it is readily apparent that the power of eminent domain formerly may have been exercised only to serve certain traditional and limited public purposes, such as the construction and maintenance of streets, highways and parks, these limitations seem merely to have corresponded to an accepted, but narrower, view of appropriate governmental functions then prevailing. The established limitations were not imposed by either constitutional or statutory fiat. Apparently acknowledging the evolving nature of public use, as we have noted, the Law Revision Commission specifically recommended against the retention of the list of possible public uses in the new law, explaining, "The scheme of the Eminent Domain Law renders a listing of public uses in the general condemnation statute, as under former Section 1238, unnecessary .... The state (Gov. Code, § 15853), cities (Gov. Code, § 37350.5) counties (Gov. Code, § 25350.5), and school districts (Ed. Code, § 1047) may exercise the power of eminent domain to acquire property necessary for any of their powers or functions." (See Cal. Law Revision Com. com. to Code Civ. Proc., § 1240.010, Deering's Ann. Code Civ. Proc. (1981 ed.) p. 24.)

From the foregoing we conclude only that the acquisition and, indeed, the operation of a sports franchise may be an appropriate municipal function. If such valid public use can be demonstrated, the statutes discussed herein afford City the power to acquire by eminent domain any property necessary to accomplish that use.

We caution that we are not concerned with the economic or governmental wisdom of City's acquisition

or management of the Raiders' franchise, but only with the legal propriety of the condemnation action. In this period of fiscal constraints, if the city fathers of Oakland in their collective wisdom elect to seek the ownership of a professional football franchise are we to say them nay? And, if so, on what legal ground? Constitutional? Both fel and state Constitutions permit condemnation requiring only compensation and a public use. Statutory? The applicable statutes authorize a city to take "any property," real or personal, to carry out appropriate municipal functions. Decisional? Courts have consistently expanded the eminent domain remedy permitting property to be taken for recreational purposes.

Whether the action proposed by City here is governed by section 1240.050 and, if so, whether it falls within the territorial limitation or the exception thereto, like the other factual and legal issues hereinabove noted, are matters which require a trial court's inquiry. Such issues are clearly material in determining whether City's proposed exercise of its power of eminent domain is proper and reasonable. Further, the facts and circumstances developed at a trial may be of substantial assistance in the formulation of any appropriate limitations on the exercise of such power. . . . . .

Our conclusion requiring a trial on the merits is reinforced by the long recognized and fundamental importance of the "facts and circumstances" of each case in determining whether a proposed use is a proper public use. (Fallbrook Irrigation District v. Bradley, supra, 164 U.S. at pp. 159-160 [41 L.Ed. at pp. 338-339]; Linggi v. Garovotti (1955) 45 Cal.2d 20, 24 [286 P.2d 15]; Lindsay I. Co. v. Mehrtens (1893) 97 Cal. 676, 680 [32 P. 802]; University of So. California v. Robbins, supra, 1 Cal.App.2d at pp. 527-528.) City and the Raiders should be afforded a full opportunity before a trial court to present the "facts and circumstances" of their respective sides during a trial on the merits. That opportunity was, of course, foreclosed by the trial court's entry of summary judgment dismissing the action.

In its petition for rehearing, the Raiders reasserts its view that a professional football franchise is not a proper subject for eminent domain. We repeat what is necessarily implicit in our opinion: Under the present statutory scheme, the courts have no authority to choose those items of property which they deem appropriate for condemnation. Our Legislature has unambiguously decreed that "A city may acquire by eminent domain any property necessary to carry out any of its powers or functions." (Italics added; Gov. Code, § 37350.5; see Code Civ. Proc., § 1235.170.) Moreover, we do not decide whether City has a meritorious condemnation claim in this case. City's ability to prove a valid public use for its proposed action remains untested. We hold only that City should be given the opportunity to prove its case in accordance with the established legal principles outlined in our opinion.

We reverse and remand the case to the trial court for further proceedings not inconsistent with this opinion.

Mosk, J., Newman, J., Kaus, J., and Reynoso, J.,
Opinions by Feinberg, J. (concurring) and Bird, J. (concurring and dissenting) are omitted.

