Should the Definition of Blight Be Modified to Encourage Use of TIF to Achieve Other Planning Goals in Underutilized Urban Areas?

A recent national survey of blight laws demonstrated that no jurisdiction has ever attempted to enforce a blight test as stringent as California's. Perhaps we should consider relaxing the definition. Officials in Diamond Bar and Mammoth Lakes were trying to make their communities more attractive for business and to work their way out of a deep real estate recession that had diminished local tax revenues. Diamond Bar also hoped to spark a retail resurgence. Mammoth Lakes was eager to revive a declining tourist trade and upgrade its modest retail core.

These communities were actively attempting to achieve the stated goals of California planning law, to meet local infrastructure needs, conserve open space, facilitate economic development, and enhance affordable housing opportunities. If they erred by trying to use redevelopment in unblighted areas, it was not because they had overlooked better options. The state has denied local governments access to enough resources to attain the goals that emerge from the state-mandated planning process.

Cities and counties cannot attain a full array of land use planning goals utilizing only their traditional land use powers. True, cities can be quite inventive in wielding their land use powers to secure a range of public benefits. Yet, in the end, land use controls amount to nothing more than the right of a city council to "just say no" to development proposals. It's mostly sticks, few carrots. Redevelopment, as Charles Abrams observed over three decades ago, "supplies a multipurpose opportunity in place of the piecemeal efforts to correct traffic problems, provide playgrounds and open spaces, provide neighborhood amenities, and new housing, public and private." Without such pro-active powers, cities and counties must remain largely passive players in shaping the use of land within their boundaries, even when the private sector isn't fulfilling community planning aspirations. Why shouldn't redevelopment agencies be empowered to re-plan developed urban areas so as to improve traffic flow, the mix of land uses, or the quality of open space?

A Proposal. Communities should be encouraged to redevelop underutilized urban land through a definition of blight specially crafted to their needs, as the legislature has accommodated redevelopment projects involving the re-use of closed military bases or rebuilding in the wake of disasters. The statutory definition should be re-formulated to promote infill-- the intensive re-use of sparsely developed urban parcels. Then, instead of having to shoehorn planning-motivated redevelopment into the narrow last of the present blight definition, communities would have a choice, a Plan B. While it isn't clear that Diamond Bar or Mammoth Lakes could qualify a redevelopment plan even under such a re-definition of blight, they should be given the chance if they want. Even if they can't qualify, other communities might, which would advance the goals of California land use planning laws. To soften the impacts on other taxing entities, consider the possibility of allocating to them a larger percentage of the TIF than *physically* blighted redevelopment projects are made to pay, or reinstating their prerogative to negotiate larger sums from redevelopment agencies, a right they enjoyed before 1993.

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Real Estate Research Brief

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Finding The Blight That's Right For California Redevelopment Law

For over half a century, federal and most state laws empowering local governments to act as urban redevelopers have attempted to confine such activity to blighted areas. Nowhere have the statutory definitions of blight, and judicial enforcement of those standards, been more rigorous than in California. In two recent cases, *Diamond Bar* and *Mammoth Lakes*, appellate courts struck down redevelopment proposals for crossing the blight line. This paper describes those cases in light of the evolution of the blight requirement. It ends up questioning whether the 1993 California legislature was right in trying to limit local government's use of redevelopment solely to those older urban areas showing unmistakable signs of physical decay.

The Origin of the Blight Requirement in Federal Redevelopment Law

Proponents of the first federal urban redevelopment law were concerned that federal courts might declare redevelopment unconstitutional for violating the Fifth Amendment's implicit requirement that private property not be taken except for a public use ("nor shall private property be taken for public use without just compensation"). Most redevelopment projects seemed vulnerable to "public use" attacks because they involved the condemnation of private property for eventual sale or lease to another private owner. To justify these takings of private property as a public use, proponents sought a justification for redevelopment grounded in the well-established police power prerogatives of state and local governments, particularly their unquestioned authority to safeguard "health and safety". Blight removal would bring redevelopment well within the ambit of "health and safety" because of the widely held conviction at the time that overcrowding in low income areas contributed to the spread of disease and crime. Since government programs to achieve health and safety goals were clearly a public use, condemnation incidental to such programs would pass constitutional muster as well.

