

*University of Southern California Law  
School*

Legal Studies Working Paper Series

---

*Year 2008*

*Paper 20*

---

Redevelopment Takings After Kelo: What's  
Blight Got to Do with it?

George Lefcoe\*

\*University of Southern California, [glefcoe@law.usc.edu](mailto:glefcoe@law.usc.edu)

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/usclwps-1ss/art20>

Copyright ©2008 by the author.

# Redevelopment Takings After Kelo: What's Blight Got to Do with it?

George Lefcoe

## Abstract

Cities large and small across the country are utilizing redevelopment powers to become land developers, transforming underutilized areas into desirable commercial and mixed use enclaves, improving the appearance of the city and shoring up sagging tax bases. In using their eminent domain powers to assist private developers, local governments open themselves to Fifth Amendment claims that these projects aren't for "public uses." After the U.S. Supreme Court opinion in *Kelo v. City of New London*, state and local government officials need not worry about federal courts declaring anytime soon that their economic redevelopment projects aren't a sufficient 'public use' to justify condemning one person's property for another unless the taking can be proved nothing but a sham, a naked pretext for wresting land from one private owner for the exclusive benefit of another. For the usual run of redevelopment projects, the requisite public use can be found either because the taking eliminates blight or proceeds from a comprehensive plan for redevelopment.

This paper begins with a recap of the Kelo Court's attenuated endorsement of comprehensive planning as a way of determining whether a taking of unblighted property qualifies as a public use. Then, the paper sketches the varying ways that states have defined blight to limit the use of eminent domain for redevelopment. Blight prevention was a rationale invoked by supporters of the federal urban renewal program to secure judicial approval in the 1930s and 1940s. Those projects were quite different from most redevelopment projects undertaken after the abolition of the federal program in 1974 and the paper describes the main differences. The blight standard makes less sense under most current types of redevelopment than it did under the early federal renewal programs because blight eradication is rarely what today's redevelopment projects aim to achieve.

In the final section, the paper compares planned efforts at improving the quality of life in the community with 'spot' redevelopment aimed solely at pumping up local tax receipts. Objectionable redevelopment enables a favored private firm (often a big retailer) to expand by acquiring land from unwilling neighboring owners. Kelo and some of the Kelo-inspired, state-enacted reforms, would lead courts to prohibit such takings. They don't serve a public use because they are meant simply to assist a particular private firm with its expansion plans in order to enhance the local tax base. The concluding section of the paper suggests how redevelopment agencies could reformulate their narrowly focused tax-motivated projects to comply with the new emphasis on redevelopment planning articulated in Kelo.

# REDEVELOPMENT TAKINGS AFTER *KELO*: WHAT'S BLIGHT GOT TO DO WITH IT?

GEORGE LEFCOE<sup>1</sup>

*Cities large and small across the country are utilizing redevelopment powers to become land developers, transforming underutilized areas into desirable commercial and mixed use enclaves, improving the appearance of the city and shoring up sagging tax bases. In using their eminent domain powers to assist private redevelopers, local governments open themselves to Fifth Amendment claims that these projects aren't for "public uses." After the U.S. Supreme Court opinion in *Kelo v. City of New London*, state and local government officials need not worry about federal courts declaring anytime soon that their economic redevelopment projects aren't a sufficient 'public use' to justify condemning one person's property for another unless the taking can be proved nothing but a sham, a naked pretext for wresting land from one private owner for the exclusive benefit of another. For the usual run of redevelopment projects, the requisite public use can be found either because the taking eliminates blight or proceeds from a comprehensive plan for redevelopment.*

*This paper begins with a recap of the *Kelo* Court's attenuated endorsement of comprehensive planning as a way of determining whether a taking of unblighted property qualifies as a public use. Then, the paper sketches the varying ways that states have defined blight to limit the use of eminent domain for redevelopment. Blight prevention was a rationale invoked by supporters of the federal urban renewal program to secure judicial approval in the 1930s and 1940s. Those projects were quite different from most redevelopment projects undertaken after the abolition of the federal program in 1974 and the paper describes the main differences. The blight standard makes less sense under most current types of redevelopment than it did under the early federal renewal programs because blight eradication is rarely what today's redevelopment projects aim to achieve.*

*In the final section, the paper compares planned efforts at improving the quality of life in the community with 'spot' redevelopment aimed solely at pumping up local tax receipts. Objectionable redevelopment enables a favored private firm (often a big retailer) to expand by acquiring land from unwilling neighboring owners. *Kelo* and some of the *Kelo*-inspired, state-enacted reforms, would lead courts to prohibit such takings. They don't serve a public use because they are meant simply to assist a particular private firm with its expansion plans in order to enhance the local tax base. The concluding section of the paper suggests how redevelopment agencies could reformulate their narrowly focused tax-motivated projects to comply with the new emphasis on redevelopment planning articulated in *Kelo*.*

## I. INTRODUCTION

*The Planning and Development Context.* Cities across America have become proactive in utilizing state granted rights to reshape their destinies when they don't like the trajectory of

---

<sup>1</sup> Ervin and Florine Yoder Chair of Real Estate Law, Gould School of Law, University of Southern California, Los Angeles, CA. My thanks to Greg Alexander, Bob Bruegmann, John Brooks, David Callies, Susan Fainstein, Gideon Kanner, and Ilya Somin for their many helpful comments and David Aghaei for his useful research.

present development trends.<sup>2</sup> Professor Susan Fainstein, commenting on three large proposals for New York City—expansive new public/private ventures in Manhattan’s West Side, the Bronx Terminal Market and Downtown Brooklyn—notes: “This expansive view of the planning function and the role of government in directing it harkens back to the early years of urban renewal in the United States. It constitutes a rejection of the timidity that followed the downfall of the federal urban renewal program. The question for planners and designers is whether to applaud this new vigor or to see in it all the pitfalls that ultimately led to the demise of the old urban renewal program.”<sup>3</sup> Unlike the projects cities undertook in the 1950s and 1960s under the aegis of the federal urban renewal program, “the efforts underway now are being carried out in the name of economic development rather than of the elimination of blight and slum clearance.”<sup>4</sup>

The question is heatedly debated whether it is a good idea for local governments to become a pro-active force in transforming underutilized areas into ‘higher and better uses’ and in selecting which developers get to build where. Planners—convinced the market doesn’t always offer the best choices or the most coherent, benign development patterns—tend to applaud this trend. These municipal endeavors have aroused critics. Some critics doubt that local public officials could ever possess the competence to perform successfully as urban land developers, and are convinced that the private sector, left alone, would do a much better job of it.<sup>5</sup> Others are hopeful that governments, though capable “of acting in high-handed ways to benefit developers rather than affected communities,” are nonetheless capable of “acting based on a broad and democratic process of consultation.”<sup>6</sup> The role of local governments in land development is a divisive policy issue courts happily leave with elected public officials—except on those occasions when local governments open themselves to Fifth Amendment claims based on their using eminent domain for other than “public uses” or denying “just compensation.”<sup>7</sup>

---

<sup>2</sup> “Over the quarter century of federally-aided urban renewal, there were approximately 2,100 federally approved urban renewal projects in about 1,000 localities.” Quintin Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 N.Y.L. SCH. L. REV. 373,397 (1994). David N. Farwell, *A Modest Proposal: Eliminate Blight, Abolishing But-For, and Putting New Purpose in Wisconsin’s Tax Increment Financing Law*, 89 MARQ. L. REV. 407, 408-09 (2005).

<sup>3</sup> New York City is embarking upon a series of enormous redevelopment projects reminiscent of the days of Robert Moses. Susan Fainstein, *The Return of Urban Renewal*, 22 HARV. DESIGN MAGAZINE (Spring/Summer 2005). [http://www.gsd.harvard.edu/research/publications/hdm/back/22\\_Fainstein.html](http://www.gsd.harvard.edu/research/publications/hdm/back/22_Fainstein.html) (last visited 06/30/07).

<sup>4</sup> Susan Fainstein, *The Return of Urban Renewal*, 22 HARV. DESIGN MAGAZINE (Spring/Summer 2005). [http://www.gsd.harvard.edu/research/publications/hdm/back/22\\_Fainstein.html](http://www.gsd.harvard.edu/research/publications/hdm/back/22_Fainstein.html) (last visited 06/30/07).

<sup>5</sup> See, e.g., Richard Epstein, *Kelo: An American Original*, 8 GREEN BAG 355, 361 (2005): “if you think that most municipalities are virtuous and knowledgeable on local planning matters, then be happy with *Kelo* and the culture of deference that the United States Supreme Court has built up to buttress their powers. But if you really believe that, then the aftermath of *Kelo* gives you reason to think again. As a matter of general constitutional theory, the presumption should always be set against the use and expansion of government power. The grisly aftermath of *Kelo* offers vivid evidence of how sound that presumption is.”

<sup>6</sup> Email by Susan Fainstein to author, 07/30/2007.

<sup>7</sup> Justice Stevens acknowledged this pointedly: “We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.” *Kelo v. City of New London*, 125 S. Ct 2655, 2668 (2005). Similar pronouncements can be found in state court opinions. See, e.g., *Sheridan Redevelopment Agency v. Knightsbridge Land Company, LLC*, 2007 WL 1558499 (Colo. App.) at p. 4. The owners of property about to be condemned for a redevelopment project contended that the project didn’t serve a legitimate public purpose under Colorado law because its purpose was not to eliminate blight but rather to increase tax revenues. The trial court had deferred to the city’s determination on this point on the mistaken belief that it could only be

*The Kelo Decision.* After the U.S. Supreme Court opinion in *Kelo v. City of New London*, state and local government officials need not worry about federal courts declaring anytime soon that their economic redevelopment projects aren't a sufficient 'public use' to justify condemning one person's property for another unless the taking can be proved nothing but a sham, a naked pretext for wresting land from one private owner for the exclusive benefit of another.<sup>8</sup> For the usual run of redevelopment projects, the requisite public use can be found either because the taking eliminates blight or proceeds from a comprehensive plan for redevelopment.<sup>9</sup>

Justice O'Connor's spirited dissent, joined by three other justices, rejected the planning rationale. Three of the four dissenters would have held that since the targeted properties in New London—houses, mostly—had created no harm, their taking for private commercial activity to shore up New London's long sagging economy hadn't been for a public use.<sup>10</sup> Justice Douglas' ringing endorsement in 1954 of urban renewal in *Berman v. Parker*<sup>11</sup> firmly established the legitimacy of blight condemnations for redevelopment.<sup>12</sup> Though the area—New London's Fort Trumbull peninsula—was economically marginal, the New London Development Corporation hadn't

---

overturned if the city's finding of blight had been made in bad faith. Colorado constitution art. II, §15 specifies that the question of public use is judicial, to be made without regard to any legislative assertion that the use is public. For this reason, the court remanded for further findings regarding public purpose.

<sup>8</sup> *Kelo*, 545 U.S. at 493 (Kennedy, J. concurring): "This taking occurred in the context of a comprehensive development plan meant to address a serious city-wide depression, and the projected economic benefits of the project cannot be characterized as de minimus. The identity of most of the private beneficiaries were unknown at the time the city formulated its plans. The city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes. In sum, while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose, no such circumstances are present in this case."

<sup>9</sup> "Such a one-to-one transfer of property [a city transferring citizen A's property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes] executed outside the confines of an integrated development plan, is not presented in this case." 125 S. Ct. 2655, 2666-67 (2005). For a discussion of this and other places in the majority opinion embracing a comprehensive redevelopment plan as evidencing the public purpose in the New London case, see David Schultz, *What's Yours Can Be Mine: Are There Any Private Takings After Kelo v. City of New London?*, 24 UCLA J. ENVTL. L. & POL'Y 195 (2006). Justice Stevens is unenthusiastic about the Court's outcome, characterizing it as dictated more by precedent than personal preference. Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. Times, Aug. 25, 2005, at A1.

<sup>10</sup> 545 U.S. 500 (2005) ("the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in Berman through blight resulting from extreme poverty")

<sup>11</sup> 348 U.S. 26 (1954).

<sup>12</sup> The U.S. Supreme Court upheld the redevelopment agency's decision to condemn a department store and a hardware store in that case, both functioning well and neither of them blighted. The redevelopment agency insisted that it could only restore the area to health by a program of wholesale demolition and redevelopment to prevent the recurrence of slum conditions. Instead of determining whether the agency's claimed need for these properties made sense, the opinion declares that this matter is one for the legislature to decide, subject to rational basis judicial review. Once the Court determines that the project lies within the local government's police power, the means for attaining those goals—including eminent domain—is a matter of legislative choice. 348 U.S. 31-34. Professor Richard Epstein protests that the rational basis standard of judicial review applied in *Berman* is so permissive that it "invites powerful local businesses to persuade "neutral" public bodies to declare as "blighted" the property they need for their own business expansion." Amicus curiae brief in *Kelo* for Cato Foundation.

alleged blight.<sup>13</sup> As Professor David A. Dana observed, “such a characterization, if upheld, would have afforded the redevelopment corporation the benefit of *Berman v. Parker* and similar precedents.”<sup>14</sup> Of all the justices, only Justice Thomas was prepared to overturn the permissive ‘rational basis’ precedent of *Berman v. Parker*.<sup>15</sup>

Plaintiffs *Kelo* and her neighbors were represented by the Institute for Justice, a Washington, D.C.-based libertarian public interest law firm.<sup>16</sup> The Institute lost the case<sup>17</sup> but won the public relations skirmish<sup>18</sup> by successfully framing the issue as a David v. Goliath situation, an uneven contest, between owners trying to save their homes,<sup>19</sup> pitted against a coalition of state officials, local civic leaders, and the Pfizer Pharmaceutical Company. Overwhelmingly, the public was cheering for the home owners.<sup>20</sup>

---

<sup>13</sup> The area vacancy rate for nonresidential structures was a daunting 82% and two thirds of those structures were in fair or poor condition. Brief of the Respondents at 3, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108). “Importantly, no allegations that the area was blighted arose, [FN113] unlike many uses of eminent domain where local governments move forward with an economic redevelopment plan. [FN114] However, a state agency designated the City of New London a “distressed municipality” in 1990. [FN115] By 1998, after closure of a military facility in 1996, the City’s unemployment rate was almost double that of the state of Connecticut, and its population was less than 24,000 residents--the lowest it had been since 1920.” Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Takes from the Supreme Court*, 75 U. CIN. L. REV. 663, 682 (2006). “The New London city officials who planned the redevelopment project faced a desperate economic crisis. New London, a small former whaling center of just 25,000 people, [FN28] has suffered decades of economic decline with the unemployment rate approaching 8 percent. [FN29] Many of its children are on public assistance. With job opportunities already scarce, New London sustained another hard hit in 1996 with the closure of the federal Naval Undersea Warfare Center, which threw an additional 1,400 people out of work. [FN30]” Timothy J. Dowling, *How to Think About Kelo After the Shouting Stops*, 38 URB. LAW. 191, 195-96 (2006).

