

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

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Introduction

Local governments undertake economic development¹ projects to pump up the local tax and job rolls, enhance urban infrastructure (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 That 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 paper 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 re-conveyance to private firms, and 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 pre-condition 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 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 condemnor’s to negotiate acquisition prices fairly. States have also legislated to safeguard

¹ The term “economic redevelopment” 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 with uses more consistent with the community’s aspirations. In this paper these terms are fungible— public-private partnerships, economic development, redevelopment.

Professor Mihaly reads the U.S. 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*, 66 *URBAN LAND* 171, 171-72 (September 2007).

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. I divide economic development takings into three groups. First, there are projects aimed at civic betterment in the best city planning tradition. Second, TIF dollars are committed to subsidize infrastructure for private projects designed and built to fulfill planning objectives that private developers couldn’t be required through regulation alone to create.⁷ 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.

(1) This paper, divided into seven 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. (2) Then, we consider why TIF funding and blight eradication don’t mix. (3) Next, the paper 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. (4) The fourth section 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. (5) In section five the paper draws a distinction between three types of economic development projects mentioned above— civic betterment, plan implementing and purely tax driven. (6) This section shows why the narrowly focused, tax driven economic development projects are so popular with local and state lawmakers. (7) A final section summarizes how state court opinions are dealing with the issues raised in *Kelo v. City of New London*.⁸ 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.

³ *City of Long Branch v. Brower*, Not Reported in A.2d, 2006 WL 1746120 (N.J.Super.L.,2006) (upholding condemnation of unblighted properties in a blighted waterfront area redeveloped with numerous public improvements and privately developed commercial and residential projects.)

⁴ 125 S.Ct. 2655 (2005).

⁵ *Norwood v. Horney*, 110 Ohio St.3d 353, 853 N.E.2d 1115, 1142 (Ohio,2006).

⁶ *Bailey v. Myers*, 206 Ariz. 224, 76 P.3d 898 (Ariz. App. Div. 1,2003).

⁷ See, e.g., *Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1274-75 (8th Cir. 1994) (subdividers of 10% 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 are entitled to reimbursement to the extent they were required to install infrastructure benefitting properties other than their own.)

⁸ 125 S. Ct. 2655 (2005).

I. Definitions of Blight That Would Logically Justify a Particular Taking As A Public Use and Definitions That Wouldn't

Market Failures, Eminent Domain and 'Public Use'. On its face, the constitutional 'public use' predicate to a taking 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 'hold outs', Professors Thomas Merrill and Gregory Alexander explain, 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, 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

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 right to abate a public nuisance by demolishing unsafe buildings that owners don't 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

⁹ Abraham Bell, *Private Takings* 25 (2008).

¹⁰ Gregory S. Alexander, *Eminent Domain and Secondary Rent Seeking*, 1 NYU J. L. & Liberty 958 (2005).

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." Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Redevelopment*, 34 Ecology L. Q.1 (2007).

¹² Thomas Miceli and Kathleen Segerson, *A Bargaining Model of Holdouts and Takings* (University of Connecticut Department of Economics Working paper series 2006-22R, June 2006, revised March 2007).

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 30 days to bring the property into safe and habitable condition, and the owner hadn't 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 in tact. See Ronald Benton Brown and Joseph M. Grohman, *Property Law: 2001 Survey of Florida Law*, 26 NOVA L. REV. 109, 156-57 (2001).

respondent could point to the harms from the property's hideous condition despoiling the neighborhood.

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 must consider each individual parcel and its status as "blighted" when planning a redevelopment project. If the parcel is not "blighted," though within a "blighted area," planners cannot take it by eminent domain."¹⁶

Minnesota, too, enacted specific legislation to protect the owners of unblighted property from economic development takings. 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."¹⁷

Georgia redevelopment law prohibits the taking of unblighted property, and defines blight in terms of nuisance-like property characteristics.¹⁸ 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."¹⁹

¹⁴ N.C.G.S.A. § 160A-515 (2006). "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. N.C.G.S.A. § 160A-503. 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).

¹⁵ 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, 1790 (2007).

¹⁶ 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, 1795 (2007).

¹⁷ MINN. STAT. ANN. § 117.075

¹⁸ "As used in this title, the term: (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 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 f

¹⁹ Id. at (1)(A)(iii).

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.”²⁰ 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 re-use of the landmark Ferry Building at the intersection of Market Street and Embarcadero Boulevard. This building was a centerpiece in the magnificent revival of the San Francisco’s once declining waterfront, now a prime stop of visitors and residents alike. In the re-use plan for the Ferry Building, gourmet food vendors dominate the ground floor .Though good for attracting curious and enthusiastic crowds, these distinctive local artisan retailers can’t afford rents sufficient to amortize the costs of restoring and maintaining the building. 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.

