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After *Kelo*, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts

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I. INTRODUCTION

Local governments undertake economic development¹ projects to pump up the local tax and job rolls, enhance urban infrastructure

1. The term "economic development" usually refers to projects that have as their public goals increasing the local tax base or creating employment opportunities. "Urban redevelopment" often refers to projects involving the replacement of established uses of land

(street improvements, ball parks, affordable housing), and advance planning norms, such as those favoring increased urban densities to facilitate the use of public transit. To achieve these outcomes, investment capital is raised from the issuance of redevelopment agency bonds to be repaid out of increased property tax receipts from the project itself, as new construction is added to the tax rolls. This method of public finance is called tax increment financing (TIF). “In this way, TIF provides funding for a project without cities having to dig into their current budgets.”² The portion of the property tax revenues collected from the project area that would previously have been divided among cities, counties, school districts, and other taxing entities is dedicated entirely to repayment of the redevelopment agency debt.

This Article is about the legal solutions afoot to deal with two controversial aspects of TIF-funded economic development. Economic development has provoked heated public use challenges to local governments taking private property for reconveyance to private firms. Moreover, it has aroused taxpayer protests that some projects accomplish little of public benefit and hog increased property tax revenues that should have been shared with other local government entities.

The states have responded to these concerns in different ways. Many states require findings of blight as a precondition to such projects, both to meet public use challenges and to steer local governments away from economic development projects of questionable value. But blight definitions vary greatly, and some are so expansive and vague as to be meaningless as constraints. Also, the same definition cannot fulfill both these functions adequately because a blight definition protective of property owners must shield unblighted properties from the threat of condemnation, while a blight norm meant to limit economic development to areas that desperately need rejuvenation must be predicated on an area wide basis and

with uses more consistent with the community’s aspirations. In this Article, the following are fungible: public-private partnerships, economic development, and redevelopment.

Professor Mihaly reads the United States Supreme Court opinion in *Kelo v. City of New London*, 545 U.S. 469 (2005), as defining economic development to mean activities geared to private wealth creation and redevelopment as projects intended “to correct the failure of the market alone to bring an area back to life after a substantial period of economic decline.” Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 34 *ECOLOGY L.Q.* 1, 8 (2007).

2. Jeffrey Spivak, *The TIF Backlash*, *URB. LAND*, Sept. 2007, at 171, 171-72.

include unblighted properties necessary for a successful economic development effort.

To protect property owners from unwarranted economic development takings, most states have enacted measures in addition to, or in place of, blight tests. States have enacted outright prohibitions on economic development takings, approved more generous compensation standards, instituted reforms in the planning process favoring citizen participation, and mandated condemnors to negotiate acquisition prices fairly. States have also legislated to safeguard school districts and other taxing entities from having their tax bases raided by opportunistic economic development projects. At the same time, state courts have been responding sympathetically to public use challenges to economic development takings, some ultimately endorsing the majority opinion³ in *Kelo v. City of New London*,⁴ some siding with the dissent,⁵ and others pioneering their own criteria based on state law.⁶

Not all economic development projects are alike in their capacity to withstand public use challenges raised by targeted condemnees. In evaluating challenges based on the takings clause, economic development projects can productively be divided into three groups.⁷

3. *City of Long Branch v. Brower*, No. MON-L-4996-05, 2006 WL 1746120, at *14 (N.J. Super. Ct. Law Div. June 22, 2006), *aff'd in part, rev'd in part*, No. A-0196-06T2, 2008 WL 3090052 (N.J. Super. Ct. App. Div. Aug. 7, 2008) (upholding condemnation of unblighted properties in a blighted waterfront area redeveloped with numerous public improvements and privately developed commercial and residential projects).

4. 545 U.S. 469.

5. *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 66 (2006).

6. *Bailey v. Myers*, 76 P.3d 898, 904 (Ariz. Ct. App. 2003).

7. Excluded from this trilogy are projects that combine significant social welfare objectives with real estate improvements designed to assist the disadvantaged residents of troubled areas. In these projects, TIF cross subsidizes extensive welfare outreach programs within the project area. A good example would be City Heights, San Diego, where a private foundation has spent over \$100,000,000 in constructing moderately priced housing, attractive shopping opportunities attuned to the present needs of area residents, a police station, and an office building that provides space for social service organizations of importance to an ethnically diverse neighborhood. The foundation and the city support an array of carefully orchestrated social service programs for area residents. TIF funds finance some public amenities but most of the budget for improving City Heights comes from other sources. City Heights Community Development Corp. Home Page, <http://www.cityheightscdc.org/community.html> (last visited Oct. 11, 2008). This is quite different from the redevelopment project that transformed South Miami Beach from a low-income enclave to a high-end international beach resort. The South Miami Beach revival effort was an ambitious long-term civic betterment project with significant gentrification. "[T]he area transformed from a vacation spot to a quiet retirement community and then to a blighted slum area before becoming the urban beach resort that it is today." Many low-income residents remain and TIF funds are being used to subsidize housing and social services for them. Michelle S.

First, there are projects aimed at civic betterment in the best city planning tradition. Second, TIF dollars are committed to subsidize infra-structure for private projects designed and built to fulfill planning objectives that private developers could not be required through regulation alone to create.⁸ Third, there are economic development projects in which local governments make land and supporting infrastructure available for private projects possessing no special merit except to increase the locality's property or sales tax revenues. Constitutionally, these are the most problematical of the three.

This Article, divided into nine Parts, begins with a comparison of different states' blight tests, focusing especially on how the various statutory criteria apply to the taking of unblighted property in blighted areas. Then, we consider why TIF funding and blight eradication do not mix. Next, the Article describes a variety of state laws unrelated to blight tests that protect property owners categorically from economic development takings, improve compensation, nurture owner participation in planning, and facilitate voluntarily negotiated acquisitions. Part V lists the ways states help school districts and other taxing entities to keep their future property tax revenues from being diverted and lost to economic development projects. In Part VI, the Article draws a distinction between three types of economic development projects mentioned above—civic betterment, plan implementing, and purely tax-driven. Part VII shows why the narrowly focused, tax-driven economic development projects are so popular with local and state lawmakers. Finally, Part VIII summarizes how state court opinions are dealing with the issues raised in *Kelo*. Basically, some state courts are demanding of condemnors that they demonstrate the tangible land use public benefits that will result from projects in which land is being transferred from one private owner to another. Civic betterment and plan implementing projects serve a public use, and can withstand such scrutiny; single-asset economic tax-driven development projects cannot.

Viegas, *Community Development and the South Beach Success Story*, 12 GEO. J. ON POVERTY L. & POL'Y 389, 392 (2005).

8. See, e.g., *Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1274-75 (8th Cir. 1994) (proposing that subdividers of ten percent of the land in a watershed could not be required to install pipes of sufficient size to carry storm water throughout the watershed to its nearest natural discharge point in the Meramec River and that these subdividers are entitled to reimbursement to the extent that they were required to install infrastructure benefitting properties other than their own).

II. DEFINITIONS OF BLIGHT THAT WOULD LOGICALLY JUSTIFY A PARTICULAR TAKING AS A PUBLIC USE AND DEFINITIONS THAT WOULD NOT

A. *Market Failures, Eminent Domain, and Public Use*

On its face, the constitutional public use predicate to a taking of property is unrelated to the sorts of market failures that would justify eminent domain in the minds of efficiency-prescribing economists.⁹ Scholars in the law and economics tradition envision circumstances in which the use of eminent domain to prevent holdouts could be efficient. Eminent domain is usually justified to prevent holdouts, Professor Gregory Alexander explains, particularly of “must have” properties indispensable to certain types of public works.¹⁰ Essentially, governments are allowed to force the sale of private lands to prevent rent seeking by opportunistic landowners commanding exorbitant sums, sums greatly more than the owners’ true reservation prices and sums far greater than the constitutional norm of fair market value.¹¹

A holdout could be a property owner whose site a developer needs as part of a larger land assemblage. The holdout hopes to extract from the buyer a price that takes account of the extra costs the buyer would incur if it had to build around the holdout site. Sellers could figure that in a voluntary sale they would be free to ask for the buyer’s reservation price—the highest price the buyer would be willing to pay—so why not in a condemnation? On the other hand, when the buyer possesses the right of eminent domain, the seller may feel constrained to accept a price lower than her true reservation price for fear that in a subsequent eminent domain proceeding, she might be awarded even less.¹²

B. *Definitions of Blight and the Justification for Takings*

It is easy to justify eminent domain as a public use when the property taken is in such deplorable condition as to be a menace to public health and safety. Local governments have long possessed the

9. Abraham Bell, *Private Takings*, 75 U. CHI. L. REV. (forthcoming 2008).

10. Gregory S. Alexander, *Eminent Domain and Secondary Rent-Seeking*, 1 N.Y.U. J.L. & LIBERTY 958, 959-60 (2005) (citing Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986)).

11. “Where such redevelopment requires the use of eminent domain, its exercise is essential against economically motivated owners who refuse to participate in the redevelopment and hold out for untenable prices.” Mihaly, *supra* note 1, at 1.

12. Thomas J. Miceli & Kathleen Segerson, *A Bargaining Model of Holdouts and Takings* (Univ. of Conn. Dep’t of Econ., Working Paper No. 2006-22, 2006).

right to abate a public nuisance by demolishing unsafe buildings that owners do not repair expeditiously.¹³ To equate blight eradication with public use, a state's definition of blight should highlight "nuisance-like" property characteristics so clearly that if the owner of a property about to be condemned for economic development were to ask, "Why me? What justifies your taking my property?," the respondent could point to the harms from the property's hideous condition despoiling the neighborhood.

C. Prohibitions Against Taking Unblighted Property Even in a Blighted Area

Several states have amended their takings laws to prohibit condemnation of unblighted properties. In North Carolina, economic development agencies may exercise the right of eminent domain only where the property taken is a blighted parcel.¹⁴ Before this law was enacted, redevelopment agencies could take unblighted properties if two-thirds of the buildings within the area were blighted.¹⁵ Now they

13. See, e.g., *Samuels v. Meriwether*, 94 F.3d 1163 (8th Cir. 1996). The city condemned and demolished a three-unit building after one unit was destroyed by fire. At the conclusion of a public hearing, the city gave the owner thirty days to bring the property into safe and habitable condition, and the owner had not done that. The court upheld the city's right to demolish the building in the interests of public safety.

Florida courts have drawn a distinction between occasional misuse of an apartment house such as the occasional cocaine sale from the perpetual public nuisance when a motel has become a center for the sale of prohibited drugs and prostitution. Only the latter can be shuttered. In the "occasional infraction" situations, the infractions must be targeted directly, leaving the realty intact. See Ronald Benton Brown & Joseph M. Grohman, *Property Law: 2001 Survey of Florida Law*, 26 NOVA L. REV. 109, 156-57 (2001).

14. N.C. GEN. STAT. § 160A-515 (2007).

"Blighted parcel" shall mean a parcel on which there is a predominance of buildings or improvements (or which is predominantly residential in character), and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals or welfare; provided, no parcel shall be considered a blighted parcel nor subject to the power of eminent domain, within the meaning of this Article, unless it is determined by the planning commission that the parcel is blighted.

Id. § 160A-503(2a). See generally Carolyn A. Pearce, *Forcing Urban Redevelopment To Proceed "Building by Building": North Carolina's Flawed Policy Response to Kelo v. City of New London*, 85 N.C. L. REV. 1784 (2007) (analyzing changes to North Carolina's eminent domain law post-*Kelo*).

15. Pearce, *supra* note 14, at 1790.

must “consider each individual parcel and its status as ‘blighted’ when planning a redevelopment project. If the parcel is not ‘blighted,’ although it may be within a ‘blighted area,’ planners cannot take the property using eminent domain.”¹⁶

Minnesota, too, has enacted specific legislation to protect the owners of unblighted property from economic development takings.¹⁷ Only buildings proven to be structurally substandard can be taken to mitigate blight “unless there is no feasible alternative to the taking of the parcels on which the buildings are located in order to remediate the blight and all possible steps are taken to minimize the taking of buildings that are not structurally substandard.”¹⁸

Georgia redevelopment law prohibits the taking of unblighted property and defines blight in terms of nuisance-like property characteristics.¹⁹ Further, before condemning the property, the public agency is required to give “notice in writing to the property owner regarding specific harm caused by the property and the owner has failed to take reasonable measures to remedy the harm.”²⁰

16. *Id.* at 1795.

17. MINN. STAT. ANN. § 117.075 (West Supp. 2008).

18. *Id.* § 117.027.

19. As used in this title:

(1) “Blighted property,” “blighted,” or “blight” means any urbanized or developed property which:

(A) Presents two or more of the following conditions:

- i) Uninhabitable, unsafe, or abandoned structures;
- ii) Inadequate provisions for ventilation, light, air, or sanitation;
- iii) An imminent harm to life or other property caused by fire, flood, hurricane, tornado, earthquake, storm, or other natural catastrophe respecting which the Governor has declared a state of emergency under state law or has certified the need for disaster assistance under federal law; provided, however, this division shall not apply to property unless the relevant public agency has given notice in writing to the property owner regarding specific harm caused by the property and the owner has failed to take reasonable measures to remedy the harm;
- iv) A site identified by the federal Environmental Protection Agency as a Superfund site pursuant to 42 U.S.C. Section 9601, et seq., or environmental contamination to an extent that requires remedial investigation or a feasibility [sic] study;
- v) Repeated illegal activity on the individual property of which the property owner knew or should have known; or
- vi) The maintenance of the property is below state, county, or municipal codes for at least one year after notice of the code violation; and

(B) is conducive to ill health, transmission of disease, infant mortality, or crime in the immediate proximity of the property.

GA. CODE ANN. § 22-1-1 (West Supp. 2008).

20. *Id.* § 22-1-1(1)(A)(iii).

D. The Case for Allowing the Taking of Unblighted Property in a Blighted Area

Professor Marc Mihaly, a land-use attorney, makes the case for findings of blight to be based on area-wide characteristics: “The market does not fail parcel by parcel. A viable use may exist inside of a blighted area, but still present an obstacle to the parcelization and development necessary to transform an area and insure its successful redevelopment.”²¹ Professor Mihaly offers two examples from his years of practice representing public agencies in California, where a taking proved indispensable to the success of a redevelopment project.

The San Francisco redevelopment agency condemned unblighted property for one of San Francisco’s favorite redevelopment projects—the restoration and reuse of the landmark Ferry Building at the intersection of Market Street and Embarcadero Boulevard.²² This building was a centerpiece in the magnificent revival of San Francisco’s once declining waterfront, now a prime stop of visitors and residents alike.²³ In the reuse plan for the Ferry Building, gourmet food vendors dominated the ground floor.²⁴ Though good for attracting curious and enthusiastic crowds, these distinctive local artisan retailers could not likely afford rents sufficient to amortize the costs of restoring and maintaining the building.²⁵ The project pro forma depended on the building owners charging high enough rents for office space on the upper floors to make the project financially viable.²⁶

An organization called the World Trade Club occupied part of the third floor on a low-rent, long-term lease—a blessing when the building was falling apart, a curse on its renewal.²⁷ Despite the agency’s best efforts to negotiate a deal, the World Trade Club refused to budge.²⁸ Professor Marc Mihaly explains how the story ended:

Finally, the Port moved to condemn the lease. This government action spurred the Club to compromise in a settlement: the Port moved the Club into comparable quarters nearby, and the Ferry Building project moved forward. Site assembly in this situation meant acquisition of the leasehold. None of this would have been possible if the regime advocated by the *Kelo* dissents had prevailed at the time. The site

21. Mihaly, *supra* note 1, at 46-47.

22. *Id.* at 28.

23. *Id.* at 29.

24. *Id.*

25. *See id.* at 30.

26. *Id.*

27. *Id.*

28. *Id.*

assembly, the historic renovation, and the consolidation of the Embarcadero renovation project would all have failed without the power of eminent domain.²⁹

In a related example, Professor Mihaly describes the condemnation of 90,000 square feet of waterfront land near the revitalized mixed-use Ferry Building in order to prevent Gap's headquarters with its 1400 employees from leaving the city.³⁰ Undoubtedly, Gap could have found an expansion site elsewhere in the Bay Area.³¹ But the city's determined effort to keep Gap in town was prompted by more than a desire to shore up the local tax base.³² A new office headquarters a short walk from the gourmet food vendors in the Ferry Building would bring a steady procession of customers and draw a congenial crowd to the public spaces in waterfront renewal.³³ This useful synergy could have been upset when the owner of a 13,000 square foot parking lot needed for the Gap project refused to negotiate a sale.³⁴ The city used eminent domain to prevent the lot owner from extorting too much of a premium for the site.³⁵ Professor Mihaly believes that without "the power of condemnation, the [Port Waterfront redevelopment] project, with all its public benefits, would have failed."³⁶

E. Expanding the Scope of Judicial Review To Authorize Courts To Decide Whether an Unblighted Property Is Truly Indispensable to an Economic Development Project

The justification for taking perfectly serviceable and well-maintained property for redevelopment of a blighted area depends on whether the inclusion of unblighted property is necessary to the realization of the development plan. Courts usually defer to the legislature's decision on whether a property is necessary to a public project.³⁷

29. *Id.*

30. *Id.* at 31.

31. *Id.* at 32.

32. *Id.*

33. *Id.* at 31.

34. *Id.*

35. *See id.*

36. *Id.* at 32.