When the constitutionality of using eminent domain for redevelopment reached the U.S. Supreme Court in the 1954 landmark case of Berman v. Parker, these constitutional worries proved needless and the "blight" requirement became redundant. Basically, the Supreme Court in Berman eliminated any meaningful judicial review of government programs challenged solely on public use grounds. Henceforth, courts would defer to legislative declarations of "public use" as "well-nigh conclusive." After Berman v. Parker, federal courts have never rejected

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a condemnation of private property for want of a public use. A few state courts have done so, invoking provisions of their respective state constitutions. But most state courts have followed the federal lead and uniformly rejected "public use" challenges to redevelopment laws whether based on federal or state constitutional provisions.

Under the federal redevelopment statute Congress could have created a private right of action empowering citizens to challenge "blight" findings as a pre-condition to federal funding. But Congress did not. Instead, although the statute specified that federal funds were to be used only for a "slum area or a blighted, deteriorated, or deteriorating area", it explicitly left to the [federal] administrator any determination of whether an area qualified. The administrator was given absolute discretion to determine whether an area was "appropriate for an urban renewal project."

The TIF Mechanism

Although the federal redevelopment program ended in 1975, California, forty-four other states, and the District of Columbia, continue to authorize redevelopment funded by TIF, which allows redevelopment agencies to receive and spend the property taxes derived from increased assessed values that accrue after formal adoption of a redevelopment project's boundaries. TIF was first used as a means for cities to meet their matching share to qualify for grants under the federal renewal program. It has since become the primary means of local governments financing redevelopment on their own.

Under TIF, any increase in property taxes collected in the redevelopment project area is reserved to pay redevelopment expenses. Redevelopment agencies obtain capital by borrowing against future tax increments. Until the redevelopment obligations are repaid, all tax increases from the project area are funneled through the agency to the repayment of redevelopment agency indebtedness. The other taxing entities continue receiving a share of property tax revenues based on pre-redevelopment assessed valuations. But they forfeit revenues from the enhanced tax base until the redevelopment bonds are paid, usually 20 to 40 years.

The Fiscal Impact of TIF on Cities, Counties and School Districts

Basically, cities with active redevelopment agencies are the main TIF winners, and counties and the state are the primary TIF losers except to the extent redevelopment increases jobs, incomes, and retail sales which spawn fiscal benefits to the state or counties through increased business, income, property and sales taxes. This is a significant exception. For instance, while most observers would concede that redevelopment has changed the face of downtown Los Angeles, starting with the Bunker Hill project, it would be difficult to assess how much of that development would eventually have been built elsewhere within Los Angeles county in the absence of redevelopment.

The use of TIF has proven irresistibly attractive to California's cities and counties short of cash and looking for added revenues. Statewide, redevelopment agencies have more than tripled their property tax revenues from about half a billion dollars in 1985-86 to nearly $1.8 billion in 1998-99. TIF-based redevelopment projects aren't found just in California's biggest, oldest cities. Four-fifths of California's 472 cities had authorized the creation of a redevelopment agency by 1998-99, and in cities with populations exceeding 50,001, over 90% of those agencies are active, working on nearly 800 projects in all.

When California cities divert funds from counties, they risk jeopardizing the ability of counties to provide vital services, such as welfare, indigent health care, roads, tax collection, the court system, and sanitation, as well as a full range of municipal services to residents in unincorporated areas and to smaller cities by contract. Redevelopment agencies have cut sizably into property tax revenues that would otherwise have been distributed to the county and other taxing entities. In Los Angeles county, for instance, during the past fiscal year, the county received 19% of property tax revenues, schools 37%, cities 18%, and redevelopment agencies 8%. That 8%–over $500,000,000–would have been available for schools and county services had there been no TIF, assuming that all of these projects would have been built somewhere in the county anyway even without redevelopment.

The impact of TIF on California schools depends entirely on the state's fiscal decisions. The state is obligated by the California constitution to allocate a large portion of state revenue to education and to make sure disparities in property tax bases do not result in unequal education spending per pupil. Thus, where cities and counties shift property taxes from schools to redevelopment projects, the state makes up the difference – but not neces-sarily out of taxes levied by the state. The state has the option of filling its fiscal holes by dipping into redevelopment and county property tax revenues to finance schools, an option it exercised from 1992 to 1994.