<sup>14</sup> David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. L. REV. 365, 370-71 (2007).

<sup>15</sup> 545 U.S. 520 (“I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.”)

<sup>16</sup> <http://www.ij.org/cases/index.html>

<sup>17</sup> Susette *Kelo* didn’t do too badly. According to John Brooks, Project Manager, Fort Trumbull project: “The City’s eminent domain taking value of the house in 2000 was \$123,000. Suzette *Kelo*’s final agreed compensation totalled \$392,000, in addition to \$50,000 mortgage payoff (mortgage company paid itself out of court escrow eminent domain compensation which Ms. *Kelo* never withdrew).” email to author, 06/29/07.

<sup>18</sup> Professor Burke searched commercial electronic news databases in the two months following the *Kelo* decision and counted 1016 documents. Professor Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Takes from the Supreme Court*, 75 U. CIN. L. REV. 663, 665 at fn 7(2006).

<sup>19</sup> Some of the home owners were renting out their houses, according to John Brooks, Project Manager, Fort Trumbull Project: “Suzette *Kelo* left the site in the middle of ‘06. She did not live at the house from late 2001 until 2005 (just prior to Supreme Court hearing in 2/05). During this time she had a relative as a tenant in the house, and maintained it was her home (or second home) for publicity purposes. She had a tenant in the house this last year (until about 5/1/07). Only three of the seven litigants actually lived in the properties (and one of those had not been subjected to eminent domain). Media interviews were conducted outside the properties frequently because there were tenants occupying the premises (Cristofaro, vonWinkle, Beyer).” email to author, 06/29/07.

<sup>20</sup> “According to a Mason-Dixon Polling and Research poll of Florida residents, 74% of Democrats, 75% of Republicans, and 72% of Independents disagreed with the Supreme Court’s ruling, and 89% of voters favored legislation to provide greater protection to private property owners against eminent domain takings... Zogby poll conducted for the National Farm Bureau found that Americans believe, by two to one, that governments should not

Defenders of the Fort Trumbull project never successfully launched a compelling counter story, though there was a story to be told. At the outset, New London faced the prospect of what to do with a closed military base and how to fund a \$30,000,000 environmental remediation of a polluted site. The emerging project would grace New London with two marinas, public parks, an extension of the waterfront river walk to connect Fort Trumbull with downtown, and 80 new condo units linked by walkways to the rest of the project.<sup>21</sup> Moreover, five of six properties taken by contested eminent domain were in the way of new streets and public infrastructure, ‘public uses’ by any definition, a fact never relied on by the city to justify the taking and never mentioned in the media shower or by the U.S. Supreme Court—although the facts were in the record before the Court.<sup>22</sup>

Perhaps the public relations failure in New London had something to do with the fact that project sponsorship was splintered and no master developer had agreed to build the project in its entirety. The big money came from Pfizer’s investment in its new global research and development facility and multi million dollar grants from the state. The small city of New London oversaw the land use planning framework. The day-to-day task of developing and executing the redevelopment plan fell to the independent, non profit, New London Development Corporation (NLDC), a quasi public entity moribund for decades.<sup>23</sup>

Redevelopment project proponents rarely triumph in the battle of the sound bites unless a designated private redeveloper produces a specific, politically palatable, financially feasible redevelopment program at the outset. Even then, project opponents will seize upon the presence of a private redeveloper as evidence that the developer ‘captured’ or exploited the political process for private gain.<sup>24</sup> Professor Marcilynn Burke observes: “The failure to articulate a

---

use eminent domain except for roads or utilities; 83% believe that governments should not use eminent domain to promote private economic development.” Daniel H. Cole, *Why Kelo Is Not Good News to Local Planners and Developers*, 22 *Ga. St. U. L. Rev.* 80(3), 822-24 (2006).

<sup>21</sup> Ibid. “It is very difficult to determine cost/benefit analysis of \$70 million (mostly state) investment. It would have been impossible for the City of New London to undertake a project of this magnitude. Almost \$30 million of this is environmental remediation. Is this wise, or a reflection of overly strict environmental legislation? Should a closed military base (that costs “too much” to redevelop) be left to crumble behind a chain link fence? Is it OK to use public funds to move a junkyard and railyard out of a potentially redeveloping area, and clean up a closed oil terminal? Surely real estate tax revenues can't be the only benefit to analyze.” email from John Brooks, Fort Trumbull Project Manager, to author. 07/16/07.

<sup>22</sup> Email to author from John Brooks, Project Manager, Fort Trumhull, 06/29/07.

<sup>23</sup> Lucette Lagando, *Disconnecticut: Needy New London Saw Cure for Its Ills In Pfizer's Arrival—But Drug Company's Vision For Research-Center Area Remains Far From Realized—Evictions, Rubble and Tears*, WALL ST. J., Sept. 10, 2002, at A1.

<sup>24</sup> See, e.g., Somin, Ilya, “Controlling the Grasping Hand: Economic Development Takings After Kelo”. *Supreme Court Economic Review*, Vol. 15, pp. 183-271, 2007 Available at SSRN: <http://ssrn.com/abstract=874865>. Professor Somin contends that economic development takings are pernicious because political entities are vulnerable to capture, there are virtually no practical limits to such takings, courts don’t apply cost-benefit analysis in evaluating whether these projects serve a public use, and don’t require that the private beneficiaries of eminent domain keep the promises of employment and development that local government relied upon in condemning land for them.



coherent response to the libertarian property rights-abuse of eminent domain rhetoric accounts for the one-sided public discourse on the topic.”<sup>25</sup>

*The Topics Covered in This Paper.* This paper compares the two ways after *Kelo* that a redevelopment taking of one person’s property for another constitutes a public use: (1) to eliminate blight, or (2) as part of a comprehensive redevelopment planning effort. A finding of blight after *Kelo* is a sufficient but not a necessary condition to a taking. As Professor Clayton Gillette put the matter: “The Court rejected any monolithic metric for economic development such as a ‘blight’ requirement, at least as a federal constitutional issue. Instead, at least where the locality was proceeding pursuant to a ‘carefully considered’ development plan, the Court was of the view that the judiciary should defer to the judgment that emerged from those legislative deliberations.”<sup>26</sup>

This paper begins with a recap of the *Kelo* Court’s attenuated endorsement of comprehensive planning as a way of determining whether a taking of unblighted property serves a public purpose. Then, we sketch the varying ways that states have defined blight to limit the use of eminent domain for redevelopment and the arguments of some scholars against pushing communities into targeting blighted areas for compulsory redevelopment. This discussion is especially salient as state legislators continue to refine their blight standards and state courts interpret them.<sup>27</sup>

Much of the pre and post *Kelo* debate is rooted in outdated assumptions about how redevelopment works. So the next section is a discussion of the origins of the blight standard in the run up to the enactment of the early federal public housing and urban redevelopment programs. The paper details the ways in which redevelopment projects funded predominantly by federal grants under the earliest programs tended to be quite different from those undertaken after the abolition of the federal program in 1974.<sup>28</sup> For decades now, most redevelopment authorities work closely with consultants and private developers to identify private market users before acquiring land for redevelopment, and study the financial feasibility of their projects carefully since they can’t expect a federal bailout. This business-like approach to redevelopment planning is most pronounced in those localities that rely for financing mainly or entirely upon increased local property tax revenues generated by the project itself.<sup>29</sup>

---

<sup>25</sup> Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Takes from the Supreme Court*, 75 U. CIN. L. REV. 663, 717 (2006).

<sup>26</sup> Clayton P. Gillette, *Kelo and the Political Process*, 34 Hofstra L. Rev. 13, (2005).

<sup>27</sup> Dana Berliner et. al., *The Condemnation Landscape Across The Country Post-Kelo*, SM006 ALI-ABA 433 (2007).

<sup>28</sup> Housing Act of 1949, Pub. L. No. 81-171, ch. 338, tit. I, §§ 101-110, 63 Stat. 413, 414-21 (originally codified at 42 U.S.C. §§ 1451-1460), omitted by Housing and Community Development Act of 1974, Pub. L. No. 93-383, tit. I, § 116(a), 88 Stat. 633, 652 (codified as amended at 42 U.S.C. § 5316 (1988)).

<sup>29</sup> “The federal urban renewal program no longer exists. Other federal programs, such as the Community Development Block Grant (CDBG) program, are not specifically directed toward local land redevelopment. As a result, local governments must create their own financing approaches. Three such approaches are in use. Tax increment financing (TIF) allows a portion of new tax revenues projected from redevelopment to be pledged to support initial borrowing. Thus, future tax receipts are used to pay for up-front development costs. The usual method is to float a bond issue; however, this may be difficult to do unless backed by a state guarantee or other form of credit enhancement. Tax incentive programs used by many states and local governments have created various

In the final section, the paper compares planned efforts at improving the quality of life in the community with ‘spot’ redevelopment aimed solely at pumping up local tax receipts, enabling a favored private firm (often a big retailer) to expand by acquiring land from unwilling neighboring owners. *Kelo* and some of the *Kelo*-inspired, state-enacted reforms, would lead courts to prohibit such takings—single shot transactions benefitting a prominent taxpayer. The paper concludes with a suggestion for how local governments could reformulate projects so narrowly focused as to invite “public use” challenges.

## II. COMPREHENSIVE PLANNING AS A PRE-CONDITION TO AN ECONOMIC DEVELOPMENT TAKING

*The Limited Scope of ‘Public Use’ Review of Local Plans.* The majority opinion in *Kelo* gives a big boost to local redevelopment efforts preceded by extensive public deliberations and, as in the case of New London’s plan, an elaborate environmental review process. The Supreme Court majority cited these procedures as evidence that the economic development taking had not been instituted for Pfizer’s benefit.<sup>30</sup> In future, the takers of unblighted properties for redevelopment should be prepared to produce, in the words of the Court’s majority opinion: “carefully-drafted plans and procedures guaranteeing maximum public exposure and participation”.<sup>31</sup> The Court signaled that it would be highly suspicious of a transfer for economic development of condemned property from one private owner to another in the absence of a plan elaborating on how the public would benefit from the transfer.<sup>32</sup> Speculating on the Court’s reliance on New London’s comprehensive planning to establish public use, Professor Nicole Stelle Garnett sees a safe harbor for well planned redevelopment and the absence of a plan as a constitutional red flag for redevelopment challengers.<sup>33</sup>

Though the *Kelo* majority mentions the word ‘plan’ or ‘planning’ forty times,<sup>34</sup> those plans are subject to only the most casual and fleeting scrutiny under the majority opinion. The Court will not hear arguments that the plan’s means are unlikely to lead to the plan’s stated goals, or even that the goals are unrealistic and unattainable.<sup>35</sup> The purpose of judicial review is more modest

---

incentives to support redevelopment projects in designated areas, which result in the land becoming more marketable. Other programs, such as those for historic preservation, are not limited to the development of vacant land but can be useful financing tools in some circumstances. Finally, some states and local governments have created bond programs for redevelopment activities. One example is Philadelphia’s Neighborhood Transformation Initiative that plans to use \$295 million in tax-exempt and taxable bonds to fund the demolition of vacant buildings, assemble development sites and rehabilitate housing.”1 CONSTRUCTION & DEVELOPMENT FINANCING § 1:3.50 (3d ed.).

<sup>30</sup> 545 U.S. 469-70.

<sup>31</sup> *Ibid.*

<sup>32</sup> 545 U.S. 487.

<sup>33</sup> Nicole Stelle Garnett, *Planning As Public Use*, 34 *Ecology L. Q.* (2007).

<sup>34</sup> Thanks to Nicole Stelle Garnett for doing the counting.

<sup>35</sup> 545 U.S. 488. Justice Stevens explained this reluctance, citing *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2085, (2005), (noting that this formula “would empower-and might often require-courts to substitute their predictive judgments for those of elected legislatures and expert agencies”). “The disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be

than that. It is simply to consider plausible allegations that the taking reeks of cronyism, corruption, or favoritism, and is devoid of redeeming features serving the public good. As long as the redevelopment agency's plans point to features of the proposed project that could conceivably benefit the public, they pass the Court's 'public use' test. As Professor David Callies concludes, after *Kelo*, "it is all about process, and process only."<sup>36</sup>

*Kelo Rejects Means-Ends Scrutiny.* The *Kelo* opinion disappointed an impressive team of law faculty members<sup>37</sup> that had advocated in an *amicus curiae* brief that for economic development takings, the condemning authority "be required to prove its case—to demonstrate that the project cannot go forward without the property and that the particular property at issue is unavailable except through coercive means."<sup>38</sup>

New London's plan fell short of forecasting the uses it contemplated for the site of Susette Kelo's house, located on parcels 3 and 4A. To date, the NLDC has no use for parcel 4A and most of the parcels in the project are not spoken for—though a few are about to be built.<sup>39</sup> Luckily for the redevelopment proponents, the Court disagreed with the professors urging an exacting judicial means-ends look-see, explaining: "Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-

---

commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans." *Ibid.* "The Court rejected the petitioners' argument that the government should have to prove with "reasonable certainty" that the redevelopment plan will produce the expected public benefits. This said the Court, was best left to the legislatures and not to the judiciary." Patricia E. Salkin, *Zoning and Land Use Planning*, 34 REAL EST. L.J. 244, 258 (2005). Justice Kennedy's concurring opinion suggests that a higher degree of judicial scrutiny might be appropriate in such situations. 545 U.S. 493 ("there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose.")

<sup>36</sup> David L. Callies, *Kelo V. CITY OF NEW LONDON: OF PLANNING, FEDERALISM, AND A SWITCH IN TIME*, 28 U. Haw. L. Rev. 327, 343 (2006).