◆ ◆ ◆ ◆ ◆

**99 Cents Only Stores v. Lancaster Redevelopment Agency**
237 F.Supp.2d 1123 (C.D. Cal. 2001) – [*Note: This is the revised case.]*

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

WILSON, District Judge.

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

I. *INTRODUCTION*

Plaintiff 99 Cents Only Stores ("99 Cents") alleges that Defendants Lancaster Redevelopment Agency and the City of Lancaster (collectively "Lancaster") have threatened to take its property in violation of the Fifth Amendment and, accordingly, seek equitable relief under 42 U.S.C. § 1983. In particular, 99 Cents asks the Court to enjoin Lancaster from initiating condemnation proceedings against it on the ground that any such condemnation would violate the "public use" provision of the Takings Clause contained in the Fifth Amendment. For the reasons set forth below, the Court grants 99 Cents' motion for summary judgment and, accordingly, issues an injunction as described herein.

II. *FACTUAL SUMMARY*

A. *The Development of the Power Center*

In 1983, pursuant to California's Community Redevelopment Law (the "CRL"), Lancaster enacted an ordinance establishing the Amargosa Redevelopment Project Area (the "Project Area") and adopted a Redevelopment Plan (the "Amargosa Plan" or the "Plan") for the revitalization of that area. As it was required to do by the CRL, Lancaster made specific findings in the Amargosa Plan describing the blighted conditions existing in the Project Area at that time. According to those findings, the Project Area was then plagued by inadequate public improvements and facilities, faulty subdivision planning, and flood hazards. The Amargosa Plan also conferred on Lancaster the power of eminent domain necessary to condemn any blighted real property. Pursuant to the CRL, those condemnation powers were set to expire in 1995, unless the Plan was expressly amended to extend them beyond that year.

In 1988, Lancaster began plans to develop a regional shopping center known as the Valley Central shopping center. The cornerstone of that center was to be a large retail shopping area called the "Power Center," which would house so- called "anchor" businesses like Costco Wholesale Corporation and Wal-Mart. Costco, in fact, moved into the Power Center in 1988 and was involved in the continued planning and development of the Power Center. The Power Center was completed in 1991, and all adjoining public roads, infrastructure, and facilities were completed by 1993. The Power Center is currently occupied by large retail stores like HomeBase, Wal-Mart, Circuit City, Costco, and 99 Cents.

In 1994, Lancaster amended the Amargosa Plan to extend the number of years the city could utilize property tax increment funds and to achieve other planning purposes. Notably, however, Lancaster did not extend its eminent domain powers, nor did it make any new blight findings, even though the California legislature had revised the CRL's definition of blight in 1993. The next year, in 1995, Lancaster's condemnation powers expired under the terms of the Plan. A year and a half later, in March of 1997, Lancaster renewed its condemnation rights by amending the Amargosa Plan a second time. Again, though, Lancaster made no new evidentiary findings of blight. Instead, it merely relied on its prior 1983 findings.

As for the Power Center itself, it had become the highest quality commercial retail property in Lancaster and one of the most prestigious shopping areas in the city. In fact, it is promoted on Lancaster's official web-site as a redevelopment "success story" and is the only shopping center in Lancaster that has a regional draw for customers.

B. *99 Cents and Costco*

In 1998, 99 Cents moved into a vacant piece of property located next to Costco and entered into a 5-year lease with the property owner of the Power Center, Burnham Pacific. Under the lease, 99 Cents had the option to extend its leasehold interest beyond 2003 for an additional 15 years. In its first full year of operation, 99 Cents' sales were in excess of $5 million. In a candid admission, Lancaster has stated that it "loves" 99 Cents because of the significant tax revenues generated by the store.