If the state legislature really wanted to plug the tax drain, it could do so directly. If there were a reliable way of making sure no greater amount of increment was diverted from other taxing entities than they received in benefits from redevelopment, that would be the best means for the state to stanch the property tax flow from counties and schools. Short of that, the state could protect county and school revenues either through enacting a TIF cap (e.g., limiting the increment to a percentage of the locality's total property tax base) or increasing the share of the increment to which other taxing entities would become automatically entitled.

Implicitly recognizing the fact that cities finance redevelopment with tax increment "borrowed" from other taxing entities, courts have often insisted upon strict compliance with statutory blight definitions.

Statute Economic Blighting Conditions

- Stagnant property values
- Abnormally high vacancies, or vacant or abandoned lots located in already developed urban areas
- A lack of necessary commercial facilities (grocery or drug stores, banks)
- Residential overcrowding or an excess of liquor stores, bars, or "adult" businesses, leading to safety or welfare problems
- High crime rates

The 1993 Legislation

Redevelopment law was made more restrictive in 1993. Changes were made pertinent to findings of blight in order to cut back on the use of redevelopment in unbuilt or vacant areas. Although prior law confined redevelopment to predominantly urban areas, the definition of "predominantly urban" was tightened to preclude new project areas from being established except in areas surrounded by urban uses. Also, findings of blight had to be supported by physical as well as economic blighting conditions. Prior law had only required proof of physical, economic or social conditions.

In the 1993 law the physical blighting conditions were listed as: (1) unsafe or decrepit buildings, (2) factors such as substandard design or inadequate lot sizes that prevent the economically viable use of buildings or lots, or (3) incompatible adjoin-ing uses which prevent economic development. The statute identified a fourth physical blighting condition as sufficient standing alone to justify a finding of blight: irregularly shaped lots or parcels too small for development but only if held in multiple ownership.

Five economic blighting conditions are listed in the statute: (1) stagnant property values, (2) abnormally high vacancies, or vacant or abandoned lots located in already developed urban areas, (3) a lack of necessary commercial facilities (grocery or drug stores, banks), (4) residential overcrowding or an excess of liquor stores, bars, or "adult" businesses, leading to safety or welfare problems, or (5) high crime rates.

With minor changes in wording, these conditions were carried forward from earlier redevelopment statutes and regrouped under two headings (physical or economic) instead of three (physical, economic, social). The only former blighting condition omitted in 1993 referenced "ill health, transmission of disease, infant mortality, and juvenile delinquency".

The Diamond Bar Case

Diamond Bar Depicted. Diamond Bar is an affluent community, mostly residential, at the southeastern border of Los Angeles County. The court noted that the city had "a median income of about $66,000, average home prices of $300,000, and a relatively low crime rate." The city incorporated in 1989, mainly to exercise greater control over land use decisions previously made by the county government. To the casual visitor, this suburban, recently built community, set amidst rolling hills and valleys at the junction of two major freeways, may appear close to picture-perfect. Only about 20% of the city's land area is nonresidential, and much of that is dedicated to schools and parkland. But the city of Diamond Bar was a fiscal loser.

Because California cities depend heavily on sales taxes as a revenue source, Diamond Bar officials weren't pleased to learn from a 1995 survey of 400 residents that 86% of them "most often purchase their retail merchandise outside of the City of Diamond Bar." From 1991 to 1994, seven of the eight surrounding communities (many with redevelopment programs of their own) experienced increased taxable retail sales while Diamond Bar's taxable sales decreased almost 5%.

Only about 2% of Diamond Bar's land is dedicated to commercial uses. Most of Diamond Bar's retail centers were built in the 1970s and 1980s and had become obsolete. They were strip retail centers and small shopping centers conspicuously devoid of anchors (big retailers like department stores, whose presence draws shoppers), short on parking, and 24% vacant.

Other types of real estate weren't doing much better. Office vacancy rates in Diamond Bar ran from 20% to 40%, and its industrial vacancy rate stood at 16%. Sites in planned industrial and office subdivisions went begging. Southern California was in the midst of a real estate recession, but values were receding faster in Diamond Bar's commercial and industrial areas than elsewhere in Los Angeles county, registering an 11% decrease at a time when county values were down a comparatively enviable 1.78%.