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. Despite the agency’s best efforts to negotiate a deal, the World Trade Club refused to budge. 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 be possible if the regime advocated by the *Kelo* dissents had prevailed at the time. The site assembly, the historic renovation, and the consolidation of the Embarcadero renovation project would all have failed without the power of eminent domain.”²¹

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 the Gap headquarters with its 1400 employees from leaving the city. Undoubtedly, the Gap could have found an expansion site elsewhere in the Bay Area. But the city’s determined effort to keep the Gap in town was prompted by more than a desire to shore up the local tax base. 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. 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. The city used eminent domain to prevent the lot owner from extorting too much of a premium for the site. Professor Mihaly believes that without the condemnation, the Port Waterfront redevelopment project “with all its public benefits, would have failed.”²²

²⁰ Marc B. Mihaly, *Living in the Past: The Kelo Court and Public/Private Economic Redevelopment*, 34 *ECOLOGY L. Q.* 1, 46-47 (2007).

²¹ Marc B. Mihaly, *Living in the Past: The Kelo Court and Public/Private Economic Redevelopment*, 34 *ECOLOGY L. Q.* 1, 30 (2007).

²² Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Redevelopment*, 34 *Ecology L. Q.*1, 32 (2007).

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. On whether a property is necessary to a public project, courts usually defer to the legislature's decision.²³

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. 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. Apparently, the redevelopment agency staff figured that a hardware store would be a better fit in a regional shopping mall than a brake repair shop, and initiated measures to acquire the brake repair shop for conveyance to the hardware store.

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. In *Bailey v. Myers*²⁴ an Arizona appellate court concluded that for a government to acquire unblighted property for transfer to another private owner would not qualify as a public use unless the property was proven to be necessary for the success of the project as a whole. Clearly, the hardware store wasn't indispensable; it hadn't even been included in the project as originally approved.

Under the Arizona constitution, 'public use' is a judicial decision to be made "without regard to any legislative assertion that the use is public."²⁵ In this landmark case, the court promulgated a long list of questions about the project and the proposed taking. Those questions included whether the property taken was necessary to the achievements of the redevelopment project's public purposes.²⁶ Acknowledging in footnote 4 that courts usually defer to legislative determinations of necessity, they are to decide the 'necessity' question on their own in making a

²³ Leslie A. Fields and Karen L. Brody, *Owner's Defenses and Quick Take Statutes*, SL050 ALI-ABA 39 (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 condemnor was taking far more land than needed or that the project wasn't intended for a public use.

²⁴ 206 Ariz. 224, 76 P.3d 898 (Ariz. App. Div. 1,2003).

²⁵ Ariz. Const. art 2, § 17.

²⁶ "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

constitutional ‘public use’ determination when a project’s status as a public use depends on whether the particular taking was necessary.²⁷

Property owners in West Virginia didn’t 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 indispensable to the realization of the plan, no reasonably practicable alternatives are available, no substitute site can be purchased by voluntary negotiation, and that a specific use has been designated in the plan for the unblighted site.²⁸ West Virginia legislators specifically empowered property owners to obtain judicial review in the circuit court in which the county is located confirming that the redevelopment agency has complied with state law and can convincingly demonstrate that unblighted property is indispensable to the redevelopment plan.²⁹

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.³⁰

²⁷ 76 P.3d at 904, fn 4: “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.”

²⁸ (b) When any area has been declared to be slum and blighted, pursuant to the provisions of this article, if a private property within that area is found to not be a blighted property, then to condemn the property pursuant to article two, chapter fifty four of the code, the municipal authority must demonstrate, in addition to all other lawful condemnation requirements, that the project or program requiring the clearance of the slum and blighted area:

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

W. Va. Code, § 16-18-6a. See generally, ” Lynn E. Blais, Urban Revitalization in the Post-Kelo Era, 34 Ford. Urb. L. J. 657, 676 (2007).

²⁹ (c) In any case when the municipal authority has decided to pursue condemnation, the property owner shall have the right to seek review in the circuit court within the county wherein the property lies. Prior to authorizing condemnation as provided pursuant to article two, chapter fifty-four of the code, the court must find that the property is blighted, or if unblighted, that the authority has met the requirements of subsection (b) of this section.

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

³⁰ Case note, Roger L. McManus, Eminent Domain: Urban Renewal: Broader Powers to Take Private Property for Public use, Mich L Rev 1065,1068 (1964).

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. 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”).³¹

The Pennsylvania law isn’t 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.³² Under these laws, a local government is empowered to condemn a perfectly serviceable property because it lies within a marginal area.

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.”³³ So explains Professor Colin Gordon who has documented how TIF-enabling statutes expanded the definition 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.”³⁴ 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.)”³⁵

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, 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

³¹ This stringent definition of blight won’t apply until 2012 in Philadelphia, Pittsburgh and other cities. Property Rights Protection Act, 26 Pa. C.S.A. § 203 (2006).

³² § 205(c), 2006 Pa. Laws at 153.

³³ Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 315 (2004).

³⁴ Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 314 (2004).

³⁵ Dana Berliner et al., *The Condemnation Landscape Across the Country Post-Kelo*, SM006 ALI-ABA 433, (2007).

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.³⁶

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 findings must be allowed to stand unless they were arbitrary or were induced by fraud, collusion or bad faith.”³⁷

The Missouri statute requires there to be a predominance of blighting conditions in areas chosen for economic redevelopment. 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 the one raised by the owners of two unblighted properties in Kansas City, Missouri, when they protested their inclusion a redevelopment plan. They claimed that the municipality had failed to determine that a preponderance of individual buildings in the project area were 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 “individually consider each parcel of property in the defined area with regard to whether the property meets the relevant statutory definition of blight.”³⁸ 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.