Almost immediately after 99 Cents moved into the Power Center, Costco advised Burnham Pacific and Lancaster of its need to expand the size of its Lancaster operations. Costco threatened to relocate in the City of Palmdale unless Lancaster provided Costco with additional space in the Power Center. Costco, Lancaster, and Burnham Pacific began negotiating options by which Costco could expand its store and remain within the city of Lancaster. Significantly, Burnham Pacific advised Lancaster that "the most efficient use of [Costco's] property would be an expansion to the south of their existing facility behind the 99¢ Only Store." Costco, however, demanded that it be allowed to expand into the space being occupied by 99 Cents.

Viewing Costco as a so-called "anchor tenant" and fearful of Costco's relocation to another city, Lancaster began negotiating with Burnham Pacific for the acquisition of the property on which 99 Cents was located. To that end, Lancaster approved a Disposition and Development Agreement ("DDA") in September of 1999, by which Lancaster was required to use its best efforts to purchase that property from Burnham Pacific and relocate 99 Cents. 99 Cents, however, was never made a party to these discussions. Ultimately, Lancaster and Burnham Pacific were unable to negotiate a mutually acceptable deal, and Lancaster therefore decided to acquire Burnham Pacific's property through a "friendly" eminent domain proceeding. Specifically, Lancaster proposed to purchase from Burnham Pacific the property on which 99 Cents was located for approximately $3.8 million, relocate 99 Cents, and then sell the property to Costco for the nominal price of $1.00.

Thereafter, on or about May 25, 2000, Lancaster offered to purchase 99 Cents' leasehold interest for the sum of $130,000, plus additional unspecified amounts to compensate 99 Cents for the loss of goodwill and the costs of relocation. 99 Cents rejected the offer. Through a series of public hearings, Lancaster proposed Resolutions 21-00 and 22-00 (the "Resolutions of Necessity"), which authorized the condemnation of the real property in which 99 Cents held its leasehold interest. The Resolutions of Necessity contained no findings of blight generally, no findings that the Power Center was blighted, nor any findings that the property on which 99 Cents was located was blighted in any way. After the Resolutions of Necessity were passed on June 27, 2000, this lawsuit immediately followed.

III. *PROCEDURAL HISTORY*

Less than two months before this case was set for trial, Lancaster rescinded the Resolutions of Necessity on December 12, 2000. In addition, three days later, Lancaster terminated the DDA with Costco. Most recently, on March 26, 2001, Lancaster has informed the Court that it "has identified and acquired real property with the intent to transfer it to Costco." This property is not located in the Power Center. As of March 26, 2001, Lancaster had begun negotiating a second DDA with Costco by which title to the newly acquired property would be transferred to Costco. To date, however, the Court has received no updated information as to the status of those negotiations.

On January 22, 2001, Lancaster moved the Court to dismiss 99 Cents' complaint on the ground that it had been rendered moot by Lancaster's rescission of the Resolutions of Necessity and its termination of the original DDA with Costco. However, Lancaster expressly refused to stipulate that it would not later attempt to condemn 99 Cents' real property interest if the Court were to dismiss this action. The Court therefore rejected Lancaster's mootness argument. Now, without invitation by the Court, Lancaster has filed a motion for summary judgment, once again asserting that this case is moot.

99 Cents counters that the Court may still entertain its action because there is a reasonable likelihood that Lancaster will initiate condemnation proceedings against it in the future unless the Court enjoins Lancaster accordingly. Furthermore, 99 Cents itself has moved for summary judgment on the ground that Lancaster's efforts to condemn its leasehold interest constitute an unconstitutional taking in violation of the Fifth

Amendment. Specifically, 99 Cents contends that Lancaster's attempt to condemn its property interest violates the "Public Use" clause of the Fifth Amendment because such condemnation would serve no purpose other than to appease a purely private entity, Costco.

IV. *DISCUSSION*

A. *Mootness*

Mootness is a jurisdictional issue that derives from the requirement of a case or controversy under Article III of the United States Constitution. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 120 S.Ct. 693, 703-04, 145 L.Ed.2d 610 (2000). It is well established, however, that a case is not rendered moot where, as here, a defendant voluntarily ceases the allegedly unlawful activity in response to a lawsuit but is otherwise free to return to it any time. *See Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1509 (9th Cir.1994). "Only if there is no reasonable expectation that the illegal action will recur is such a case deemed moot." *Id.* at 1510 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)). The burden of demonstrating mootness "is a heavy one." *County of Los Angeles v. Van Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979).

