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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re] Case No. 03-54106-ASW
] Chapter 13
JACK METZGER,]
] Debtor.]
_____]
KEN DOOLITTLE,] Adversary Proceeding No.
] 03-5482
] Plaintiff,]
] v.]
] COUNTY OF SANTA CRUZ, WILLIAM]
] "JACK" METZGER, NUSAN DEVELOPMENT]
] COMPANY, L.P., and DOES 1 to 20,]
] Defendants]
_____]
] COUNTY OF SANTA CRUZ, a]
] political subdivision of the State]
] of California; and THE PEOPLE]
] OF THE STATE OF CALIFORNIA,]
] Cross-Complainants,]
] v.]
] JACK METZGER, aka WILLIAM J.]
] METZGER, individually and as]
] general partner of THE COURTSIDE]
] AFFAIR, a limited partnership,]
] and as general partner of JAD]
] DEVELOPMENT COMPANY, KEN]
] DOOLITTLE, MONTEREY BAY SECURITIES,]
] INC., MONTEREY BAY INVESTMENTS]
] CORPORATION, HAROLD S. SANDERS,]
] aka HAL SANDERS, AND DOES 1]
] THROUGH 100, INCLUSIVE,]
] Cross-Defendants.]
_____]

1 MEMORANDUM DECISION ON CROSS-MOTIONS FOR SUMMARY ADJUDICATION
2 BY KEN DOOLITTLE AND THE COUNTY OF SANTA CRUZ

3
4 Before the Court are cross-motions for summary adjudication
5 brought by Ken Doolittle ("Doolittle") and the County of Santa Cruz
6 ("the County").

7
8 I. INTRODUCTION

9 In July 1992 this Court issued an Order Authorizing Sale Free
10 and Clear of Liens ("the 1992 Sale Order") by Aptos Courtside
11 Affair, L.P. ("Courtside") to Nusan Development Company ("Nusan").
12 The property sold pursuant to the Sale Order was at the time raw
13 land in Santa Cruz County (the "Property") and Courtside was a
14 chapter 11 debtor. Doolittle loaned Nusan the funds for the
15 purchase of the Property in July 1992, foreclosed on his deed of
16 trust in 2000, and now owns the Property. Doolittle and the County
17 disagree about the effect of the 1992 Sale Order.

18
19 II. JURISDICTION

20 This Adversary Proceeding was removed to this Court on
21 Doolittle's motion under 28 U.S.C. §§ 1441, 1452 and Bankruptcy
22 Rule 9027. This Court has jurisdiction of this action under 28
23 U.S.C. 1334(b) as a matter related to this chapter 13 case under
24 the test of Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984),
25 which has been adopted by the Ninth Circuit. In re Fietz, 852 F.2d
26 455 (9th Cir. 1988). The debtor in this case, Jack Metzger, was
27 the general partner of Courtside and was a partner in Nusan; he is
28 a defendant in the action removed from state court. The outcome of

1 these cross-motions could alter Metzger's rights, liabilities,
2 options, or freedom of action (either positively or negatively) and
3 will in some way impact this estate. Pacor, at 994; Feitz, at 457.

4 As noted above, the parties' dispute focuses on the effect of
5 the 1992 Sale Order. This Court has jurisdiction to interpret its
6 own orders. In re Franklin, 802 F.2d 324, 326 (9th Cir. 1986)(court
7 retains jurisdiction to construe its own orders); In re Taylor, 884
8 F.2d 478, 481 (9th Cir. 1989) (court retains jurisdiction to
9 interpret orders entered prior to dismissal of underlying case); In
10 re Aheong, 276 B.R. 233 (9th Cir. B.A.P. 2002) (court retains
11 ancillary jurisdiction after case is closed).

12 13 III. BACKGROUND

14 In 1985, the County issued development permits for the Property
15 based, in part, on an affordable housing restriction contained in a
16 recorded Participation Agreement between the County and Courtside
17 ("the Participation Agreement").

18 The Participation Agreement required that twenty-five of the
19 townhouses were to be sold at market rates ("the market rate
20 units") and four were restricted as to the price at which they
21 could be sold and to whom they could be sold ("the below market
22 rate units"). The market rate units had been built and sold by
23 2000.

24 Nusan defaulted on its loan from Doolittle and Doolittle
25 acquired the Property (then consisting only of the four below
26 market rate units) by credit bidding at his foreclosure sale of the
27 Property.

28 It is extraordinary to be asked to revisit the 1992 Sale Order

1 14 years after the Court issued it. The delay in seeking this
2 relief is explained by the length of time it took Nusan to develop
3 the Property -- from 1992 to 2000 -- and the ensuing litigation
4 between Doolittle and the County which began in 2000 and was
5 removed to this Court in 2003. Plus, Doolittle, the plaintiff in
6 this Adversary Proceeding, first acquired the property in 2000.
7 The fact that Doolittle himself filed bankruptcy in September 2005
8 also delayed the progress of the case.