As Diamond Bar officials came to realize, only the most expensive housing ($500,000 and up) generates sufficient property taxes to offset the cost of municipal services and the quality of public improvements its affluent residents desired. Diamond Bar had to choose between restricting housing development to pricey gated communities and nurturing better use of the commercial and industrial land within its turf. It chose the latter.

Seven years after incorporation, the city council commissioned an initial study to explore the feasibility of redevelopment, and adopted a redevelopment plan in 1997. The council placed virtually all of the city's commercial and industrial land into the redevelopment project area. Improving the city's tax base was high on its redevelopment agenda. Diamond Bar's plan was to enhance its tax base by using TIFs to lure new business, subsidize the rehabilitation of existing ones, improve roads, upgrade schools and parks, install streetscaping to create a pedestrian-friendly retail environment, and provide other public amenities.

On behalf of a dozen Diamond Bar residents, that plan was challenged by one of California's leading redevelopment attorneys, Murray O. Kane and his law partners in *Beach-Courchesne v. City of Diamond Bar.* Though the challengers lost in trial, they won on appeal, as a unanimous three-judge appellate panel overturned the trial court's determination and found no substantial evidence that Diamond Bar's redevelopment plan complied with the state blight statute.

Framing Diamond Bar as Blight Free. At some point the appellate court became convinced Diamond Bar had no blight, and had chosen redevelopment as "simply a vehicle…to finance community improvements."

For starters, the court emphasized the precise wording of the 1993 blight statute which required proof of both physical and economic blight within the project area so serious as to burden the community as a whole. To demonstrate that the proposed redevelopment area could have had no such impact, Murray Kane videotaped a 28-minute tour of the project area. Here is the appellate court's summary of what it saw on the tape: "This court feels compelled to comment that it viewed the plaintiffs' videotapes in their entirety and did not perceive anything remotely resembling blight. The videotapes depicted modern, well-maintained, retail and office structures, amidst ample landscaping and open space, in a partially rustic setting."

No Physical Blight in Diamond Bar. The appellate court flunked Diamond Bar for not fitting its project within the statutory conditions defining *physical* blight, so the court never reached the sub-section of the statute defining *economic* blighting conditions.

As mentioned above, the first of four physical blighting conditions listed in the 1993 statute concerned unfit buildings. The appellate court concluded that Diamond Bar had abandoned at trial any effort to prove the project area contained buildings unsafe or unhealthy to live or work in. While this was not quite what Diamond Bar's attorneys thought they had done, they acknowledged some difficulty satisfying this condition, but explained they didn't have to. The statute identified dilapidated buildings as but one of four possible ways to demonstrate physical blight.

The second blighting physical condition mentioned in the 1993 statute mixes physical components (inadequate lot size, lack of parking) with economic loss (prevention or hindrance of economically viable use). The court faulted the city for failing to "identify a single building" as suffering from inadequate vehicular access, substandard building materials, or inadequate loading areas. Even if it had identified such a building, the city would then have had to show how these deficiencies "hindered the economically viable use" of the property identified, and how the redevelopment plan was going to set things right. The redevelopment agency thought it had done its job by pointing generally to parking and loading area deficiencies in the project area, and the agency's plans to lure new firms and subsidize upgrades to existing retail facilities. It hadn't anticipated having to produce a building by building analysis or having to connect particular physical deficiencies to prove unprofitability.

Incompatible land uses are at the core of the third physical blighting condition. It, too, has both a physical ("adjacent or nearby uses that are incompatible with each other") and an economic component ("prevents the economic development of those parcels or other portions of the project area").

To make its case on this point, the city had cited as evidence of incompatible uses some industrial areas located near schools. It mentioned specifically the "potential hazard to children" exacerbated by the absence of a traffic signal at a busy intersection separating the school from many industrial uses. But this evidence didn't help. Diamond Bar never demonstrated the relevance of the incompatibility to the redevelopment plan. Even if the industrial uses were harmful to the school, the city had no intention of acquiring and relocating the school or of eliminating the industrial uses. Although respondents' brief alluded to high vacancy rates–up to 50%–in some of the industrial and commercial buildings near the school, the city had offered no plausible explanation of how proximity to the school had led to the high industrial vacancy rate or prevented the economic development of the industrial parcels.