Indeed, to establish mootness, the defendant bears the burden of showing that "subsequent events [have] made it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur." *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1238 (9th Cir.1999) (citation omitted and alteration in original). Lancaster has not sustained that burden here. According to Lancaster, there is no reasonable basis to believe it will re-initiate condemnation proceedings against 99 Cents because Lancaster has rescinded the Resolutions of Necessity, terminated the original DDA with Costco, and purchased property for a proposed Costco relocation. None of these facts, however, renders the present case moot.

First, the mere repeal of a law is not, by itself, sufficient grounds to make a case moot. *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982) (repeal of city ordinance did not render challenge to ordinance moot where city was likely to reenact ordinance after completion of litigation). The fact that Lancaster's repeal of the Resolutions of Necessity came only in the wake of 99 Cents' lawsuit is strong evidence that Lancaster might simply reenact the resolutions upon the completion of this litigation. *See Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 854 (9th Cir.1985). The mere termination of the original DDA with Costco is also of no moment. Lancaster can simply enter into a new DDA at any time, as evidenced by the fact that it is currently negotiating a second DDA with Costco.

As for Lancaster's present intention to relocate Costco, it is just that--an intention, not a legal commitment. It bears emphasizing in this regard that throughout the course of this litigation, Lancaster has persistently refused to enter into any stipulation agreeing not to condemn 99 Cents' leasehold interest at Costco's behest. If, in fact, Lancaster intends to physically relocate Costco *outside* of the Power Center and *away* from 99 Cents, there is no reason why Lancaster could not agree to such a stipulation. Its refusal to do so weighs heavily against a finding of mootness. *See LSO Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir.2000) (observing that government's failure to disavow future application of challenged provision gives substance to plaintiff's fears). Moreover, Lancaster's naked assertion that it has no plans to initiate eminent domain proceedings against 99 Cents for the sole benefit of Costco is made suspect by the fact that it continues to insist it is within its absolute right to do so.

Accordingly, the Court cannot conclude that 99 Cents' request for injunctive relief is rendered moot solely because of Lancaster's voluntary cessation of condemnation proceedings. Absent conclusive proof that Lancaster will not again attempt to condemn 99 Cents' real property interest simply to allow Costco's expansion, the Court remains convinced that 99 Cents has a reasonable expectation that Lancaster will resume its condemnation efforts in the future at Costco's behest.[1] Thus, the Court must reach the merits of 99 Cents'

[1]For this reason as well, Lancaster's standing argument similarly fails. *See LSO Ltd.*, 205 F.3d at 1155.

complaint for injunctive relief.

### B. *Unconstitutional Taking Under the Fifth Amendment*

#### 1. *Public Use Clause*

The Fifth Amendment to the Constitution proscribes the "taking" of private property "for public use without just compensation." U.S. Const., amend. V. The "public use" requirement is an explicit limit on the power of government to take private property for, as the Supreme Court has long recognized, a taking--even if justly compensated--must serve a legitimate public purpose. *See Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80, 57 S.Ct. 364, 81 L.Ed. 510 (1937). A taking for purely private use is unconstitutional no matter the amount of "just compensation" that may be given. *See id; Armendariz v. Penman*, 75 F.3d 1311, 1320 (9th Cir.1996) (en banc). "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).

To satisfy the Public Use Clause, a taking need only be "rationally related to a conceivable public purpose." *Id.* at 241, 104 S.Ct. 2321. "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." *Id.* at 240, 104 S.Ct. 2321. Under the *Midkiff* standard, the Court must accept the avowed public purpose of Lancaster's condemnation efforts unless the public use findings are "palpably without reasonable foundation." *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1158 (9th Cir.1997) (quoting *Midkiff*, 467 U.S. at 241, 104 S.Ct. 2321). Even under such a deferential standard, however, public use is not established as a matter of law whenever the legislative body acts. While the scope of judicial scrutiny is narrow, "[t]here is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use." *Midkiff*, 467 U.S. at 240, 104 S.Ct. 2321.