9
10 IV. THE PARTIES' CONTENTIONS

11 The County contends that the 1992 Sale Order did not eliminate
12 the affordable housing restriction on the four units, because the
13 County was not given any notice of the hearing at which the sale
14 was approved and it asserts that it would have objected if it had
15 known that Courtside was trying to eliminate its interest.

16 The County also claims that (i) its interest could not be
17 eliminated under § 363(f)(1) because applicable non-bankruptcy law
18 does not permit a sale free and clear of its particular kind of
19 interest; (ii) the sale could not eliminate its interest under
20 Bankruptcy Code § 363(f)(5) because it could not have been
21 compelled to accept a money satisfaction of its interest; and (iii)
22 equitable factors weigh in its favor because it detrimentally
23 relied on what it was told by the parties involved with the
24 development of the Property and that Nusan actually developed the
25 Property according to permits premised on the County's affordable
26 housing restriction.

27 Doolittle acknowledges that the County was not given formal
28 notice of the hearing at which Courtside obtained approval for the

1 sale to Nusan. Nevertheless, Doolittle contends that the 1992 Sale
2 Order divested the Property of the County's affordable housing
3 restriction because the County had actual knowledge of the
4 Courtside bankruptcy case and allegedly had been told that the
5 Property was going to be sold free and clear of the County's
6 interest. He also argues that the County was on inquiry notice
7 such that its failure to act (e.g., by filing a request for special
8 notice or by reviewing the Court's file) amounted to consent to the
9 sale -- freeing the Property of its interest.

10 Doolittle also argues that Bankruptcy Code § 363(f)(1) and §
11 363(f)(5) permit sale free and clear of the County's interest and
12 it is too late to challenge the sale under Rule 60(b).

13
14 **V. RELIEF REQUESTED**

15 The County seeks a declaration that the 1992 Sale Order did not
16 divest the Property of its interest and an order remanding this
17 matter to state court so it may proceed to trial there. Doolittle
18 seeks a declaration that the 1992 Sale Order divested the Property
19 of the County's interest.

20
21 **VI. FACTS**

22 The pertinent facts, taken from the parties' Requests for
23 Judicial Notice, deposition excerpts and documents produced in
24 discovery, all of which have been submitted in support of their
25 cross-motions, are as follows. These facts are not disputed.¹

26
27 ¹The parties rely on the Declaration of Jason M. Heath in
28 support of the County's motion for summary adjudication which
attaches as exhibits documents and deposition excerpts, the
Declaration of David Beck in support of Doolittle's motion for

1 1. In January 1985, the County entered into a Participation
2 Agreement with Courtside through which Courtside agreed to
3 participate in the County's program to provide affordable housing
4 in the development of a twenty-nine unit townhouse project.
5 Courtside agreed to develop four of the twenty-nine townhouses as
6 affordable housing as defined in the Participation Agreement. The
7 permit from the County to develop what was then raw land was
8 premised in part on this restriction. The Participation Agreement
9 restricts the resale of the units by price and by grantee.

10 2. The Participation Agreement was recorded on July 19, 1985.
11 It was junior to a deed of trust in favor of Mt. Whitney Savings &
12 Loan, Courtside's lender for its purchase of the Property ("Mt.
13 Whitney").

14 3. The Participation Agreement provides, *inter alia*: "the
15 terms, covenants and conditions of this agreement shall apply to,
16 and shall bind, the heirs, successors, executors, ... and grantees
17 of both parties and shall be covenants running with the land.
18 Acceptance of any deed to Property constitutes acceptance of the
19 covenants contained herein."

20 4. No development of the Property took place between 1985 and
21 1987. Courtside and Mt. Whitney had a dispute regarding Mt.
22 Whitney's loan to Courtside and were in litigation regarding the
23 loan. Courtside filed its chapter 11 case in 1987. Mt. Whitney
24 was taken over by Federal regulators (the "FDIC") in 1992.

25 5. The FDIC was actively involved in the Courtside bankruptcy
26

27 summary adjudication and the Declaration of David Beck in
28 opposition to the County's motion -- both of which attach
deposition excerpts and background documents.

1 case because its loan was in default and it had begun to foreclose
2 on the Property.

3 6. During its chapter 11 case, Courtside proposed to sell the
4 Property on five different occasions, and filed applications
5 seeking court authority for these sales in April 1989, November
6 1989, June 1990, February 1991, and July 1992. The July 1992 sale
7 was the only sale to be consummated.

8 7. The County was not served with any of the pleadings
9 regarding the five sale attempts and does not appear on any of the
10 certificates of service for any of the sale pleadings.

11 8. In March 1992, Nusan and Courtside entered into a Purchase
12 Agreement (the "Purchase Agreement").

13 9. The Purchase Agreement, provides, *inter alia*, that (i) the
14 seller will remove all monetary liens and (ii) the purchaser will
15 subordinate a new construction deed of trust to any covenants,
16 conditions and restrictions and/or any public utility easements
17 reasonably required for the development of the Property.