<sup>37</sup> Amicus Curiae brief in *Kelo* by Professors David L. Callies, James T. Ely, Paula A. Franzese, Nicole Stelle Garnett, James E. Krier, Daniel R. Mandelker, John Copeland Nagle, John Nolon, J.B. Ruhl, Shelley Ross Saxer, A. Dan Tarlock, Laura Underkuffler, and Edward F. Ziegler. 2004 WL 2803192.

<sup>38</sup> *Id.* at 24-25.

<sup>39</sup> "We expect to announce our first office tenant (USCG R&D Center through G.S.A.) within the next several weeks. This will be in an existing (Navy built) building that is now a shell. Site improvements on that parcel (Parcel 3A) should start by Labor Day, with Tenant Improvements starting in the fall for a third-quarter 2008 occupancy date. The residential parcels (2A, 2B, 2C) will go under ground lease by Labor Day, with groundbreaking expected before October 1. These apartments and townhouses (80 units) have a 18-20 month construction time frame for occupancy by spring/summer of '09. Corcoran Jennison has a development agreement with \$1/year ground lease per parcel - provided they build within agreement timeframes. Residential component alone is a \$18 million project. If they don't build, they don't have the leases." email to author from John Brooks, Project Manager, Fort Trumbull, 07/13/07.

"There is not a definitive use scheduled at present for Parcel 4A. From 2000 until 2006 it was designated as the site for National Coast Guard Museum. The museum is now planning on building on Parcel 1A next to hotel (as a result of eminent domain controversy and delays). Most of the sites are not yet spoken for." Email to author from John Brooks, Project Manager, Fort Trumbull, 06/29/07.

guess the City's determinations as to what lands it needs to acquire in order to effectuate the project."<sup>40</sup>

Professor Orlando Delogu is with the amicus writers on this point, and faults the majority's response as a misguided ends-justifies-means rationale. To Professor Delogu: "If the view that 'ends' do justify 'means' ever gains wide acceptance, then all constitutionally protected rights are at risk."<sup>41</sup>

Legislators in at least three states agree and have introduced laws that would bar taking private property except when its use is proven essential or necessary to achieving a public purpose, or there is no alternative means of achieving it.<sup>42</sup>

*A Loophole in Reliance on Comprehensive Redevelopment Plans as a Check on 'Public Use'.* Professor Gideon Kanner faults the Court's reliance on redevelopment plans to ascertain 'public use'. "In reality redevelopment plans can be unreliable and unenforceable window dressing. They need not be followed at all."<sup>43</sup> Suppose a redevelopment agency disregards its plan entirely, claims it is taking the property for one purpose or owner, and conveys it to another for an entirely different use? Professor Kanner recounts numerous cases where this happened, and courts refused to grant relief to the deceived owners—even when the agency knew at the time it was promulgating a plan that it would soon disregard. One of Professor Kanner's most convincing examples is this: the Los Angeles Community Redevelopment Agency condemned and cleared a low income Mexican-American neighborhood at Chavez Ravine, allegedly to make room for the construction of a public housing project that was never built. Instead, years later, oject that was never built. Instead, years later, the city turned over the property to the Dodgers for a ballpark to lure them from Brooklyn. Professor Kanner concludes: "When it comes to their implementation and enforcement, municipal plans underlying projects for which private land is taken by eminent domain, aren't worth the proverbial paper they are written on."<sup>44</sup>

He reminds us of "the familiar rule of eminent domain law that once title to the condemned land is transferred to the condemning agency, the latter may do as it pleases with the acquired land."<sup>45</sup>

---

<sup>40</sup> 125 S. Ct. at 2667-68.

<sup>41</sup> Orlando E. Delogu, *Kelo v. City of New London—Wrongly Decided and A Missed Opportunity for Principled Line Drawing with Respect to Eminent Domain Takings*, 58 ME. L. REV. 17, 29-30 (2006). Professor Delogu offers several good examples to support his thesis. Here is one: "For example, law enforcement is surely a public purpose; if New London, faced with rising crime rates, undertook a widened program of search and electronic surveillance, it could logically believe that this enhanced program of law enforcement would have benefits to the community. Citing the reasoning of *Kelo*, would not the abrogation of traditional "probable cause" standards (standards that today protect individual rights and civil liberties) be appropriate? After all, the rationale of *Kelo*, put simply, is that once a public purpose is found, the means to achieving the ends sought are within the purview and prerogative of elected executive/legislative officials." *Id.* at 30.

<sup>42</sup> Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Takes from the Supreme Court*, 75 U. Cin. L. Rev. 663, 693 at fn 212 and 213 (2006) (citing proposed statutes from California, Massachusetts and New Jersey).

<sup>43</sup> Gideon Kanner, *Planning? We Don't Have to Follow Any Stinkin' Planning*, SM006 ALI/ABA 15, 22 (2007).

<sup>44</sup> Gideon Kanner, *Planning? We Don't Have to Follow Any Stinkin' Planning*, SM006 ALI/ABA 15, 23 (2007).

<sup>45</sup> Gideon Kanner, *Kelo v. New London, Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW 201,204-05 (2006).

This assumes the condemnation was of a fee simple with no condition limiting the condemnor's use of the property. However, many states even before *Kelo* had enacted states and constitutional amendments granting owners of property previously taken an option to repurchase once the acquiring agency declares the land to be surplus, no longer needed by the government and potentially available for sale to the bidding public.<sup>46</sup> Post-*Kelo*, other states are enacting such laws.<sup>47</sup>

### III. SHOULD ONLY BLIGHTED PROPERTY BE SUBJECT TO CONDEMNATION FOR TRANSFER TO ANOTHER PRIVATE OWNER?

#### A. THE BLIGHT STANDARD REIGNS SUPREME IN MANY STATES

*Kelo* aside, in most states redevelopment agencies are still best advised to demonstrate the existence of blight before officially designating each project area.<sup>48</sup> Such a determination is often required by state law as a pre-requisite for condemnation, and for delineating project area boundaries for redevelopment.<sup>49</sup> Thirty-four states enacted post-*Kelo* eminent domain reforms outlawing condemnations solely for economic development—but sixty percent of them (twenty-three) “have explicitly excluded from their prohibitions the exercise of eminent domain intended to address or eradicate blight.”<sup>50</sup>

#### B. THE IGNOMINIOUS HISTORY OF THE CONCEPT OF BLIGHT

Blight eradication was a linchpin of the federal urban renewal program, 1949-74, inserted cryptically in the statute to lend legitimacy to local governments becoming redevelopers of urban land with federal financial assistance. During the life of the urban renewal program, 1949-1974, cities could apply for federal grants to subsidize the cost of selling urban land to private redeveloper. The federal subsidy, called a land write down, was designed to cover two-thirds of the difference between the redevelopment agency's land costs (planning, acquisition, demolition and infrastructure) and the agency's resale price. Its purpose was to reduce the cost of these replatted sites to make them competitive with suburban green fields. The federal renewal law limited its largesse to projects in areas that could qualify as slum, blighted, deteriorated or deteriorating. In practice, the HUD administrators of the renewal program in Washington, D.C.

---

<sup>46</sup> “This scenario arises when an otherwise public project fails, leaving valuable surplus land in the hands of the condemning agency. Some states have precluded such a result by tightening their surplus property procedures in response to *Kelo*. Statutory provisions requiring the condemning authority to offer unused property to the original property owner at the acquisition price are an effective way to prevent this surplus-driven, *Kelo*-like transfer of private property. But in jurisdictions where such protections have not been enacted, the question remains: is this an unfortunate but inevitable part of eminent domain law, or a hidden backdoor to *Kelo*?” Jeffrey A. Beaver, Larry J. Smith, and Zachary R. Hiatt, *What Happens When the Project Fails?*, SM006 ALI-ABA 697, 708 (2007).

<sup>47</sup> Lynda J. Oswald, *Can the Condemnee Regain Its Property if the Condemnor Abandons the Public Use?* 39 *Urb. LAW.* 671, 680 (2007).

<sup>48</sup> Private consulting firms usually prepare blight studies, and in California the typical one costs about \$250,000. Interview by author with John Shirey, Executive director, California Redevelopment Association, 06/15/07.

<sup>49</sup> Wendell E. Pritchett, *The ‘Public Menace’ of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL’Y REV.* 1, 49 (2003), citing Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 *REAL PROP. PROB. & TR. J.* 389 (2000).

<sup>50</sup> Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 *FORD. URB. L. J.* 657, 674 (2007).

enjoyed virtually unfettered discretion and they left local redevelopment agencies largely to their own devices in finding and declaring blight.

The precedent of focusing redevelopment activity on ‘blighted’ areas derived from pre and early post World War II urban renewal efforts. Downtown stakeholders were eager for older cities to be made more attractive for the types of people who had been fleeing to the suburbs starting back in the 19th century. Their idea was to clear out poor minority neighborhoods on the fringe of fading down towns and convert these areas into buildable sites that could compete with the rapidly expanding suburbs for shiny new development, thriving businesses and affluent residents.

Conjuring images of “abandoned buildings severely neglected by their owners, vacant lots full of rubble and garbage, or dangerous and/or illegal uses such as crack houses,”<sup>51</sup> Professor Robert Bruegmann reminds us:

“Blight” had its origins in horticulture, referring to a small, nearly microscopic insect that attacked plants. In the seventeenth century the word had entered common speech as a more general term that meant a “baleful influence of mysterious or invisible origin.” By the end of the nineteenth century it was commonly used to describe the way densely settled city neighborhoods seemed to breed physical and social pathologies, disease, social unrest, and crime. This was the assumption of American housing expert Lawrence Veiller when, at a planning conference in the 1920s, he called blight a “civic cancer that must be cut out with a surgeon’s knife.” The implication was that blight was a kind of impersonal, external pathogen that had to be removed by a skilled practitioner, in this case a trained planner, to ensure the health of the rest of the organism.<sup>52</sup>

Proponents of clearing out slums and blighted areas near central business districts, as early as the 1930s, adhered to a theory of urban growth put forward by the Chicago School of Sociology.<sup>53</sup> As cities grew, the housing in poor neighborhoods near the city center, built in the late 19th century for factory workers, would deteriorate. Inhabitants would move out when they could afford to, and newly arrived immigrants from abroad and the south would take their places. As the family incomes increased of those who had moved from the slums to the inner suburbs, they would move again to suburbia. Without wholesale public intervention, the theory was that unless the slums or areas on their way to becoming slums (called ‘blighted’) were demolished, they would only continue to deteriorate, eventually spreading to nearby neighborhoods and ‘infecting’ them with poverty, crime, unsanitary conditions and disease. The theory didn’t explain why old

---

<sup>51</sup> [http://www.urbanplan.org/UP\\_Glossary/UP\\_Glossary.html#b](http://www.urbanplan.org/UP_Glossary/UP_Glossary.html#b)

<sup>52</sup> Robert Bruegmann, *SPRAWL: A COMPACT HISTORY* (2005).

<sup>53</sup> “When the University of Chicago was founded in 1892, it established the nation’s first department of sociology. The study of sociology was still a relatively undeveloped field, but by the 1920s the department had become nationally famous and graduates of its Ph.D. program dominated newly formed sociology programs across the country. During its early history, Chicago sociology was connected with progressive reform programs, including Jane Addams’s Hull House project. The department pioneered research on urban studies, poverty, the family, the workplace, immigrants, and ethnic and race relations, and developed important research methods using mapping and survey techniques.” <http://www.encyclopedia.chicagohistory.org/pages/265.html> (Last visited 07/02/07).

housing in prosperous neighborhoods didn't slide into deterioration over the years the way that slum housing was presumed to do. Obviously, people of means could afford to maintain the older housing stock quite well.<sup>54</sup>

The theory didn't explain why apartments, coops and condos built in prosperous neighborhoods didn't slide into deterioration over the years the way that slum housing was presumed to do. Obviously, people of means could afford to maintain the older housing stock quite well. Professor Bruegmann speculates that this line of thinking would have led analysts to consider the possibility that poverty amelioration should be the proper object of public intervention, not modifications to the built environment. Such reasoning would have been inconvenient for urban planners since they knew something about city building, but not much about the causes and cures of poverty.<sup>55</sup>

### C. FUNCTIONS SERVED BY DEFINING AND DESIGNATING BLIGHTED AREAS AND PROPERTIES

Definitions of blight serve four related, yet distinct functions: (1) As a justification for planning intervention in city building; (2) To delineate the precise boundaries of the areas requiring redevelopment; (3) To convince conservative judges in the 1930s and 1940s that local implementation of federal programs like public housing and urban renewal were simply extensions of the common law of nuisance abatement. Program proponents contended that the 'public use' was in the removal of blight and judges needn't be concerned with what the redevelopment agency did with the formerly blight sites once the blight was eradicated. (4) To justify taking private property by eminent domain for re-sale to private developers, as if the owners of land taken had asked redevelopment agencies, "why me?" and the agency replied: "We are taking your property because it is unsafe, in disrepair, a deterrent to potential investors not only within your neighborhood but other parts of the city as well."

*The 'Why Me' Rationale for Making Blight A Pre-condition to an Economic Development Taking.* Professor Lee Anne Fennell elaborates on the "why me" rationale for taking blighted property. She imagines that "the case for clearing blighted land is essentially a nuisance-control rationale that hinges on the negative externalities generated by the land in its present condition." Think of a junk yard or a decrepit apartment house. To the extent the owner is reaping more than a fair market value return, "we might say that the surplus arises from a willingness to offload costs onto neighbors and tenants, rather than from any affirmative, site-specific investments in the community.... Blighted land presents a thin-market or monopoly problem that is particularly troubling. If the use is inflicting costs on the surrounding area, then the owner under ordinary market conditions might well be able to hold out for a large share of the surplus that will be delivered from the discontinuance of the use. But as a distributive matter, it does not seem that the landowner has any right to the surplus, the very existence of which is a product of the landowner's subnormal use of the land. The incentives for extortionate behavior are clear enough if people are allowed to create bad situations and then glean some of the surplus associated with

---

<sup>54</sup> I am grateful to Professor Bruegmann for suggesting these ideas in a series of emails to author, 05/14/07, 05/26/07 and 05/28/07.