No judicial deference is required, for instance, where the ostensible public use is demonstrably pretextual. *See Armendariz*, 75 F.3d at 1321. "If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a 'public use,' and if those officials could later justify their decisions in court merely by positing 'a conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings." *Id.* The sole question before the Court, therefore, is whether Lancaster has presented a valid or pretextual public use for its plan to condemn 99 Cents' leasehold interest.

#### 2. *Lancaster's Alleged Public Use*

In this case, the evidence is clear beyond dispute that Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another. Indeed, Lancaster itself admits that the *only* reason it enacted the Resolutions of Necessity was to satisfy the private expansion demands of Costco. It is equally undisputed that Costco could have easily expanded within the Power Center onto adjacent property *without* displacing 99 Cents at all but refused to do so. Finally, by Lancaster's own admissions, it is was willing to go to any lengths--even so far as condemning commercially viable, unblighted real property--simply to keep Costco within the city's boundaries. In short, the *very reason* that Lancaster decided to condemn 99 Cents' leasehold interest was to appease Costco. Such conduct amounts to an unconstitutional taking for purely private purposes. *See, e.g., Armendariz*, 75 F.3d at 1321 (observing that forced sale of property for purpose of allowing private developer to acquire it at reduced price would not be for "public use").

Yet, Lancaster nevertheless insists that the need to keep Costco satisfied is, by itself, sufficient for purposes of the Public Use Clause. Specifically, Lancaster posits that if the city were to lose Costco, a major "anchor" tenant, surrounding businesses would potentially suffer and eventually cause a "reestablishment of blight." However, Lancaster does not contend--nor did it ever find--that 99 Cents' property suffers from any *existing blight* or that it is contributing to blight in the Amargosa Project Area in any way. Rather, the sole reason for condemning the property was Costco's unilateral demand for expansion into the space being occupied by 99 Cents. According to Lancaster, this is enough because the loss of Costco may cause what it calls "future

blight" and preventing "future blight" is an adequate public use within the meaning of the Takings Clause.[2]

Lancaster's contention suffers from two fatal flaws. First, the notion of "future blight," a concept not discussed anywhere in California redevelopment law, made its first appearance in this litigation in direct response to 99 Cents' lawsuit. Aside from Lancaster's bald assertions in its briefs, there is simply no evidence in the record to suggest that so-called "future blight" was the actual reason underlying Lancaster's condemnation efforts at the time they were initiated. Nothing in Lancaster's Resolutions of Necessity, its DDA with Costco, or its public hearing statements relied upon *any* evidentiary findings of "future blight." The idea of future blight simply embodies Lancaster's current litigation position; it is not supported by any evidence in the record. Accordingly, the Court need not defer to Lancaster's belated statement of public use. *See Armendariz,* 75 F.3d at 1321 (deference to alleged legislative determinations of "public use" not appropriate where there is no record evidence of such determinations).

Furthermore, Lancaster's "public use" theory fails for another independent reason. Lancaster can point to no authority--and the Court could find none--supporting its novel legal proposition that the prevention of "future blight" is a legitimate public use under California redevelopment law. To the contrary, Lancaster's theory of "future blight" turns the Community Redevelopment Law (the "CRL") on its head.

"The purpose of the CRL is to provide a means of remedying blight *where it exists.*" *Beach-Courchesne v. City of Diamond Bar,* 80 Cal.App.4th 388, 95 Cal.Rptr.2d 265, 279 (2000) (emphasis added); *see also Friends of Mammoth v. Town of Mammoth Lakes Redev. Agency,* 82 Cal.App.4th 511, 98 Cal.Rptr.2d 334, 362 (2000) ("Determinations of blight are to be made on the basis of an area's existing use, not its potential use."). For this reason, the California Supreme Court has warned that "[p]ublic agencies and courts both should be chary of the use of the [redevelopment] act unless, ... there is a situation where the blight is such that it constitutes a real hindrance to the development of the city and cannot be eliminated or improved without public assistance. It never can be used just because the public agency considers that it can make a better use or planning of an area than its present use or plan." *Sweetwater Valley Civic Ass'n. v. City of National City,* 18 Cal.3d 270, 133 Cal.Rptr. 859, 555 P.2d 1099, 1103 (1976) (citation omitted).