37. *See* Leslie A. Fields & Karen L. Brody, *Owner's Defenses and Quick Take Statutes*, in ALI-ABA COURSE OF STUDY, CONDEMNATION 101: FUNDAMENTALS OF CONDEMNATION LAW AND LAND VALUATION 1, 5 (2006). Though contesting necessity is difficult, the authors list numerous instances in which owners have resisted quick take condemnations by pointing to flaws in the condemnor's "necessity" logic such as that the

Though infrequent, cases arise in which courts scrutinize local government findings of necessity. One of those arose in the city of Mesa, which had initiated a redevelopment plan for a signature retail mall to anchor its downtown.³⁸ After local officials approved the project, called the Mesa Town Center Redevelopment Area, a hardware store owner called a staffer in the city redevelopment office expressing interest in expanding its business into space occupied at the time by a decades-old brake repair shop.³⁹ Apparently, the redevelopment agency staff figured that a hardware store would be a better fit at the prime intersection of an area targeted for retail activity than a brake repair shop and initiated measures to acquire the brake repair shop for conveyance to the hardware store.⁴⁰ The city redevelopment agency designated the Ace Hardware site for redevelopment. This was not as unusual as it may seem because Mesa predicated its redevelopment effort on facilitating private efforts to upgrade the area by working with potential redevelopers at sites they chose instead of relying on a detailed master plan. The target area needing redevelopment was simply too large to make wholesale designation for redevelopment sensible.⁴¹

Dismayed at being forced out at the behest of Ace Hardware, the brake shop owners challenged the attempted condemnation of their property as being for a private use and won.⁴² In *Bailey v. Myers*, an Arizona appellate court concluded that a government acquisition of unblighted property for transfer to another private owner would not qualify as a public use.

Under the Arizona Constitution, public use is a judicial decision to be made “without regard to any legislative assertion that the use is

condemnor was taking far more land than needed or that the project was not intended for a public use. *Id.*

38. *Bailey v. Myers*, 76 P.3d 898, 900 (Ariz. Ct. App. 2003).

39. *Id.* at 899.

40. *Id.* at 900.

41.

Mesa’s redevelopment director, Greg Marek, has admitted at trial and in official government documents that the city decides which properties to condemn based on whether someone in the private sector wants the land and has a project for it. That concession seemed to be a clear indication that private interests were driving redevelopment policy in Mesa.

SAM STALEY, WRECKING PROPERTY RIGHTS: HOW CITIES USE EMINENT DOMAIN TO SEIZE PROPERTY FOR PRIVATE DEVELOPERS (Feb. 2003), <http://www.reason.com/news/show/28680.html>.

42. *Bailey*, 76 P.3d at 904-05.

public.”⁴³ The *Bailey* court promulgated a long list of questions about the project and the proposed taking.⁴⁴ Those questions included whether the property taken was necessary to the achievement of the redevelopment project’s public purposes.⁴⁵ Acknowledging that courts usually defer to legislative determinations of necessity, they are to decide the “necessity” question on their own in making a constitutional public use determination when a project’s status as a public use depends on whether the particular taking was necessary.⁴⁶ Clearly, the hardware store—though useful in sparking retail activity in the area—was not indispensable; it had not even been included in the project as originally approved.⁴⁷

Property owners in West Virginia do not need a lawsuit for the necessity of a taking to become justiciable. By statute, the question of necessity is now a matter for the courts in West Virginia. Owners of unblighted properties are empowered to demand from local governments a plausible explanation of why their property is

43. ARIZ. CONST. art. II, § 17.

44. 76 P.3d at 904.

45.

There are many factors that may be considered in evaluating the private or public character of the intended use of property. For example, for what purpose or purposes will the property be used? Will title to the property be held by a public entity? If one or more private parties will own or lease the property, will the property be used for private profit, non-profit or public purposes? Will the end use of the property provide needed public services? What degree of control will the condemning authority retain over the use of the property? What are the anticipated public uses or benefits? What is the ratio of public to private funds to be expended for the redevelopment? Will the community as a whole benefit or only a few of its members? Who stands to gain most by the taking, private parties or the public? Are private developers the driving force behind the redevelopment project? Is profit the overriding motivation? Are there public health or safety issues involved? Is there a true slum or blight to be removed? Is the property to be taken unique? To what extent, if any, will the proposed taking result in loss, detriment, or harm to members of the community? How necessary is the property to the achievement of the public purposes? Do the anticipated public purposes or benefits outweigh the private purposes or benefits of taking the property? Has the protection afforded private-property owners under Article 2, Section 17 been fully considered?

Id. (footnote omitted).

46.

Although the issue whether the property is being taken for a constitutionally acceptable public use is a separate inquiry from the statutory requirement of necessity, the court in considering a challenged “public use” must evaluate the anticipated public benefits and in that sense the necessity of the taking is an appropriate factor in the constitutional analysis.

Id. at 904 n.4.

47. *Id.* at 899.

indispensable to the realization of the plan, why no reasonably practicable alternatives are available, why no substitute site can be purchased by voluntary negotiation, and that a specific use has been designated in the plan for the unblighted site.⁴⁸ West Virginia legislators specifically empowered property owners to obtain judicial review in the circuit court in which the county is located to confirm that the redevelopment agency has complied with state law and can convincingly demonstrate that unblighted property is indispensable to the redevelopment plan.⁴⁹

48.

- (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, [§§ 54-2-1 et seq.], 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.

W. VA. CODE ANN. § 16-18-6a (LexisNexis 2006) (alteration in original). *See generally* Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 *FORDHAM URB. L.J.* 657, 676 (2007).

49.

- (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 [§§ 54-2-1 et seq.], 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.

This statute opens wide the door to litigation by condemnees. Advocates for redevelopment predict this law will encourage spurious claims that could delay redevelopment projects for years. They urge a more expeditious option: give challengers ample opportunity to debate the necessity for a taking in a public hearing convened before the redevelopment agency completes its final plan.⁵⁰

F. Redevelopment Laws That Authorize the Taking of Unblighted Property in Blighted Areas but Define Blight in Terms of Individual Property Characteristics

Perhaps the best example of a blight definition based on individual property characteristics is Pennsylvania's post-*Kelo* enactment, which prohibits the use of eminent domain "to take private property in order to use it for private enterprise" with a limited exception for blighted properties.⁵¹ Every line of the Pennsylvania definition of blight answers the "why me" question, declaring 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").⁵²

The Pennsylvania law is not as comforting to the owners of unblighted property as the North Carolina or West Virginia laws. In areas where a majority of parcels meet the blight test, unblighted properties can get trapped in the eminent domain net.⁵³ Under these

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- (d) All of the rights and remedies contained in article three [§§ 54-3-1 et seq.], 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 ANN. § 16-18-6a (alteration in original).

50. Roger L. McManus, Recent Decision, *Miller v. City of Tacoma*, 378 P.2d 464 (Wash. 1963), 62 MICH. L. REV. 1065, 1068 (1964).

51. Property Rights Protection Act, 26 PA. CONS. STAT. ANN. § 204 (West Supp. 2008).

52. *Id.* § 205. This stringent definition of blight will not apply until 2012 in Philadelphia, Pittsburgh, and other cities. *Id.* § 203.

53. *Id.* § 205(c).

laws, a local government is empowered to condemn a perfectly serviceable property because it lies within a marginal area.⁵⁴

G. Redevelopment Laws that Authorize the Taking of Unblighted Property in Blighted Areas and Define Blight Expansively

“Local governments, under cover of vague state laws and beguiled by the prospect of capturing federal grants or a larger tax base, have every incentive to define blight expansively.”⁵⁵ So explains Professor Colin Gordon who has documented how TIF-enabling statutes have expanded the definition of blight even further: “TIF statutes echoed and expanded the older statutory definition of blight, typically grafting economic considerations, such as underutilization of land, uneven commercial development and insufficient tax revenues, onto the older ‘health and welfare’ notion of urban blight.”⁵⁶ Far from restricting the scope of potential takings, under these criteria, virtually “anything goes” within TIF boundaries. Institute for Justice Attorney Dana Berliner finds: “States’ definitions of blight are so broad and vague that they could apply to practically every neighborhood in the country. (‘Blight’ can include such things as a home not having two full bathrooms or three full bedrooms.)”⁵⁷

In this respect, the Missouri statute is typical, defining an area as blighted

by reason of the predominance of defective or inadequate street layout, unsanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use.⁵⁸

Considering the plasticity of the phrase “economic or social liability,” judicial review is perfunctory. “Missouri courts have been extremely reluctant to disturb a finding of blight by local governments. Since their first redevelopment decision in 1954, they have held that the local

54. *Id.*

55. Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *FORDHAM URB. L.J.* 305, 315 (2004).

56. *Id.* at 314.

57. Dana Berliner et al., *The Condemnation Landscape Across the Country Post-Kelo*, in *ALI-ABA COURSE OF STUDY: EMINENT DOMAIN AND LAND VALUE LITIGATION* 433, 439 (2007).

58. *MO. ANN. STAT.* § 99.805(1) (West 2008).

findings must be allowed to stand unless they were arbitrary or were induced by fraud, collusion or bad faith.”⁵⁹

The Missouri statute requires there to be a predominance of blighting conditions in areas chosen for economic redevelopment.⁶⁰ Is predominance to be measured building by building, and redevelopment permitted only where the blighted buildings outnumber the unblighted ones, or may redevelopment officials look at the square footage of the area as a whole in making their “predominance” determination? This question was raised by the owners of two unblighted properties in Kansas City, Missouri when they protested their inclusion a redevelopment plan.⁶¹ They claimed that the municipality had failed to determine that a preponderance of individual buildings in the project area was blighted.

The property owners pointed to the above-quoted statute as well as another provision of Missouri redevelopment law enacted after *Kelo* that called for the condemning authority to “examine carefully each parcel of property in the defined area apart from the others to determine whether or not it satisfies the statutory definition of blight.”⁶² In fact, the condemning authority had mapped the target area, showing the condition of each building (excellent, good, fair, or poor), and indicating each vacant building and parcel.⁶³

Not good enough, argued the owners, because the condemnor never made specific findings as to whether each parcel was blighted. The court disagreed. Looking to the legislative history, the court noted that the legislature had rejected an earlier draft of the statute explicitly calling for the condemning authority to consider whether each parcel of property in the redevelopment area was blighted.⁶⁴

The Missouri statutes make an important distinction between TIF-funded projects and non-TIF-funded projects. For the latter, the use of eminent domain is restricted to blighted areas.⁶⁵ But in TIF-funded projects—which require a vote of approval by the local legislature—condemnation is also allowed in designated conservation

59. Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO. L. REV. 721, 736 (2006).

60. MO. ANN. STAT. § 99.805(1).

61. *Allright Props. v. Tax Increment Fin. Comm’n of Kan. City*, 240 S.W.3d 777, 778 (Mo. Ct. App. 2007).

62. *Id.* at 779 (citing MO. ANN. STAT. § 523.274).

63. *Id.* at 782.

64. *Id.* at 781 (“This history causes us to conclude that a condemning authority is to determine that an area is predominantly blighted by measuring total square footage of blight in a redevelopment area and comparing it to the square footage of land that is not blighted.”).

65. MO. ANN. STAT. § 99.330(2)(a).

areas “in which fifty percent or more of the structures in the area have an age of thirty-five years or more” and that is “not yet a blighted area but is detrimental to the public health, safety, morals, or welfare and may become a blighted area.”⁶⁶ Any TIF-funded project that cannot qualify under this law can look to yet another Missouri statute empowering local governments in designated economic development areas to finance projects that would help retain businesses that might otherwise decide to leave the state, increase jobs, or preserve and enhance the property tax base.⁶⁷ Given these virtually limitless possibilities, it should be no surprise that in greater St. Louis, for example, “TIFs are almost exclusively pursued by fringe communities competing for new shopping malls.”⁶⁸

The Ohio statutes offer an example of an extremely expansive statutory blight definition based on area wide characteristics. Before the Ohio Supreme Court stepped in,⁶⁹ local governments had virtually limitless discretion in designating properties for condemnation if they were not being put to their “best and most efficient” use as defined by local government officials.⁷⁰ The statutory definition includes 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, and excessive dwelling unit density.⁷¹

Enthusiasts of historic preservation must cringe upon being informed that the age of a building suffices to classify it as blighted.⁷²

66. *Id.* § 99.805(3).

67. *Id.* § 99.805(5)(a)-(c).

68. Gordon, *supra* note 55, at 319 (citing Thomas Luce, *Reclaiming the Intent: Tax Increment Finance in the Kansas City and St. Louis Metropolitan Areas* 8-11 (Brookings Inst. Ctr. on Urb. & Metro. Pol’y, Discussion Paper 2003), available at <http://www.brookings.edu/es/urban/publications/lucetif.pdf>).

69. *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 67 (2006).

70. Christopher S. Brown, *Blinded by the Blight: A Search for a Workable Definition of “Blight” in Ohio*, 73 U. CIN. L. REV. 207, 211 (2004) (citing AAAA Enters., Inc. v. River Place Cmty. Urban Redevelopment Corp., 598 N.E.2d 711, 713 (Ohio Ct. App. 1991)).

71. OHIO REV. CODE ANN. § 1728.01 (LexisNexis 2001).

72.

[F]or 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.

Brown, *supra* note 70, at 226 (internal footnotes omitted).

“Most American cities today contain vibrant historic districts that not long ago were considered blighted.”⁷³ In fact, home owners in the United States 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, which have now become prime magnets for redevelopment.⁷⁴ As for obsolescence, any structure more than a few years old could be labeled obsolescent if it lacks features found in newer structures.⁷⁵ 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 cannot be blamed on land owners in full compliance with local subdivision, zoning, and building codes.

Commentators are unclear whether California’s blight standard is expansive or restrictive.⁷⁶ Based on the description that follows,

73. J. Peter Byrne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. L. & POL’Y 131, 141 (2005).

74.

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.

Jon C. Teaford, *The Fate of Suburbia*, H-NET REVIEWS, Aug. 2006, at 1, 2, available at <http://www.h-net.org/reviews/showrev.php?id=12122> (reviewing WILLIAM H. LUCY & DAVID L. PHILLIPS, *TOMORROW’S CITIES, TOMORROW’S SUBURBS* (2006)) (quoting JOINT CTR. FOR HOUSING STUDIES OF HARVARD UNIV., *REMODELING HOMES FOR CHANGING HOUSEHOLDS 3-4* (2001)).

75.

[S]uch 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.

Brown, *supra* note 70, at 227.

76. See Tim Kowal, *Who Will Redevelop Redevelopment?: Power and Pragmatism in California Redevelopment Law*, 12 ALB. L. ENVTL. OUTLOOK J. 93, 96-97 (2007) (“[R]edevelopment abuse in California is rampant despite the fact that California’s redevelopment law provides one of the strictest blight requirements in the nation.” (footnote omitted)). The ambiguity of “takings” law in California redevelopment was not diminished

readers can draw their own conclusions. California's statutory definition of blight has little to do with 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.⁷⁷ The blight standards strike compromises between critics of TIF-funded redevelopment and the redevelopment lobby.

Blight under California redevelopment law is defined in terms of area-wide characteristics. To qualify as blighted, an area must be predominantly urbanized.⁷⁸ This is likely meant to preclude economic development of green field sites or agricultural land. With the state's high growth rate, many areas now undeveloped or farmed but that have the potential for generating big tax increments in the foreseeable future will probably be developed sooner or later, without public assistance.

when California voters approved Proposition 99 in the June 2008 ballot. It bars the use of eminent domain to acquire owner occupied homes for conveyance to private persons. However, as the California Redevelopment Association, sponsor of the measure, explains:

The prohibition on using eminent domain to acquire an owner-occupied, single-family home for resale to a private party would not apply if the acquisition is for a public work or improvement. A "public work or improvement" is defined to include what have been traditionally viewed as public facilities, including those that may be constructed or operated as public/private partnerships (e.g., toll roads). The initiative would also not apply if the acquisition was to abate a nuisance, protect public health and safety from building, zoning or other code violations, prevent serious, repeated criminal activity, respond to an emergency, or remediate hazardous materials.

Cal. Redevelopment Ass'n, Summary of the Homeowners and Private Property Protection Act, Proposition 99, at 1, http://www.calredevelop.org/AM/Template.cfm?Section=Search§ion=ED_Legislative_Updates&template=/CM/ContentDisplay.cfm&ContentFileID=1023 (last visited Oct. 16, 2008). One commentator suggests that a city could take homes by rezoning the area commercial, and claiming as the justification for the taking the goal of actual uses to the zoning. Posting of Ilya Somin to The Volokh Conspiracy, The California League of Cities' Deceptive Eminent Domain "Reform" Referendum Initiative, <http://volokh.com/posts/1175462916.shtml> (Apr. 1, 2007).

77. Senate Comm. on Local Gov't et al., *Redevelopment and Blight* 2-3 (Briefing Paper for the Joint Interim Hearing 2005), available at <http://www.sen.ca.gov/locgov/BRIEFINGPAPER10-26-05.pdf>.

Under the law, blight must be found before redevelopment can be authorized, because, first, without evidence of blight there is no solid justification for compelling taxpayers in one section of the community, for example . . . the School District . . . to subsidize the cost of development of another section of the community by carrying a disproportionate share of the cost of local government.

Regus v. City of Baldwin Park, 139 Cal. Rptr. 196, 204 (Ct. App. 1977).

78. See CAL. HEALTH & SAFETY CODE § 33320.1 (West 1999).

There is no reason to allow a city redevelopment agency to co-opt all the property taxes from other entities for areas like these.