<sup>55</sup> Ibid.

relieving the negative condition. It is like arguing that someone who is making hideous music on the sidewalk has a right to some of the surplus associated with stopping the racket.”<sup>56</sup>

#### D. EXAMPLES OF VARYING STATE DEFINITIONS OF BLIGHT

*For Responsiveness to the “Why Me” Standard, Pennsylvania’s Blight Definition Is the Best.* Every line of the Pennsylvania definition of blight answers the “why me” question by pointing to curable defects in the property taken.<sup>57</sup> Few statutory definitions of blight are as clearly focused as this. The definition would curb expansive uses of redevelopment authority so much that big Pennsylvania cities managed to exempt themselves from it until 2012.<sup>58</sup>

*Blight in California Redevelopment Law.* The California statute divides blight into two categories—physical and economic. To establish a viable redevelopment project, under California law, the redevelopment agency need cite only one physical and one economic ‘blighting’ condition.<sup>59</sup> Most of the physical conditions answer the “why me?” question. Most of economic factors constituting blight do not.<sup>60</sup> For instance, an appropriate “why me” criterion from the physical list points to dilapidated structures in such bad shape as to be unsafe or unhealthy—a situation for which the owner might well be held accountable. Economic ‘blight’ includes such factors as a high business vacancy rates, an excess of liquor stores or adult oriented

---

<sup>56</sup> Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 Mich. St. L. Rev. 957, 984-85 (2004).

<sup>57</sup> Timothy Sandefur summarizes the law: “The new law prohibits the use of eminent domain “to take private property in order to use it for private enterprise.” The only exceptions to this prohibition are cases in which the property owner consents, where the property is transferred to “a common carrier” or “incidental” commercial activities such as gift shops or newsstands in government buildings, or where the condemnation is necessary to eliminate public nuisances or dangerous buildings, or where the condemnation is necessary to eliminate “blight” as narrowly defined by the bill itself. The bill’s definition of blight eliminates the possibility of economic development condemnations in the style of *Kelo*: it allows government to declare property blighted only if it is actually a danger to the public health and safety (e.g., “a structure which is a fire hazard or is otherwise dangerous to the safety of persons or property”; or “any vacant or unimproved lot . . . in a predominantly built-up neighborhood which, by reason of neglect or lack of maintenance, has become a place for accumulation of trash and debris or a haven for rodents or other vermin”. In addition, it places a 10 year limit on the lifespan of any declaration of blight.” It won’t apply until 2012 in Philadelphia, Pittsburgh and other cities. Timothy Sandefur, *The “Backlash” So Far: Will Citizens Get Meaningful Eminent Domain Reform?* 2006 MICH. ST. L. REV. 709, 761.

<sup>58</sup> Property Rights Protection Act, 26 Pa.C.S.A. § 203 (2006).

<sup>59</sup> See Steven Greenhut, *Abuse of Power: How the Government Misuses Eminent Domain* 272 (2004).

<sup>60</sup> California Health & Safety Code 33019 : (a) This subdivision describes physical conditions that cause blight:

- (1) Buildings in which it is unsafe or unhealthy for persons to live or work. These conditions may be caused by serious building code violations, serious dilapidation and deterioration caused by long-term neglect, construction that is vulnerable to serious damage from seismic or geologic hazards, and faulty or inadequate water or sewer utilities.
- (2) Conditions that prevent or substantially hinder the viable use or capacity of buildings or lots. These conditions may be caused by buildings of substandard, defective, or obsolete design or construction given the present general plan, zoning, or other development standards.
- (3) Adjacent or nearby incompatible land uses that prevent the development of those parcels or other portions of the project area.
- (4) The existence of subdivided lots that are in multiple ownership and whose physical development has been impaired by their irregular shapes and inadequate sizes, given present general plan and zoning standards and present market conditions.



businesses, or stagnant property values, none of which necessarily implicate the property owner for community-impairing misbehavior or neglect that would justify condemnation.<sup>61</sup>

It isn't that the California legislature is incapable of enacting a definition of blight that would assure fairness to the owners whose lands are condemned for private use. The statute isn't just about fairness to the owners of property taken. In California, redevelopment, particularly redevelopment intended to attract high volume retail, is a widely used way of boosting the city's share of the state sales tax, and sequestering property tax money that would have gone to the counties, school districts and other taxing entities. The blight standards are written to set some boundaries on these tax grabs. Unless redevelopment is eradicating blight so pervasive and insidious as to threaten the well being of other parts of the community, there would be no justification for diverting property taxes from elsewhere, including from other taxing entities. Further, without curbs on the use of tax increment cities would be tempted to engage in ruinous competition with the each other to entice private redevelopers with subsidized land acquisition costs in redevelopment project areas.

Property rights advocates find the California blight standards appalling.<sup>62</sup> So do the members of a California-based group called Municipal Officials for Redevelopment Reform (MORR). MORR explains how the 'blight' game is played by California redevelopment agencies. "All a city needs to do to create or expand a redevelopment area is declare it 'blighted,' easily accomplished due to the vague statutory standards. Redevelopment agencies choose consultants who "know their job is not to determine if there is blight" but to find blight where the agency wants it to be found.

Vacant land, prime sites in affluent cities, and parklands have all been declared blighted, oddly enough. Redevelopment agencies quickly certify their consultants findings of blight and retain legal counsel to document this and defend against legal challenges. There is a procedure for requiring a vote of the electorate before a project area can be established or expanded, so difficult to initiate that it is rarely used. But when it is, "redevelopment nearly always loses by wide margins".<sup>63</sup>

Blight findings are occasionally challenged by homeowners fearing that "an official designation of blight will hurt property values."<sup>64</sup> Counties and school districts sometimes challenge blight findings because they stand to lose major property tax revenue if a new redevelopment area is created. Challenges are rare because of the expense (the challenger may need to commission its own blight study), the short statute of limitations and political realities. County supervisors don't want to antagonize city officials, and attorneys who know redevelopment law well enough to mount a successful attack, work for public agencies and developers doing projects and risk

---

<sup>61</sup> California Health & Safety Code 33031(b).

<sup>62</sup> A Pacific Legal Foundation staffer protests that "Such amorphous standards make it possible to declare property blighted whenever officials believe it is failing to produce revenue at their preferred level" because "the standards for defining "blight" so vague as to allow merely unattractive or unproductive property to be declared blighted." Timothy Sandefur, *The "Backlash" So Far: Will Citizens Get Meaningful Eminent Domain Reform?* 2006 Mich. St. L. Rev. 709, 722.

<sup>63</sup> <http://www.coalitionforredevelopmentreform.org/references/morrreport.php>

<sup>64</sup> Ibid.

losing clients by representing challengers. Shopping center owners try to enjoin the use of TIF to subsidize the building of competing malls in the same market area.<sup>65</sup>

Nonetheless, there have been successful challenges to redevelopment agency ‘blight’ findings.<sup>66</sup> Understandably, officials in the losing jurisdictions believe these decisions are unfairly inhibiting their efforts to put their communities on a sound fiscal footing, upgrade the quality of development and open space, and bring new jobs to the locality.<sup>67</sup>

*Blight in Ohio Redevelopment Law: Now You See It, Now You Don’t.* Leading the states in permissive definitions of blight, Ohio had been pre-eminent—until the Ohio Supreme Court in an opinion by Justice Maureen O’Connor prohibited the city of Norwood from demolishing a neighborhood of perfectly decent, if modest, single family homes to make room for a developer’s mixed use project of 200 new apartments and 500,000 square feet of office and retail space. The city has suffered from losing its industrial job base, and being disrupted by a major interstate highway bisecting the town. It desperately needed the \$2,000,000 of new annual property tax revenue the new project would bring.

In Ohio ‘blight’ had come to mean that particular properties impede the development or quality of life in the surrounding community because they are not being put to their “highest and best

---

<sup>65</sup> “In suburban St. Louis, one mall is suing another and a neighboring city’s government over its aid to the second mall.” John Gibeaut, *The Money Chase: Municipalities Love Using Tax Breaks to Lure New Businesses, But Sweetheart Deals Have Lawyers for School Districts and Industry Rivals Raising Red Flags*, 85-MAR A.B.A. J. 58, 60 (1999).

<sup>66</sup> For a description of two such victories for ‘blight’ challengers, see G. Lefcoe, *Finding the Blight That’s Right for California Redevelopment Law*, 52 HASTINGS L. J. 991 (2001).

<sup>67</sup> The City of Diamond Bar lost one of the two cases mentioned in the article cited in the previous footnote. Murray Kane, the plaintiffs’ attorney, convinced the appellate court Diamond Bar, a prosperous suburban community in Los Angeles County, wasn’t blighted. He actually toured the town making a video that showed the designated redevelopment area. No doubt there was room for improving Diamond Bar’s commercial and office area, as Diamond Bar residents had little choice but do to most of their shopping in neighboring jurisdictions.

When asked what had happened in the past five years to the areas Diamond Bar would have redeveloped but for judicial intervention, in an email to author 06/01/07 Diamond Bar city manager James DeStephano replied: “Development within the proposed project area has moved more slowly than would have been the case utilizing the resources from tax increment and tools contained within California Redevelopment Law.

In fact, we have lost ground in the competitive world of attracting and retaining sales tax producing retail uses. And more importantly for me, we still lack the ability to effectively “redevelop” commercial areas of the City in order to capture tax dollars and jobs for our community. Those sites that were anticipated to be attractive candidates for new commercial business have not occurred. In addition, we have been unable to retain our top sales tax producers as they have been secured by other Cities using their own redevelopment powers to help lure the uses from Diamond Bar.

Some sites within the project area have been successfully developed i.e. the newly opened Target store. The last parcel for office uses is finally under construction within the Gateway Corporate Center. That’s good. However other sites remain underutilized and very difficult to rehabilitate/ redevelop as a result of the property complexities and the very limited tools we have to correct the deficiencies. We had intended to utilize the resources from the project area to physically enhance the related infrastructure. We have had to utilize other limited resources or have simply chosen not to proceed with some of the originally anticipated capital projects.

Watching our adjacent communities use their redevelopment agencies to assemble properties and facilitate the construction of high quality retail centers and new offices that draw our businesses to relocate, and our high income residents to purchase retail products in their Cities, is particularly frustrating.”

use.”<sup>68</sup> The statutory definition included such factors as the age of the building, obsolescence, inadequate street layout, incompatible land uses or land use relationships, overcrowding of buildings on the land, or excessive dwelling unit density.<sup>69</sup>

Enthusiasts of historic preservation must cringe upon being informed that the age of a building suffices to classify it as ‘blighted’.<sup>70</sup> In fact, home owners in the U.S. are spending as much money on fixing up houses as on new construction, and many of the houses being remodeled and expanded were built between 1945 and 1970 in the inner suburbs that have now become prime magnets for redevelopment.<sup>71</sup> As for obsolescence, any structure more than a few years old could be labeled obsolescent if it lacks features found in newer structures.<sup>72</sup> How about inadequate street layouts, incompatible land uses, or excessive dwelling unit density? The statute defines none of these terms. All of them are within the purview of the municipality’s subdivision and zoning controls. Regulatory failures certainly can’t be blamed on land owners in full compliance with local subdivision, zoning and building codes.

Based on these Ohio statutes, and a provision in its municipal redevelopment law, the city of Norwood had concluded that the project area was not bad enough to be declared blighted but could be labeled “deteriorating”. Lower courts had reluctantly deferred to the city’s findings<sup>73</sup> but the Ohio Supreme Court reversed them. In line with the *Kelo* minority, the Ohio Supreme Court held that an economic or financial benefit alone was insufficient to satisfy the Ohio constitution’s public-use requirement. “Any taking based solely on financial gain is void as a

---

<sup>68</sup> Christopher S. Brown, *Blinded by the Blight: A Search for a Workable Definition of “Blight” in Ohio*, 73 U. CIN. L. REV. 207, 212 (2004).

<sup>69</sup> Ohio Rev. Code Ann. § 1728.01 (Anderson 2000).

<sup>70</sup> For a building to be eligible for listing in the National Register of Historic Places it must be over more than fifty years old or be of such historical or architectural importance as to be listed earlier. Once listed either individually or as part of a district, the building is protected from federal or federally funded action and is eligible for tax credits should it be restored. Declaring older areas that are eligible or listed on the National Register as blight and subject to the potential clearance seems contrary to Federal and Local Historic Preservation laws and programs.” Christopher S. Brown, *Blinded by the Blight: A Search for a Workable Definition of “Blight” in Ohio*, 73 U. CIN. L. REV. 207, 226 (2004).

<sup>71</sup> “The Joint Center for Housing Studies of Harvard University has found that each year from 1985 through 1999 about one million homeowners spent more than \$10,000 on a major kitchen or bathroom remodel, an addition, or other major interior alteration. This means that in any given year about 1.5 percent of all owner-occupied units undergo significant modification—about the same share added to stock each year by new construction.” Over this period, 19.2 percent of owner-occupied homes added bathrooms, 14.6 percent added bedrooms, and 24.5 percent added other rooms. Moreover, the Center reported that annual spending on improvements reached its highest level for middle-aged dwellings that were twenty-five to twenty-nine years old, the very dwellings that Americans were supposedly eschewing because of the daunting obstacles to adaptation. Joint Center for Housing Studies of Harvard University, *Remodeling Homes for Changing Households* (Cambridge, Mass.: Joint Center for Housing Studies of Harvard University, 2001), pp. 3-4. Quoted in Jon C. Teaford, reviewing William H. Lucy and David L. Phillips. *TOMORROW’S CITIES, TOMORROW’S SUBURBS*. Chicago: Planners Press, 2006.” <http://www.h-net.org/reviews/showrev.cgi?path=312931160573208> (Last visited 07/01/07).

<sup>72</sup> “Such a broad requirement of functional obsolescence would give municipalities the option of declaring any building not constructed within the past year as blight. Because functional obsolescence is not determinative of whether an area is placing a substantial economic or physical burden on the community, it should not be considered a factor in finding blight.” Christopher S. Brown, *Blinded by the Blight: A Search for a Workable Definition of “Blight” in Ohio*, 73 U. CIN. L. REV. 207, 227 (2004).

<sup>73</sup> *Norwood v. Horney*, 161 Ohio App.3d 316, 830 N.E.2d 381 (Ohio App. 1 Dist.,2005).

matter of law, and the courts owe no deference to a legislative finding that the proposed taking will provide financial benefit to a community.”<sup>74</sup>

*Blight in New Jersey Redevelopment Law: ‘Blight’ in State Constitution Trumps Statutory Definitions of Blight.* Similarly, New Jersey’s statutory definition of blight has been expanded so broadly over the years that it has come to contravene the public understanding of the term extant at the time that the New Jersey constitution was amended in 1947, authorizing redevelopment only for ‘blighted areas’.<sup>75</sup> The statute now includes such ‘wild cards’ in delineating blight as an area’s being “not fully productive” or “in need of redevelopment”.