18 10. The Purchase Agreement also gave the buyer time to review
19 a title report and accept or reject any exception showing on the
20 title report and time to do a feasibility study regarding the
21 current development plans.

22 11. In March 1992, the County learned that the FDIC was in the
23 process of foreclosing its deed of trust on the Property and
24 started a proceeding which would have canceled the existing
25 subdivision map (the "reversion to acreage" proceeding). If the
26 County had completed this proceeding, no development would have
27 been permitted under the existing subdivision map or plans.

28 12. The FDIC asked the County to postpone the reversion to

1 acreage proceeding and the County agreed to do so. At the same
2 time, the FDIC agreed to postpone its foreclosure sale so that
3 Nusan could complete its purchase of the Property.

4 13. On April 28, 1992, Hal Sanders (on behalf of Nusan) and
5 Jack Metzger (as general partner of Courtside) appeared at a
6 hearing before the County Board of Supervisors to discuss the
7 Property and the reversion to acreage proceeding.

8 14. According to the transcript of this hearing, Hal Sanders
9 told the County: "I've been, uh, negotiating for the purchase of,
10 uh, th -- this Property, and, uh, uh, the, um, the, the bankruptcy
11 of, um, uh, the company that owns the property right now has really
12 helped things out and, uh, what we really want to do is, um, uh,
13 finalize our negotiations, uh, with, with Courtside and with, uh,
14 FDIC and, uh, continue with this project, uh, as it was laid out
15 and, um, uh, by the end of the year, we'll have the uh, uh, the
16 units in which will be -- which will increase the County's tax
17 base, we'll have the four BMRs and, uh, if, uh a reversed [sic]
18 acreage, uh - I, I'm afraid it'll be years before, uh, anybody puts
19 in anything there, uh, including the BMRs."

20 15. In May 1992, Jack Metzger, acting as the general partner
21 of Courtside, executed and recorded an assignment of the
22 Participation Agreement to Hal Sanders. Hal Sanders was at the
23 time the secretary of Nusan Development Corp. which was the general
24 partner of Nusan.

25 16. On July 7, 1992, Courtside filed an "Application for
26 Authorization to Sell Real Property" and a "Notice of Hearing on
27 Application for Authorization to Sell Real Property" (the
28 "Application" and the "Notice"). The hearing was set for July 23,

1 1992. The Application is supported by the Declaration of Jack
2 Metzger.

3 17. The County was not served with the Application or the
4 Notice.

5 18. The Application recites, *inter alia*, that (1) Courtside
6 seeks court approval to sell to Nusan all of its interest in the
7 Property as described in the Purchase Agreement (a copy of which
8 was attached and made a part of the Application) for \$300,000; (2)
9 the sale is to be free and clear of all "liens and encumbrances"
10 pursuant to Bankruptcy Code section 363(f); and (3) the buyer will
11 be purchasing the FDIC's note and deed of trust directly from the
12 FDIC for \$1 million in a separate transaction.

13 19. The Application also states that there are two deeds of
14 trust on the Property, the first deed of trust held by the FDIC and
15 the second deed of trust held by Hal Sanders and Cindy Murray. The
16 Application says that both deed of trust holders consent to the
17 sale: the FDIC consents on the condition that its note and deed of
18 trust are purchased by the buyer. The second deed of trust holders
19 consent on the condition that the buyer assumes their deed of
20 trust.

21 20. The Application is silent as to the County's affordable
22 housing restriction. It does, however, say that the County's taxes
23 would be paid from escrow.

24 21. On July 31, 1992, the Court issued its Order approving the
25 sale to Nusan. The Order provides that the sale is "free and clear
26 of all liens and encumbrances, pursuant to 11 U.S.C. section
27 363(f)."

28 22. According to the 1992 Sale Order, Nusan assumed the FDIC's

1 first deed of trust, and paid \$300,000 cash, used to (1) pay
2 closing costs and taxes, (2) assume Hal Sanders' existing second
3 deed of trust in the approximate amount of \$192,000, (3) fund a new
4 third deed of trust in favor of Courtside in the amount of
5 approximately \$24,000 -- which was to be subordinate to a new
6 construction loan.²

7 23. Doolittle arranged the financing for Nusan's purchase of
8 the Property. Pursuant to the "Loan and Security Agreement and
9 Escrow Instructions" dated October 6, 1992 (the "Doolittle Loan
10 Agreement" and the "Doolittle Loan"), Nusan borrowed \$1.6 million
11 from a group of lenders assembled by Doolittle.

12 24. The Doolittle Loan Agreement recites that the Doolittle
13 Loan was secured by an assignment to Doolittle of the FDIC's note
14 and first priority deed of trust on the Property.

15 25. On November 5, 1993, the California Department of Real
16 Estate issued a Final Subdivision Public Report to Nusan. This
17 Report says the project includes the below market rate units.