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.³⁹

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. But in TIF funded projects— which require a vote of approval by the local legislature— condemnation is also allowed in designated conservation 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.”⁴⁰ Any TIF funded project that can’t 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

³⁶ MO. ANN. STAT.

³⁷ Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO. L. REV. 721,736 (2006).

³⁸ MO. ANN. STAT. §523.274.

³⁹ *Allright Properties, Inc. v. Tax Increment Financing Commission of Kansas City*, 240 S.W. 3d 777 , 781 (Mo. App. 2007)(“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.”)

⁴⁰ MO. STAT. ANN. §99.805(3) (amended 1986 and 1997).

preserve and enhance the property tax base.⁴¹ 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.”⁴²

The Ohio statutes offer another example of an extremely expansive statutory blight definition, based on area wide characteristics. Before the Ohio Supreme Court stepped in,⁴³ local governments had virtually limitless discretion in designating properties for condemnation if they weren’t being put to their “highest and best use” as defined by local government officials.⁴⁴ 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, or excessive dwelling unit density.⁴⁵

Enthusiasts of historic preservation must cringe upon being informed that the age of a building suffices to classify it as ‘blighted’.⁴⁶ “Most American cities today contain vibrant historic districts that not long ago were considered blighted.”⁴⁷ In fact, home owners in the U.S. are spending as much money on fixing up houses as on new construction, and many of the houses being remodeled and expanded were built between 1945 and 1970 in the inner suburbs that have now become prime magnets for redevelopment.⁴⁸ As for obsolescence, any structure more than a few years old could be labeled obsolescent if it lacks features found in newer structures.⁴⁹ How about inadequate street layouts, incompatible land uses, or excessive dwelling unit density? The statute defines none of these terms. All of them are within the purview of the municipality’s subdivision and zoning controls. Regulatory failures certainly can’t be blamed on land owners in full compliance with local subdivision, zoning and building codes.

⁴¹MO. STAT. ANN. §99.805(5) (amended 1986 and 1997).

⁴² Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development and the Elusive Definition of Blight*, 31 *Fordham Urb. L.J.* 305, 319 (2004). Quoting See Thomas Luce, *Brookings Inst. Ctr. on Urb. & Metro. Pol’y, Reclaiming the Intent: Tax Increment Finance in the Kansas City and St. Louis Metropolitan Areas 8-11* (2003), available at <http://www.brookings.edu/es/urban/publications/lucefif.pdf>.

⁴³ *Norwood v. Horney*, 110 Ohio St.3d 353, 853 N.E.2d 1115, 1142 (Ohio,2006).

⁴⁴ Christopher S. Brown, *Blinded by the Blight: A Search for a Workable Definition of “Blight” in Ohio*, 73 U. CIN. L. REV. 207, 212 (2004).

⁴⁵ Ohio Rev. Code Ann. § 1728.01 (Anderson 2000).

⁴⁶ For a building to be eligible for listing in the National Register of Historic Places it must be over more than fifty years old or be of such historical or architectural importance as to be listed earlier. Once listed either individually or as part of a district, the building is protected from federal or federally funded action and is eligible for tax credits should it be restored. Declaring older areas that are eligible or listed on the National Register as blight and subject to the potential clearance seems contrary to Federal and Local Historic Preservation laws and programs.” Christopher S. Brown, *Blinded by the Blight: A Search for a Workable Definition of “Blight” in Ohio*, 73 U. CIN. L. REV. 207, 226 (2004).

⁴⁷ J. Peter Byrne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 *UCLA J. Envtl. L. & Pol’y* 131, 141 (2005).

⁴⁸ “The Joint Center for Housing Studies of Harvard University has found that each year from 1985 through 1999 about one million homeowners spent more than \$10,000 on a major kitchen or bathroom remodel, an addition, or other major interior alteration. This means that in any given year about 1.5 percent of all owner-occupied units undergo significant modification—about the same share added to stock each year by new construction.” Over this period, 19.2 percent of owner-occupied homes added bathrooms, 14.6 percent added bedrooms, and 24.5 percent added other rooms. Moreover, the Center reported that annual spending on improvements reached its highest level for middle-aged dwellings that were twenty-five to twenty-nine years old, the very dwellings that Americans were supposedly eschewing because of the daunting obstacles to adaptation. Joint Center for Housing Studies of Harvard University, *Remodeling Homes for Changing Households* (Cambridge, Mass.: Joint Center for Housing Studies of Harvard University, 2001), pp. 3-4. Quoted in Jon C. Teaford, reviewing William H. Lucy and David L. Phillips. *TOMORROW’S CITIES, TOMORROW’S SUBURBS*. Chicago: Planners Press, 2006.” <http://www.h-net.org/reviews/showrev.cgi?path=31293>

⁴⁹ “Such a broad requirement of functional obsolescence would give municipalities the option of declaring any building not constructed within the past year as blight. Because functional obsolescence is not determinative of whether an area is placing a substantial economic or physical burden on the community, it should not be considered a factor in finding blight.” Christopher S. Brown, *Blinded by the Blight: A Search for a Workable Definition of “Blight” in Ohio*, 73 U. CIN. L. REV. 207, 227 (2004).