The New Jersey Supreme Court has ruled against a city’s trying to condemn a parcel of 63 largely vacant acres of wetlands because it wasn’t “fully productive”.<sup>76</sup> “At its core,” the Court explained, “‘blight’ includes deterioration or stagnation that has a decadent effect on surrounding property.”<sup>77</sup> There is a way the property might have been swept into the city’s redevelopment project area: if it were found necessary for redevelopment of a larger blighted area. But the city offered no evidence that this property was connected in any way to a larger development plan.<sup>78</sup> New Jersey’s Office of the Public Advocate recommends removing from the statutory definition of blight those portions that are inconsistent with the state constitution.<sup>79</sup>

*The Special Challenge Presented by the Taking of Unblighted Sites in Blighted Areas.* Courts usually approve takings of unblighted properties located within blighted areas that local officials believe to be necessary for achieving the redevelopment plan.<sup>80</sup> The plaintiffs in *Berman v. Parker* owned unblighted property in a blighted area— one of them owned a department store and the other, a retail hardware store—neither blighted. Justice Douglas’ opinion dismissed this troubling fact by proclaiming that if the ends of regulation—the redevelopment of a blighted area—fell within the police power (and it did because cities had the right to improve their worst areas), it was entirely a matter for local discretion how best to attain those goals.<sup>81</sup> The *Kelo* majority rejected this analysis, and embraced the norm that it violates the ‘public use’ constraint for a local government to take property from A for no reason other than to benefit B by transferring it to her. Whether a taking of unblighted property is purely for private benefit is to be gleaned from perusal of its redevelopment plan and the process of its adoption.

---

<sup>74</sup> *Norwood v. Horney*, 110 Ohio St.3d 353, 853 N.E.2d 1115, 1142 (Ohio,2006).

<sup>75</sup> “Although the Constitution does not further define ‘blighted area,’ the term had a widely accepted definition when applied to land redevelopment in 1947.” Department of the Public Advocate, Reforming the Use of Eminent Domain for Private Redevelopment in New Jersey, May 18, 2006 (on file with author).

<sup>76</sup> *Gallentin Realty Development, Inc. V. Borough of Paulsboro*, 2007 WL 1687274 (2007).

<sup>77</sup> *Id.* at 12.

<sup>78</sup> *Id.* at 18.

<sup>79</sup> Department of the Public Advocate, Reforming the Use of Eminent Domain for Private Redevelopment in New Jersey, May 18, 2006 (on file with author).

<sup>80</sup> Jonathan M. Purver, *What constitutes “blighted area” within urban renewal and redevelopment statutes*, 45 A.L.R.3d 1096, §5 (Effect of Inclusion of unblighted lots).

<sup>81</sup> 348 U.S. 13 (“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.”)

This standard is more exacting than what is required under many state law definitions of blight when it comes to justifying the taking of unblighted properties just because they happen to be located within a blighted area. So, for instance, Minnesota limits takings to blighted areas defined as an urban area where more than 50 percent of the structures are “structurally substandard.”<sup>82</sup> A structurally substandard property is defined in literal terms to include properties with structural problems so serious as to be in danger of actual collapse of the building, or to possess comparable physical defects. This definition certainly explains why blighted properties might be condemned. It offers no reason for taking unblighted property within a blighted area.

Owners of unblighted properties taken in West Virginia receive more benign treatment, a statutory means-ends test of sorts.<sup>83</sup> The burden is on the taker to show why the property is indispensable to the realization of the plan, no reasonably practicable alternatives are available, no substitute site can be purchased by voluntary negotiation, that a specific use has been designated in the plan for the unblighted site, relocation assistance is due and if the taken

---

<sup>82</sup> Available at <http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S2750.5.html&session=ls84> (visited June 10, 2006).

<sup>83</sup> (b) When any area has been declared to be slum and blighted, pursuant to the provisions of this article, if a private property within that area is found to not be a blighted property, then to condemn the property pursuant to article two, chapter fifty four of the code, the municipal authority must demonstrate, in addition to all other lawful condemnation requirements, that the project or program requiring the clearance of the slum and blighted area:

- (1) Cannot proceed without the condemnation of the private property at issue;
- (2) That the private property shown not to be blighted cannot be integrated into the proposed project or program once the slum and blighted area surrounding such property is taken and cleared;
- (3) That the condemnation of the unblighted property is necessary for the clearance of an area deemed to be slum or blighted;
- (4) That other alternatives to the condemnation of the unblighted property are not reasonably practical;
- (5) That every reasonable effort has been taken to ensure that the unblighted property and its owners have been given a reasonable opportunity to be included in the redevelopment project or plan without the use of eminent domain;
- (6) That no alternative site within the slum and blighted area is available for purchase by negotiation that might substitute as a site for the unblighted property;
- (7) That the redevelopment project or plan could not be restructured to avoid the taking of the unblighted property;
- (8) That the redevelopment project or plan could not be carried out without the use of eminent domain; and
- (9) That there is specific use for the unblighted property to be taken and a plan to redevelop and convert the unblighted property from its current use to the stated specific use basically exists.

(c) In any case when the municipal authority has decided to pursue condemnation, the property owner shall have the right to seek review in the circuit court within the county wherein the property lies. Prior to authorizing condemnation as provided pursuant to article two, chapter fifty-four of the code, the court must find that the property is blighted, or if unblighted, that the authority has met the requirements of subsection (b) of this section.

(d) All of the rights and remedies contained in article three, chapter fifty-four of this code concerning relocation assistance are available to the private property owner whose unblighted property is being condemned, and if the property to be condemned contains a business owned by the property owner, the property owner is entitled to the amount, if any, which when added to the acquisition cost of the property acquired by the condemning authority, equals the reasonable cost of obtaining a comparable building or property having substantially the same characteristics of the property sought to be taken. W. Va. Code, § 16-18-6a.

property was a business, it is entitled to receive enough compensation to acquire comparable facilities. Admittedly, this standard asks a lot of governments taking unblighted property. But it also has the potential of benefitting condemners by discouraging local governments from promulgating inflexible redevelopment site plans drawn to include indispensable ‘must have’ properties. A better approach is for plans to depict several ways of achieving their goals so that no single parcel becomes absolutely necessary to the success of the venture. Plans replete with practicable alternatives and substitute sites reduce the chances of the local government being compelled to pay a premium to ‘hold out’ land owners demanding far more than fair market value. The fact that this flexibility can be achieved more often than public officials tend to admit is evidenced in the frequency with which even expressway planners find ways to modify their routes to stay clear of properties owned by specially favored interests.<sup>84</sup>

#### E. THE BLIGHT PRE-REQUISITE FOR ECONOMIC DEVELOPMENT TAKINGS THWARTS SOUND PLANNING

Often, “blight” is defined in terms of older habitats in disrepair. The demolition of declining older areas often turns out to be a big mistake. Professor Peter Byrne reminds us that “blight is a socially constructed understanding of urban decay which rests on a doubtful analogy to a gangrenous limb and more closely describes a degree of disinvestment that can be addressed directly and without amputation. Most American cities today contain vibrant historic districts that not long ago were considered blighted.”<sup>85</sup>

Confining redevelopment activity to blighted sites would invite bad planning, Professor Lynn Blais predicts. Planners worried about judicial review “will be precluded from choosing the best, most efficient area for urban revitalization projects. Instead, projects will have to be made to “work” in blighted areas that might be poorly suited for them.”<sup>86</sup>

*The Regressivity of the Blight Standard.* The ‘blight’ standard has been assailed because it legitimizes—perhaps even mandates—taking the property of low income residents and marginal small business firms, not just for projects meant to benefit them but also for projects designed specifically to kick them out of their homes and shut down their businesses, to replace them with wealthier occupants and better capitalized firms. In the Washington, D.C. project upheld in *Berman v. Parker*, only 300 of the 5,900 housing units constructed there were affordable to the

---

<sup>84</sup> In the mid 1950s, for instance, Chicago’s expressway planners managed to route their projects so as to avoid taking all but five of the city’s 400 Catholic churches. Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 103 (2006).

<sup>85</sup> J. Peter Byrne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVT. L. & POL’Y 131, 141 (2005).

<sup>86</sup> Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORD. URB. L. J. 657, 685 (2007).

former residents.<sup>87</sup> In Professor Pritchett's words: "Blight was a facially neutral term infused with racial and ethnic prejudice."<sup>88</sup>

Lower income residents of modest older housing not being maintained to middle class standards were targeted for removal.<sup>89</sup> As Amanda Goodin observes, blight is "more likely to be found in low-income areas—for example, the less-valuable buildings in low-income neighborhoods are far more likely to be 'dilapidated, unsanitary, unsafe, vermin-infested or lacking in the facilities and equipment required by statute or an applicable municipal code' than buildings in upper- and middle-income neighborhoods."<sup>90</sup> "Too often the victims of redevelopment were the poor because slum clearance meant removing them for the benefit of the rich and powerful."<sup>91</sup> Homeowners in low income neighborhoods that happened to be predominantly black were especially disadvantaged in the years following World War II because federal agencies regarded such neighborhoods as blighted per se and ineligible for FHA insured or VA guaranteed loans.<sup>92</sup> "Too often the victims of redevelopment were the poor because slum clearance meant removing them for the benefit of the rich and powerful."<sup>93</sup>

Generally, neighborhoods are in bad shape not because the owners are willfully deferring maintenance but because the property owners are short of resources, and their tenants can't afford the rents that would support a better quality of maintenance and repair. Instead of dealing with this reality, business stakeholders and elected officials in city centers were eager to clear out these 'slum or blighted' areas because their occupants weren't good for local property values or tax rolls. Judge Prettyman knew this and expressed strong disapproval when he wrote the lower

---

<sup>87</sup> Howard Gillette, Jr., *Between Justice and Beauty: Race, Planning, and the Failure of Urban Policy in Washington, D.C.*, 163-64 (1995). Thanks to Professor Ilya Somin for calling this to my attention in *Controlling the Grasping Hand: Economic Development Takings after Kelo*, 15 SUPREME COURT ECONOMIC REVIEW 183 (2007). Available at SSRN: <http://ssrn.com/abstract=874865> (last visited 07/03/07).

<sup>88</sup> Wendell E. Pritchett, *The 'Public Menace' of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 6 (2003).

<sup>89</sup> At the 1930 Hoover Conference, blight was singled out as an "economic liability" whose demands upon the public purse outstripped its tax revenues. "Structures become shabby and obsolete," as one observer wrote in 1938, "[t]he entire district takes on a down-at-the-heel appearance. The exodus of the more prosperous groups is accelerated. Rents fall. Poorer classes move in. The poverty of the tenants contributes further to the general air of shabbiness. The realty owner becomes less and less inclined or able to make repairs." Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 310 (2004).

<sup>90</sup> Amanda W. Goodin, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177, 220 (2007).

<sup>91</sup> Jon C. Teaford, *Urban Renewal and its Aftermath*, 11 HOUSING POLICY DEBATE 443, 446 (2000). Professor Teaford offers some powerful examples: the evisceration of an Italian enclave in Boston's West End, a Croatian-American community in the Vaughan Street area in Portland, Oregon, the residents of Philadelphia's Eastwick project, the inhabitants of New York's West Village, the Mexican American residents of Los Angeles' Bunker Hill, and the inhabitants of San Francisco's Western Addition.

<sup>92</sup> See Meredith Lee Bryant, *Combating School Resegregation Through Housing: A Need for Reconceptualization of American Democracy and the Rights it Protects*, 13 HARV. BLACKLETTER L. J. 127, 132-35 (1997).

<sup>93</sup> Jon C. Teaford, *Urban Renewal and its Aftermath*, 11 HOUSING POLICY DEBATE 443, 446 (2000). Professor Teaford offers some powerful examples: the evisceration of an Italian enclave in Boston's West End, a Croatian-American community in the Vaughan Street area in Portland, Oregon, the residents of Philadelphia's Eastwick project, the inhabitants of New York's West Village, the Mexican American residents of Los Angeles' Bunker Hill, and the inhabitants of San Francisco's Western Addition.

court opinion modified by *Berman v. Parker*:<sup>94</sup> “The poor are entitled to own what they can afford. The slow, the old, the small in ambition, the devotee of the outmoded have no less right to property than have the quick, the young, the aggressive, and the modernistic or futuristic.”<sup>95</sup>

Justice Thomas’ opinion in *Kelo v. City of New London* pointedly links racism and the blight norm in urban redevelopment: “Urban renewal projects have long been associated with the displacement of blacks; “[i]n cities across the country, urban renewal came to be known as ‘Negro removal.’ Over 97 percent of the individuals forcibly removed from their homes by the “slum-clearance” project upheld by this Court in *Berman* were black.”<sup>96</sup> Indeed, the reason Justice Thomas would have overturned *Berman* is that a quest for more lucrative land uses is likely to burden poor communities disproportionately “Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.”<sup>97</sup>

#### E. THE CASE FOR NEVER ALLOWING CONDEMNATION FOR ECONOMIC DEVELOPMENT TAKINGS

*Assemble Needed Sites through Secret Agents; Don’t Even Think of ‘Taking’ for Economic Development.* Some critics of the ‘blight’ exception to economic development takings don’t see why governments should ever be able to force one owner to sell for the benefit of another it happens to favor. As Attorney Daniel Kelly has written: “[d]istinguishing actual blight from asserted blight is a relatively difficult task. The use of eminent domain should therefore be disfavored in all cases of asserted blight.” Instead of splitting hairs over the optimal interpretation of ‘public use’, why not cut this debate short by never allowing governments to take property for economic development, blighted or not?

“Although this proposal would increase the cost of property acquisition to potential participants in economic development projects, the government, if it so desires, could offer tax breaks, grants, and other incentives to these businesses in order to offset these increased costs. The money to pay for these tax breaks and grants would, of course, come from the public treasury, meaning that the additional costs of property acquisition arising from the unavailability of eminent domain would be spread among all taxpayers. Spreading the cost is much more just than concentrating the burden of subsidizing economic development projects on the few people whose property would otherwise be marked for condemnation.”<sup>98</sup>

Quite often, private redevelopers manage to assemble multiple parcels for significant projects in already developed areas.<sup>99</sup> Mr. Kelly suggests that governments should emulate successful private land assembly practices by hiring third parties as buyers and acquire the properties they need secretly.