18 26. Nusan developed the Property between 1992 and 2000. In
19 2000, Nusan filed a chapter 7 bankruptcy case and the chapter 7
20 trustee abandoned the estate's interest in the four below market
21 rate units. Doolittle foreclosed on these four units in late 2000.

22 27. Following his foreclosure sale, Doolittle asked the County
23 to release the units from the County's affordable housing
24 restriction and the County refused. Doolittle then filed suit
25

26
27 ²The terms of the deal described in the Doolittle Loan
28 Agreement differ somewhat -- but the difference is immaterial to
this decision.

1 against the County and related parties³ in the Superior Court for
2 the County of Santa Cruz on January 25, 2001.

3
4 VII. ISSUES

5 1. Whether the County's interest in the Property could have
6 been eliminated under Bankruptcy Code § 363(f)(1) or (f)(5).

7 2. Whether Courtside's notice of the 1992 sale satisfied the
8 County's due process rights.

9 3. Whether the County's actual knowledge of Courtside's
10 bankruptcy case and intent to sell the Property put the County on
11 inquiry notice equivalent in effect to formal notice.

12
13 VIII. DISCUSSION

14
15 1. Whether the County's Interest in the Property Could Have Been
16 Eliminated under Bankruptcy Code § 363(f)(1) or (f)(5).

17 Doolittle argues that the County's affordable housing
18 restriction is a lien as defined in the Bankruptcy Code.⁴ As a
19 lien, the Property could be sold free and clear of it under §
20 363(f)(1) or (f)(5)⁵.

21
22 ³Both Nusan and Jack Metzger are named as defendants in
23 Doolittle's Second Amended Complaint. The County contends
24 Doolittle's foreclosure sale was improper and seeks to have it set
25 aside.

26 ⁴Bankruptcy Code § 101(37) defines lien as a "charge against
27 or interest in property to secure payment of a debt or performance
28 of an obligation." The Participation Agreement created an
obligation in Courtside or its successors to perform in a specified
manner and secured the performance of that obligation.

⁵Under § 363(f), a debtor may sell property under § 363(b)
free and clear of any interest if -

1 Doolittle argues the County's interest could be removed in a
2 sale under 363(f)(1) because the Participation Agreement did not
3 create a covenant running with the land. At the time it was
4 recorded the County was not a grantor or grantee or the owner of
5 the Property, one of which is required under California law for the
6 creation of a covenant. Civil Code §§ 1461, 1462, 1468. Richland
7 Calabasas, L.P. v. City of Calabasas, 45 Fed. Appx. 661 (9th Cir.
8 2002) (covenants purportedly created by development agreement
9 ineffective when city neither owner, grantor nor grantee at time
10 created).

11 Doolittle argues that the sale could have satisfied § 363(f)(5)
12 because the County could have been compelled to accept a money
13 satisfaction of its interest. He contends that, in effect, the
14 County had a claim which could have been calculated by the
15 difference between the sale price of each unit as restricted and as
16 unrestricted.

17 At oral argument, the County conceded that the Participation
18 Agreement did not satisfy California law for the creation of a
19 covenant running with the land, acknowledging that its interest was
20 subject to removal under § 363(f)(1). The County still argues that
21 § 363(f)(5) is inapplicable because it could not be compelled to
22

-
- 23 (1) applicable non-bankruptcy law permits sale of such
24 property free and clear of such interest;
25 (2) such entity consents;
26 (3) such interest is a lien and the price at which such
27 property is to be sold is greater than the aggregate
28 value of all liens on such property;
(4) such interest is in *bona fide* dispute;
(5) such entity could be compelled, in a legal or
equitable proceeding, to accept a money satisfaction of
such interest.

1 accept a money satisfaction for its interest because it is not one
2 that is reducible to a dollar amount.

3 There is conflicting authority regarding the treatment of
4 interests such as the County's in the context of a § 363 sale.
5 These decisions are, in large part, driven by their facts and
6 applicable state law regarding real property. None of the cases
7 cited by the County or Doolittle have facts identical to those
8 before the Court. See generally, In re WBO Partnership, 189 B.R.
9 97 (Bankr. E.D. Va. 1995) (under Virginia law, agency's "recapture"
10 rights that ran with the property were an interest that could be
11 satisfied with money for purposes of § 363(f)(5) sale); In re Arden
12 & Howe Assoc. Ltd., 152 B.R. 971 (Bankr. E.D. Cal. 1993) (under
13 California law, restrictive use covenant in lease runs with land
14 and binds successors in certain situations described in Civil Code
15 § 1470; however, if debtor/lessor rejects lease, covenant fails and
16 § 365(h)(2) preempts all state remedies for breach of restrictive
17 use covenant); Gouveia v. Tazbir, 37 F.3d 295 (7th Cir. 1994) (under
18 Indiana law, restrictive covenant was not contractual, but was a
19 property interest; in sale free and clear of liens under §
20 363(f)(5), holder could not be compelled to accept money in
21 satisfaction of its interest); In re 523 East Fifth Street Housing
22 Preservation Development Fund Corp., 79 B.R. 568 (Bankr. S.D. N.Y.
23 1987) (under New York law, city could not be compelled to accept
24 money satisfaction under § 363(f)(5) of restrictive covenant
25 regarding low income housing in its deed to ch. 11 debtor).