The California statute divides blight into two categories—physical and economic.⁷⁹ To establish a viable redevelopment project under California law, the redevelopment agency need cite only one physical and one economic “blighting” condition.⁸⁰ For instance, a criterion from the physical list points to dilapidated structures in such bad shape as to be unsafe or unhealthy.⁸¹ Economic “blight” includes such factors as a high business vacancy rate, an excess of liquor stores or adult oriented businesses, or stagnant property values.⁸²

Further, the physical and economic conditions of blight identified in the statute must be so pervasive and substantial as to threaten the well-being of other parts of the community.⁸³ This requirement addresses the tax grab problem if we assume that in a blighted area, tax revenues are likely to be declining and are expected to continue to decline without decisive public intervention. A proposed economic redevelopment that succeeds in reversing this area-wide downward trend in tax revenues will increase tax yields to the other taxing entities because they will receive ALL of the resulting increment within the project area once the costs of redevelopment are paid.⁸⁴

It can be irresistibly tempting for a redevelopment agency to stretch the boundaries of an existing project area to encompass a purely private development about to be built. That is what the city of Baldwin Park had done.⁸⁵ The city placed two areas into a single redevelopment project area even though they were located on opposite sides of a freeway more than a mile apart. The area north of the freeway had been developed primarily with single-family homes.⁸⁶ The commercial and industrial area south of the freeway included twenty-five acres already being developed for a new United Parcel Service distribution facility and a lumber yard unrelated to any redevelopment effort.⁸⁷ But the city included this twenty-five-acre site within the redevelopment project area before it had been reassessed for

79. *Id.* § 33031.

80. *Id.*

81. *Id.* § 33031(b)(1), (3), (6).

82. *Id.* § 33031(a)(1).

83. *Id.* § 33321.

84. *See, e.g.*, DAVID SWENSON & LIESL EATHINGTON, IOWA STATE UNIV., DO TAX INCREMENT FINANCE DISTRICTS IN IOWA SPUR REGIONAL ECONOMIC AND DEMOGRAPHIC GROWTH? 2 (2002).

85. *See Regus v. City of Baldwin Park*, 139 Cal. Rptr. 196, 199 (Ct. App. 1977).

86. *Id.* at 198.

87. *Id.* at 199.

property tax purposes so that the redevelopment agency could capture the tax increment. Its plan was to jump-start their TIF-funded endeavor this way with about \$126,000 in annual tax revenues from the two projects already under way.⁸⁸

The appellate court struck down Baldwin Park's attempt because it had failed to establish blight in either portion of the project area.⁸⁹ The very fact of new industrial construction south of the freeway evidenced the lack of a need for public intervention.⁹⁰ Baldwin Park got caught. Many redevelopment agencies have included already commenced projects into a newly formed redevelopment project area and gotten away with this ploy.

The California legislature has recognized this problem and resolved it in a way that attempts to reconcile the interests of owners of unblighted property taken with the public interests in coherent redevelopment planning. The legislative solution allows redevelopment agencies to use eminent domain to acquire unblighted property located within or contiguous to a redevelopment project area as long as the taking agency can show that the property is "necessary for effective development."⁹¹ Agencies are also empowered to acquire unblighted properties not contiguous to the redevelopment project area for relocation of people displaced from redevelopment project areas or for the construction of low and moderate-income housing. The statute

88. *Id.* at 200.

89. *Id.* at 201.

90. *Id.* at 203.

91.

- (a) The area included within a project and a project area may be either contiguous or noncontiguous. All noncontiguous areas of a project area shall be either blighted or necessary for effective redevelopment. An unblighted, noncontiguous area shall be conclusively deemed necessary for effective redevelopment if that area is being used predominantly for:
 - (1) The relocation of owners or tenants from other noncontiguous areas in the same project area or from other project areas in the community.
 - (2) The construction and rehabilitation of low- or moderate-income housing.
- (b) An unblighted, noncontiguous area shall be deemed not necessary for effective redevelopment if that area is included for the purpose of obtaining the allocation of taxes from such area pursuant to Section 33670 without other substantial justification for its inclusion.
- (c) The redevelopment agency shall not use the power of eminent domain for acquisition of property, other than vacant land, in noncontiguous, unblighted areas.

specifically bars acquisition of such areas solely to enhance the tax base “without other substantial justification for its inclusion.”⁹²

H. Redevelopment Laws Enabling the Use of TIF for Economic Development Without Regard to Slum or Blight Conditions

A number of states empower cities to use TIF economic development without regard to whether the project area could be characterized as slum or blight. Here are a few examples:

Alaska allows the use of tax increment financing in improvement areas, defined as blighted or “capable of being substantially improved based on the property value within the area.”⁹³

Idaho allows the use of tax allocation bond financing for local economic development to finance growth and development in urban renewal areas, broadly defined, or areas that are competitively disadvantaged because they are located near state boundary lines.⁹⁴

In *Illinois*, the criteria for establishing redevelopment areas are extensive and flexible. They include areas developed without regard to a community plan or that were subdivided into lot sizes no longer of practical size and configuration for optimal use and development.⁹⁵

In *Indiana*, cities may engage in economic redevelopment for the purpose of protecting and increasing property tax revenues, among other permissive criteria.⁹⁶

Iowa law authorizes local governments to form economic development areas for commercial and industrial enterprises.⁹⁷ No blight finding is required.

I. Compliance Issues

It scarcely matters how rigorous a state’s statutory definition of blight happens to be if it is not enforced. Only a few states conduct annual state-level audits of local government compliance with statutory economic development standards and order noncomplying

92. *Id.*

93. ALASKA STAT. § 29.47.460(d)(2)(B) (2006).

94. IDAHO CODE ANN. § 50-2904 (2000).

95. 65 ILL. COMP. STAT. ANN. 5/11-74.4-2(a) (West 2005).

96. IND. CODE ANN. § 36-7-14-2.5 (LexisNexis Supp. 2008).

97. IOWA CODE ANN. § 403.2(3) (West Supp. 2008).

agencies to disgorge their ill-gotten tax increments.⁹⁸ Elsewhere, the fox patrols the chickens. Compliance with the statutory definitions of blight is left to the same local government that formed and administered the TIF.⁹⁹ As one commentator has observed, “although procedural mechanisms can sometimes create checks-and-balances that prevent abuse, this does not work when the procedural requirements can be fulfilled by the *same agency* that commits the abuse to begin with.”¹⁰⁰

Even in states with the most demanding definitions of blight, compliance enforcement is random, sporadic, and ineffectual. “[B]light remains a designation sought by developers, and hence shaped not by public purpose, but by private interests seeking public subsidies.”¹⁰¹ Developers often initiate economic development projects and reach tentative understandings with redevelopment agencies before the agency hires the consulting firm that will find whatever blight the law requires.¹⁰² Few TIF projects go forward until the redevelopment agency has received sufficient expressions of interest and preliminary negotiations to attain confidence that the project would be completed on schedule.¹⁰³

III. WHY TIF AND TRUE BLIGHT DO NOT MIX

A nonprofit organization called “Good Jobs First” lamented what it described as the weakening of TIF laws by replacing blight as the eligibility criterion for economic development projects.¹⁰⁴ The shift

98. See, e.g., MINN. STAT. ANN. § 469.1771(b) (West 2008). The state auditor has the authority to determine compliance of TIF districts with state law, inform noncomplying jurisdictions before taking definitive action, and then turn over the matter to the county attorney for enforcement. This process resulted in \$14 million being refunded by TIF districts to cities, towns, counties and school districts from 1996 to 2001. MINN. OFFICE OF THE STATE AUDITOR, TAX INCREMENT FINANCING LEGISLATION REPORT FOR THE YEAR ENDED DECEMBER 31, 2002, at 5-6 (2004), http://www.osa.state.mn.us/reports/tif/2002/legislative/legislative_02_report.pdf.

99. Timothy Sandefur, *The “Backlash” So Far: Will Americans Get Meaningful Eminent Domain Reform?*, in ALI-ABA COURSE OF STUDY: LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION 533, 557 (2007).

100. *Id.*

101. Gordon, *supra* note 55, at 336.

102. Sandefur, *supra* note 99, at 548.

103. Interview with Larry Kosmont, Principal, Kosmont Cos. (Jan. 26, 2008).

104.

Good Jobs First is a national policy resource center for grassroots groups and public officials, promoting corporate and government accountability in economic development and smart growth for working families. We provide timely, accurate information on best practices in state and local job subsidies, and on the many ties

would disadvantage the poor, the report's authors feared, because it would legitimize the use of TIF in wealthier areas where poverty would not be addressed.¹⁰⁵

Unfortunately, the history of vigorous efforts at blight eradication through downtown urban redevelopment suggests that when public funds were channeled to low-income areas, it was not to help but to displace the already disadvantaged and gentrify their neighborhoods.¹⁰⁶ More low-income housing was demolished than was built in federally funded urban renewal projects,¹⁰⁷ and viable ethnic communities were scattered to the winds.¹⁰⁸ "Professor Thomas Merrill argued that eminent domain legislation that makes 'blight' a precondition of economic development takings seems designed largely to reassure the middle class that its property will not be targeted for such projects, not to protect the very poorest communities."¹⁰⁹

Blight tests probably will not result in economic development projects benefiting the constituencies Good Jobs First hopes to assist. "True" blight—the meaning of blight in everyday speech, not necessarily the statutory definitions—seldom has much to do with the projects local governments undertake or with the reasons they undertake them. What matters most to the financial outcome of a TIF-funded project is the ultimate difference between pre- and postproject, tax-assessed values.¹¹⁰

between smart growth and good jobs. Good Jobs First works with a very broad spectrum of organizations, providing research, training, communications and consulting assistance.

Good Jobs First, Who We Are, http://www.goodjobsfirst.org/about_us.cfm#good (last visited Oct. 6, 2008).

105. See ALYSSA TALANKER, KATE DAVIS WITH GREG LEROY, *STRAYING FROM GOOD INTENTIONS: HOW STATES ARE WEAKENING ENTERPRISE ZONE AND TAX INCREMENT FINANCING PROGRAMS 1* (2003), <http://www.goodjobsfirst.org/pdf/straying.pdf>.

106. See, e.g., John A. Powell & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 *HOW. L.J.* 433, 434 (2003) ("The state is already manipulating the housing market to the benefit of gentrifiers and is not poised to redistribute resources to better serve impoverished urban dwellers of color."). But see J. Peter Byrne, *Two Cheers for Gentrification*, 46 *HOW. L.J.* 405 (2003) (arguing that gentrification does not necessarily displace low-income residents and may create benefits for them).

107. SCOTT GREER, *URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION 3* (1965).

108. HERBERT J. GANS, *THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS 380-81* (1982).

109. Nasim Farjad, *Condemnation Friendly or Land Use Wise? A Broad Interpretation of the Public Use Requirement Works Well for New York City*, 76 *FORDHAM L. REV.* 1121, 1164 (2007) (citation omitted).

110. Richard F. Dye & Jeffrey O. Sundberg, *A Model of Tax Increment Financing Adoption Incentives*, 29 *GROWTH & CHANGE* 90 (1998).

Programs of wholesale blight eradication funded by TIF do not work well in stagnant, poorer communities.¹¹¹ An optimal TIF project is one that can be built quickly, at the highest conceivable density and at the greatest fair market value, garnering huge retail sales. In places lacking dramatic growth in effective demand for space, property values and tax revenues are not going to increase quickly and broadly enough to finance the costs of acquisition and redevelopment.¹¹² Densely built, run-down areas filled with marginal businesses and low-income residents are only good candidates for TIF-funded redevelopment if located where there is strong potential demand for “higher and better” uses. Even then, the arduous, often contentious task of clearing heavily populated areas is expensive, takes time, and absorbs political capital as well. For example, in California from 1998 to 1999, commercial and industrial projects outnumbered residential projects by about two-to-one, and new construction in redevelopment project areas outpaced rehabilitation by a margin of about eight-to-one.¹¹³

The ideal site for the production of a big tax increment is either vacant when declared a redevelopment project area or easily cleared.¹¹⁴ “[G]reenfields, because they have very low ‘base value’ property tax assessments and no sales tax base values at all, offer by far the largest

111. A recent study in Massachusetts of twelve older industrial cities and fourteen prosperous cities and towns showed that the total value of real property rose 2.5 to 3.5 times faster in the affluent communities, and total property value per capita was significantly higher in the richer communities with the gap widening over time. Barry Bluestone & Chase M. Billingham, *The Property Tax and the Fortunes of Older Industrial Cities*, LAND LINES, Jan. 2008, at 8, 9-10. For instance, in 2004 the city of Lawrence had \$28,000 in assessed property value for each resident while Andover next door had \$188,000 per capita. *Id.* In 1987, Lawrence had \$13,000 and Andover \$53,000. *Id.*

112. A study by two economists at the University of Iowa showed dramatic increases in the use of TIF among Iowa localities from 1989 to 1999, from 126 cities to 323. SWENSON & EATHINGTON, *supra* note 84, at 4 tbl.3A. Tax revenues grew sizably inside TIF jurisdictions during the period studied and increased very little in the 624 jurisdictions not using TIF-funded redevelopment. *Id.*

113. CAL. STATE CONTROLLER, COMMUNITY REDEVELOPMENT AGENCIES ANNUAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 1999 xxi-ii (2000).

114. The state legislature recognized the irresistible attraction for redevelopment agencies to lure big, tax-generating uses to vacant sites, blighted or not. To remove this temptation, the legislature banned direct assistance to automobile dealerships in redevelopment project areas located on land never previously developed for urban uses. CAL. HEALTH & SAFETY CODE § 33426.5(a) (West 1999). The legislature also banned direct assistance to development that would generate sales taxes from being located on a parcel of land five acres or larger, unless the principal permitted use was office, hotel, manufacturing, or industrial. *Id.* § 33426.5 (b).

increments.”¹¹⁵ By comparison, if older buildings already on the property tax rolls are demolished, property taxes from the site will decline until new structures of equal or greater value replace those that were removed. TIF-driven projects tend not to call for publically funded open space on previously built land, for this would produce a property tax deficit, not an increment. Every dollar of new construction—once the area is officially declared to be within a redevelopment project—increases the tax base by a dollar. They must also be sites upon which private redevelopers are ready to build immediately. This usually precludes redevelopment of the most crime-ridden and poverty-stricken sites in town because there is simply no alternate market for them.

Officials in cash-hungry local governments rack their brains trying to find ways of complying with state laws restricting redevelopment to hard-core blighted areas. But they will not have chosen their redevelopment sites because they were located within blighted areas, but because they held the promise of increased tax yields. A good example of this comes from Baraboo, Wisconsin, where local officials designated a cornfield and an apple orchard as blighted, and used a TIF-funded subsidy to help Wal-Mart build a supercenter on the site.¹¹⁶ Imposing a blight test out of sync with the underlying economic realities invites this sort of gamesmanship. Redevelopment agencies pay consultants very well to document blight where there is none. Cities can *spend* TIF dollars for affordable housing or community centers in blighted areas but must *earn* those TIF dollars in more promising locations.

“The notion of blight might reasonably be associated with the assumption of declining property tax values in the would-be TIF district.”¹¹⁷ To justify a redevelopment agency tapping into county and school district shares of the property tax, a blighted area targeted for economic redevelopment should be experiencing a declining property tax base. Theoretically, areas covered by definitions of blight like those found in the California, Ohio, or Missouri statutes should be exactly the types of areas for which a city could justifiably tap into the county and school district shares of property tax revenue to finance

115. Greg LeRoy, *TIF, Greenfields, and Sprawl: How an Invention Created To Alleviate Slums Has Come To Subsidize Upscale Malls and New Urbanist Developments*, PLAN. & ENVTL. L., Feb. 2008, at 3, 6.

116. The Hometown Advantage: Reviving Locally Owned Business, TIF Reform, <http://www.newrules.org/retail/tifreform.html> (last visited Oct. 6, 2008).

117. Dye & Sundberg, *supra* note 110, at 96.

public improvements and stimulate private investment. Imagine an abandoned, grimy industrial zone. As factories close their doors, properties are left vacant or underutilized. For this reason, the county and the school district would have nothing to complain about; they would have continued losing tax revenue but for the redevelopment intervention. After the redevelopment project debt is retired, those taxing entities will enjoy the ensuing perpetual tax bounty.

The trouble with this line of reasoning is that studies of TIF-funded redevelopment conclude that other taxing entities surrender approximately twice as much real property tax revenue as they eventually gain.¹¹⁸ TIF financing is most attractive to communities where property values are rising rapidly so that any investment is likely to pay off and least attractive to communities where property values are flat or declining since the public investment might not be able to generate enough increment in the way of increased property taxes to amortize it.¹¹⁹

A nonprofit research organization studied thirty-six of Chicago's 114 TIF districts and found that property taxes were on the rise in many of them. "Tax increment financing is not cost free when already-growing areas are designated as TIF districts," the study's authors concluded.¹²⁰ Over the lifetime of the thirty-six districts analyzed, the other taxing entities will forfeit \$1.3 billion in tax revenues they probably would have received "if these areas had not been declared TIF districts."¹²¹

Suppose that property values are increasing in an area targeted for TIF-funded redevelopment by 5% a year. Imagine that the city, the school district, the county, and other taxing entities each share 25% of

118. See Neighborhood Capital Budget Group, Who Pays for the Only Game in Town? 17, http://www.ncbg.org/tifs/tif_pays.htm (last visited Oct. 6, 2008) ("[The author] estimates that taxing bodies in Chicago have suffered \$1.3 billion in 'lost revenues' as a result of the TIF program."); see also Richard F. Dye & David F. Merriman, *TIF Districts Hinder Growth*, POL'Y F. (Inst. Gov't & Pub. Affairs, Univ. of Ill., Urbana, Ill.), Nov. 2000, at 1 (finding that annual increase in property values in municipalities with TIF districts remained stagnant while municipalities without TIF districts saw the rate of property value growth double).