---

94 348 U.S.26 (1954).

95 *Schneider v. District of Columbia*, 117 F. Supp. 705, 719 (D.C. 1953).

96 125 S. Ct. at 2687.

97 125 S.Ct. 2687.

98 Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL’Y 491, 499 (2006).

99 Daniel B. Kelley, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORN. L. REV. 1,59 (2006).



*Rebuttal to the 'Never Take' View.* Professor Blais thinks this may be unrealistic, and notes that most public/private partnership redevelopment projects are smaller and simpler than typical redevelopment projects.<sup>100</sup> Also, though private firms can rely on secret buying agents, governments aren't allowed to operate "under a cloak of secrecy". Professor Mihaly points out that governments have disclosure, notice and hearing requirements that make secret takings out of the question, and could encounter more serious 'agency' problems than developers experience with their third party negotiators.<sup>101</sup> True, overwhelmingly, governments don't use their eminent domain powers to acquire land.<sup>102</sup> They negotiate sales without using eminent domain although these sales occur in the shadow of eminent domain.<sup>103</sup> Professor Cohen acknowledges the possibility of 'holdouts' blocking useful projects but sees this as a worthwhile risk to take.<sup>104</sup> Many developers and redevelopment officials are convinced that without the possibility of eminent domain, worthwhile redevelopment projects will fail.<sup>105</sup>

*An Alternative: Contract for the Private Redeveloper to Assemble the Needed Sites; Reserve the Power of Eminent Domain for Tactical Advantage.* Redevelopment agencies could avoid 'takings' for economic development projects by contracting for its chosen redeveloper to acquire the needed sites privately.<sup>106</sup> Quite often, local government officials stubbornly dictate which sites to acquire without considering alternative site plans if their preferred sites become too costly. When private redevelopers know they will have to acquire the land on their own dime before commencing construction, they are likely to scrutinize redevelopment site plans seeking some flexibility in the selection of redevelopment sites, precisely to derail 'hold outs' by including very few, if any, 'must have' properties in the plan.

Even when delegating to a private developer the task of land acquisition, the redevelopment agency should probably retain the right to take. Not only could such a right be useful in deterring unreasonable demands by 'hold outs'. It is also a pre-requisite enabling land sellers to structure their arrangements so as to qualify themselves for the highly favorable tax-deferred exchange provisions of IRC §1033. This user friendly provision is only available to sellers whose properties were taken by eminent domain or sold voluntarily under a plausible threat of eminent

---

<sup>100</sup> "While some of the projects cited are large and multi-faceted, most tend to be relatively small and uni-dimensional compared to complex urban revitalization projects." Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORD. URB. L. J. 657, 682-83 (2007).

<sup>101</sup> "Councils adopt these plans in open, noticed hearings. This public participation is usually real, not token; the public process often takes years and alters fundamentally the shape of ultimate product." Marc B. Mihaly, *Living in the Past: The Kelo Court and Public/Private Economic Redevelopment*, 34 ECOLOGY L. Q. 1, 17 (2007).

<sup>102</sup> Though there is little empirical research on the incidence of condemnation, "approximately 80% of state and federal governments' acquisition of private property is through voluntary transactions." Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Takes from the Supreme Court*, 75 U. CIN. L. REV. 663, 716, fn 381 (2006).

<sup>103</sup> Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORD. URB. L. J. 657, 683 (2007).

<sup>104</sup> Id. at 568.

<sup>105</sup> Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain*, N.Y. TIMES, Jan. 18, 2006, at C5.

<sup>106</sup> As long as the city doesn't actually use its eminent domain power, voluntarily negotiated sales to the city's chosen private redeveloper aren't a 'taking', even if the threat of eminent domain looms in the background during the negotiations. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 74 Ohio App.3d 170, 598 N.E.2d 711 (Ohio App. 10 Dist.,1991).

domain.<sup>107</sup> Any community which eschews the use of eminent domain entirely makes the unfortunate blunder of automatically denying the benefits of this provision to the owners of properties it acquires.

#### F. CALIBRATING LANDOWNER PROTECTIONS TO THE RATIONALE FOR USING EMINENT DOMAIN

To some, allowing cities to condemn property because it is blighted is questionable because it has nothing to do with the reasons for governments ever using this extraordinary power. Eminent domain is usually justified to prevent ‘holdouts’, Professors Thomas Merrill and Gregory Alexander explain, particularly of ‘must have’ properties indispensable to certain types of public works.<sup>108</sup> Essentially, governments are allowed to force the sale of private lands to prevent rent seeking by an opportunistic landowner commanding an exorbitant sum, greatly more than the constitutional norm of “fair market value”. This sum doesn’t include the subjective or sentimental value of a home, the good will of a small business or the costs and inconvenience of finding a new place and relocating. Professor Merrill observes: “If the subjective loss is large enough, the condemnee’s loss may exceed the additional wealth generated when eminent domain is used to overcome barriers to exchange in thin markets.”<sup>109</sup>

Professor Eric Freyfogle cautions that in deciding whether to compensate for the owner’s ‘subjective’ losses, local governments should not try to keep a few landowners happy by paying more than the property is worth, at the expense of treating unfairly “the mass of taxpayers”.<sup>110</sup> It would make little sense to worry about rent seeking by the holdout and overlook the possibility of the redevelopment authority’s private buyer engaging a bit of rent seeking by purchasing the property on the cheap, and not paying the owners of properties taken for the assemblage premium. Professor Merrill urges close judicial scrutiny here as well: “In cases where eminent domain is most likely to foster secondary rent-seeking behavior—where one or a small number of persons will capture a taking’s surplus....”<sup>111</sup>

After reviewing the relationship between Pfizer’s decision to build an office and research headquarters in Fort Trumbull and the redevelopment plan promulgated by the non profit New London Development Corporation, Professor Alexander concluded that there was little chance of secondary rent seeking here<sup>112</sup>—though the issue of Pfizer’s influence on the project was

---

<sup>107</sup> 26 U.S.C. §1033 (2006). “State income tax codes have similar provisions.” Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Takes from the Supreme Court*, 75 U. CIN. L. REV. 663, 686 at fn 154 (2006).

<sup>108</sup> Gregory S. Alexander, *Eminent Domain and Secondary Rent Seeking*, 1 NYU J. L. & Liberty 958 (2005).

<sup>109</sup> Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 83 (1986)

<sup>110</sup> Eric T. Freyfogle, *The Land We Share* (2003) p. 248. Professor Lopez doesn’t accept the premise that ‘fair market value’ is ‘just compensation’ for Fifth Amendment purposes. “Confiscating a home and then transferring it to another private party for the primary economic benefit of the latter is unseemly, particularly when cognizable injuries go uncompensated. Because losses attributable to eminent domain, regardless of the compensatory scheme, do not have a perfect monetary equivalent, compensation is more like mitigation than restitution. Including a subjective element in the compensation calculus, much like other proposals, increases the monetary mitigation factor and might remove a modicum of the unseemliness associated with the ordeal.” Alberto Lopez, *Weighing and Reweighing Eminent Domain’s Political Philosophies Post-Kelo*, 41 WAKE FOREST L. REV. 237, 300 (2006).

<sup>111</sup> Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 87 (1986)

<sup>112</sup> Gregory S. Alexander, *Eminent Domain and Secondary Rent Seeking*, 1 NYU J. L. & LIBERTY 964 (2005).

vigorously contested.<sup>113</sup> None of the petitioners' properties were being taken for Pfizer's research facility though part of a parcel had been marked out for office space adjacent to the new Pfizer facility.<sup>114</sup> In fact, Pfizer hadn't initiated its coming to New London. It was the other way around. The NLDC coaxed Pfizer to come aboard. Quite early in their deliberations, key members of the NLDC Board concluded that the project needed a Fortune 500 company to anchor the planned redevelopment. At the time, Pfizer had been searching for a suitable location for this facility but New London hadn't been on its list until the chair of the NLDC convinced a senior Pfizer executive to pitch the site to the company as a possibility.<sup>115</sup> The rest is history.

*The Florida Legislature's Strong Reaction to The Battle for Riviera Beach.* Florida has curbed economic development takings, even of blighted or slum property, by declaring such takings not to be for a public purpose in Florida.<sup>116</sup> Florida voters enacted a constitutional amendment requiring three-fifths vote of both houses of the legislature to sanction a taking of one private person's property for transfer to another.<sup>117</sup>

Apparently, this ban arose in the wake of the Battle for Riviera Beach, a predominantly black community of modest seaside bungalows that city leaders had proposed to transform into a \$2.4 billion high end resort, similar to those in neighboring, affluent coastal towns. Michael Brown, the former four-term mayor (a black man), championed redevelopment, noting that Riviera Beach was the most impoverished town in the county. "At the time of the 2000 U.S. Census, one out of every four homes in Riviera Beach had three rooms or less, a figure associated with overcrowding. Eighty had no plumbing; 327 had no source of heat at all."

The Riviera Beach city council had approved the plan with \$1.25 billion set aside to condemn the waterfront areas. About 300 homes had been scheduled for condemnation. "Though a few residents and businesses vowed to fight the plan, most appeared willing to sell their property for

---

Pfizer's new headquarters building was the anchor of the Fort Trumbull effort. The first chair of the NLDC had known a key Pfizer executive personally and persuaded him to try to bring Pfizer to the site. Together they convinced Pfizer's senior management to locate a major corporate headquarters there. Pfizer, in turn, hoped the city would re-shape the surrounding area into a place congenial to its executives and employees. Some of the desired improvements involved infrastructure—sidewalks, street lights, landscaping, new roads, placing utilities underground, sewage and water plant improvements, a 16 acre waterfront park surrounding the old fort, and extending the existing riverwalk to downtown. Other aspects were to be built by private developers—adding a five star hotel, a conference center within walking distance of the Pfizer complex, high end condos, retail/entertainment uses and additional research and office buildings. The project is well underway with a long way to go towards fruition. Peggy Cosgrove, New London Development Corporation. [http://www.clairegaudiani.com/Writings/documents/NLDC\\_Case\\_Study.pdf](http://www.clairegaudiani.com/Writings/documents/NLDC_Case_Study.pdf) (last visited 06/18/07).

<sup>113</sup> The petitioners labeled Pfizer the '10,000 pound gorilla' of the project, and noted that all of its conditions for locating in New London were meticulously included in the adopted redevelopment plan. Brief for Petrs'. 4-5. See Nicole Stelle Garnett, *Planning As Public Use*, 34 Ecology L. Q. (2007),

<sup>114</sup> *Kelo v. City of New London*, 125 S. Ct. At 2659-60.

<sup>115</sup> Peggy Cosgrove, *New London Development Corporation* (a case study prepared for the American Assembly). [http://www.clairegaudiani.com/Writings/documents/NLDC\\_Case\\_Study.pdf](http://www.clairegaudiani.com/Writings/documents/NLDC_Case_Study.pdf) (last visited 06/30/07).

<sup>116</sup> Takings to prevent a nuisance were also banned unless the nuisance arose from violating building codes. Fla. Stat. 73.014.

<sup>117</sup> HR 1569 was approved by both houses on June 20, 2006, appeared on the November 8, 2006 general election ballot as Constitutional Amendment Question no. 8, and approved by a margin of 69% to 31%.

the ‘right’ price. One holdout resident reported selling her house for more than three times its fair market value. And the displaced property owners also received funds for relocation expenses.”

Great resistance came, though, from those homeowners with waterfront properties who feared that no matter how generously they were paid for their homes, replacement waterfront homes would forever lie beyond their financial reach.

Neither city officials nor the private redeveloper were pleased with the state’s intervention. The city had anticipated property values rising in the area from \$155 million to \$900 million, 6,500 new jobs and \$3 million a year in new sales taxes. Apparently, the developer didn’t believe it could proceed without eminent domain.

#### IV. HOW REDEVELOPMENT HAS CHANGED SINCE THE EARLY FEDERAL RENEWAL PROGRAM

##### A. REDEVELOPMENT SUCCESS STORIES

While every big renewal project has its vehement critics, most observers who look at the record without a fixed ideology hostile to government participation in shaping the urban environment will come to the conclusion that local governments can sometimes make cities better places to live through redevelopment. Professors Frieden and Sagalyn concluded their landmark study of urban redevelopment through the 1980s with this observation:

After thirty years of rebuilding, most big cities had new downtowns by the 1980s. Gone were the manufacturing districts of the 1950s, the working harborside warehouses, the freight terminals, some of the once-thriving department stores and specialty shops, and most working-class neighborhoods. Gone too were the rubble fields of the 1960s, when the wrecking crews were finished but the builders nowhere in sight. The new centers featured a cluster of office towers mixed with new hotels and civic buildings, freeways pumping heavy traffic to the edge of downtown, modern housing complexes, a shopping mall, some renovated office buildings and warehouses, many new restaurants, and at least one restored Victorian neighborhood.

These changes were visible enough to counteract the negative image of big cities in perpetual crisis. Even a public that clearly preferred to live in suburbs or small towns recognized that cities had advantages as well as problems. By 1978 half the respondents in a national survey considered large cities best for job opportunities, health care, colleges and universities, culture, public transportation, and restaurants and movies.<sup>118</sup>

Urban renewal success stories abound—some with federal funding, many without it. The earliest projects built much needed moderate income housing in Manhattan, Philadelphia and

---

<sup>118</sup> Bernard J. Frieden and Lynne B. Sagalyn, *DOWNTOWN INC. HOW AMERICA REBUILDS CITIES* 287 (MIT Press 1990).

Cleveland.<sup>119</sup> Baltimore's Charles Center "was everything its promoters hoped for".<sup>120</sup> Other projects on planners lists of 'greatest hits' include: Detroit's Lafayette Park, Los Angeles' Bunker Hill, Robert Moses's Lincoln Center, San Francisco's Yerba Buena Center South of Market Street and the Gateway Center-Embarcadero, Boston's Government Center, Philadelphia's Society Hill, Chicago's Hyde Park-Kenwood, Pittsburgh's downtown Point district, Denver's Mile High Center<sup>121</sup>...the list is huge and ongoing.