26 Whether the obligation is contractual in nature, and therefore
27 personal as between the County and Courtside (and later, by the
28 assignment, between the County and Nusan), or is a covenant running

1 with the land, is a question which this Court does not need to
2 reach for its decision.⁶

3 The narrow issue now before the Court is whether the notice of
4 the hearing that led to the 1992 Sale Order comported with due
5 process such that the Order divested the Property of the County's
6 interest. For these purposes, the County had an *interest* in the
7 Property at the time of the 1992 sale to Nusan sufficient to
8 require that it receive notice of the hearing at which the Court
9 was asked to approve a sale that Doolittle now claims stripped the
10 Property of the County's interest.

11
12 **2. Whether Courtside's Notice of the 1992 Sale Satisfied Due**
13 **Process.**

14 **A. Grounds and Procedure for Section 363 Sales**

15 Selling real property free and clear of liens is routine in
16 bankruptcy cases.⁷ There is an established procedure for such

17 ⁶Courtside's Chapter 11 counsel, James D. Sumner, testified at
18 his deposition that the County's interest appeared on the
19 Property's title report. See Declaration of Jason M. Heath in
20 support of the County's motion for summary adjudication, Exhibit E,
21 p. 150:5-151:11. This fact supports a conclusion that the County
22 had an interest in the Property entitling it to notice of the sale.
23 The California Supreme Court has described the area of the law
24 dealing with covenants and servitudes as an "unspeakable quagmire."
25 See Citizens for Covenant Compliance v Anderson, 12 Cal. 4th 345
26 (1995). See also Basil Mattingly, Sale of Property of the Estate
27 Free and Clear of Restrictions and Covenants in Bankruptcy, 4 Am.
28 Bankr. Inst. L. Rev. 431 (1996).

⁷ The applicable Code sections and Rules in effect in 1992
were, in relevant part, the same as the current version of these
Code sections and Rules quoted in this decision. Sales are either
"subject to" liens or "free and clear" of them. Here, the Property
was not sold free and clear of the liens of the first or second
priority deeds of trust. The first remained on the Property but the
FDIC, as the beneficial owner, was replaced by Doolittle. The
second, held by Hal Sanders, appears to have been assumed by Nusan.

1 sales. The process for obtaining approval is generally as follows:

2 After notice and a hearing a debtor may sell property of the
3 estate outside the ordinary course of business.⁸ Bankruptcy Code §
4 363(b)(1). Under § 363(f), a debtor may sell property free and
5 clear of interests under certain conditions. The two conditions
6 relevant here are in (f)(1)(applicable non-bankruptcy law permits
7 sale free and clear of such interest) and (f)(5) (the entity could
8 be compelled, in a legal or equitable proceeding, to accept a money
9 satisfaction of its interest).⁹

10 **B. The Required Notice for a Section 363 Sale**

11 Rule 6004(a) implements § 363. It provides that notice of a
12 proposed sale not in the ordinary course of business is to be given
13 pursuant to Rule 2002(a)(2). Rule 2002(a)(2) in turn states that
14 all parties in interest are to be given 20 days notice by mail of a
15 proposed sale outside the ordinary course of business. Rule
16 2002(c) states that subject to Rule 6004, the notice of a proposed
17 sale must include the time and place of any public sale, the terms
18 and conditions of any private sale and the time fixed for filing
19 objections.

20 Rule 6004(c) provides that a motion for authority to sell
21 property free and clear of liens or other interests shall be made

22 _____
23 The only lien arguably removed from the Property was the County's.

24 ⁸Section 102(1) defines the phrase "after notice and a
25 hearing" to mean after such notice as is appropriate in the
26 particular circumstances, and such opportunity for a hearing as is
appropriate in the particular circumstances.

27 ⁹ The County is an "entity" by the definition in § 101(15) and
28 a "government unit" by definition in §101(40). The parties'
positions regarding whether the County's interest is subject to
sale under 363(f)(1) or (f)(5) are discussed *supra*.

1 in accordance with Rule 9014 and shall be served on the parties who
2 have liens or other interests in the property to be sold. The
3 notice required by Rule 6004(a) is to include the date of the
4 hearing on the motion and the time within which objections may be
5 filed and served on the debtor. A motion is to be served in the
6 manner of serving a summons and complaint by Rule 7004. Rule
7 9014(b).