Commentators disagree about whether California's blight standard is expansive or restrictive.⁵⁰ Based on the description that follows, 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.⁵¹ 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.⁵² This is 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 which have the potential for generating big tax increments in the foreseeable future will probably be developed sooner or later, without public assistance. There is no reason to allow a city redevelopment agency to coopt all the property taxes from other entities for areas like these.

The California statute divides blight into two categories—physical and economic. To establish a viable redevelopment project, under California law, the redevelopment agency need cite only one physical and one economic 'blighting' condition.⁵³ For instance, a criterion from the physical list points to dilapidated structures in such bad shape as to be unsafe or unhealthy. Economic 'blight' includes such factors as a high business vacancy rate, an excess of liquor stores or adult oriented businesses, or stagnant property values.⁵⁴

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. 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 since they will receive ALL of the resulting increment within the project area once the costs of redevelopment are paid.⁵⁵

⁵⁰ "Redevelopment abuse in California is rampant despite the fact that California's redevelopment law provides one of the strictest blight requirements in the nation." Tim Kowal, *Who Will Redevelop Redevelopment: Power and Pragmatism in California Redevelopment Law*, 12 ALB. L. ENVTL. OUTLOOK J. 93,97 (2007).

⁵¹ Redevelopment and Blight, Briefing Paper for the Joint Interim Hearing, Oct. 26, 2005. <http://www.sen.ca.gov/locgov/BRIEFINGPAPER10-26-05.doc>; "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 those in the County, the School District, and in Baldwin Park outside the Project area, 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*, 70 Cal.App.3d 968, 982, 139 Cal.Rptr. 196 (1977)

⁵² Ca. Health & Safety Code Section 33320.1

⁵³ See Steven Greenhut, *Abuse of Power: How the Government Misuses Eminent Domain* 272 (2004).

⁵⁴ California Health & Safety Code 33031(b).

⁵⁵ David Swensen and Liesl Eathington, Do Tax Increment Financing Districts in Iowa Spur Regional Economic and Demographic Growth? P. 2 (June 2002).

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. The city had 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. The area south of the freeway was commercial and industrial where twenty- five acres was already being developed for a new UPS distribution facility and a lumber yard unrelated to any redevelopment effort. But the city included this twenty-five acre site within the redevelopment project area before it had been re-assessed for 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.

The appellate court struck down Baldwin Park's attempt since it had failed to establish blight in either portion of the project area. The very fact of new industrial construction south of the freeway evidenced the lack of a need for public intervention.⁵⁶ 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".⁵⁷ Agencies are 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 specifically bars acquisition of such areas solely to enhance the tax base "without other substantial justification for its inclusion."⁵⁸

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 ."⁵⁹

⁵⁶ *Regus v. City of Baldwin Park*, 70 Cal.App.3d 968, 139 Cal.Rptr. 196 (1977).

⁵⁷ Ca. Health & Safety Code §33320.2. (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.

⁵⁸ *Ibid.*

⁵⁹ See, e.g., ALASKA STAT § 29.47.460 (2002).

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.⁶⁰

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.⁶¹

“Economic development” is broadly defined in *Indiana* to include redevelopment with the goal of protecting and increasing property tax revenues, among other permissive criteria.⁶²

Iowa law authorizes local governments to form economic development areas for commercial and industrial enterprises.”⁶³ No blight finding is required.

Compliance Issues. It scarcely matters how rigorous a state’s statutory definition of blight happens to be if it isn’t enforced. Only a few states conduct annual state level audits of local government compliance with statutory economic development standards, and order non complying agencies to disgorge their ill gotten tax increments.⁶⁴ Elsewhere, the fox patrols the chickens. Compliance with the statutory definitions of blight is left to the same local government that formed the administered the TIF. 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.”⁶⁵

Even in states with the most demanding definitions of blight, compliance enforcement is random, sporadic and ineffectual. “Blight remains a designation sought by developers, and hence shaped not by public purpose, but by private interests seeking public subsidies.”⁶⁶ 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.⁶⁷ 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.⁶⁸

⁶⁰ Idaho Code §50 (2006).

⁶¹ 65 Ill. Code §11-74.4.

⁶² Ind. Code 36-7-14-2.5.

⁶³ IOWA CODE ANN. §403.2 (1999).

⁶⁴ MINN. STAT. 469.1771(b). The state auditor has the authority to determine compliance of TIF districts with state law, inform non complying jurisdictions before taking definitive action and then turn over the matter to the state attorney general for enforcement. This process resulted in \$14 million being refunded by TIF districts to cities, towns, counties and school districts from 1996 to 2001. http://www.osa.state.mn.us/reports/tif/2002/legislative/legislative_02_introduction.pdf

⁶⁵ Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 321- 22 (2004).

⁶⁶ Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305,336 (2004).

⁶⁷ Timothy Sandefur, *The ‘Backlash’ So Far: Will Americans Get Meaningful Eminent Domain Reform?* SM040 ALI-ABA 587, 611 (2007).

⁶⁸ Interview with Larry Kosmont.