119. Dye & Merriman, *supra* note 118, at 3.

120. Neighborhood Capital Budget Group, *supra* note 118, at 4.

121. *Id.* In Illinois, where TIF is widely used to subsidize individual developers and firms, the impacts on the property tax base have been exactly the opposite of what municipal officials hoped. See *id.* at 18. The tax base grew steadily in communities that had not used TIF but only maintained pre-TIF adoption rates in communities that had. *Id.* at 17. "Municipalities that use TIF do worse . . . [g]overnment subsidies reallocate property improvements in such a way that capital is less productive in its new location." Dye & Merriman, *supra* note 118, at 3.

the property tax revenue. As long as the new project increases property tax revenues by more than 1.25%, the city will be ahead even though the project is economically inefficient—evidenced by the fact that it results in a diminished rate of growth in the tax yield. In this scenario, three-fourths of the public contribution to the project is financed by entities other than the host city. Imagine that the project produces an increment of 1.5%. The city is ahead by .25%. The other taxing entities cover their share of the cost and realize no increased tax revenues until after the project debt has been amortized.

The county, school district, and other taxing entities would similarly be losers if the project built in the redevelopment zone would have been built somewhere else anyway, but within the boundaries of the county or school district. There is evidence that this is exactly what happens with retail or commercial projects, though probably not as much with industrial projects.¹²² While early federal urban renewal policies sought to leverage investment in the rehabilitation of genuinely blighted areas, TIFs depend upon dramatic increases in property value and, as a result, are geared more toward new commercial investment, often in well-heeled suburban neighborhoods. Therefore, while TIFs generally require a finding of “blight,” they often turn that notion on its head.

In California, the legislative staff is familiar with these realities.¹²³ Redevelopment agencies in fast-growing Riverside and San Bernardino

122.

Our evidence shows that commercial TIF districts reduce commercial property value growth in the non-TIF part of the same municipality. This is not terribly surprising, given that much of commercial property is retailing and most retail trade needs to be located close to its customer base. That is, if you subsidize a store in one location there will be less demand to have a store in a nearby location. Industrial land use, in theory, is different. Industrial goods are mostly exported and sold outside the local area, so a local offset would not be expected. Our evidence is generally consistent with this prediction of no offset in industrial property growth in non-TIF areas of the same city.

Richard F. Dye & David F. Merriman, *Tax Increment Financing: A Tool for Local Economic Development*, LAND LINES, Jan. 2006, at 2, 7.

123.

When redevelopment agencies take property tax increment revenues from other public services, they affect the budgets of the local governments that lose those property tax dollars. When redevelopment agencies redirect property tax increment revenues from schools, the State General Fund must backfill those lost revenues. Pages 10 and 11 explain these fiscal effects in more detail.

Although redevelopment's primary purpose is to eradicate blight, some observers note that redirecting property tax increment revenues is one of the few remaining ways for local officials to increase their revenues without raising taxes. Critics argue that this fiscal temptation drives the pursuit of redevelopment to the

counties scarf up a higher percentage of total property tax revenues in their counties than agencies in any other counties in the state—about a quarter of all property tax revenues in those counties, which in Riverside amounts to nearly three times the amount the county receives in property tax revenues.¹²⁴ Cities in these rapidly growing, thriving counties placed thousands of acres of undeveloped land into redevelopment project boundaries and were able to benefit by diverting the county and school district shares of the growing property tax base to the redevelopment agency and its sponsoring city as previously unbuilt areas were subdivided en masse.¹²⁵ Under state law, redevelopment agencies are required to make certain pass-through payments to schools and counties but these are modest compared to the revenues TIF-funded redevelopment shifts from schools and counties to redevelopment agencies.¹²⁶

IV. STATE STATUTES PROTECTING THE OWNERS OF PROPERTY TAKEN

Legislation protecting property owners can be broadly grouped into three categories: (1) statutory prohibitions against the use of eminent domain for economic development purposes, (2) statutes entitling owners and occupants to greater compensation than courts interpreting the “just compensation” provision of the Fifth Amendment have traditionally awarded, and (3) reforms in planning practice to institute early consultation with potentially impacted residents and

point that some local officials designate redevelopment project areas primarily for their revenue potential and only incidentally to eradicate blight.

It follows, therefore, that if the Legislature is concerned about how redevelopment officials use their extraordinary powers of eminent domain and property tax increment financing, legislators should focus on where redevelopment agencies use those powers. Because the presence of blight is necessary before redevelopment officials can use those powers, legislators need to review the “blight” definition.

Senate Comm. on Local Gov’t et al., *supra* note 77, at 2-3.

124. In 2003-2004, Riverside County redevelopment agencies took 25.2% of all property tax revenues, and the county government took 9.8%. *Id.* at 10 tbl.3. In San Bernardino County, redevelopment agencies took 22.3%, and the county government took 11.9%. *Id.*

125. California’s largest redevelopment project areas are in San Bernardino (46,200 acres, the George Air Force Base, located within the Victor Valley Economic Development Authority), followed by 27,590 acres in Riverside County’s Desert Communities Project. Senate Local Gov’t Comm., Redevelopment Agency Fact Sheet (Sept. 2002), <http://www.caltax.org/RDAFactsDetwiler05.pdf>.

126. Basically, the pass-through payments amount to less than \$200 million a year compared to \$3 billion in TIF they collect. Senate Comm. on Local Gov’t et al., *supra* note 77, at 10.

businesses, coupled with negotiation reforms to encourage voluntary acquisitions.

A. Statutory Limits on the Use of Eminent Domain for Economic Development Purposes

Some property rights advocates would absolutely bar governments from taking one private owner's property for transfer to another private owner for economic development projects of any kind.¹²⁷ They would confine "public uses" to traditional government purposes—roads, fire protection, and schools.¹²⁸ They fault post-*Kelo* statutory reforms that leave big takings loopholes by excepting blighted properties and defining blight too expansively.

Statutes from Alaska, Florida, and Indiana, described in the following paragraphs, illustrate the kinds of prohibitions that appeal to staunch defenders of individual property rights. Outraged by the outcome in *Kelo*, Alaska enacted this statute: "The power of eminent domain may not be exercised to acquire private property from a private person for the purpose of transferring title to the property to another private person for economic development purposes."¹²⁹

Florida has curbed economic development takings, even of blighted or slum property, by declaring that such takings are not for a public purpose.¹³⁰ Florida voters enacted a constitutional amendment requiring a three-fifths vote of both houses of the legislature to sanction a taking of one private person's property for transfer to another.¹³¹

Indiana lawmakers protect homeowners from being ousted for tax- or job-driven economic development projects. Their recently enacted legislation bans transfers to private parties "for a use that is not

127. CASTLE COALITION, 50 STATE REPORT CARD TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* 7 (2007), http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf.

128. *Id.* at 3.

129. ALASKA STAT. § 09.55.240(13)(d) (2006).

130. Takings to prevent a nuisance were also banned unless the nuisance arose from violating building codes. FLA. STAT. ANN. § 73.014(1) (West 2008).

131. HJR 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 was approved by a margin of sixty-nine to thirty-one percent. See Fla. House of Representatives, HJR 1569—Eminent Domain, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=33830> (last visited Oct. 16, 2008); Fla. Dep't of State, Div. of Elections, Eminent Domain, <http://election.dos.state.fl.us/initiatives/initdetail.asp?account=10&seqnum=66> (last visited Oct. 16, 2008).

a public use.”¹³² By statute, “[t]he term does not include the public benefit of economic development, including an increase in a tax base, tax revenues, employment, or general economic health.”¹³³

In addition, Indiana law excepts situations reminiscent of the San Francisco Ferry Building’s problem with the World Trade Club or the parking lot owner that could have derailed the Gap headquarters project, mentioned earlier in this Article. This exception in the Indiana law allows condemnation to be used for parcels at least ten acres in size, not owner-occupied, and located in a designated economic development area, if the condemnor acquires title to ninety percent of the economic development area and “the legislative body for the condemnor” authorizes the condemnation by a two-thirds vote.¹³⁴ In other words, after the condemnor has acquired through voluntary purchases ninety percent of the land needed for the project, local governments in Indiana can authorize condemnation for economic development by a supermajority council vote. Holdout property owners, negotiating in the shadow of eminent domain, would have an incentive to keep their demands within reason. And condemnors would be deterred from making lowball offers, barred from using eminent domain until they held title to ninety percent of the properties required for the project.

B. Liberalizing the Compensation Standard

While it is true that money is not everything, for many people it is the most important thing. With the constitutional requirement for just compensation set at fair market value, and nothing more, it is of little surprise that some people will “go for broke” in fighting eminent domain, especially if faced with an egregiously low priced, strong arm offer from the government.¹³⁵

The Fifth Amendment’s cryptic requirement that just compensation be paid for property taken for public use prescribes no valuation standard. Courts have equated just compensation to the fair market value of the property taken on the date of valuation.¹³⁶ Sifting through

132. IND. CODE ANN. § 32-24-4.5-1(b)(3) (LexisNexis Supp. 2008).

133. *Id.* § 32-24-4.5-1(a).

134. *Id.* § 32-24-4.5-11(b).

135. Dale Orthner, *Toward a More “Just” Compensation in Eminent Domain*, 38 MCGEORGE L. REV. 429, 455 (2007).

136. Date of valuation is the precise point in time for establishing the market or actual value of realty taken. Usually, it is based on the condemnor’s filing date but not always. Statutes in about half the states specify the date of valuation. In the other states, the date is a

the conflicting testimony of appraisers, courts set a price based on what a willing buyer would pay a willing seller if neither party was under duress to sell or buy.¹³⁷ But fair market value is not the only possible standard of just compensation. The United States Supreme Court identified a competing norm calling for restoration: “The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.”¹³⁸ In practice, the norm of restoration has generally been subordinated to the market value standard.

The market value standard attempts to separate the “pure” value of the real estate from the personal attributes of the present owner that contribute to the profitability of the operation. Courts are sensitive to issues of horizontal equity—the need to treat all property owners alike. Just compensation is not designed to put owners in as good a position as they would have enjoyed had the condemnation not taken place because such a standard almost assuredly would produce differential treatment among owners whose properties were physically comparable or identical. One owner may have had the idea of selling anyway, and welcomes the government as an all cash buyer. A second owner, a book collector with 4000 volumes at home, not planning to move anytime soon, might nonetheless be willing to sell if someone paid her library moving costs. A third owner may be so infirm that the move could kill her. She flatly refuses to sell at any price. One price does not really fit all three situations, even if a real estate appraiser concluded that each of the three homes had the same value.

A “restoration measure” recognizes that there are certain economic costs imposed on condemnees excluded from fair market value. “[C]urrent compensation rules exclude whole categories of damages caused by government takings of private property.”¹³⁹ For instance, the owners of property taken possess no constitutional assurance of reimbursement for attorneys’ fees or appraisals. These costs are already presumably built into the market value because

matter for common law adjudication. 11A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 32.97 (3d ed. 2000).

137. 4 JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 12.02 (3d ed. 2007) (noting that the constitutional measure of compensation is fair market value).

138. *United States v. Miller*, 317 U.S. 369, 373 (1943); *see also* *United States v. Lee*, 360 F.2d 449, 452 (5th Cir. 1966) (“‘Just compensation’ invokes the equitable powers of the court, and courts must use their equity powers to put an owner of land being condemned in as good position as he would have been if his property had not been taken, or as nearly so as is possible under the given circumstances.”).

139. Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 *Nw. U. L. Rev.* 677, 678-79 (2005).

ordinarily buyers and sellers of realty in the open market customarily pay their own attorneys and other due diligence experts.

Narrowing the gap between market value and making the involuntary seller whole, federal and state governments have authorized compensation for attorneys' fees,¹⁴⁰ appraisal costs, moving and relocation costs,¹⁴¹ and lost business goodwill.¹⁴² A few states have authorized compensation in excess of a stated percentage of fair market value. In Indiana, when blighted property is taken for a public use, the original property owner must be compensated 125% of fair market value for agricultural property and 150% of fair market value for a residence.¹⁴³ Iowa requires the acquiring agency to cover the relocation costs of condemnees along with other consequential damages, but in place of relocation costs the condemnor can offer 130% of the appraised amount plus certain expenses allowed by statute.¹⁴⁴

The Federal Uniform Relocation Assistance Act (the Act)¹⁴⁵ and comparable state laws cover expenses not usually included in the fair market value standard: moving expenses and a comparable replacement dwelling if one cannot be found for the same price as the fair

140. 42 U.S.C. § 4654(a) (2000).

141. *Id.* § 4360.

142.

If a business or trade is destroyed by a taking, the owner shall be compensated for loss of going concern, unless the condemning authority establishes any of the following by a preponderance of the evidence: (1) the loss is not caused by the taking of the property or the injury to the remainder; (2) the loss can be reasonably prevented by relocating the business or trade in the same or a similar and reasonably suitable location as the property that was taken, or by taking steps and adopting procedures that a reasonably prudent person of a similar age and under similar conditions as the owner, would take and adopt in preserving the going concern of the business or trade; or (3) compensation for the loss of going concern will be duplicated in the compensation otherwise awarded to the owner.

MINN. STAT. ANN. § 117.186, subdiv. 2 (West Supp. 2008).

143. IND. CODE ANN. § 32-24-4.5-8 (West 2008).

144.

A purchase offer made by an acquiring agency shall include provisions for payment to the owner of expenses, including relocation expenses, expenses listed in section 6B.54, subsection 10, and other expenses required by law to be paid by an acquiring agency to a condemnee. However, in the alternative, the acquiring agency may make, and the owner may accept, a purchase offer from the acquiring agency that is an amount equal to one hundred thirty percent of the appraisal amount plus payment to the owner of expenses listed in section 6B.54, subsection 10, once those expenses have been determined.

IOWA. CODE ANN. § 6B.2B (West 2008).

145. 42 U.S.C. §§ 4601-4655 (2000).

market value paid by the condemnor for the property taken.¹⁴⁶ Every federal project or federally assisted project is subject to the Act.¹⁴⁷ The practical consequences of the Act are significant because the condemnor cannot proceed with its project until it has found at least one “decent, safe and sanitary,” functionally equivalent, comparable replacement dwelling for each residence taken—and not just for owner occupants.¹⁴⁸ Tenants are protected as well. “Comparable housing” payments are subject to a statutory caps of \$22,500 per household.¹⁴⁹ But if the project would be delayed or completely shuttered because of a lack of comparable replacement housing, the condemnor as a last resort can make larger payments.¹⁵⁰

Minneapolis attorney Mark Savin offers a good example of how a public agency could run into trouble by not identifying and planning for “last resort” situations:

Consider, for example, a large, old home that is located in the middle of a major urban road expansion project. The home must be condemned to make room for a new intersection. The appraised value of the home is \$400,000. The highway agency may budget approximately that figure for acquisition of the property, and plan to start the condemnation proceeding a few months before the property is needed. But what happens when the government discovers that the homeowners have 19 children living at home? Under the Relocation Act, the government has to identify another home that is large enough for 21 people, with similar access to schools, work, and commercial businesses. It will likely be difficult to find such a house for anything close to \$422,500 (the appraisal price plus the ordinary replacement housing payment). Housing of last resort may be required, which could involve buying a much more expensive house, or putting significant addition on another home, or building new. It is likely that none of these options could be accomplished in just a few months. So now the agency’s budget is far too low and its schedule has to be modified.¹⁵¹

The Act and its state equivalents also offer funds to displaced business firms for moving expenses¹⁵² and reestablishment expenses—the costs

146. Extensive regulations define “comparable replacement dwelling.” 49 C.F.R. § 24.2(a)(6) (2007).

147. *See, e.g., id.* § 24.1(b).

148. 42 U.S.C. § 4624(a)-(b).

149. *Id.* § 4623(a)(1).

150. *Id.* § 4626(a).

151. Mark D. Savin, *The Biggest House in Town: Extending the Limit of Just Compensation*, in ALI-ABA COURSE OF STUDY: EMINENT DOMAIN AND LAND VALUATION LITIGATION 213, 223 (2008).

152. 49 C.F.R. § 24.301(g).

of making the replacement property suitable for the condemnee's relocated business.¹⁵³

Increasingly, in a post-*Kelo* world, legislatures are adjusting their models of compensation to take account of the condemnee's actual losses.¹⁵⁴ For instance, in Minnesota, property owners are now entitled by law to compensation "sufficient for an owner to purchase a comparable property in the community."¹⁵⁵ "This language thus directly incorporates some of the concepts of the Relocation Act into determination of just compensation for purposes of condemnation."¹⁵⁶

C. *Reforms in Planning and Negotiating*

1. Punishing Condemnors for Making Lowball Offers

In many instances, there have been surprisingly large spreads between the government's last offer and the price eventually negotiated or awarded by a jury. One student author provides an eye-popping example: Poletown residents had been offered \$357,000 for the General Motors site; they eventually negotiated compensation of \$5,100,000.¹⁵⁷ Another example of unexplained disparities between an agency's last offer and the ultimate price paid comes from Las Vegas. Under former Mayor Jan Jones, the redevelopment agency offered Carol Pappas \$450,000 for her corner parcel after paying a former U.S. senator \$4,300,000 for his adjoining lot of the same size.¹⁵⁸ Outraged, the Pappas family sued on public use grounds, won at trial,¹⁵⁹ lost in the

153. *Id.* § 24.304. Reestablishment expenses include construction and installation costs for exterior signage, redecoration, advertisement of the replacement location, and increased costs of operations. Presently, there is a \$10,000 cap on these reimbursements. *Id.* Some states have raised that cap considerably. "In Minnesota, the legislature raised the cap on reestablishment expenses to \$50,000 for projects where the federal law does not apply. In North Dakota, the legislature removed the cap on reestablishment expenses altogether." Savin, *supra* note 151, at 224 (citations omitted).