8 The party attempting service is responsible for proper service
9 and bears the burden of proof that it has been accomplished. In re
10 Ex-Cel Concrete Co., 178 B.R. 198, 203 (9th Cir. B.A.P. 1995). The
11 party objecting to service has the burden of proving a *prima facie*
12 error in service. In re Webb, 212 B.R. 320, 324 (8th Cir. B.A.P.
13 1997); In re Villar, 317 B.R. 88, 94 (9th Cir. B.A.P. 2004). The
14 same due process and service requirements are applicable to both
15 Bankruptcy Rules 7004 and 9014. In re Zumbrun, 88 B.R. 250, 252 (9th
16 Cir. B.A.P. 1988).

17 These interrelated Code sections and Rules have been
18 deliberately crafted to provide procedural assurance that a party
19 holding or claiming an interest in real property in a debtor's
20 estate will receive timely notice of the intention to sell specific
21 property free and clear of liens. Ex-Cel, at 203. "The message to
22 be derived from these rules is that notice is to be taken
23 particularly seriously when liens are being affected in bankruptcy.
24 Holders of liens that may be adversely affected are entitled to
25 unambiguous notice and an adequate opportunity to reflect and to
26 respond." In re Loloe, 241 B.R. 655, 662 (9th Cir. B.A.P. 1999)
27 (emphasis added).

1 C. Defective Notice

2 The County was not served with the Notice of the hearing or the
3 Application. Accordingly, the Court did not have jurisdiction over
4 the County and there is a *per se* jurisdictional defect in the
5 Order. Ex-Cel, at 205 (no notice to secured creditor meant court
6 lacked *in personam* jurisdiction to adjudicate creditor's property
7 rights -- order issued after sale had *per se* jurisdictional defect
8 and was therefore void); In re Center Wholesale, Inc., 759 F.2d
9 1440, 1448 (9th Cir. 1985)(judgment may be set aside as void under
10 Rule 60(b)(4) for a violation of the due process clause of the
11 Fifth Amendment; one day's notice of hearing on use of cash
12 collateral was inadequate); In re Villar, 317 B.R. 88 (9th Cir.
13 B.A.P. 2004). In Ex-Cel, the Ninth Circuit Bankruptcy Appellate
14 Panel explained:

15 the due process clause of the Fifth Amendment requires that
16 notice be reasonably calculated, under all circumstances,
17 to apprise interested parties of the pendency of the action
18 and to afford them an opportunity to present their
19 objections. (Citation omitted). If the notice requirement
20 of the due process clause is not satisfied, the order is
21 void. (Citations omitted).

22 Ex-Cel, at 203.

23 The Ninth Circuit Bankruptcy Appellate Panel distinguished In
24 re Edwards, 962 F.2d 641 (7th Cir. 1992), the Seventh Circuit case
25 upon which Doolittle relies:

26 Based on the analysis in Center Wholesale (which dealt with
27 unduly short notice), we conclude that the lack of any notice
28 to [the lienholder] constituted constitutional lack of due

1 process which could not confer *in personam* jurisdiction on the
2 bankruptcy court to adjudicate [the lienholder's] property
3 rights. This was *per se* a jurisdictional defect sufficient to
4 result in a void order. We therefore respectfully disagree
5 with Edwards to the extent it allows considerations, such as
6 the exigent needs of the bankruptcy system or the innocence or
7 good faith of third parties involved in bankruptcy sales, to
8 justify departures from due process standards in adjudicating
9 property rights.

10 Ex-Cel, at 205.

11 Doolittle argues that Edwards supports a conclusion that sale
12 orders are to be granted finality and can only be attacked by a
13 motion under Rule 60(b) brought within a reasonable time.¹⁰

14 Doolittle contends that the County is now precluded from bringing
15 such a motion because more than a "reasonable time" has elapsed
16 since the 1992 Sale Order. Doolittle is incorrect that there is a
17 time limitation for a Rule 60(b)(4) motion. A motion to set aside
18 a void judgment may be brought at any time and a void judgment
19 cannot acquire validity because of laches. Center Wholesale, at
20 1448.

21 In Edwards, the Court approved a §363 sale free and clear of
22 liens to a *bona fide* purchaser and an arms' length lender had
23 arranged the financing for the purchase. More than a year after
24 the sale, a secured creditor, who had been omitted from the notice,
25 argued that the sale order was void as to it under Rule 60(b)(4).

27 ¹⁰ Rule 60(b) says upon such terms as are just, the court may
28 relieve a party from a final judgment for the following reasons:
...(4) the judgment is void.

1 In that context, the strong policy of finality in bankruptcy sales
2 supported the conclusion that the sale should not be set aside.
3 The Seventh Circuit concluded that even though notice was
4 defective, the policy of finality controlled to protect the *bona*
5 *fide* purchaser. Edwards, at 645.