II. Why TIF and True Blight Don't Mix

A non profit organization called Good Jobs First⁶⁹ lamented what it described as the weakening of TIF laws by replacing blight as the eligibility criterion for economic development projects. The shift would disadvantage the poor, the report's authors feared, because it would legitimize the use of TIF in wealthier areas where poverty wouldn't be addressed.⁷⁰

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.⁷¹ More low income housing was demolished than was built in federally funded urban renewal projects,⁷² and viable ethnic communities were scattered to the winds.⁷³ Professor Thomas Merrill speculates that making "'blight' a precondition of economic development takings seemed mostly to assuage the concerns of middle class residents that their homes and neighborhoods wouldn't be flattened by the strong hand of government."⁷⁴

Blight tests probably won't 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 the reasons they undertake them. What matters most to the financial outcome of a TIF-funded project is the ultimate difference between pre- and post-project tax assessed values.⁷⁵

Programs of wholesale blight eradication funded by TIF don't work well in stagnant, poorer communities.⁷⁶ In places lacking dramatic growth in effective demand for space, property values

⁶⁹ "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 between smart growth and good jobs. Good Jobs First works with a very broad spectrum of organizations, providing research, training, communications and consulting assistance."
http://www.goodjobsfirst.org/about_us.cfm#good

⁷⁰ Alyssa Talanker and Kate Davis with Greg LeRoy, *Straying from Good Intentions: How States are Weakening Enterprise Zone and Tax Increment Financing Programs* (Good Jobs First, August 2003) 1.

⁷¹ See, e.g., J. Peter Bryne, *Two Cheers for Gentrification*, 46 HOW. L. J. 405 (2003); John A. Powell and 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.")

⁷² Scott Greer, *Urban Renewal and American Cities* (1964), p. 3.

⁷³ Herbert J. Gans, *The Urban Villagers: Group and Class in the Life of Italian Americans* (1982), p. 380-81.

⁷⁴ "The Kelo Decision: Investigating Takings of Homes and Other Private Property": Hearing Before the S. Comm. on the Judiciary, 108th Cong. (2005) (testimony of Thomas A. Merrill, Charles Keller Beekman Professor, Columbia Law School), http://judiciary.senate.gov/testimony.cfm?id=1612&wit_id=4661 [hereinafter Testimony of Merrill]. Quoted from 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 (2007).

⁷⁵ Richard F. Dye and Jeffrey O. Sundberg, *A Model of Tax Increment Financing Adoption Incentives*, 29 Growth and Change 90 (1997).
<http://www.blackwell-synergy.com/action/showPdf?submitPDF=Full+Text+PDF+%28160+KB%29&doi=10.1111%2F1468-2257.00077>.

⁷⁶ A recent study in Massachusetts of 12 older industrial cities and 14 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. 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. In 1987, Lawrence had \$13,000 and Andover \$53,000. Barry Bluestone and Chase M. Billingham, *The Property Tax and the Fortunes of Older Industrial Cities*, 20 Land Lines 8, 9-10 (Lincoln Institute of Land Policy, January, 2008).

and tax revenues aren't going to increase quickly and broadly enough to finance the costs of acquisition and redevelopment.⁷⁷ Densely built, rundown 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. It is not surprising, then, that commercial and industrial projects outnumber residential by about two-to-one, or that new construction in redevelopment project areas outpaces rehabilitation by a margin of about eight-to-one."⁷⁸

An optimal TIF project is one that can be built quickly, at the highest conceivable density, at the greatest fair market value, garnering huge retail sales. The ideal site for the production of a big tax increment is either vacant when declared a redevelopment project area or easily cleared.⁷⁹ "Greenfields, because they have very low 'base value' property tax assessments and no sales tax base values at all, offer by far the largest increments."⁸⁰ 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 publicly 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. It must also be a site 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 "blighted," and used a TIF funded subsidy to help Wal-Mart build a supercenter on the site.⁸¹ 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.

⁷⁷ 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. Tax revenues grew sizably inside TIF jurisdictions during the period studied, and increased very little in the 624 jurisdictions not using TIF funded redevelopment. David Swensen and Liesl Eathington, Do Tax Increment Financing Districts in Iowa Spur Regional Economic and Demographic Growth? Table 3A, p.4 (June 2002).

⁷⁸ State of CA Controller, Annual Report of the Community Redevelopment Agencies for Fiscal Year 1998-99 at xxi, xxii(2000), available at <http://www.sco.ca.gov/ard/local/locprep/redevelop/98-99/> [hereinafter Annual Report].

⁷⁹ 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 automobile dealerships in redevelopment project areas from being located on land never previously developed for urban uses. Cal. Health & Safety Code § 33426.5(a) (West 1999). The legislature also banned 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. Cal. Health & Safety Code § 33426.5 (b) (West 1999).

⁸⁰ Greg LeRoy, *TIF, Greenfields, and Sprawl: How an Incentive Created to Alleviate Slums Has Come to Subsidize Upscale Malls and New Urbanist Developments*, 60 Planning and Environmental Law 3 (February, 2008).

⁸¹ Institute for Local Self Reliance, The Hometown Advantage: Reviving Locally Owned Business, <http://www.newrules.org/retail/tifreform.html>

“The notion of blight might reasonably be associated with the assumption of declining property tax values in the would-be TIF-district.”⁸² 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 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 most studies of TIF funded redevelopment conclude that other taxing entities surrender approximately twice as much real property tax revenue as they eventually gain.⁸³ 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.⁸⁴ A non profit research organization studied 36 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 authors concluded.⁸⁵ Over the lifetime of the 36 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.”⁸⁶

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 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.