154. Savin, *supra* note 151, at 218.

155. MINN. STAT. ANN. § 117.187 (West Supp. 2008).

156. Savin, *supra* note 151, at 225.

157. Nathan Burdsal, Comment, *Just Compensation and the Seller's Paradox*, 20 BYU J. PUB. L. 79, 84 (2005). Other cases in the article show compensations for different takings moving from \$11,500 to \$200,000, and from \$11,000 to \$5,000,000. *Id.*

158. Steve Miller, *Pappas Property Settlement Expected Soon*, LAS VEGAS TRIB., July 12, 2000, <http://www.stevemiller4lasvegas.com/PappasPropertySettlementExpectedSoon.htm>.

159. The district court judge who decided in favor of the Pappas family was Don Chairez, who subsequently ran for attorney general and strongly supported Question 2, a ballot initiative called the Property Owner's Bill of Rights, outlawing the acquisition of private property by eminent domain for transfer to another private owner. Editorial, *Constitutional Offices*, LAS VEGAS REV. J., Oct. 20, 2006, http://www.reviewjournal.com/lvrj_home/2006/Oct-20-Fri-2006/opinion/10311900.html.

Nevada Supreme Court,¹⁶⁰ and eleven years after the threatened condemnation, finally settled with the city for \$4,500,000.¹⁶¹

Several states have enacted statutes in hopes of deterring condemnors from making lowball offers. Here are but two examples: Minnesota requires condemnors to pay condemnees' attorneys' fees and other costs if the final award or judgment exceeds the agency's last best offer by twenty percent.¹⁶² In New York, if the court awards substantially more than the condemnor's proof, or prevesting offer, the condemnee may be awarded attorneys' fees and other litigation costs.¹⁶³

2. Reforms in Planning: Citizen Participation

There is often a basic tension between the interests of the residents and businesses that occupy a neighborhood before redevelopment and the interests of developers and anchor tenants who expect to be there after redevelopment. Politically connected developers confer informally with public officials about the possibility of striking a redevelopment deal long before the formal redevelopment process begins.¹⁶⁴ An experienced Florida-based land use attorney, Charles Siemon, observes that developers and local officials often reach tentative agreements before the beginning of the public review process.¹⁶⁵ The negotiated deal is presented and approved at a public

160. *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 17 (Nev. 2003).

161. Edward Lawrence, Question 2: Eminent Domain Will Take Center Stage in November (Oct. 17, 2006), <http://www.lasvegasnow.com/global/story.asp?S=5552980>.

162.

If the final judgment or award for damages, as determined at any level in the eminent domain process, is more than 40 percent greater than the last written offer of compensation made by the condemning authority prior to the filing of the petition, the court shall award the owner reasonable attorney fees, litigation expenses, appraisal fees, other experts fees, and other related costs in addition to other compensation and fees authorized by this chapter. If the final judgment or award is at least 20 percent, but not more than 40 percent, greater than the last written offer, the court may award reasonable attorney fees, expenses, and other costs and fees as provided in this paragraph.

MINN. STAT. ANN. § 117.031(a) (West Supp. 2008).

163. N.Y. EM. DOM. PROC. § 701 (McKinney Supp. 2008). A New York condemnation attorney reports that this provision has inclined condemnors to settle a significant number of cases. Michael Rikon, *Eleven Trial Preparation Pointers for Condemnation Cases*, PRAC. REAL EST. LAW, Nov. 2007, at 35.

164. Patience A. Crowder, *"Ain't No Sunshine": Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623, 636 (2007).

165. Charles L. Siemon, *Public/Private Partnerships and Fundamental Fairness*, *Introduction* to TERRY J. LASSAR, CITY DEAL MAKING 81, 86 (1990).

meeting without much input from the public.¹⁶⁶ State open meeting laws require elected officials to conduct their business in sessions that are open to the public, but these laws do not bar discussions between developers and individual officials and most of them allow officials to conduct secret discussions of real estate transactions.¹⁶⁷

The virtues of public participation are well-known. Professor Rossi lists them as: increased accountability and oversight, minimizing excessive concentrations of power, better quality information for decision makers and citizen participants, legitimacy and acceptance of the decisions emerging from an open process, and encouragement of future citizen participation in general.¹⁶⁸

Redevelopment officials and developers are often wary of extensive public hearings. They anticipate that a public hearing process would slow things down—a significant handicap in the fast-moving world of real estate finance. Formal hearings tempt owners of competing firms in the same market area to participate or hire paid surrogates to participate with a view to killing or delaying the project. Hearings will also tip off owners whose properties are scheduled for condemnation, lend credibility to the views expressed even if unrepresentative of community sentiment, consume a great deal of agency staff time, and can lead to controversial standoffs paralyzing decision makers and blocking the political approval process. This is a special risk if the public hearing takes place just before a local election. Officials may be tempted to delay their vote until after the election.

3. Promulgating a Plan That Signals Whether Eminent Domain Is To Be Used, and Why

Every economic development project should come with a detailed financial analysis of the public costs and benefits, along with a coherent land use plan. The plan should indicate whether the agency reserves or renounces the use of eminent domain and should identify all of the sites that the proposed development would require. Anyone who owns, occupies, or leases property slated for an economic development condemnation should receive notice and an opportunity to be heard before the local legislature resolves whether eminent domain is necessary to acquire that property.¹⁶⁹

166. *Id.*

167. Crowder, *supra* note 164, at 650 nn.166-67.

168. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 Nw. U. L. REV. 173, 182-89 (1997).

169.

West Virginia's redevelopment law provides a good example of what a plan should contain. "A redevelopment plan shall be sufficiently complete to indicate its relationship to definite local objectives as to appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities and other public improvements and the proposed land uses and building requirements in the redevelopment project area"¹⁷⁰

In Texas, a municipality can prepare a redevelopment plan only if it makes a finding of blight, designates an area as appropriate for urban renewal because redevelopment is necessary to further some public purpose, and a majority of voters approve the plan.¹⁷¹

Probably the best way to protect property owners against being grossly underpaid would be to give them a chance to approve any plan contemplating condemnation. In California, for instance, jurisdictions contemplating condemnation of residences must make that clear in their redevelopment plan and form a project area committee elected by local residents and businesses to oversee the project.¹⁷² The local government needs a two-thirds vote to approve a plan disapproved by the project area committee.¹⁷³

4. Informal, Early, and Frequent Consultation with Area Residents, Land Owners, and Business Operators

Redevelopment officials have found that it can be a colossal mistake to keep impacted area residents in the dark until the formal hearing process begins. Waiting until the last formal stages of project adoption to inform the neighbors about what is going on can infuriate

The acquiring agency shall send notice of a proposed resolution, motion, or other document authorizing acquisition of property by eminent domain to each property owner whose property is proposed to be acquired by eminent domain, to any contract purchaser of record of the property, and to any tenant known to be occupying the property at least fourteen days prior to the date of the meeting at which such proposed authorization will be considered for adoption by the acquiring agency. The notice shall include the date, time, and place of the meeting and a statement that the persons receiving the notice have a right to attend the meeting and to voice objection to the proposed acquisition of the property. The notice shall include a copy of the proposed resolution, motion, or other document authorizing acquisition by eminent domain.

IOWA CODE ANN. § 6B.2D(1) (West 2008).

170. W. VA. CODE ANN. § 16-18-6(d) (LexisNexis 2006).

171. TEX. LOC. GOV'T CODE ANN. § 374.011(a) (Vernon 2005).

172. CAL. CIV. PROC. CODE § 1245.235 (West 2007); *see also* DAVID F. BEATTY, REDEVELOPMENT IN CALIFORNIA 89, 136 (2d ed. 1995).

173. CAL. CIV. PROC. CODE § 1245.240.

them, cause elected officials to be impeached or replaced at the next election, and damage the public credibility of redevelopment agency staff.

Instead, a better practice is for agency staff to arrange frequent, informal, well-publicized meetings in the neighborhood starting early, and continue meeting with interested neighborhood residents and business operators throughout the decision-making process and beyond.¹⁷⁴ They should listen to the public's views, take suggestions seriously, and advocate changes in the plan based on those views and suggestions.

5. Negotiating Acquisitions

Negotiation should be mandated along the lines that a Missouri Economic Development Task Force recommended. Agencies would make good faith offers not lower than the agency's appraisal, underwrite the owner's attorney and appraisal costs, engage in negotiation to find an agreeable price and terms, mediate if necessary, and present the agency's final and best offer in writing with ample time for the recipient to seek professional advice on whether to take it.¹⁷⁵

V. PROTECTING OTHER TAXING ENTITIES

In all but a handful of states, cities using TIF financing to repay redevelopment agency bonds can tap into future property tax revenues that would have gone to school districts and other taxing entities. Because schools depend significantly on property tax revenues in most states, TIF-financed economic development drains millions of dollars each year from schools.¹⁷⁶

States have come up with various ways to safeguard schools from becoming net losers as a result of TIF-funded economic development: (1) Many states authorize municipalities to negotiate payments in lieu of taxes (PILOTs) from subsidized firms or developers.¹⁷⁷ PILOTs never fully replace revenues lost to TIF.¹⁷⁸ (2) Some states make up all

174. See, e.g., Ehlers & Assocs., *Redevelopment Best Practices*, http://www.ehlers-inc.com/downloads/docs/RedevBestPractices1_06.pdf (last visited Oct. 10, 2008).

175. *Id.*

176. Nat'l Educ. Ass'n, *Protecting Public Education from Tax Giveaways to Corporations: Property Tax Abatements, Tax Increment Financing and Funding for Schools* 8 (Nat'l Educ. Ass'n, Working Paper, 2003), <http://www.goodjobsfirst.org/pdf/edu.pdf>.

177. *Id.* at 15 tbl.3.4.

178. *Id.* at 17.

or most of the local school district revenue loss due to TIF.¹⁷⁹ (3) In some states, the schools receive notice of proposed TIF-funded projects that would divert revenues from schools and the opportunity to comment.¹⁸⁰ (4) In other states, school districts take a seat on a TIF advisory committee.¹⁸¹ (5) Some states impose an absolute ban on the use of the school district's share of future property tax receipts.¹⁸² (6) A handful of states allow school districts to exercise a veto over any redevelopment plan that diverts tax increments from schools.¹⁸³ In these states, without school district approval, redevelopment is permissible but may not be funded with property taxes that would previously have been reserved to schools. The same menu of options could be offered to counties and other taxing entities.

The National Education Association (NEA) endorses the idea of giving school boards a veto over any TIF-funded economic redevelopment that contemplates including the school district's share of property taxes.¹⁸⁴ They see this as the "first line of defense," enabling school districts to "effectively protect education."¹⁸⁵

Giving school districts and counties a veto over TIF-funded redevelopment makes it worthwhile for them to study the economics of project proposals closely. Redevelopment agencies may argue that economic development is bound to lift all ships as tax rolls rise. But according to the United States Department of Commerce, there are few states—such as Maryland and New York—with public accounting systems in place that are equal to the task of estimating the fiscal impacts of tax incentives.¹⁸⁶ Most states collect no data on tax dollars lost to tax breaks—called "tax expenditures."¹⁸⁷ They only report on direct budget appropriations, not on revenue that would have been received but for the tax breaks.¹⁸⁸ As an NEA-sponsored study observed: "Too often, these poorly monitored subsidies have gone to low-density industrial parks; tourist, convention, and shopping destinations; and other enterprises that may not really need special

179. *Id.* at 15 tbl.3.3 (Michigan, Minnesota, and Ohio).

180. *Id.* (Michigan, Minnesota, and Ohio).

181. *Id.* (Missouri, Nevada, Ohio, Wisconsin, and Utah).

182. *Id.* at 12.

183. *Id.* at 15 tbl.3.3.

184. *Id.* at 36.

185. *Id.* at 3.

186. KENNETH E. POOLE ET AL., NAT'L ASS'N OF STATE DEV. AGENCIES, EVALUATING BUSINESS DEVELOPMENT INCENTIVES, at iii (1999) (prepared for the United States Department of Commerce).

187. *Id.*

188. *Id.*

public support, do not create long-term jobs with decent wages, and contribute little to community infrastructures as a whole.¹⁸⁹ School districts using the leverage of their veto power could negotiate suitable agreements with redevelopment agencies on potentially beneficial projects and opt out of pure tax giveaways.

Do not expect redevelopment officials to greet a school district pocket veto with wild enthusiasm. School districts are sometimes big, slow-moving bureaucracies, self-absorbed, and unskilled in real estate development. Through indifference, incompetence, and intransigence, they could delay to death otherwise viable redevelopment efforts.

North Carolina has come up with additional statutory safeguards to protect the interests of other taxing entities including schools from TIF-funded projects draining revenues from them. Under one of its statutes authorizing the use of TIF for economic development, no more than twenty percent of the square footage of any proposed economic development project outside a city's central business district can be devoted to retail, hotel, or consumer banking uses.¹⁹⁰ Another North Carolina statutory provision authorizes development finance districts to enter agreements with other taxing entities guaranteeing a minimum value agreement so that even if property values decline, the taxing entity will be sure to receive enough of the property tax increment to continue making payments on its outstanding debts.¹⁹¹ A third statute

189. Nat'l Educ. Ass'n, *supra* note 176, at viii.

190.

If the district in which such a project will occur is outside a city's central business district (as that district is defined by resolution of the city council, which definition is binding and conclusive), then, of the private development forecast for a development project by the development financing plan for the district in which the project will occur, a maximum of twenty percent (20%) of the plan's estimated square footage of floor space may be proposed for use in retail sales, hotels, banking, and financial services offered directly to consumers, and other commercial uses other than office space. The twenty percent (20%) limitation in the preceding sentence does not apply to development financing districts located in a development tier one area, as defined in G.S. 143B-437.08 and created primarily for tourism-related economic development, such as developments featuring facilities for exhibitions, athletic and cultural events, show and public gatherings, racing facilities, parks and recreation facilities, art galleries, museums, and art centers.

N.C. GEN. STAT. § 158-7.3(a)(1) (2007). North Carolina has enacted numerous TIF laws protective of other taxing entities. See generally P. Michael Juby, *Tax Increment Financing in North Carolina: The Myth of the Countermajoritarian Difficulty*, 83 N.C. L. REV. 1526, 1533-45 (2005).

191. 2003 N.C. Sess. Laws 1159; Juby, *supra* note 190, at 1532-33.

prohibits development financing districts from placing more than five percent of their geographic areas into TIF projects.¹⁹²

VI. DISTINGUISHING AMONG TYPES OF ECONOMIC DEVELOPMENT PROJECTS—“CIVIC BETTERMENT,” PLAN IMPLEMENTING, AND PURELY TAX-DRIVEN

Ambiguously, “economic development” refers to projects meant to improve the appearance and livability of the city, private development projects benefiting from infrastructure subsidies to help offset the costs of the developer complying with local land use planning goals, and tax-driven projects of no particular spatial, planning, or programmatic significance other than to enhance local tax revenues.

A. Civic Enhancement Projects

The area-wide beautification projects generate broad public benefits through a transformation in the appearance and utility of the reused land. This type of project features public amenities—plazas and parks, landscaped rights of way, museums, and stadiums—to anchor often high-density, private redevelopment that will bring new employees, residents, and visitors. Federally funded urban redevelopment encouraged improvements in civic infrastructure because local governments could count such expenditures to meet their matching share contribution under the federal renewal program.¹⁹³ These programs also encouraged big, ambitious projects because, as a condition to project funding, local governments had to produce convincing “workable programs” demonstrating how they would excise blight from redevelopment project areas.¹⁹⁴ Designed as civic symbols of area-wide rejuvenation, redevelopment projects often boasted a level of public amenity superior to what the private sector usually built, except in the very wealthiest areas.

Property owners challenging civic enhancement projects as not being for public use emphasize the important role that the private firm designated as the master developer plays in the formulation of these plans.¹⁹⁵ But they discount the public benefits of the project.¹⁹⁶ A

192. 2003 N.C. Sess. Laws 1173.

193. 42 U.S.C. § 1453(a)(2)(B) (omitted 1988).

194. *Id.* § 1451 (omitted 1975).