6 If the reasoning in Edwards were used in the Ninth Circuit, it
7 would not dictate a different result on these facts. Nusan was not
8 a *bona fide* purchaser and Doolittle is not a *bona fide* purchaser
9 equivalent to the one in Edwards. The Participation Agreement was
10 assigned to Hal Sanders, a principal of Nusan, and it was recorded
11 in May 1992. When Doolittle arranged the financing for Nusan's
12 purchase from Courtside in 1992, he was on full notice of the
13 Participation Agreement. There is no *bona fide* purchaser to
14 protect here and there is no innocent intervening lender on these
15 facts.¹¹

16
17 **3. Whether the County's Actual Knowledge of Courtside's Bankruptcy**
18 **Case and Intent to Sell the Property Put the County on Inquiry**
19 **Notice Equivalent in Effect to Formal Notice.**

20 At oral argument, the County agreed that it knew of the
21 Courtside bankruptcy case and that Courtside planned to sell the
22 Property to Nusan, and of the proposed closing date for the sale.
23 At oral argument, Doolittle conceded that the County did not have
24 knowledge of the actual hearing date at which the sale was
25 approved. The parties do not agree whether the County knew that

26 ¹¹Doolittle argues that construction lenders made decisions on
27 the basis that below market rate restriction had been eliminated by
28 the 1992 sale but he offers no evidence to support this assertion.
No such lender has intervened or sought to intervene in this
Adversary Proceeding.

1 Courtside intended the sale to remove the County's interest from
2 the Property but, in the Court's view, resolution of that factual
3 question is not dispositive since the County had no notice of the
4 hearing on the 1992 sale.

5 There is, of course, a difference between actual knowledge of a
6 bankruptcy case and actual knowledge of a hearing on a sale free
7 and clear of liens. In theory, actual knowledge of a hearing may,
8 in some circumstances, be sufficient to satisfy due process
9 concerns. Ex-Cel, at 203 (actual notice or an *acceptable substitute*
10 for procedural notice requirements may save order from
11 constitutional due process concerns); In re Gabel, 61 B.R. 661
12 (Bankr. W.D. La. 1985) (where secured creditor denied receiving
13 formal notice, but had constructive notice through publication and
14 actual knowledge of time and place of sale, court found implied
15 consent to sale); In re Shapiro, 265 B.R. 373 (Bankr. E.D. NY 2001)
16 (party had actual notice because summons and complaint were mailed
17 to its correct address rather than incorrect address in petition --
18 due process satisfied).

19 The level of knowledge must be examined in each case to
20 determine whether it rises to the level required to comport with
21 due process. In re Halux, 665 F.2d 213, 216 (8th Cir. 1981)
22 (evidence of actual knowledge must be more substantial than
23 discussion in general terms of possible auction at some
24 undetermined future date); Loloe, at 662 (holders of liens that
25 may be adversely affected are entitled to unambiguous notice and an
26 adequate opportunity to reflect and respond); Center Wholesale, at
27 1448 (notice must fulfill due process requirements of timeliness
28 and specificity and must be examined in light of the Code's

1 statutory requirements, safeguards, and remedies).

2 Doolittle argues that the County knew *enough* to put it on
3 inquiry notice and because the County failed to investigate the
4 bankruptcy court's files or take any steps to protect itself, it
5 may not now complain that the 1992 Order could not divest the
6 County of its interest in the Property.

7 In support of his inquiry notice theory, Doolittle relies on In
8 re Gregory, 705 F.2d 1118 (9th Cir. 1983).¹² Gregory is a chapter 13
9 case and deals with the bar date for *unsecured* creditors to file
10 claims. The rule in Gregory, and similar cases dealing with the
11 claims bar date in chapter 7 and chapter 13 cases, is not
12 controlling here. First, the issue here is not a claims bar date
13 for an unsecured creditor. The issue is the appropriate notice of
14 a sale that Doolittle claims was a valid sale free and clear of
15 liens. Second, as explained below, the procedural and statutory
16 differences between chapter 7 and chapter 13 cases, on the one
17 hand, and chapter 11 cases on the other hand, give rise to
18 different due process standards for certain bankruptcy events.
19 Third, even in the claims bar date context, creditors in a chapter
20 11 case who have knowledge of the pending case have a right to
21 assume that reasonable notice will be given before their claims are
22 barred. City of New York v. New York, New Haven & Hartford RR Co.,
23 344 U.S. 293, 297 (1953). In a chapter 11 case, the creditor who
24 is not given notice, even if he has actual knowledge of

25
26 ¹² Even if the County had such a duty, a review of the pleadings
27 regarding the five sale attempts would not have disclosed an intent
28 to strip the Property of the affordable housing restriction. None
of the sale applications addresses the County's interest or states
that it will be removed by the sale.

1 reorganization proceedings, does not have a duty to investigate and
2 inject himself into the proceedings. In re Maya Construction Co.,
3 78 F.3d 1395, 1399 (9th Cir. 1996).