⁸² Richard F. Dye and Jeffrey O. Sundberg, *A Model of Tax Increment Financing Adoption Incentives*, 29 *Growth and Change* 90 (1997). <http://www.blackwell-synergy.com/action/showPdf?submitPDF=Full+Text+PDF+%28160+KB%29&doi=10.1111%2F1468-2257.00077>

⁸³ Richard F. Dye and David F. Merriman, *TIF Districts Hinder Growth*, 13 *Policy Forum #4* (University of Illinois, 2000). http://www.igpa.uiuc.edu/lib/data/pdf/PF13-4_tiff.pdf

⁸⁴ *Ibid.*

⁸⁵ Neighborhood Capital Budget Group, *Who Pays in TIFs, Executive Summary* (2000). http://www.ncbg.org/tifs/tif_pays.htm

⁸⁶ *Ibid.* 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. The tax base grew steadily in communities that hadn’t used TIF but only maintained pre-TIF adoption rates in communities that had. The study authors conclude: “Municipalities that use TIF do worse....government subsidies reallocate property improvements in such a way that capital is less productive in its new location.”

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.⁸⁷ “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, legislative staff is familiar with these realities.⁸⁸ Redevelopment agencies in fast growing Riverside and San Bernardino counties scarf up a highest percentage of total property tax revenues in their counties than any in the state, about a quarter of all property tax revenues in those counties, in Riverside nearly three times the amount the county receives in property tax revenues.⁸⁹ Cities in these rapidly growing, thriving counties placed thousands of acres of undeveloped land into redevelopment project boundaries⁹⁰ 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. By 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.⁹¹

⁸⁷ Richard F. Dye and David S. Merriman, *Tax Increment Financing: A Tool for Local Economic Development*, 5/1/06 J. HOUSING COMMUNITY DEV. 22 (2006): “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 municipality.”

⁸⁸ “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 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.” Redevelopment and Blight, Briefing Paper for the Joint Interim Hearing, Oct. 26, 2005. <http://www.sen.ca.gov/locgov/BRIEFINGPAPER10-26-05.doc>

⁸⁹ Riverside county takes 25.2% of all property tax revenues, and the county 9.8%. San Bernardino county, 22.3%, San Bernardino county, 11.9%, Table Three, Table Two, Redevelopment and Blight, Briefing Paper for the Joint Interim Hearing, Oct. 26, 2005. <http://www.sen.ca.gov/locgov/BRIEFINGPAPER10-26-05.doc>.

⁹⁰ 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, Redevelopment Agency Fact Sheet, Senate Local Government Committee, September 2002. <http://www.caltax.org/RDAFactsDetwiler05.pdf>

⁹¹ Basically, the pass through payments amount to less than \$200,000,000 a year compared to \$3,000,000,000 in TIF they collect Redevelopment and Blight, Briefing Paper for the Joint Interim Hearing, Oct. 26, 2005. <http://www.sen.ca.gov/locgov/BRIEFINGPAPER10-26-05.doc>.

III. State Statutes Protecting the Owners of Property Taken

Legislation protecting property owners can be broadly grouped into three categories: (A) statutory prohibitions against the use of eminent domain for economic development purposes, (B) statutes entitling owners and occupants to greater compensation than courts interpreting the ‘just compensation’ provision of the Fifth Amendment have traditionally awarded, and (C) reforms in planning practice to institute early consultation with potentially impacted residents and business firms, 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.⁹² They would confine ‘public uses’ to traditional government purposes—roads, fire protection, schools. 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.”⁹³

Florida has curbed economic development takings, even of blighted or slum property, by declaring such takings not to be for a public purpose.⁹⁴ Florida voters enacted a constitutional amendment requiring three-fifths vote of both houses of the legislature to sanction a taking of one private person’s property for transfer to another.⁹⁵

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 a public use.”⁹⁶ By statute, “the term does not include the public benefit of economic development, including an increase in a tax base, tax revenues, employment, or general economic health.”⁹⁷

Simultaneously, 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 de-railed the Gap headquarters project, mentioned earlier in this paper. This exception in the Indiana law allows condemnation to be used for parcels at least ten acres in size, not owner occupied, located in a

⁹² Castle Coalition, *50 State Report Card Tracking Eminent Domain Reform Since Kelo* (August 2007). http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf

⁹³ ALASKA STAT. § 09.55.240.

⁹⁴ Takings to prevent a nuisance were also banned unless the nuisance arose from violating building codes. Fla. Stat. 73.014.

⁹⁵ HR 1569 was approved by both houses on June 20, 2006, appeared on the November 8, 2006 general election ballot as Constitutional Amendment Question no. 8, and approved by a margin of 69% to 31%.

⁹⁶ IND. CODE ANN. § 32-24-4.5-1(b)(3).