195. One blogger’s view carries this headline: *Bruce Ratner Calls the Shots: Bloomberg, Pataki and the Empire State Development Corporation Dance the Dance*, Posting of mole333 to The Daily Gotham, http://www.dailygotham.com/blog/mole333/bruce_ratner_

typical example was the challenge to the Atlantic Yards Project, described by the plaintiffs, a coterie of property owners threatened with condemnation, as a

publicly subsidized development project set to cover twenty-two acres in and around the Metropolitan Transit Authority's Vanderbilt Yards, an area in the heart of downtown Brooklyn, New York. The plan for the Project, which will be designed in part by the architect Frank Gehry, includes the construction of a sports arena that will play home to the National Basketball Association franchise currently known as the New Jersey Nets, no fewer than sixteen high-rise apartment towers, and several office towers.¹⁹⁷

Applying *Kelo*, the United States Court of Appeals for the Second Circuit concluded that these public benefits qualified the project as a public use:

Few powers of government have as immediate and intrusive an impact on the lives of citizens as the power of eminent domain. For affected property owners, monetary compensation may understandably seem an imperfect substitute for the hardships of dislocation and the loss of a home or business. But federal judges may not intervene in such matters simply on the basis of our sympathies. Just as eminent domain has its costs, it has its benefits, and in all but the most extreme cases, Supreme Court precedent requires us to leave questions of how to balance the two to the elected representatives of government, notwithstanding the hardships felt by those whose property is slated for condemnation.¹⁹⁸

B. Projects Benefiting from TIF Expenditures To Achieve Planning Goals

Local governments have considerable authority to decide how to finance infrastructure—whether with general funds, special assessments, improvement bonds, or tax increment financing—subject to Supreme Court limits on the authority of local governments to require land dedications and exactions roughly proportional to the

calls_the_shots_bloomberg-pataki_and_the_empire_state_development_corporation_dance_the_dance (Jan. 28, 2006, 21:49 EST).

196. Dan Kelly rightly points out that courts in determining whether economic development projects serve a public use tend to overvalue the public benefits of redevelopment because they are conjectural ex ante and undervalue potential private benefits. Daniel B. Kelly, *Pretextual Takings of Private Developers, Local Governments, and Impermissible Favoritism*, SUPREME COURT ECON. REV. (forthcoming).

197. Goldstein v. Pataki, 516 F.3d 50, 53 (2d Cir. 2008).

198. *Id.* at 52.

spillover harms created by private projects.¹⁹⁹ Around the country, many local governments desire to encourage “smart growth”—higher-density development. Sometimes, the costs of providing infrastructure can be greater for higher-density populations.

A homebuilder looking to construct twenty houses on 400 acres may be able to use septic tanks instead of sewage treatment plants, well water instead of piped water, and narrower streets. Creating a mixed-use project for 2000 residents with shops, schools, and offices will demand a much greater investment in infrastructure. The developer may lack the financial capacity, expertise, or confidence in market receptivity for the mixed-use, high-density development. It is doubtful that local governments could regulate the developer into building the higher-density project,²⁰⁰ although they might find a basis in adverse environmental consequences or inconsistency with the locality’s general plan for denying the developer’s proffered low-density subdivision map.²⁰¹ Possibly the best way to achieve the community’s planning goals would be to allocate TIF funding from property taxes collected within the project area to cover the incremental costs of the increased size and capacity of roads, sewer and water facilities, and other infrastructure needed to accommodate a higher-density project properly.

A good example of this use of TIF comes from the local governments serving the four million residents in Colorado’s rapidly growing Front Range, including Denver. Front Range sites have accepted the “new urbanist” prescription for higher development densities and mixed-use projects clustered within a quarter- to a half-mile near rail transit lines.²⁰² Proponents of this planning vision believe that only with higher-density development can Colorado preserve open space by enforcing urban growth boundaries, minimizing the carbon footprint of new growth, and reducing auto dependency.²⁰³ TIF-funded subsidies of basic infrastructure in two prominent massive redevelopment sites—4700 acres at the now closed Stapleton Airport

199. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

200. Subdividers cannot be obliged to align their proposed subdivisions to features of the comprehensive plan that have not been implemented. Elizabeth K. Arias, Note, *Batch v. Town of Chapel Hill. Takings Law and Exactions: Where Should North Carolina Stand?*, 21 CAMPBELL L. REV. 49, 54 (1998).

201. In California, for instance, subdivision maps must be consistent with the general plan, and all feasible mitigation measures must be taken to avoid adverse environmental consequences. CAL. GOV’T CODE § 65456(a) (Deering Supp. 2008).

202. Jennifer Lang, *New Urban Renewal in Colorado’s Front Range* 10 (Ctr. for the Am. Dream of Mobility & Home Ownership, Issue Paper No. 2-2007, 2007).

203. *Id.* at 11-12.

and 1866 acres at the shuttered Lowry Air Force Base—are sized to serve mixed-use urban villages with higher-density housing than the market would have provided had developers been required to pay for their own development infrastructure.²⁰⁴ The Town Center in Lowry will create the “density, synergy, and energy” of a mixed-use European city.²⁰⁵ “When completed, Stapleton will provide 12,000 homes and apartments, three million square feet of retail space, and ten million square feet of office space.”²⁰⁶

Some Coloradans see this as a colossal waste of taxpayer dollars through which the eighty percent of the population favoring single-family homes with usable back yards are being compelled to subsidize the twenty percent who might prefer living in clustered, mixed-use, transit-oriented urban settings.²⁰⁷ They see no call for planners to use tax dollars as a means of changing the way people live and anticipate that subsidies will result in an oversupply of medium- and high-density housing, the costs of which will be ultimately borne by taxpayers instead of developers.²⁰⁸ In their view, the only reason these programs persist is that the costs are disbursed unnoticed among millions of taxpayers while the benefits are bestowed in large sums to a short list of favored developers.²⁰⁹

Colorado is not alone in its use of TIF to subsidize the cost of public infrastructure needed to support private development such as street improvements, sewer and water facilities, parks, and playgrounds. Another example of the aggressive use of TIF dollars for infrastructure improvements to nudge developers into “smart growth” densities comes from the town of Oconomowoc, Wisconsin, where a 1500-acre, mixed-use project on rolling farmland received the benefit of TIF funding, even though the state’s law clearly defines predominantly open land developed only for agricultural use as unblighted.²¹⁰ TIF dollars supported construction of sewer and water facilities for a 1500 unit development on 1500 acres, along with an upscale mall, big box retailers, and office space.²¹¹ Homebuilders lure

204. *Id.*

205. *Id.* at 12.

206. *Id.*

207. *Id.* at 10, 14.

208. *Id.* at 14.

209. *Id.* at 18.

210. WIS. STAT. ANN. § 66.1105(2)(a)(2) (West 2003); David N. Farwell, Comment, *A Modest Proposal: Eliminating Blight, Abolishing But-For, and Putting New Purpose in Wisconsin’s Tax Increment Financing Law*, 89 MARQ. L. REV. 407 (2005).

211. Farwell, *supra* note 210, at 408-09.

prospective buyers to Pabst Farms by promoting the advantages of living in a master planned community with “the conveniences of an urban area in a historically rich, breathtaking Lake Country setting.”²¹²

The developer proposed an outdoor lifestyle mall that city officials welcomed and wanted redesigned to put a more congenial face towards the heavily trafficked abutting roadways.²¹³ The developers modified the big box design, accepted the idea of a generous landscape buffer between the buildings and the roadways, and the city granted the land use approvals.²¹⁴

A state senator who noted that the Pabst Farms was “anything but blighted” tried to change the state’s blight definition to no avail.²¹⁵

Using TIF for economic development, as long as authorized by state law, raises no serious constitutional issues as long as TIF money goes into public infrastructure. Iowa law allows cities to establish economic development areas by a municipal resolution and empowers cities to spend public money for infrastructure in those areas.²¹⁶ Earlier versions of the urban redevelopment law restricted its application to areas of slum or blight.²¹⁷ But in 1985, that law was amended to give cities the economic development option with no slum or blight strings attached.²¹⁸ A student author studying the implications of this law, concluded:

In the face of depleted federal resources and growing popular pressure to produce, politicians and municipalities have discovered a method of seemingly financing the future for free—TIF. These pressures greatly minimize the likelihood of TIF ever again being used solely as a method of restoring blighted property to an economically productive status.²¹⁹

West Des Moines, Iowa, entered a development agreement with a nationally prominent mall developer, Chicago-based General Growth, for a \$150 million shopping center at Jordan Creek.²²⁰ The developer

212. iNest, Standard Builder: Community #21639, Oconomowoc, WI, <http://www.internest.com/homebuilder/homebuilder21639.asp> (last visited Oct. 6, 2008).

213. Amy Rinard, *Pabst Farms Plans Tweaked*, MILWAUKEE J. SENTINEL, Jan. 25, 2008, at B1.

214. Lisa Sink, *Pabst Farms Gets Oconomowoc’s OK, but Questions Remain*, MILWAUKEE J. SENTINEL, Feb. 19, 2008, <http://www.jsonline.com/story/index.aspx?id=71991>.

215. Farwell, *supra* note 210, at 420-21.

216. IOWA CODE ANN. § 403.5(1)(2) (West 2008).

217. *Id.* (repealed 1985).

218. Brad Perri, Note, *Financing the Future: Interpreting the “Economic Development Area” Provision of the Iowa TIF Statute*, 50 DRAKE L. REV. 159, 162 (2001).

219. *Id.* at 177-78 (internal footnotes omitted).

220. *McMurray v. City Council of W. Des Moines*, 642 N.W.2d 273, 275 (Iowa 2002).

promised not just a typical cookie-cutter regional mall but a true town center.²²¹ In exchange, the city committed to placing the proposed shopping center site into a newly designated economic development area in order to use TIF from the project area to finance public infrastructure: a municipal fire and EMS station, a municipal substation, various street improvements, water mains, sanitary sewers, storm water facilities, and public recreational facilities.²²² The city also agreed to pay \$2.5 million to the mall developer to offset some of the costs of public recreational space within the mall.²²³

These improvements were not undertaken solely for the benefit of the Jordan Creek mall project. Instead of confining the boundaries of the economic development area to the 200 acres the mall was intended to occupy, the city put 1075 acres into its economic development zone.²²⁴ This allowed the redevelopment agency to use TIF from the entire area, not just the mall site, to pay for the new infrastructure. The city's capital improvement plan had included all this infrastructure for a decade by the time the Jordan Creek project materialized²²⁵ and was simply accelerated by the Jordan Creek development agreement. Even if the city would have preferred financing these improvements by instituting a system of area-wide impact fees, Iowa has not empowered cities to levy impact fees.²²⁶

Jordan Creek was located a mile south of Interstate 80 in a residential and agricultural area.²²⁷ But as mentioned above, under Iowa law, an economic development area can be created to stimulate employment and investment regardless of whether the designated project area is characterized as slum or blight.²²⁸

221. *Id.*

222. *Id.* at 283.

223. *Id.* at 275.

224. *Id.*

225. *Id.* at 282.

226. Kristin B. Flood, Note, *Who Should Pay for the Impact of New Development in Iowa: Developers or the Preexisting Community?* *Analysis of Home Builders Association of Greater Des Moines v. City of West Des Moines*, 91 IOWA L. REV. 751, 754 (2006).

227. *McMurray*, 642 N.W.2d at 275, 279.

228. IOWA CODE ANN. § 403.2 (West Supp. 2008). Cities can enact a resolution of necessity for the designation of an urban renewal area as slum, blighted, or economic development. *McMurray*, 642 N.W.2d at 279. Plaintiffs did not allege that the law required a finding of blight. *Id.* Their claim was that the law impliedly required findings concerning the existence of unemployment or housing shortages. *Id.* The court found that because the city's plan for the area involved no residential uses, statutory provisions concerning low and moderate-income housing were inapplicable. *Id.* Because the statute referred to prevention of unemployment as a goal, it could not be sensibly required to demonstrate existing unemployment as a condition to creation of an economic development project area. *Id.*

Instead of including the mall within the first phase of its renewal plan, or having the city council approve the development agreement first, the city divided the process into two parts. Initially, the city council designated the boundaries of the economic development area and enacted a redevelopment plan as required under state law.²²⁹ Later, the city would consider the development agreement and other land use aspects of the new mall project.²³⁰ Although the economic development area was designated for commercial and industrial use—not residential—the accompanying plan made no mention of any specific commercial projects.²³¹

Phasing the project this way completely undermined the lawsuit filed by two area residents and two established malls in the same market area. The economic development plan contemplated no use of eminent domain, so the “public use” question was not before the court. To block the expenditure of TIF dollars that would bring significant new retail competition, the plaintiffs contended that using public money this way violated the Iowa constitutional provision barring the use of public money for private purposes without approval of the State General Assembly.²³² Project opponents, taxpayers, lost on summary judgment at trial and on appeal.²³³ The Iowa Supreme Court’s reasoning was straightforward:

The public infrastructure projects contemplated in the Plan will benefit not only the proposed GGP mall project, but more generally will benefit the City’s citizens. . . . The Plan advances a public purpose and will not be invalidated because it benefits not only the public, but also potentially benefits a private developer.²³⁴

After *Kelo*, the Iowa Legislature reconsidered the economic development takings issue. It restricted the use of eminent domain to properties found to qualify individually as “slum or blight” unless seventy-five percent of the project area fell within the statutory definition of blight.²³⁵ However, the legislature precluded from “public use,” “public purpose,” or “public improvement”: “economic development activities resulting in increased tax revenues,” “increased

229. *McMurray*, 642 N.W.2d at 275.

230. *Id.* at 282.

231. *Id.*

232. *Id.*; IOWA CONST. art. III, § 31.

233. *McMurray*, 642 N.W.2d at 283.

234. *Id.*

235. IOWA CODE ANN. § 6A.22(5)(a) (West Supp. 2008). The Governor vetoed Act 2006 (81 G.A.) H.F. 2351 on June 2, 2006, but the Legislature voted to override the veto in an Extraordinary Session held July 14, 2006.

employment opportunities,” “privately owned or privately funded housing and residential development,” “privately owned or privately funded commercial or industrial development,” or “the lease of publicly owned property to a private party.”²³⁶ In sum, Iowa cities can use TIF money for public infrastructure in economic development areas, and can condemn property for these traditional public purposes as well. They could not take property from private owner *A* for conveyance to private owner *B* to enhance the tax base or create jobs.

C. Purely Tax-Driven Projects

The takings that have the greatest difficulty overcoming the public use hurdle are those initiated for “tax enhancing” projects that often cater to discount retailers like Costco, Target, or Wal-Mart. These types of high-volume retailers are especially sought after in California and other states where a portion of the state sales tax is remitted to the city where the sale takes place.

A survey of local development officials in California, for example, found that their first priority in developing or redeveloping land is to attract big box retail (with one and a quarter cents of the sales tax going to the local government where the sale occurs)—not to create good jobs or build affordable housing.²³⁷

A Colorado appellate court opinion describes how these one-shot deals work.²³⁸ After determining that it could condemn a certain prime corner as blighted, the Wheat Ridge Urban Renewal Authority (the Authority) contacted Cornerstone, a commercial developer who built stores for Walgreens to see if his client was interested in operating a drug store at this location.²³⁹ Walgreens said yes, it wanted to buy the site from the Authority once the Authority acquired it. The site consisted of five parcels. The Authority negotiated the purchase of one and initiated condemnation actions to take the other four. For its part, Walgreens promised to enter a twenty-five-year lease of the site and Cornerstone would construct a drug store there. At some point, the Authority decided to abandon its deal with Walgreens and sought

236. IOWA CODE ANN. § 6A.22(5)(b).

237. LeRoy, *supra* note 115, at 6 (internal footnote omitted); see PAUL G. LEWIS & ELISA BARBOUR, PUB. POL'Y INST. OF CAL., CALIFORNIA CITIES AND THE LOCAL SALES TAX, at ix (1999) (surveying local officials in all 471 California cities in existence in 1998 regarding city development strategies).

238. Cornerstone Group XXII v. Wheat Ridge Urban Renewal Auth., 151 P.3d 601 (Colo. Ct. App. 2006), *rev'd*, 176 P.3d 737 (Colo. 2007).

239. *Id.* at 603.

termination of its Development and Disposition Agreement.²⁴⁰ Cornerstone filed suit, seeking specific performance and damages based on equitable estoppel. At trial the plaintiffs were granted an injunction against the Authority spending certain funds it was required to raise, but the court denied Cornerstone specific performance. On appeal, the court affirmed the injunction, overturned the denial of specific performance, and remanded.²⁴¹

Condemnations of this sort raise public use issues and are bad for school districts and counties because they often spend TIF dollars for projects that would have been built elsewhere within the county or school district. As a California appellate judge noted over three decades ago, when a city tries to attract consumption-based businesses such as hotels and shopping centers through redevelopment, rather than seeking out businesses engaged in production, the city is not increasing “the total wealth of a region as a whole but merely redistribut[ing] the existing supply by capturing business from rival communities. The success of such strategy assumes the absence of effective countermeasures by rival communities targeted for displacement.”²⁴² Without TIF, virtually all of these projects might have been built elsewhere in the market area—though maybe not in the particular city whose redevelopment agency lured them there.²⁴³

Most of these tax-driven retail projects look no different from what discount retailers build without municipal assistance. As long as the retailers’ checkout counters are lined with shoppers, it fulfills its tax-generating mission. A cash cow is not necessarily expected to be an object of beauty.

D. Comparing Project-Specific with District-Wide Projects

An attorney who specializes in this area of redevelopment practice compares the pros and cons of each type of development—area-wide versus project-specific.²⁴⁴ TIF funds go for major regional

240. *Id.* at 604.

241. *Id.* at 609.

242. *Regus v. City of Baldwin Park*, 139 Cal. Rptr. 196, 205 (Ct. App. 1977).