Undoubtedly, these projects came at a high price in tax dollars and evictions. Whether they could be justified on a cost benefit basis is debatable. That they produced substantial civic benefits is not. "Redevelopment's past presents us with a contradictory and complex record. Perhaps nothing better embodies the dialectic of modern social experience than the last century and a half of the deliberate, idea-driven and government-directed remake of cities, a history marked by the simultaneity of good and evil, of civic accomplishment and social destruction, and by the combination of great ambition and great corruption."<sup>122</sup>

## B. CHANGES IN REDEVELOPMENT SINCE THE ABOLITION OF THE FEDERAL PROGRAM IN 1974

Redevelopment has changed considerably since the early federal renewal programs. As we have seen, the emphasis on blight and slum clearance once seen as legally indispensable is no longer a requisite of federal constitutional law. Statutory compensation to displaced owners and tenants now supplements the often inadequate measure of compensation courts established earlier under the Fifth Amendment. Finally, and most significantly, because they are no longer dependent on federal funds to bail them out of ill conceived schemes, many (though not all) local governments have become quite sophisticated as land developers, deferring the acquisition of land until they have a buyer and a plan for its reuse, and shaping the scope and design of the project to maximize rapid returns to the local government in the form of increased tax revenues.

### 1. The Place of Slum Clearance and Blight Removal in Early Public Housing and Redevelopment Law

The legal history of slum and blight clearance is intertwined with the story of how the concept of urban redevelopment evolved. An informal alliance of civic activists, real estate interests, and social welfare reformers sought to revive declining urban centers starting in the 1930s. Social reformers hoped to improve living conditions for the working class through the construction of public housing and rigorous code enforcement. They expected low and moderate income housing to rise in place of units demolished. Real estate interests often represented by the National Association of Real Estate Boards vigorously opposed funding for public housing (fearful of competition with private landlords). The real estate lobby spearheaded by downtown merchants wanted to gut low income areas and make the land available for 'higher and better' uses. They assumed (or hoped) that those displaced could find other housing outside the central city. The law required of every federally funded redevelopment project either housing to be demolished,

---

<sup>119</sup> Jon C. Teaford, *Urban Renewal and Its Aftermath*, 11 Housing Policy Debate 43, 446 (2000).

<sup>120</sup> Jon C. Teaford, *Urban Renewal and Its Aftermath*, 11 Housing Policy Debate 43, 451 (2000).

<sup>121</sup> Jon C. Teaford, *Urban Renewal and Its Aftermath*, 11 Housing Policy Debate 43 (2000).

<sup>122</sup> Marc B. Mihaly, *Living in the Past: The Kelo Court and Public/Private Economic Redevelopment*, 34 ECOLOGY L. Q. 1, 18 (2007).

constructed or both, as part of the redevelopment plan. But the law failed to protect area residents because it lacked any requirements for cities to build replacement housing affordable to those they displaced.<sup>123</sup> Reformers had a limited window of opportunity during the Great Depression when the federal government was looking for ways to create work and stimulate economic growth. “The Public Works Administration (PWA) implemented the nation’s first significant public housing program, and between 1934 and 1937, the PWA constructed more than 21,000 units of publicly-owned housing for the working-class.”<sup>124</sup>

Public housing jarred conservative judges, and before the legal triumph of the New Deal stayed their hands, they were prepared to strike down government schemes that smacked of socialism. Property owners challenged the city of Louisville’s attempt to condemn four city blocks as a site for public housing—and won. The Sixth Circuit couldn’t see how condemning owner A’s property so that tenant B could eventually reside there constituted a public use. In the court’s judgment: “The taking of one citizen’s property for the purpose of improving it and selling or leasing it to another, or for the purpose of reducing unemployment, is not, in our opinion, within the scope of the powers of the federal government.”<sup>125</sup>

Eventually, federal and state courts came overwhelmingly to accept the legitimacy of public housing, yielding to the argument that slum clearance or blight removal, in itself, constituted a ‘public use’. “Blight” was an adornment in the federal redevelopment legislation meant to placate social reformers and skeptical judges. Judges were just as susceptible as the general public in regarding inner city low income neighborhoods as ‘blighted’ and good riddance. The leading precedent came from New York’s highest court. It found public use in the public ownership of housing and in the neighborhood-wide slum clearance that preceded it. “The designated class to whom incidental benefits will come are persons with an income under \$2,500 a year, and it consists of two-thirds of the city’s population. But 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.”<sup>126</sup> The authors of the 1949 federal urban renewal law could see that by restricting federal largesse to the acquisition of slum or blighted areas, their program would qualify as a public use under the public housing case precedents.<sup>127</sup>

No federal law or regulation ever defined blight and the federal agency dispensing renewal funds never withheld funding because it was being used to buy sites that weren’t blighted. Professor Pritchett notes: “Renewal advocates never developed a systematic process by which to determine when an area was blighted. While they devoted a great deal of study to blighted areas, renewal advocates preferred to define the phenomenon with vague generalities.”<sup>128</sup> There was a good

---

<sup>123</sup> Jon C. Teaford, *Urban Renewal and its Aftermath*, 11 Housing Policy Debate 443 (2000)

<sup>124</sup> Gail Radford, *MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA* (1996).

<sup>125</sup> *U.S. v. Certain Lands in City of Louisville, Jefferson County, Ky.*, 78 F.2d 684, 687-88 (6<sup>th</sup> Cir. 1935)

<sup>126</sup> *New York City Housing Authority v. Muller*, 270 N.Y. 333, 341-42, 1 N.E.2d 153 (N.Y. 1936).

<sup>127</sup> BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN, INC. HOW AMERICA REBUILDS CITIES* 23 (MIT Press 1990). This was the number dispossessed through urban renewal by 1967. Federal aid urban highways displaced 330,000 households during the same time period.

<sup>128</sup> “Renewal advocates never developed a systematic process by which to determine when an area was blighted. While they devoted a great deal of study to blighted areas, renewal advocates preferred to define the phenomenon

reason for this. City renewal directors were discovering that private builders and developers shunned launching big commercial projects in hopelessly blighted areas, and when they tried to develop in seriously blighted areas, their projects failed miserably.<sup>129</sup> Unfortunately, they discovered this only after dislocating over 400,000 families, many poor enough to qualify for public housing.<sup>130</sup>

## 2. How Condemnation and Compensation Arrangements Have Improved for Those Displaced by Redevelopment Since the Early Days of the Federal Renewal Program

Redevelopment has evolved greatly since the time of *Berman*. Professor Marc Mihaly summarizes some of the biggest changes regarding condemnation and compensation: “In recent decades, agencies have increasingly avoided the use of condemnation, especially in the single-family residential context.

Attaining just compensation for private property owners is always a challenge. Public agencies often work with appraisers accustomed to ‘low balling’ the value of properties about to be taken , and use these appraisals to try to convince property owners to sell at bargain prices. Condemnation attorneys stand ready to assist property owners from being short changed by offering their services on a contingent fee basis. The property owner has nothing to lose in employing counsel except for paying incidental costs such as appraisal fees since the contingency is based on a percentage of the final condemnation award above the agency’s last best offer before the attorney became involved. But many owners settle without the benefit of counsel. Some could be unaware of the availability of legal services on a contingent fee basis. Others might be wary of incurring the emotional costs of involvement in contentious legal proceedings.

Statutory reforms, federal and state, have improved the payments condemnees receive. These include business good will and relocation assistance. While condemnees were often shortchanged by conventional common law rules regarding compensation, Professor Garnett has documented the significant motivations that elected officials and program administrators (the ‘takers’, she calls them) have to over compensate, coupled with state and federal statutes so generous that many displaced tenants are given lump sum payments to cover increased rent as they move from blighted to good housing, payments often large enough that recipients use them as down payments on their first homes. <sup>131</sup> Tenants are benefitted indirectly in many states by requirements that housing lost to demolition by redevelopment be replaced at a greater than one-to-one ratio.”<sup>132</sup>

---

with vague generalities.” Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale Law and Policy Rev. 1, 18 (2003).

<sup>129</sup> Jon C. Teaford, *Urban Renewal and Its Aftermath*, 11 Housing Policy Debate 443 (2000).

<sup>130</sup> Bernard J. Frieden and Lynne B. Sagalyn, *DOWNTOWN, INC. HOW AMERICA REBUILDS CITIES* 28-29 (MIT Press 1990).

<sup>131</sup> Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 Mich. L. Rev. 101 (2006).

<sup>132</sup> Marc B. Mihaly, *Living in the Past: The Kelo Court and Public/Private Economic Redevelopment*, 34 *ECOLOGY L. Q.* 1 (2007).

### 3. The Difference Between Federally Subsidized Redevelopment and Redevelopment Financed Locally

The 1949 federal redevelopment program envisioned wholesale demolition of marginal housing areas near downtown central business districts. Proponents anticipated that private developers would not pay as much as redevelopment sites would cost to acquire, level and prepare for re-use with updated infrastructure— roads, parking garages, civic plazas, new sewer and water lines, underground utilities. There would be sizable deficits between these costs and the price at which the land could be sold for the uses permitted by the redevelopment plan. The federal subsidy was designed to cover two-thirds of the difference between the costs and the resale price (called the land write-down).<sup>133</sup> The more land the city acquired, the more subvention it could anticipate receiving in grants from the federal government.

Federal urban renewal funding encouraged cities to acquire enormous sites and level them.<sup>134</sup> (The longer the federal funds rolled in, the longer the local agency staff had a reason to hold on to their jobs.) The federal urban renewal program called for project areas to be delineated, acquired, and cleared before being sold to private developers or public housing authorities.<sup>135</sup> Redevelopment agencies furiously assembled acreage ‘blind’—without any commitments from developers to buy and build. Cities often discovered painfully, after clearing out all the residents and small businesses, that the market had already been putting the land to its ‘highest and best use,’ and there were no viable takers for it.<sup>136</sup>

In time, entrepreneurial redevelopment directors began reaching out to private developers early in the planning stages.<sup>137</sup> Today, redevelopment is funded mainly by state grants and locally raised tax revenues. By the time the federal cash cow ran dry, local governments came to appreciate the virtues of redevelopment agencies striking a deal with a developer, or receiving sufficient expressions of interest and preliminary negotiations to attain confidence that the project would be completed on schedule.

---

<sup>133</sup> Ch. 338, 63 Stat. 416 (Act of July 15, 1949) (codified at 42 U.S.C. § 1453(a)(2)(B) (omitted 1988).

<sup>134</sup> Bernard J. Frieden and Lynne B. Sagalyn, DOWNTOWN INC. HOW AMERICA REBUILDS CITIES 27 (MIT Press 1990). The authors remind us that the Rockefeller Center site in the 1930s, one of the largest land holdings in Manhattan at the time, was 12 acres. Charles Center Baltimore was 33 acres, Government Center Boston 44 acres, Capitol Mall Sacramento 59 acres, Gateway Center Minneapolis 72 acres, Wooster Square New Haven 235 acres, Southwest project Washington, D.C., 560 acres. “These holdings were of a size not seen in American cities since the early land developers first laid out lot lines on the open countryside.”

<sup>135</sup> For a list of unsold sites during the heydays of the federal renewal program, and a plea that cities stop acquiring land until they sell the enormous tracts they had already acquired, see Lyman Brownfield, *The Disposition Problem in Urban Renewal*, 25 LAW & CONTEMP. PROB. 732, 740 (1961)

<sup>136</sup> Teaford at 445-450. “In some instances, the entire process took many years; and if an acceptable developer could not be obtained, the land remained vacant indefinitely.” Quintin Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 N.Y.L. SCH. L. REV. 373,396 (1994)

<sup>137</sup> “While actual disposition follows acquisition and clearance, URA encourages preliminary steps toward finding a redeveloper as early as the survey and planning stage.” Nick S. Fisfis and Harold Greenberg, *Suburban Renewal in Pennsylvania*, 111 U. PA. L. REV. 61, 94 text at fn 281 (1962). See also, Lyman Brownfield, *The Disposition Problem in Urban Renewal*, 25 LAW & CONTEMP. PROB. 732, 749-50 (1961).



Professor Mihaly has described the redevelopment process very well.<sup>138</sup> It begins, typically, with the selection of a master developer based on competitive bidding and detailed spreadsheets depicting the timing of estimated costs and revenues. Justice Kennedy mentioned being influenced in his ‘swing vote’ in *Kelo* by “the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known”.<sup>139</sup> Still, it not difficult to look at the contract documents between a redevelopment agency and its master redeveloper to make sure the public is receiving something of substantial value for its investment.

There are other changes as well in the typical redevelopment project then and now. Locally funded redevelopment tends to favor “small, strategic sites” and avoids “trying to rebuild entire districts.”<sup>140</sup> Large projects take too long to complete and drain local resources. Under federal grant programs larger cities tended to fare better than smaller ones. They contained more potential voters, and could afford to hire staffers adept at procuring federal grants. Federal funding was targeted initially to cities with low income populations. By contrast, many prosperous towns and well-heeled suburbs find irresistible immediately realizable development opportunities that would boost local property tax receipts, especially new commercial investment in high income neighborhoods.<sup>141</sup> Redevelopment has evolved into a tool for municipalities of all sizes to increase local revenues while controlling the pace and direction of development as much as to eliminate blight.<sup>142</sup>

Because acquiring land through eminent domain is contentious and time consuming, condemnations are rare. In the last year for which data are available, redevelopment agencies in California, working on about 500 projects will be displacing fewer than 600 families. (These projects will also create 11,000 new housing units statewide).<sup>143</sup>

Because New London’s Fort Trumbull project was funded mostly by grants from the state of Connecticut, and not from tax revenues generated by the project itself, it resembles the old federal urban renewal projects in its lack of fiscal savvy. Land was acquired before the NLDC had many firm commitments for its re use; numerous parcels remain available to this day.<sup>144</sup> For

---

<sup>138</sup> Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 34 *ECOLOGY L. Q.* 1, 54-59 (2007).

<sup>139</sup> 545 U.S. at 491-92.

<sup>140</sup> *Id.* at 299-300 This trend began in the 1970s, during the waning days of the federal redevelopment program. They avoided residential neighborhoods and concentrated in underused waterfront and warehouse districts or civic eyesores such as porno districts.

<sup>141</sup> Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development and the Elusive Definition of Blight*, 31 *Fordham Urb. L.J.* 305, 319 (2004). Quoting See Thomas Luce, *Brookings Inst. Ctr. on Urb. & Metro. Pol’y, Reclaiming the Intent: Tax Increment Finance in the Kansas City and St. Louis Metropolitan Areas* 8-11 (2003), available at <http://www.brookings.edu/es/urban/publications/lucetif.pdf>.