⁹⁷ IND. CODE ANN. §32-24-4.5-1(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.⁹⁸ 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 super majority 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 low ball 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.”⁹⁹

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.’¹⁰⁰ Sifting through the conflicting testimony of appraisers, courts set a price based on what a willing seller would pay a willing buyer neither under duress to sell or buy.¹⁰¹ ‘Fair market value’ isn’t the only possible standard of ‘just compensation’. The U.S. 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.”¹⁰² 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’ isn’t 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 4,000 volumes at home, not planning to move anytime soon, might nonetheless be willing 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.

⁹⁸ IND. CODE ANN. §32-24-4.5-11(a).

⁹⁹ Dale Orthner, *Toward a More “Just” Compensation in Eminent Domain*, 38 MCGEORGE L. REV. 429, 455 (2007).

¹⁰⁰ 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 matter for common law adjudication. 11A MCQUILLIN MUN. CORP. § 32.97 (3rd ed.)

¹⁰¹ 4 Nichols on Eminent Domain § 12.02 (3d ed. 2006) (the constitutional measure of compensation is fair market value).

¹⁰² *U.S. v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 279-80. (1943). See also, *United States v. Lee*, 360 F.2d 449, 452 (C.A. Tex. 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”).

One price does not really fit all 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.” “Current compensation rules exclude whole categories of damages caused by government takings of property.”¹⁰³ 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’ since 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,¹⁰⁴ appraisal costs, moving and relocation,¹⁰⁵ and lost business good will.¹⁰⁶ 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.¹⁰⁷ Iowa requires condemnors 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.¹⁰⁸

The Federal Uniform Relocation Assistance Act,¹⁰⁹ 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 market value’ paid by the condemnor for the property taken.¹¹⁰ Every federal project or federally assisted project is subject to this Act.¹¹¹ 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—

¹⁰³ Serkin, Christopher, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 Nw. L. Rev. 677, 679 (2005). Available at SSRN: <http://ssrn.com/abstract=693961>

¹⁰⁴ 42 U.S.C. §4654(a)

¹⁰⁵ 42 U.S.C. §4360.

¹⁰⁶ MINN. STAT. ANN. §117.186:

Subd. 2. Compensation for loss of going concern. 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

¹⁰⁷ IND. CODE ANN. § 32-24-4.5-8.

¹⁰⁸ “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.C.A. § 6B.2B (2006).

¹⁰⁹ 42 U.S.C. §§ 4601-4655.

¹¹⁰ Extensive regulations define “comparable replacement dwelling”. 49 C.F.R. § 24.2(a)(6).

¹¹¹ 49 C.F.R. § 24.1(b).

and not just for owner- occupants. Tenants are protected as well. ‘Comparable housing’ payments are subject to a statutory caps of \$22,500 per household. But if the project would be delayed or completely shuttered because of a lack of comparable replacement housing, the condemnor as a last resort could make larger payments.¹¹²

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.¹¹³

The Uniform Relocation Act and its state equivalents also offer grants to displaced business firms for moving expenses¹¹⁴ and reestablishment expenses– the costs of making the replacement property suitable for the condemnee’s relocated business.¹¹⁵

Increasingly, in a post-*Kelo* world legislatures are adjusting their models of compensation to take account of the condemnee’s actual losses.¹¹⁶ For instance, in Minnesota, property owners are now entitled by law to compensation “sufficient for the owner to purchase a comparable property in the community.”¹¹⁷ “This language thus directly incorporates some of the concepts of the Relocation Act into determination of just compensation for purposes of condemnation.”¹¹⁸

¹¹² 42 U.S.C.A. § 4626 (a).

¹¹³ Mark D. Savin, *The Biggest House in Town: Extending the Limit of Just Compensation*, SN041 ALI-ABA 213 (2008).

¹¹⁴ 49 C.F.R. § 24.301(g).

¹¹⁵ 49 C.F.R. § 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 although 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. Minn. Stat. § 117.52 subd. 1a. In North Dakota, the legislature removed the cap on reestablishment expenses altogether. N.D. Cent. Code § 54-01.1-03(1)(d).” Mark D. Savin, *The Biggest House in Town: Extending the Limit of Just Compensation*, SN041 ALI-ABA 213 (2008).

¹¹⁶ Mark D. Savin, *The Biggest House in Town: Extending the Limit of Just Compensation*, SN041 ALI-ABA 213 (2008).

¹¹⁷ MINN. STAT. § 117.187.

¹¹⁸ Mark D. Savin, *The Biggest House in Town: Extending the Limit of Just Compensation*, SN041 ALI-ABA 213 (2008).

C. Reforms in Planning and Negotiating

Punishing Condemnors for Making Low Ball Offers. In many instances there have been surprisingly huge 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 \$5,100,000.¹¹⁹ Another example of big 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 US Senator \$4.3 million for his adjoining lot of the same size.¹²⁰ Outraged, the Pappas family sued on public use grounds, won at trial,¹²¹ lost in the Nevada Supreme Court,¹²² and eleven years after the threatened condemnation, finally settled with the city for \$4.5 million.¹²³

Several states have enacted statutes in hopes of deterring condemnors from making low ball 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 20%.¹²⁴ In New York if the court awards substantially more than the condemnor's proof or pre-vesting offer, the condemnee may be awarded attorneys fees and other litigation costs.¹²⁵

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 their striking a redevelopment deal long before the formal redevelopment process begins.¹²⁶ 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. The

¹¹⁹ Nathan Burdsal, *Just Compensation and the Seller's Paradox*, 20 BYU J. Pub. L. 79, 84 (2005). Other cases show compensations for different takings moving from \$11,500 to \$200,000, and from \$11,000 to \$5,000,000.