243. “Though there is some disagreement in the literature, the preponderance of evidence in recent studies concludes that TIF is more likely to shift investment from one area to another than to create new investment.” Rose Nacarrato, Tenn. Advisory Comm’n on Intergovernmental Relations, Tax Increment Financing Opportunities and Concerns 6 (Mar. 2007), available at [http://www.cdfa.net/cdfa/cdfaweb.nsf/fbaad5956b2928b086256efa005c5f78/3c832f194c822be4862572dc004c31e1/\\$FILE/Tax%20Increment%20Financing.pdf](http://www.cdfa.net/cdfa/cdfaweb.nsf/fbaad5956b2928b086256efa005c5f78/3c832f194c822be4862572dc004c31e1/$FILE/Tax%20Increment%20Financing.pdf).

244. Jennifer LeGrand & John Stalfort, Creation of Tax Increment Financing Districts, <http://www.cdfa.net> (select “TIF Resource Library” from “Research and Resources” tab; then

infrastructure in the district-wide projects.²⁴⁵ In smaller projects, public improvements or subsidies tend to assist a single firm in one-off arrangements.²⁴⁶ Smaller projects involve fewer participants, are executed in short, predictable timelines, require minimal public financing, usually do not need eminent domain, and can be targeted to close a financing gap that would otherwise have made the project impossible.²⁴⁷ On the other hand, small projects are riskier because they depend for their success on a single landowner, contain the seeds of “the appearance of impropriety”—government favoritism for a particular developer or landowner²⁴⁸—and seldom fulfill any articulated planning vision for improvement of the community.

Big projects have the advantage of large public investments in infrastructure that can attract widespread participation by the business community, have the capacity to transform and revitalize neighborhoods, and are more effective in achieving broad planning goals, including economic development.²⁴⁹ Among their disadvantages are long timelines for completion, droves of participants with potentially conflicting interests whose developments need to be coordinated, the potential for pushing out residents and disrupting small businesses, huge public expenditures, and significant public opposition.²⁵⁰

E. Community Benefit Agreements (CBAs)

Community activists are well aware of the adverse consequences of past publically funded renewal efforts on the socially disadvantaged: “Inner-city gentrification, the creation of low-wage dead-end jobs lacking health benefits, and the loss of affordable housing frequently occur.”²⁵¹ In exchange for their support for land use entitlements and public subsidies, community groups negotiate contracts with

select “Understanding TIF”; then follow hyperlink “Creating of Tax Increment Financing Districts”) (last visited Oct. 16, 2008) (presentation slides).

245. *Id.* at 3.

246. *See id.*

247. *Id.* at 4.

248. *See id.*

249. *Id.* at 5.

250. *See id.*

251. Patricia E. Salkin & Amy Lavine, *Understanding Community Benefit Agreements*, PRAC. REAL EST. LAW., July 2008, at 19, 21. Sometimes, developers coopt the process for public relations purposes, exclude community groups from significant participation, and offer few if any significant benefits to the neighborhood. *Cf.* Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 35, 36 (2007).

developers, sometimes embodied in development agreements with the city.²⁵²

Deal points often include specified numbers of new affordable housing units, a commitment to hire local labor first, a developer's commitment to create a specified number of jobs at living wages, and job training.²⁵³ "Because the agreements are negotiated between community coalitions and interested developers, the benefits can be tailored to meet specific community needs, such as the need for parks, daycare centers, or job-training facilities."²⁵⁴ Community representatives come from the neighborhood and from labor, environmental, and religious organizations, often assisted by public interest lawyers²⁵⁵ and city staff, and encouraged by elected city officials.²⁵⁶

Though there are no legal barriers to negotiating a CBA in a small scale, tax-driven, business-subsidy project, these agreements are more likely to arise in the large scale civic betterment type of project. As the executive director of the Los Angeles Community Redevelopment Agency has remarked, CBAs "'work best when there is substantial agency money invested, when they're big projects, and when they're in hot markets or emerging markets.' When these elements are missing, CBAs are often criticized as creating development barriers that encourage developers to simply find other, less costly, locations."²⁵⁷

VII. WHY TAX-DRIVEN TIF PROJECTS HAVE SUCH LONG POLITICAL "LEGS"

Professor Ron Rosenberg reminds us that local governments financing their activities over the last twenty years have experienced: "1) significant reductions in intergovernmental funding transfers from both state and federal government and 2) the imposition of voter-mandated limitations on the ability of the locality to generate tax revenues from community-wide taxation sources."²⁵⁸

252. *Id.* at 20.

253. *Id.* at 19.

254. *Id.*

255. Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999, 2064 (2007).

256. Salkin & Lavine, *supra* note 251, at 19.

257. *Id.* at 30-31 (quoting Harold Meyerson, *No Justice, No Growth: How Los Angeles Is Making Big-Time Developers Create Decent Jobs*, RACE, POVERTY & ENV'T, Spring 2007, at 58, 58).

258. Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 180 (2006).

To close the gap between expenditures and revenues, local governments have increasingly turned to TIF to lure economic development. Consider the California experience. In 1978, California voters overwhelmingly approved Proposition 13 by statewide initiative, launching the beginning of a nationwide revolt against property taxes—the mainstay of local government finance in the United States.²⁵⁹ Local governments in California lost fifty-seven percent of their revenues overnight following Proposition 13.²⁶⁰ Essentially, the property tax was frozen at its 1978 levels, local tax rates were capped at one percent (plus enough extra to cover previously incurred bonded indebtedness), and the tax base could only rise by two percent a year for inflation.²⁶¹ For property tax purposes, tax assessed values would be adjusted to market when the property was sold or new construction added.²⁶² To enact new taxes at the state level or increase the rates under existing taxes including the income tax, Proposition 13 required a two-thirds vote of both houses of the state legislature.²⁶³ For local governments to raise property taxes or float bonds, the proposition required a two-thirds vote of the local electorate.²⁶⁴

TIF-funded redevelopment became an irresistible way for local governments to scrape up some much needed tax revenue without imposing new taxes. Following the enactment of Proposition 13, the number of localities with redevelopment agencies nearly doubled.²⁶⁵ Statewide over the past two decades, redevelopment agencies have tripled their share of property tax revenues, from 3.6% in 1982-1983 to 9.8% in 2003-2004—\$3 billion annually.²⁶⁶ By 2005, that number had risen to nearly \$3.5 billion.²⁶⁷

259. Bruce A. Wallin, *Budgeting for Basics: The Changing Landscape of City Finances* (Brookings Inst., Ctr on Urb. & Metro. Pol'y, Discussion Paper, 2005), http://www.brookings.edu/metro/pubs/20050823_BudgetingBasics.pdf. Property taxes, the largest source of city revenues, accounted for 21.4% of city revenues in 2000, down from 27.1% in 1977. *Id.*

260. See Mark Wyland, *Proposition 13; 25 Years Later; A Mixed Legacy on Limiting Taxes*, SAN DIEGO UNION-TRIB., June 6, 2003, at B7.

261. CAL. CONST. art. XIII A, § 1(a).

262. *Id.* § 2(a).

263. *Id.* § 3.

264. *Id.* § 1(b)(2).

265. From 1980 to 1996, the number of local redevelopment agencies grew from 197 to 399 and the number of project areas grew from 300 to 744. JEFFREY I. CHAPMAN, PUB. POL'Y INST. OF CAL., PROPOSITION 13: SOME UNINTENDED CONSEQUENCES 12 (1998), http://www.ppic.org/content/pubs/op/OP_998JCOP.pdf.

266. Senate Comm. on Local Gov't et al., *supra* note 77, at 9 tbl.2.

267. CAL. STATE CONTROLLER, COMMUNITY REDEVELOPMENT AGENCIES ANNUAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2005 xii fig.9 (2006).

With new tax dollars to spend, local officials can enjoy feasting off of a menu of delicious options—increase local services (police, fire, emergency health services), improve local infrastructure (everything from roads and sewers to schools and libraries), or reduce tax rates.²⁶⁸ The downside is that the redevelopment agency hogs the tax increment for decades at the expense of other local taxing entities like the school districts and counties.

TIF-funded redevelopment shifts to the redevelopment agency all of the city's share of the property taxes—plus the property taxes that counties, school districts, and other taxing entities would otherwise have received. All of the increment can be used to repay redevelopment agency debt.

In California as well as many other states, city redevelopment agencies have built projects of no special community merit except that they siphoned hundreds of millions of property tax dollars from counties and school districts to redevelopment agencies.²⁶⁹ Due to nuances of California law, the state backfills the deficit from school budgets resulting from redevelopment agency removal of TIF—a sum of \$1.5 billion in 2003-2004.²⁷⁰ Savvy retailers applaud these efforts because they have managed to snare sizable chunks of anticipated tax revenues away from redevelopment agencies through direct cash rebates of property and sales tax increments.²⁷¹

Why has the state legislature allowed this? Planning consultant Larry Kosmont explains the practical politics of TIF by asking us to

268. For a clear and convincing though fictional account of how even the most determined NIMBYs (not in my backyard) can sometimes get behind massive new development because they need the property tax revenues to support much needed local police and social services, see JOHN MANRIQUE, *OCEAN RATON* 20 (2007).

269. These projects are of questionable benefit to low-income households. See UCLA CTR. FOR LABOR RESEARCH & EDUC. & L.A. ALLIANCE FOR A NEW ECON., *WHO BENEFITS FROM REDEVELOPMENT IN LOS ANGELES?: AN EVALUATION OF COMMERCIAL REDEVELOPMENT ACTIVITIES IN THE 1990S*, at i-ii (1999), <http://www.laane.org/docs/research/WhoBenefits.pdf>.

270. Senate Comm. on Local Gov't et al., *supra* note 77, at 12.

271. Like Illinois, California cities can pledge their share of prospective sales taxes to the repayment of bonds used to finance development or infrastructure for development. Tax Increment Allocation Redevelopment Act, 65 ILL. COMP. STAT. ANN. 5/11-74.4-1 to -11 (West 2008). Indiana does not allow sales taxes to be pledged that way, and economic directors in northwest Indiana do not like it: "The reason Illinois gets high-end stores and Northwest Indiana only middle-market players is simple Illinois offers sales tax increment financing, which allows for a portion of sales taxes collected to go into infrastructure development." Keith Benman, *TIF Big Weapon in Retail Wars*, *TIMES NORTHWEST IND.*, Dec. 17, 2007, http://www.nwitimes.com/articles/2007/12/17/news/top_news/doc9bcfbeb674d4e6b862573b400052a35.txt (interviewing Robert Super, Principal Partner at Precision Construction, Inc., in Highland, Indiana).

imagine we were elected to a local city council.²⁷² As budget season nears, we will receive from our staff a menu of municipal costs. A municipality is a service business that voters judge on the basis of performance. Just to maintain services at their present levels will require additional revenues to cover the cost of living increases. The council has three choices: cut back on services, raise taxes and fees, or find new revenue sources. Besides the fact that we would need two-thirds voter approval to increase the property tax, new taxes are famously unpopular. Under these conditions, TIF-funded economic development appeals to many a local elected council member.

The fiscal dilemmas facing local elected officials should not hamper state legislators from preventing school and county tax coffers from being diminished by local redevelopment agencies, especially since the state is the financier of last resort for schools and counties. Because half of all property taxes are allocated to schools, the state has a lot of backfilling to do when it replaces tax revenue lost to redevelopment agencies with general fund subsidies for schools.²⁷³ We can only speculate about why state legislatures have been so reluctant to pull the plug on these tax-shifting schemes since they will be left to fill the emptying coffers of school districts and counties.

Community Redevelopment Association²⁷⁴ director John Shirey finds the answer in the effective lobbying efforts of city officials, joined by some county officials, and the significant number of state legislators who once themselves served as city and redevelopment

272. Interview with Larry Kosmont, *supra* note 103. "Kosmont Companies is a development services firm offering a full range of real estate and economic advisory, brokerage, project finance, investment, and planning services for both the public and private sectors." Kosmont Cos. Home Page, <http://www.kosmont.com> (last visited Oct. 10, 2008).

273.

But property tax increment financing never harms schools because the State General Fund makes up for the diverted revenues. The State General Fund automatically makes up any difference between what a school district receives in property tax revenues and what the district needs to meet its revenue allocation limit. If a redevelopment agency diverts property tax increment revenues from a school district, the State General Fund pays the difference. In other words, the State General Fund pays about \$1 billion a year to school districts to backfill their property tax increment revenue losses. These payments are an indirect state subsidy to redevelopment agencies.

Senate Univ. & Cmty. Dev. Comm., *Redevelopment and the Governor's Budget 6* (Jan. 23, 2003), <http://sinet2.sen.ca.gov/locgov/REDEVELOPMENTPAPER.htm>.

274. This is the association that represents local redevelopment agencies in California. California Redevelopment Association Home Page, <http://www.calredevelop.org> (last visited Oct. 6, 2008).

officials.²⁷⁵ By and large, post-*Kelo* reforms have strengthened the hand just a bit for property owners threatened with eminent domain for economic development projects but have not cut back substantially on the use of TIF to boost local tax receipts.²⁷⁶ As a Wisconsin-based researcher for a nonprofit public policy group put it, “Many citizens want their tax rates—and government spending—as frozen as the February tundra.”²⁷⁷ The only way for public revenues to keep pace with increasing costs and demands for public service without raising tax rates is by augmenting the tax base. By subsidizing public infrastructure improvements and developers, TIF revenues can be leveraged to increase the tax base.

VIII. JUDICIAL REVIEW OF ECONOMIC DEVELOPMENT TAKINGS

A. *Kelo v. City of New London*²⁷⁸

The *Kelo* majority did not endorse the “rational basis” test articulated in *Berman v. Parker*²⁷⁹ as the standard of judicial review for economic development takings. Instead of accepting eminent domain as an ancillary power to fulfill any government purpose, the majority opinion in *Kelo* can be read as justifying government intervention in private markets to deal with the types of market failures inherent in externalities and the provision of public goods. “Externalities occur when one person’s actions affect another person’s well-being and the relevant costs and benefits are not reflected in market prices.”²⁸⁰ Properties maintained so poorly as to constitute nuisances are generating externalities when their noxious uses prevent other owners from fully enjoying and realizing the potential of their properties.²⁸¹

275. Interview with John Shirey, Dir., Cmty. Redevelopment Ass’n (May 16, 2007).

276. In California, for example, the Redevelopment Plan must specify whether residences can be acquired by eminent domain, and either a Project Area Committee of local residents and businesses must approve the plan that includes an explicit description of how eminent domain will be used to acquire residences or the local government cannot adopt the plan except by a two-thirds vote of its governing body, typically four votes out of a five-member council. CAL. CIV. PROC. CODE §§ 1245.240, 1245.350 (West 2007).

277. Ryan Horton, Editorial, *How To Get Out of Tax Hell? Use TIF in State’s Cities*, MILWAUKEE J. SENTINEL, Feb. 20, 2005, <http://www.jsonline.com/story/index.aspx?id=302860>.

278. 545 U.S. 469 (2005).

279. 348 U.S. 26, 32 (1954) (“[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.”).

280. Tyler Cowan, The Concise Encyclopedia of Economics: Public Goods, <http://www.econlib.org/library/Enc/PublicGoods.html> (last visited Sept. 6, 2008).

281. *Id.*

Public goods represent a different type of market failure. Markets have difficulty producing goods with “two distinct aspects—‘nonexcludability’ and ‘nonrivalrous consumption.’ Nonexcludability means that nonpayers cannot be excluded from the benefits of the good or service.”²⁸² “Nonrivalrous” means that additional consumers do not diminish the utility of the good or service to others or increase the cost of providing it.²⁸³ An economic development project offering benefits to the general public serves a public use; a plan with no reasonably foreseeable beneficiaries except the eventual land user does not.²⁸⁴

The *Kelo* majority affirmed long-standing case law that eradication of project-area blight can justify an economic development taking as a public use under the Fifth Amendment, but so can many other public purposes.²⁸⁵ The public goods mentioned in the majority opinion that were offered by the New London project included two marinas, public parks, an extension of the waterfront river walk to connect Fort Trumbull with downtown, a United States Coast Guard Museum, new condo units, and a hotel linked by walkways to the rest of the project.²⁸⁶ 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 mentioned in the media shower or by the Supreme Court even though the facts were in the record before the Court.²⁸⁷

In looking back at the facts in *Berman*, the *Kelo* majority opinion asserts that blight eradication (externality removal) could not have been the “public use” justifying the taking of the properties because

282. *Id.*

283. *See id.*

284.

It is further argued that without a bright-line rule nothing would stop a city from 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. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use.

Kelo v. City of New London, 545 U.S. 469, 486-87 (2005) (footnotes omitted).

285. *Id.* at 487.

286. *Id.* at 474.

287. E-mail from John Brooks, Project Manager, New London Dev. Comm'n to George Lefcoe, Professor of Law, USC Gould School of Law (June 29, 2007) (on file with author).

the properties taken were not blighted.²⁸⁸ Berman's property was taken because it was needed to transform "a blighted area into a 'well-balanced' community through redevelopment."²⁸⁹ The Supreme Court regarded the public use in *Berman* as

redesign[ing] the whole area so as to eliminate the conditions that cause slums. . . . The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes, but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.²⁹⁰

To the appellant's question of how courts would stop a city "from 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," the Court responded that "[s]uch a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case."²⁹¹

Justice Kennedy cast the swing vote in the five-to-four split in *Kelo*, so his opinion merits special attention.²⁹² For him, a taking serves a public use only if it possesses "the purpose and expected effect of conferring substantial benefits on the public at large."²⁹³

B. "Public Use" Challenges in State Courts After Kelo

State appellate courts are hammering the tax-driven, narrowly focused economic development projects into the ground. Here are two examples.