Under the fourth physical blight condition, concerning irregularly shaped or impossibly small lots in multiple ownership, the city had pointed to 48 parcels–including 10 of the city's 15 retail shopping centers–being held in multiple ownership. In response, the court picked up this point from Appellants' Brief: "The mere fact of multiple ownership does not establish blight. Otherwise, a condominium development by definition would be blighted."

The city's consultants had contended that its retail areas were too small and poorly configured to accommodate large scale "power centers" and "big box" type retailers. There were two problems with the city's embracing its consultants' analysis on this point. First, the city had banned "big box" retailing through its general plan. Second, a number of undeveloped parcels within the project area contained parcels large enough for such retailing, sites of 47, 41, 36, 35 and 24 acres.

All in all, the appellate court opinion held out little hope that Diamond Bar could ever fashion a lawful redevelopment project along the lines of the proposal it had been advancing.

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The Mammoth Lakes Case

The Setting. Mammoth Lakes is a small community of approximately 24 square miles, on the eastern side of the Sierra Nevada Mountain range, surrounded by national forest land and including one of the largest ski areas in the United States. Founded on ski-based tourism, the town grew rapidly in the 1960s and 70s, incorporating in 1984. Half of Mono County's 10,900 residents live in the town. The area was hit hard by the 1990s California real estate recession, evidenced by a stark 50% nosedive in ski ticket sales from 1.4 million per year in the mid-1980s to about 730,000 in 1997.

According to its 1992 general plan, the Town of Mammoth Lakes aspired to become a "unique, high-quality destination resort community with year-round recreational opportunities." But its modest airport lacked a jet runway, and the town had no luxury resorts or upscale retail. Although the town had granted land use approvals to several promising mixed use projects, all of them were stalled in the recession. In 1996 the town instructed its redevelopment staff to begin studies necessary to designate a project area. The staff worked with a private developer, Infrawest, which had acquired the approved sites. Both the agency and Infrawest were hoping to use TIF as a means of subsidizing new tourist facilities and funding the requisite public infrastructure, from parking and snow storage areas to the creation of a viable downtown village center.

The Bases for Legal Challenge. As in Diamond Bar, Murray O. Kane and his law partners were the challengers. Here, again, they lost at trial and prevailed on appeal. They succeeded in persuading the appellate court that the redevelopment project area did not qualify as "predominantly urbanized," nor was it physically blighted.

Absence of Physical Blight. The discussion of physical blight in the Mammoth Lakes appellate opinion paralleled the discussion in the Diamond Bar case. Indeed, the consulting firms for both cities had applied much the same study methods which two separate appellate courts would reject.

Redevelopment Reserved for Areas Predominantly Urbanized. The Town of Mammoth Lakes confronted a legal barrier Diamond Bar had met. By the terms of the 1993 statute, redevelopment is deemed appropriate only for "predominantly urbanized" areas. The statute defines a predominantly urbanized area as one where not less than 80% of the land is developed for urban uses or is an integral part of a developed urban area, itself surrounded by other developed urban uses. The appellate court concluded that the Town of Mammoth Lakes had erred in counting as urban several sites partly built but largely vacant. For instance, consider the green areas within an 84-acre golf course.

> The mere fact that land is developed as a golf course doesn't conclusively render the use an urban use for purposes of redevelopment. Here, this golf course is designed as a 'mountain course with significant amounts of natural and preserved forest lands and water features interspersed throughout the course.' Further, the course was developed on what was otherwise undeveloped forest land, and continues to be surrounded by undeveloped forest land. The characteristics of this golf course can hardly be related to or characteristic of a city or a densely populated area. We conclude there is no substantial evidence on which the Town Council could determine the Lodestar golf course was an urban use.

As a result of the legal setback, Mammoth Lakes must reconcile itself to a much reduced redevelopment project area, or none at all.