Under Lancaster's theory, the very prosperity the Power Center is currently enjoying justifies its indiscriminate use of eminent domain powers because such prosperity could be erased at any time by "future blight." In Lancaster's view, then, no redevelopment site can ever be truly free from blight because blight remains ever latent, ready to surface at any time. Such an untenable position not only defies logic, it is contrary to California redevelopment law. If a city cannot even obtain redevelopment powers in the first place unless there is *existing blight* to be redressed, it necessarily follows that, if the city later acquires those powers, it cannot exercise them to condemn property that is *not blighted* solely to prevent some unidentifiable "future blight" that may never even materialize. In short, the notion of avoiding "future blight" as a legitimate public use

---

[2] Unable to argue that the property being currently leased by 99 Cents is blighted, Lancaster alternatively contends that its original 1983 evidentiary findings of blight are enough to condemn 99 Cents' leasehold interest over 17 years later without any renewed findings of blight. The parties dispute whether the CRL requires new blight findings prior to the exercise of eminent domain powers. The Court need not delve into such matters, however, to resolve the present case. Regardless of whether new blight findings are required by *California law*--an issue the Court expressly declines to address--the existence of such findings are relevant under *federal law* only insofar as they bear upon the Court's "public use" analysis under the Fifth Amendment. Independent of California law, Lancaster must present a valid public use within the meaning of the Takings Clause supporting its decision to condemn 99 Cents' property interest. Lancaster's failure to show that 99 Cents' leased property was blighted at the time of its attempted condemnation is determinative of 99 Cents' federal takings claim only. Its significance under California law is an issue the Court need not resolve.

is entirely speculative and wholly without support in California redevelopment law. As such, the Court concludes that Lancaster's condemnation efforts violate the Public Use Clause of the Fifth Amendment.

C. *Timeliness of 99 Cents' Challenge*

Finally, Lancaster asserts that 99 Cents' complaint is time- barred by Cal. Health & Safety Code § 33500. In pertinent part, that section provides:

> No action attacking or otherwise questioning the validity of any redevelopment plan, or amendment to a redevelopment plan, or adoption or approval of such plan, or amendment, or any of the findings or determinations of the agency or the legislative body in connection with such plan shall be brought prior to the adoption of the redevelopment plan nor at any time after the elapse of 60 days from and after the date of adoption of the ordinance adopting or amending the plan.

Because 99 Cents did not challenge the Amargosa Plan within 60 days of its enactment in 1983, Lancaster argues that 99 Cents is barred from challenging it.

The Court need not tarry long with this argument because it is foreclosed by *Redevelopment Agency of the City of Fresno v. Herrold*, 86 Cal.App.3d 1024, 150 Cal.Rptr. 621 (1978). There, the court held that the 60-day limitations period in § 33500 applies only when a party is "attacking the legality of the redevelopment plan as originally adopted," not when he "is questioning the implementation of the plan with respect to his property." *Id.* at 625. Section 33500 is simply inapposite "[i]n cases like the present one where the challenge is not directed to the legality of the plan itself, but merely to its illegal implementation with respect to one parcel" of real property. *Id.*

V. *CONCLUSION*

For all the foregoing reasons, the Court denies Lancaster's motion for summary judgment and grants 99 Cents' motion for summary judgment. Lancaster is hereby permanently enjoined from initiating eminent domain proceedings against the real property currently being occupied and leased by 99 Cents so long as the purpose or effect of such proceedings is to displace 99 Cents and permit the physical expansion of Costco onto that property. The Court cannot and will not issue any injunctive relief, however, as to any other grounds for condemnation under the Amargosa Plan that may potentially arise in the future, as such matters do not present an existing justiciable case or controversy.

IT IS SO ORDERED.