1. Public agencies cannot condemn one owner's property while acting as an agent for another owner who wants to buy it.²⁹⁴ That is what happened in *Southwestern Illinois Development Authority v. National City Environmental, LLC*.²⁹⁵ A regional economic development agency tried to condemn 148.5 acres owned by a profitable auto shredding facility (shredding 100,000 cars a year) for the benefit of a nearby privately owned auto racing track that the

288. *Kelo*, 545 U.S. at 484 n.13.

289. *Id.* at 484.

290. *Berman v. Parker*, 348 U.S. 26, 34-35 (1954).

291. *Kelo*, 545 U.S. at 488.

292. Ronald S. Cope, *Kelo v. City of New London—How Safe Is Your Castle?*, 94 ILL. B.J. 186, 191 (2006).

293. *Kelo*, 545 U.S. at 492 (Kennedy, J., concurring).

294. *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1 (Ill. 2002).

295. *Id.*

agency had subsidized.²⁹⁶ The auto track had been enormously successful, drawing huge crowds to National City, Illinois (located just across the river from St. Louis).²⁹⁷ The racing track was so successful that on busy auto racing days, traffic was backed up for miles on the nearby interstate, and long lines of cars waited to enter and exit the track's parking lot that could not handle the crowds.²⁹⁸ Things got worse when the track operators increased the seating capacity without adding new parking.²⁹⁹

To alleviate congestion and complaints, the track owners asked a regional economic development agency to condemn the land for parking lots that the auto shredding firm used as a landfill and as a reserve for future expansion.³⁰⁰ The public agency earned a hefty fee by acting as an acquisition agent for the racing track to acquire the auto shredder's land.³⁰¹ In this sort of brokerage role, the Illinois appellate court could find no public use:

The public is allowed to park on the property in exchange for the payment of a fee. Gateway's racetrack may be open to the public, but not "by right." It is a private venture designed to result not in a public use, but in private profits. If this taking were permitted, lines to enter parking lots might be shortened and pedestrians might be able to cross from parking areas to event areas in a safer manner. However, we are unpersuaded that these facts alone are sufficient to satisfy the public use requirement, especially in light of evidence that Gateway could have built a parking garage structure on its existing property.³⁰²

The Illinois Supreme Court faulted the economic development agency's decision process, because the public agency conducted no "thorough study of the parking situation at Gateway" and promulgated no "economic plan requiring additional parking."³⁰³ Quite the opposite, it had "advertised that, for a fee, it would condemn land at the request of 'private developers' for the 'private use' of developers."³⁰⁴ The agency's obvious intention was "to act as a default broker of land" for

296. *Id.* at 3-4.

297. *Id.* at 4.

298. *Id.* at 14.

299. *Id.*

300. *Id.* at 4.

301. *Id.*

302. *Id.* at 9 (internal citations omitted).

303. *Id.* at 10.

304. *Id.*

the racing track.³⁰⁵ Public agencies earning brokerage fees are not performing public uses.

2. An economic development agency condemning land for the headquarters of a major employer needs to demonstrate either that the site sought is blighted or will bring public benefits besides the jobs and taxes.³⁰⁶ The case of *Walser Auto Sales, Inc. v. City of Richfield* was brought by the owners of two successful automobile dealerships.³⁰⁷ Their business occupied approximately seven acres located in the city of Richfield, near Minneapolis, in the northeast quadrant of I-494 and Penn Avenue.³⁰⁸ Originally, the city of Richfield had worked with a private redeveloper to construct an enormous mixed-use project—the development of a hotel, office buildings, town homes, an apartment building, a restaurant, and an upscale auto dealership to be owned by the Walsers.³⁰⁹ Then, after four years of planning effort, the developer abandoned the proposal.³¹⁰

Best Buy came to the rescue of the TIF redevelopment effort by reaching a deal with the city for construction of a new corporate headquarters—a 1.5 million-square-foot office facility in the Interchange West Area.³¹¹ Best Buy negotiated successfully with eighty-two other owners of homes and businesses in the project area for purchase and sale prices that included relocation costs.³¹² But Best Buy could not come to terms with the Walsers.³¹³

The Walsers sued, claiming, among other things, that the area did not meet the Minnesota blight test, and condemning their land for a Best Buy headquarters was not for a public purpose.³¹⁴ The trial court had dismissed the complaint, but an appellate court reversed.³¹⁵

According to the city's architectural consultants, the properties in the district generally appeared to be in good condition and could not

305. *Id.*

306. *Walser Auto Sales, Inc. v. City of Richfield*, 635 N.W.2d 391, 393 (Minn. 2001), *aff'd*, 644 N.W.2d 425 (Minn. 2002).

307. *Id.*; Hous. & Redevelopment Auth. v. *Walser Auto Sales, Inc.*, 630 N.W.2d 662, 669 (Minn. Ct. App. 2001), *aff'd*, 641 N.W.2d 885 (Minn. 2002).

308. *Walser*, 635 N.W.2d at 393.

309. *Id.*

310. *Id.* at 395.

311. Michelle Lore, *Taxpayers Can Contest Property Retention*, MINN. LAW., Nov. 18, 2001, available at <http://www.minnlawyer.com/article.cfm?recid=70741>.

312. Dan Wascoe Jr., *Best Buy Property Deals Set To Close; Walsers Stand Alone as Richfield Braces for Redevelopment*, STAR TRIB. (Minneapolis, Minn.), Mar. 3, 2001, at 3B.

313. *Walser*, 635 N.W.2d at 395.

314. *Id.*

315. *Id.* at 404.

“by any means, be classified as ‘run down.’”³¹⁶ The appellate court found that the use of TIF funds was challengeable under Minnesota law both because the Walsers’ site was not blighted and the trial court had not determined whether the primary purpose of the project had been for a public purpose.³¹⁷ The appellate court decision became final when on appeal the Minnesota Supreme Court split three to three.³¹⁸

If you visit Richfield today, you will find the Best Buy headquarters in four buildings at the TIF site, a project that cost \$160 million.³¹⁹ In 2005, 4500 people were employed there.³²⁰ After the case was remanded back to the trial court, Best Buy added to its original \$9.4 million offer another \$9 million to cover the cost of moving the Walser Auto facility from Richfield to Bloomington.³²¹

I draw two conclusions from this episode in Minnesota. First, condemnors need to establish either the externality of blight or the public goods that the project is going to feature. Second, it scarcely matters whether a property owner succeeds in blocking a condemnation for lack of blight or an insufficient plan. In either event, the condemnee’s leverage in negotiating a sales price satisfactory to the seller is considerable, and the condemnor is likely either to abandon the effort or strike a deal acceptable to the seller.

Until a redevelopment plan identifies either blight or a firm commitment to deliver specified public goods, takings of private property for private development are not public uses. An evolving norm in the takings game calls for condemnors to identify the public goods that will result from an economic development taking. Iowa has codified this norm by requiring the condemnor to establish a reasonable expectation that the public purposes justifying the taking will be fulfilled.³²² A New Jersey appellate court applied a comparable norm in rejecting an attempt by the city of Camden to acquire forty-three owner-occupied homes in Cramer Hill, the only neighborhood in

316. *Id.* at 394.

317. *Hous. & Redevelopment Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 669 (Minn. Ct. App. 2001), *aff’d*, 641 N.W.2d 885 (Minn. 2002).

318. *Id.*

319. Terry Pristen, *Eminent Domain Revisited: A Minnesota Case*, N.Y. TIMES, Oct. 5, 2005, at C9.

320. *Id.*

321. *Id.*

322. “The authority to condemn is not conferred, and the condemnation proceedings shall not commence, unless the governing body for the acquiring agency approves the use of condemnation and there is a reasonable expectation the applicant will be able to achieve its public purpose, comply with all applicable standards, and obtain the necessary permits.” IOWA CODE ANN. § 6B.2C (West 2008).

the city zoned exclusively for single-family residences, located within a larger, well-functioning community.³²³ The city's purpose was to build affordable housing, but the city had not committed to any definitive, well analyzed reuse plan:

The trial court did not specifically address whether demolition of the units as set forth in the ordinance would increase or decrease the number of affordable housing units in the City. The ordinance does not specify the number of affordable housing units to be developed if the City proceeds with acquisition, by condemnation or otherwise, in all of the intended locations. In its statement of material facts presented to the trial court, the City asserted that it intends to build 162 units of affordable housing on sites E and F. Defendant Primas certified that sites E and F contain twenty-eight properties, only eleven of which were occupied residential buildings. These statements of intent lie outside the four corners of the ordinance, rendering their potential enforceability questionable.

....

The people entrust the government with the power of eminent domain, with the expectation that it will be used sparingly, and in furtherance of a public good. The court's function is to ensure that this power is used consistent with and in furtherance of a clearly defined public good.³²⁴

Economic development agencies have no right to an order for immediate possession unless they can establish both the necessity for the taking and the need for immediate possession. The *Kelo* opinion has important implications regarding the strategic behavior of takers. Under state law, they have the option of seeking an order for immediate possession of property long before a court has determined just compensation.³²⁵ The rationale for quick take procedures resides in the fact that most condemnees are only concerned about the amount of compensation and do not dispute the condemnor's right to use eminent domain. The taker places with the court a sum of money it regards as sufficient, and the owner withdraws that money in exchange for immediate possession.³²⁶

323. *Cramer Hill Residents Ass'n v. Primas*, 928 A.2d 61, 69 (N.J. Super. Ct. App. Div. 2007).

324. *Id.* at 69-71.

325. *See, e.g., Dep't of Pub. Works & Bldgs. v. Dust*, 166 N.E.2d 36, 38 (Ill. 1960) (“[The quick-take provision’s] primary purpose is to place possession and title in the State prior to a final determination of just compensation.”).

326. *Id.* at 36 (applying provisions of quick-take statute).

One way that a redevelopment agency could evade judicial scrutiny of whether a taking qualifies as a public use would be to exercise quick take condemnation. Under such a procedure, a condemnor gains possession of private property, often *ex parte*.³²⁷ Traditionally, courts had accepted without question the condemnor's assertion of a need for immediate possession.³²⁸ "Orders for Immediate Possession are routinely granted, so much so that the condemnation lawyer for the property owner typically stipulates to the OIP."³²⁹

Had *Kelo* embraced the rational basis test for economic development takings, perhaps that practice would have continued unchallenged. But economic development condemnees now have a basis for an as yet unspecified quantum of judicial oversight into matters of public use.

The Maryland Supreme Court, sensitive to this potential end run around *Kelo*, would not allow the Rockville Redevelopment Agency to "quick take" the Magnet Bar when the agency had not promulgated a plan sufficiently detailed to indicate why it needed this site in such a hurry and the use to which it would ultimately put the condemnee's property.³³⁰ "While it claimed that the property was needed for 'business expansion' the City had not yet issued a Request for Proposals and did not anticipate having a specific plan for the property until after it took possession."³³¹ In the Court's well-chosen words:

Quick-take condemnation should only be conducted when the need for the possession of the property is immediate (i.e., at the time of filing the petition, immediately necessary) and in the public interest. Otherwise, the City should utilize the regular condemnation power which permits a property owner the full exercise of his or her procedural due process rights. Under circumstances where there is no immediacy, the use of quick-take condemnation deprives a property owner of a significant

327. See *R.I. Econ. Dev. Corp. v. Parking Co.*, 892 A.2d 87 (R.I. 2006) (upholding challenge to the *ex parte* feature of quick-take statute and explaining that a condemnee could file a separate action challenging whether the taking was for a public use). See Gideon Kanner, *Developments in Eminent Domain Law—2006-2007*, in ALI-ABA COURSE OF STUDY, *supra* note 99, at 91.

328. "Challenging the right to take is not easy to do. As a general matter, condemnation statutes and the case law interpreting them are often condemnor friendly and place a high burden on the landowner to successfully challenge a taking or quick take." Fields & Brody, *supra* note 37, at 3.

329. Jay Dushoff, *An Eminent Domain Primer*, ARIZ. ATT'Y, Nov. 2006, at 22, 23.

330. *Mayor of Balt. v. Valsamaki*, 916 A.2d 324, 338 (Md. 2007).

331. John J. Delaney, *Selected Recent Court Decisions*, in ALI-ABA COURSE OF STUDY, *supra* note 99, at 11, 21.

part of the process to which he or she is due, without any corresponding necessity on the part of the City to justify that deprivation. When the stockpiling of property is the goal, except perhaps under some circumstances relating to a final acquisition, the regular condemnation power is more appropriate, in that it affords the greater procedural due process protections to the property owner. Nor is the use of quick-take proper purely in order to gain a litigation advantage.³³²

The Baltimore authorities had contemplated acquiring all of the proposed site and then issuing RFPs from private developers for reuse of the site.³³³ Perhaps the agency felt that developers would submit more favorable proposals for a site already in public ownership. After *Kelo*, RFP procedures are vulnerable to public use challenges because they envision condemnation for economic redevelopment without specific reuse plans for each site acquired.³³⁴ This could deny condemned property owners the chance to mount even the circumscribed public use challenge promised in *Kelo* when private owner *A*'s property is taken for conveyance to private owner *B*.

IX. SUMMARY

1. In TIF-funded economic development, blight tests can be used for either of two purposes: (1) to safeguard the owners of unblighted private property from expropriation for the benefit of other private owners; or (2) to limit the use of tax increment financing to situations in which the other taxing entities will experience net tax base increases. Among the challenges in formulating blight tests are:
 - a. Criteria are not the same for achieving both objectives, a fact that some state legislatures have not accounted for. This means that legislatures must choose between protecting the owners of unblighted properties from economic develop-

332. *Valsamaki*, 916 A.2d at 346.

333. *Id.* at 332.

334.

We have categorized this type of condemnation as "RFP Condemnation" where the condemning authority condemns property in Baltimore City for redevelopment and assemblage without having any plan for its public use or ultimate development. In fact, the City acquires the property then submits and [sic] RFP to the real estate development community and, based on their response, determines how the property will be used and to which private developer the property will be conveyed. This does not meet the constitutional requirements of *Kelo* or the constitutional or statutory requirements in Maryland.

Berliner et al., *supra* note 57, at 634.

- ment takings, or safeguarding the tax base so that the completed project maximizes net tax revenue not only for the jurisdiction initiating the project, but for other taxing entities as well. For individual owners, the best blight norm confines takings to decrepit properties that either qualify as a public nuisance, or come close. For other taxing entities, the best blight norm is that property taxes are declining in the project area and the proposed project will increase values both within and outside the project area;
- b. Enforcement of blight tests is erratic and unpredictable. This means that local governments can take their chances and engage in projects clearly violating the norm. An unlucky few might get caught up in a litigation battle. Most violators will escape unscathed.
2. TIF-funded economic development works best where it is not needed, in locations where property values are already on the rise. It is almost certain to fail in areas where the tax base is declining unless the project contemplates massive gentrification. With neighborhood participation, gentrification projects should be halted by popular protest or should provide restoration based levels of compensation for the displaced.
 3. Property owners are benefiting from three types of post-*Kelo* enactments:
 - a. prohibitions against economic development takings enacted in some states;
 - b. legislation entitling condemnees to more than fair market value when that measure of compensation fails to restore them to their pretakings situation;
 - c. procedural reforms including the right to notice and a hearing to owners, users, and residents of properties targeted for condemnation and a good faith negotiation effort by the condemnor to strike a deal.
 4. States have come up with many ways to insulate school budgets from TIF raids. Short of not allowing use of the school shares of the property tax at all in TIF redevelopment, school districts could be given a veto before tax increments are diverted from them.
 5. Economic development projects can be sorted into three categories: (1) civic betterment projects delivering public goods—plazas, stadiums, museums; (2) projects subsidizing infrastructure to induce private developers to build projects

- conforming to the local government's land use planning goals; and (3) purely tax-driven, narrowly focused condemnations of one private user for conveyance to another private user with only intangible public benefits such as augmenting the tax base.
6. Those narrowly drawn projects are irresistible to local governments because taxpayers oppose tax hikes to support their growing demands for government services and improved public infrastructure. Local governments can augment their tax bases by using TIF subsidies to lure massive new private construction that adds to the property tax rolls. To local officials, these projects are fat cash cows waiting to be milked for tax revenues.
 7. The majority opinion in *Kelo* invited states to impose greater restrictions on economic development takings.³³⁵ State courts are doing that. Though not disrupting "civic betterment" projects undertaken as part of a comprehensive local plan, they appear more inclined than ever to reject the purely tax-driven projects.³³⁶ As Professor Marc Mihaly puts it, tax-driven projects are "off the table" these days.³³⁷ The intangible promises of tax base enhancement are not enough to overcome the appearance of impropriety when private owner *A*'s land is sought to be taken for the benefit of private owner *B* with no tangible public improvements.³³⁸ For this, the property rights advocates who supported Susette Kelo and her neighbors can claim a partial victory even though they did not achieve the goal of putting an end to all local government economic development takings.

335. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

336. See David Schultz, *Economic Development and Eminent Domain After Kelo: Property Rights and "Public Use" Under State Constitutions*, 11 ALB. L. ENVTL. OUTLOOK J. 41 (2006).

337. E-mail from Marc Mihaly, Professor of Law, Univ. of Vt. Law Sch., to George Lefcoe, Professor of Law, University of S. Cal. Gould Sch. of Law (June 29, 2007) (on file with author).

338. *Id.*