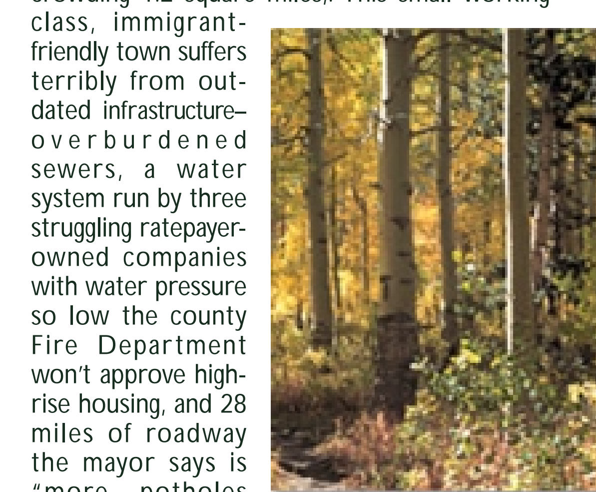
Did Diamond Bar and Mammoth Lakes Make New Law?

In one respect these two cases have made new law. They have specified an exacting level of documentation for redevelopment agencies aspiring to surmount the "physical blight" and "predominantly urbanized" bars set in place by legislation enacted in 1993. But that bar had already been set on the high side by the California Supreme Court in its 1976 opinion, *Sweetwater Valley Civic Association v. City of National City.*

In *Sweetwater*, the California Supreme Court reversed both a trial and an appellate court by ruling against a redevelopment project designed to facilitate the conversion of a marginally profitable golf course into a regional shopping mall. For 18 years the Bonita Golf Course had been operated in an area subject to periodic flooding. The redevelopment agency's prospects of being able to clear the blight hurdle of the day didn't look too bad. Under the statute in effect at the time blight could be found in "an economic dislocation...resulting from faulty planning." Compared to the land valuation and property taxes of the average acreage in town, Bonita was only 57% as valuable. This economic dislocation (measured by the disappointing property value) could be seen as having resulted from faulty planning since water run-off inundated the site with mud and debris for periods as long as two weeks at a time.

To the California Supreme Court, the statutory reference to economic dislocation didn't mean the community could imagine increasing its tax yield if the site were put to better use. Yet, a city or county could meet the statutory blight definition of the day by proof of tax receipts insufficient to pay the cost of public services. But the legislature had narrowed the definition of blight and removed fiscal stress as a justification for redevelopment. That change had become law by the time the Court wrote its opinion. Cognizant of the statutory change, the Court construed the applicable earlier law in a manner consistent with the newly enacted one, and interpreted the prior one to mean the present use had deteriorated into an irreparable economic failure. That wasn't the situation here. The Court could point to evidence in the administrative record which showed "the golf course is at least marginally profitable." Anyway, the Court reminded, "the maintenance of open space land for recreational purposes is in the public interest," evidenced by the Open-Space Lands Act (discouraging premature conversion of open space lands to urban uses). As the California Supreme Court explained, the city had come to view the site as a liability not because of how it was being used but because of its unrealized potential.

Despite *Sweetwater*, *Diamond Bar*, and the statutory revisions, cities continue to deploy redevelopment just for the tax dollars it can bring. Consider Maywood, a town about 10 miles south-east of downtown Los Angeles, and California's most densely populated city with 40,000 residents crowding 1.2 square miles,. This small working-class, immigrant-friendly town suffers terribly from outdated infrastructure–overburdened sewers, a water system run by three struggling ratepayer-owned companies with water pressure so low the county Fire Department won't approve high-rise housing, and 28 miles of roadway the mayor says is "more potholes than original paving material". Nearly half of Maywood's apartments are overcrowded (defined as accommodating more than 1.5 persons per room). "It's just a never-ending battle going after the converted garages, the inhabited laundry rooms, the single-family dwellings that have been divided two and three times," says David Mango, the city's building and planning director.



With nothing much but modest residential uses to tax, the town has lately turned to redevelopment for fiscal relief. By placing the entire community within a redevelopment project area, the town anticipates receiving any future increases in property tax revenue including an annual 2% inflation factor the county will be obliged to pass forward to the city redevelopment agency under the state redevelopment law.

We will never know if Maywood's tax-motivated use of redevelopment could have fended off a well-prepared challenge based on the 1993 law because no one challenged it. Even if sued, Maywood would probably have prevailed because courts are quite sympathetic to redevelopment undertaken by poor cities, Murray Kane opines. In other words, the Diamond Bar case evidences a tacit judicial presumption that affluent cities don't need redevelopment. Apparently, courts feel particularly justified in strictly construing the blight statute when judging the attempts of prosperous cities to use redevelopment for fiscal relief.