4 In Maya Construction, the Ninth Circuit acknowledged that lack
5 of formal notice of a claims bar date in a chapter 13 or chapter 7
6 case is less significant than it is in a chapter 11 case because a
7 claims bar date is automatically set by the date of the section 341
8 meeting. A creditor who receives notice of the section 341 meeting
9 is, in effect, given notice of the claims bar date.

10 In Gregory (a chapter 13 case) and in In re Coastal Alaska
11 Lines, Inc., 920 F.2d 1428 (9th Cir. 1990) (a chapter 7 case), the
12 creditors had received actual notice of the section 341 meeting.
13 Indeed, in Gregory the complaining unsecured creditor had received
14 an order providing notice of the date, time, and location of the
15 meeting of creditors stating that the creditors' meeting was
16 scheduled for December 17, 1979 at 1:00 p.m. and that the
17 confirmation hearing in the bankruptcy court would follow at 2:00
18 p.m. Gregory, 705 F.2d at 1119-20. The order also stated that
19 "The debtors' plan does not propose payment of unsecured
20 creditors." The creditor did not appear at the creditors' meeting
21 or at the confirmation hearing. The bankruptcy court issued its
22 order confirming the plan and the creditor did not appeal.

23 The facts in Coastal Alaska are more complicated than in
24 Gregory. However, in that case the complaining creditor had
25 received a copy of the first notice of creditors' meeting which
26 stated that it appeared that there were no assets in the estate so
27 creditors need not file claims at that time, but that if it later
28 appeared that there were assets from which a dividend could be

1 paid, the bankruptcy court would notify listed creditors and give
2 them an opportunity to file their claims. The complaining creditor
3 knew at that time that it had not been listed as a creditor and
4 would not receive the statutory notice that would be sent if it
5 turned out there was a reason to file claims. On these facts, the
6 Ninth Circuit found that the creditor had been provided sufficient
7 notice and a reasonable opportunity to appear as a creditor and
8 receive statutory notice and that it had not acted reasonably in
9 simply waiting to receive notice (that the estate had assets from
10 which a dividend could be paid). The Court of Appeals held that
11 due process did not require a separate notice of a claims bar date.
12 This case sensibly holds that notice of the section 341 meeting is
13 sufficient notice of the bar date for filing proofs of claim.¹³

14 There is no corresponding rule for inquiry notice in a chapter
15 11 case and no such rule for a sale free and clear of liens. The
16 County had no duty to "inject itself" into the case. It was
17 entitled to notice of a certain specificity affording it a certain
18 amount of time to prepare for and appear at a hearing at which the
19 court would be asked to rule on the elimination of its interest in
20 the Property. There is no support for Doolittle's theory that the
21 duty to give unambiguous notice of a sale free and clear of liens
22 may be met by putting a party on inquiry notice.

23 Doolittle relies only on cases involving claims bar dates in
24 chapter 7 and chapter 13 cases. The Court is aware of no case
25 supporting this inquiry notice theory in a chapter 11 case
26 involving a sale free and clear of liens. The Court concludes that

27
28 ¹³ Doolittle does not argue that the County received any section
341 notice or any documents in this case.

1 inquiry notice does not exist in the context of the facts before
2 this Court.

3
4 **4. The Appropriate Remedy**

5 The Court has jurisdiction to review and modify or set aside
6 its own orders. Wayne United Gas Co. v. Owens-Illinois Gas Co., 300
7 U.S. 131 (1937) (court can set aside a sale order so long as
8 proceedings have not terminated and no intervening rights have
9 become vested which would be disturbed by modification or
10 reconsideration of order); Franklin, 802 F.2d 324, 326 (9th Cir.
11 1986)(court retains jurisdiction to construe its own orders);
12 Taylor, 884 F.2d 478, 481 (9th Cir. 1989) (court retains
13 jurisdiction to interpret orders entered prior to dismissal of
14 underlying case). A void order may be set aside at any time under
15 Rule 60(b)(4). Center Wholesale, at 1448. Because the County did
16 not have adequate notice of the hearing on the 1992 Sale Order, the
17 Order is void as to the County's interest.

18 The Court has some flexibility in creating a remedy here and
19 need not and will not find the entire sale void on these facts.
20 Center Wholesale, at 1451 (cash collateral order void for
21 inadequate notice, remedy available under §507(b) preferable to
22 setting aside cash collateral arrangement under which parties had
23 performed); Loloe, at 663 (sale order void only to extent it
24 purported to resolve priority dispute). The Court need only find,
25 and does find, that the County's interest in the Property survived
26 the sale to Nusan. The 1992 Sale Order is to that limited extent
27 void because the County's due process rights were violated.

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IX. CONCLUSION

For the foregoing reasons, the Order is void as to the County's interest in the Property. The 1992 Sale Order is otherwise valid and fully enforceable. The County shall submit an order in accordance with this decision after review as to form by counsel for Doolittle. The County shall also submit a separate order providing for the remand of this matter to state court after review as to form by counsel for Doolittle.

Dated:

ARTHUR S. WEISSBRODT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

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