<sup>142</sup> David N. Farwell, *A Modest Proposal: Eliminate Blight, Abolishing But-For, and Putting New Purpose in Wisconsin’s Tax Increment Financing Law*, 89 *MARQ. L. REV.* 407, 408-09 (2005).

<sup>143</sup> [http://www.hcd.ca.gov/hpd/rda/04-05/app\\_a104-05.pdf](http://www.hcd.ca.gov/hpd/rda/04-05/app_a104-05.pdf)

<sup>144</sup> “Most NLDC staff funding is coming through state grants (at present, during Fort Trumbull project). We have other programs/grants that are independently funding portions of staff from time to time.” email to author from John Brooks, Project Manager, Fort Trumbull, 06/29/07.

a redevelopment project funded from local tax revenues, this would be a calamity. For New London, it means soliciting the state for more money.

#### V. COMPARING COMPREHENSIVE REDEVELOPMENT WITH SINGLE SHOT TRANSFERS UNDERTAKEN TO FACILITATE A FAVORED FIRM'S EXPANSION PROMISING NEW JOBS OR TAX REVENUE

*Distinguishing Comprehensive from Spot Economic Redevelopment.* Most redevelopment projects effect improvements in urban design, create jobs, spur economic development, and enhance local tax receipts—all at the same time. Any of these are of sufficient public benefit under *Kelo* to rebut allegations that a project is meant solely for private benefit, not ‘public use’. Though the U.S. Supreme Court accepted the characterization of the Fort Trumbull project as aimed at economic development and tax base enrichment, the majority opinion concluded: “The plan was also designed to make the City more attractive and to create leisure and recreational amenities on the waterfront and in the park.”<sup>145</sup>

Justice O’Connor observed that the Court’s rule would do nothing to “prohibit property transfers... whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.”<sup>146</sup> Well, Justice O’Connor may prove correct for comprehensively planned projects involving many owners. But if a redevelopment agency takes one or a few unblighted properties for transfer to a single developer, the majority opinion signals a willingness to take a closer look, similar, Professor Gillette hypothesizes to the familiar distinction between comprehensive and spot zoning.

Just as spot zoning raises concerns that the person who got the exception had the fix in, in ways that are less probable when a locality adopts a comprehensive zoning plan, so too are the conditions for deference relaxed where the takings decision implicates so few parcels that one reasonably fears a heightened risk of abuse. Indeed, Justice Stevens invited just such an exception when he wrote “a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.” Hanging over those words is the unspoken parenthetical: “And when it is presented, I will vote against it.”

A redevelopment plan or a zoning ordinance that affects numerous owners is less likely to be the result of improper dealings for two reasons. More than one land owner probably stands to be threatened with condemnation so the targeted owners have reason to join forces in challenging the favored retailer or employer. “Significant engagement by multiple actors in public hearings” can be expected to evoke various views on what the city should do, diminishing “the capacity of a small rent-seeking group to impose its will on a complacent majority or an under-represented minority”.<sup>147</sup>

---

<sup>145</sup> 545 U.S. 474.

<sup>146</sup> 545 U.S. 504.

<sup>147</sup> Clayton P. Gillette, *Kelo and the Political Process*, 34 Hofstra L. Rev. 13, 18 (2005). Lending support to Professor Gillette’s analysis, essentially that ‘voice’ matters and participation by the affected owners eases the distress, Connecticut Governor M. Jodi Rell observed about *Kelo*: “This issue is the twenty-first century equivalent of the Boston Tea Party: the government taking away the rights and liberties of property owners without giving them

*Spot Takings for Economic Development Fare Badly in State Courts.* Though we can't yet be certain how Justice Stevens will vote in the "one-to-one transfer of property" case, state courts have rejected takings initiated to placate a single firm.<sup>148</sup> Compare the following two cases, each involving a retailer expanding its turf in a shopping mall. In the first case the tenant acquired the landlord's title to the mall over the owner's vehement objections. In the second a retailer wanted to push out other retailers in the mall so it could expand. In *Friedman v. Redevelopment Authority*<sup>149</sup> a redevelopment agency was allowed to acquire a shopping center from the owner, and sell it at cost to one of the tenants. This was part of the city's redevelopment program to revive an undeniably blighted central business district. The objecting landlord conceded that the properties acquired were in poor condition. Under an agreement between the redevelopment authority and the tenant (a drugstore operator), the tenant would demolish the center, reconfigure the site to make it accessible to a nearby public parking facility, and build a modern shopping center in its place. Though blight removal was the justification, the court noted the details of the plan in demonstrating that the purpose of the condemnation transcended the well being of the tenant who would eventually acquire and redevelop the site.

Conversely, the Supreme Court of Colorado struck down a redevelopment agency's attempt to condemn land in a shopping mall to enable Wal Mart to expand. The mall had been built earlier as part of a redevelopment effort to eliminate blight. The agency's blight finding had been made in 1981—over twenty years ago. But by the time Wal Mart sought to displace other retailers in the mall to make way for a superstore, the area was prosperous and thriving, no longer blighted by any definition. The Wal Mart expansion promised to increase local sales tax revenues by \$3-\$3.5 million per year. The agency didn't contemplate any changes in the project except those needed to facilitate Wal Mart's expansion. The Court rejected the condemnation.<sup>150</sup>

A federal district court reached the same conclusion in a case involving the discount retailer Target.<sup>151</sup> Target had been leasing space at a site in South St. Louis for 30 years. The time came when it wanted to renew the lease and build a new store but couldn't come to terms with its

---

a voice." Press Release, State of Connecticut, Statement of Governor Rell on Call for Legislative Hearings on Eminent Domain, (July 11, 2005), <http://www.ct.gov/governorrell/cwp/view.asp?A=1761&Q=296184> (With thanks to Professor Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Takes from the Supreme Court*, 75 U. CIN. L. REV. 663, 693 at fn 212 and 213 (2006).

<sup>148</sup> Perhaps the most glaring example of tax-motivated favoritism ever successfully challenged in federal court arose in protest of the city of Lancaster's effort to replace one retailer with another that generated more sales tax revenue, *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

<sup>149</sup> 24 Pa. D. & C.3d 377 (1982).

<sup>150</sup> "An urban renewal authority derives its power to condemn private property from our Urban Renewal Law, which authorizes condemnation of private property only to prevent or eliminate the spread of blight. Once blight has been cured or eliminated from a particular parcel, an urban renewal authority loses its statutory condemnation power with respect to that parcel." *Arvada Urban Renewal Authority v. Columbine Professional Plaza Ass'n, Inc.*, 85 P.3d 1066, 1067 (Colo., 2004). See also, e.g., *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp.2d 1203 (C.D. Cal., 2002). Here, a church owned 18 acres, sought a CUP to develop the site for church purposes, including a 4,700 seat auditorium. The site was located in a redevelopment project area established 12 years ago. After denying the CUP application, the city instituted proceedings to condemn the church property for a Costco. The court held for the church, among other reasons because the site wasn't blighted.

<sup>151</sup> *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1177-78 (E.D. Mo. 2003), reversed, slip op. (8th Cir. Feb. 3, 2004).

landlord. So Target and the city joined forces. The city pledged the use of its redevelopment authority to declare the site blighted, and condemn it for Target. In turn, Target agreed to cover some of the costs the city would incur in the process and to build a new store once they purchased the land from the city. The Court disapproved this ‘spot’ transaction, derisively labeling the city a “default broker of land... to allow tenants to wrest property from their landlords merely to enable the tenant to maximize its profits.”<sup>152</sup> Schemes like these, the court predicted, would only “magnify the financial risk of investing in core City neighborhoods, and thereby strongly discourage private investment in those areas.”<sup>153</sup>

The ‘public interest’ justification—to increase local tax receipts—is weak for local governments extending the benefit of eminent domain to firms like Wal Mart and Target. They aren’t necessarily more productive than the owners they would displace, more generous employers, or better contributors to the life of the community. Indeed, tax exempt institutions may take the prize for making the greatest contributions to the community’s cultural, educational, health and spiritual well being.

*Implications for California Redevelopment Takings of the Distinction Courts Draw Between Comprehensive and Spot Economic Redevelopment.* This case law nixing one-shot redevelopment deals is bad news for California redevelopment planners accustomed to focusing single-mindedly on increasing local tax revenues. After Proposition 13 was enacted in 1978, local property tax revenues declined precipitously. Under that voter approved amendment to the state constitution, the legislature was given the task of dividing a greatly reduced property tax base among cities and counties. The state chose to preserve for each city the same percentage of tax revenues as it had enjoyed before Proposition 13, hugely disadvantaging new or rapidly growing cities. This could be a percentage as low as 15% of all property taxes collected in the jurisdiction.<sup>154</sup> Under state law, cities are entitled to one cent of each dollar of state sales tax collected there. This has led cities into desperate competition with each other for retailers, offering generous subsidies, going easy on design and planning standards for big box discounters and megalithic shopping malls, and utilizing eminent domain for facilitate the expansion of big sales tax producers .<sup>155</sup> As long as these narrowly focused retail projects jump the seldom

---

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Steven Greenhut, *ABUSE OF POWER: HOW THE GOVERNMENT MISUSES EMINENT DOMAIN* 272 (2004).

<sup>155</sup> Steven Greenhut, *ABUSE OF POWER: HOW THE GOVERNMENT MISUSES EMINENT DOMAIN* 272-73 (2004). A good example of the competitive fervor can be seen in the state statute enacted for the benefit of the auto mall in the City of Costa Mesa. State law prohibits billboards on designated landscaped freeways. The City of Costa Mesa sought and procured a state legislative exemption because the auto malls of nearby cities, located on freeways that had not been designated scenic, were able to display billboards advertising their auto malls on freeways. The justification appeared in the statute: July 3, 2007

“(b) Automobile dealerships located in the auto malls in the City of Costa Mesa are the second highest sales tax generators in the city. In addition, because those dealerships employ approximately 1,000 persons, the auto malls provide other significant benefits to the city’s economy. Accordingly, the City of Costa Mesa has an obligation to promote those dealerships’ ability to compete with other automobile dealerships in Orange County.” *West’s Ann. Cal. Bus. & Prof. Code* § 5442.8.

Another example comes from the prosperous San Gabriel Valley city of Arcadia. Rusnak Mercedes produced 10% of the city’s sales tax revenue. To keep the car dealer from leaving town, the city agreed to acquire adjoining commercial properties for the car dealer’s expansion. Dean Dennis, *Eminent Domain: The Risk and the Reality*,

litigated ‘blight’ hurdle of state law, nothing except local politics and public opinion can stop cities from their dogged pursuit of retail. Faced with a “public use” challenge, redevelopment agencies that wish to avail themselves of their powers of eminent domain to deliver sites to their favored retailers will need to consider expanding the scope of their tax-motivated projects to include more than one redeveloper, schedule more than a single site for redevelopment, and embellish the project with ‘public goods’—quality design, public open space, transit stops, and other amenities.

## VII. CONCLUSION

Owners whose seriously blighted properties are taken by eminent domain for economic redevelopment, or whose properties are taken as part of an extensive planning effort with ample public participation, will probably be disappointed if they were hoping federal courts would shield them from condemnation. On the other hand, local governments striking a deal to acquire one or a small number of properties for conveyance to a desired buyer should weigh litigation risk carefully before instituting eminent domain.<sup>156</sup>

Don’t expect big changes in redevelopment practices. City officials, redevelopment agencies, the enormous cadre of professionals from ‘blight’ consultants to redevelopment attorneys, and real estate developers support redevelopment.<sup>157</sup> Though a few states have significantly limited the use of eminent domain for economic development projects, most have not. The blight exception appearing in most of these statutes enables redevelopment agencies to continue condemning land for economic development projects unimpeded.<sup>158</sup> Redevelopment proponents have proven

---

Mini-Storage Messenger, September 2006, p. 75. Rod’s Grill was one of the properties scheduled for acquisition. Its owner mounted a successful political campaign against the use of eminent domain. At the next election, two new city council members were elected on a no-condemnation platform. So the redevelopment agency had to acquire the adjoining sites for Rusnak by private negotiation. This resulted in a sales price about 40% higher than probably would have been awarded under threat of condemnation. Interview with Dean Dennis, attorney for an Arcadia property owner in the self-storage business, 08/09/07.

<sup>156</sup> Missouri allows redevelopment takings of blighted areas, defined as those portions of a city that ‘by reason of age, obsolescence, inadequate or outmoded design or physical deterioration have become economic and social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes....’. The Centene Plaza Redevelopment Corporation purchased property to expand its current office and parking space. The city was seeking redevelopment of the area and issued Requests for Proposals. Only Centene responded with a proposal for redeveloping the entire block. The city subsequently declared the area blighted based on a consultant’s report and approved a redevelopment plan based on Centene’s proposal. Centene attempted to negotiate acquisition of all the parcels in the block but couldn’t reach agreement with the owners of three separate parcels. So the city initiated condemnation actions against those parcels. The land owners sued and won. The Missouri Supreme Court ruled that the city had failed to introduce substantial evidence supporting its conclusion that the project area was a social liability. *Centene Plaza Redevelopment Corp. v. Mint Properties*, 200 WL 1695163 (MO. 2007).

<sup>157</sup> Developers have made “a conscious decision to remain largely silent” though groups such as the International Council of Shopping Centers and the Urban Land Institute have made their positions in favor of economic redevelopment well known to their elected representatives and constituencies. Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Takes from the Supreme Court*, 75 U. CIN. L. REV. 663,669(2006).

<sup>158</sup> Somin, Ilya, *Controlling the Grasping Hand: Economic Development Takings after Kelo*, 15 SUPREME COURT ECONOMIC REVIEW 183 (2007). Available at SSRN: <http://ssrn.com/abstract=874865> (last visited 07/03/07).

better organized to resist state legislative attempts to scuttle it than are the public interest groups flying under the banner of property rights,<sup>159</sup> or the presently unknown home owners whose properties might someday be threatened with eminent domain for economic development projects. Definitive decisions about the proper place of local government in the re-use of urban land will continue to be made project by project at city hall.

---

<sup>159</sup> Both the Institute for Justice and another libertarian group, the Cato Institute, have mounted national campaigns for state-level eminent domain reforms. Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Takes from the Supreme Court*, 75 U. CIN. L. REV. 663, 667 (2006).