¹²⁰ Steve Miller, Pappas property settlement expected soon, Las Vegas Tribune, July 12, 2000. <http://www.stevemiller4lasvegas.com/PappasPropertySettlementExpectedSoon.htm>

¹²¹ The district court judge who decided in favor of the Pappas' 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, Las Vegas Review-Journal, Oct. 20, 2006. http://www.reviewjournal.com/lvrj_home/2006/Oct-20-Fri-2006/opinion/10311900.html

¹²² *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 119 Nev. 429, 437, 76 P.3d 1,7 (Nev.2003).

¹²³ Edward Lawrence, Question 2: Eminent Domain Will Take Center Stage in November. <http://www.lasvegasnow.com/Global/story.asp?S=5552980>

¹²⁴ MINN. STAT. ANN. §117.031.

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.

¹²⁵ McKinney's EDPL § 701(1987). A New York condemnation attorney reports that this provision has inclined condemnors to settle a significant number of cases. Michael Rikon, *Eleven Trial Preparation Points for Condemnation Cases*, 23 PRAC. REAL EST. LAW. 35 (Nov.,2007).

¹²⁶ 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 (2007).

negotiated deal is presented and approved at a public meeting pretty much as presented.¹²⁷ State open meeting laws require elected officials to conduct their business in sessions that are open to the public but these laws don't bar discussions between developers and individual officials and most of them allow officials to conduct secret discussions of real estate transactions.¹²⁸

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.¹²⁹

Redevelopment officials and developers are often wary of extensive public hearings. They anticipate that a public hearing process will slow things down— a significant handicap in the fast moving world of real estate finance. Formal hearings tempt owners of competing firms in 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.

Promulgating a Plan Which 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 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 to use eminent domain if necessary to acquire that property.¹³⁰

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

¹²⁷ Charles L. Siemon, *Public/Private Partnerships and Fundamental Fairness, in City Deal Making* in Terry Jill Lassar, INTRODUCTION TO CITY DEAL MAKING 81(1990).

¹²⁸ 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, fn 66, 67 at p. 650 (2007).

¹²⁹ JIM ROSSI, *Participation Run Amok, The Costs of Mass Participation for Deliberative Agency Decision Making*, 92 NW. U. L. Rev. 173, 182-89 (1997).

¹³⁰ "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 C.A. § 6B.2D (2006).

and building requirements in the redevelopment project area....”¹³¹ 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.¹³²

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.¹³³ The local government needs a two-thirds vote to approve a plan disapproved by the project area committee.¹³⁴

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 enrage 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.¹³⁵ They listen to the public’s views, take suggestions seriously, and advocate changes in the plan based on those views and suggestions.

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.¹³⁶

¹³¹ CODE OF WEST VIRGINIA §16-18-6.

¹³² TEX. LOC. GOV’T CODE § 374.011(a) (Vernon 2006).[http://web2.westlaw.com/find/default.wl?tf=-&rs=WLW8.02&fn=_top&sv=Split&tc=-1&findtype=L&docname=TXLGS374.011&db=1000179&utid=%7bD5074EAE-F2F9-4263-BDC0-92CA41C71D6E%7d&vr=2.0&rp=%2ffind%2fdefault.wl&mt=LawSchool&SR;379&ãã David N. Farwell, A Modest Proposal: Eliminating Blight, Abolishing But-For, and Putting New Purpose in Wisconsin’s Tax Increment Financing Law, 89 MARQ. L. REV. 407, 408-09 \(2005\).](http://web2.westlaw.com/find/default.wl?tf=-&rs=WLW8.02&fn=_top&sv=Split&tc=-1&findtype=L&docname=TXLGS374.011&db=1000179&utid=%7bD5074EAE-F2F9-4263-BDC0-92CA41C71D6E%7d&vr=2.0&rp=%2ffind%2fdefault.wl&mt=LawSchool&SR;379&ãã David N. Farwell, A Modest Proposal: Eliminating Blight, Abolishing But-For, and Putting New Purpose in Wisconsin’s Tax Increment Financing Law, 89 MARQ. L. REV. 407, 408-09 (2005).)

<http://www.internest.com/homebuilder/homebuilder21639.asp&ã,ãPabst Farms Gets Oconomowoc’s OK But Questions Remain, 20 February 2008.>

http://www.redorbit.com/news/science/1261305/pabst_farms_gets_oconomowocs_ok_but_questions_remain_who_will/index.html?source=r_sci enceãã Id. at 420-21.ãã Terry Pristin, Eminent Domain Revisited: A Minnesota Case, NY Times on line, Oct. 5, 2005.

¹³³ CAL. CIV. PROC. CODE §§ 1245.235, 1245.240 (West 2005); see also David F. Beatty et al., REDEVELOPMENT IN CALIFORNIA 89, 136 (2d ed. 1995).

¹³⁴ *Ibid.*

¹³⁵ Special Report, Ehlers & Associates, Redevelopment Best Practices.
http://www.ehlers-inc.com/downloads/docs/RedevBestPractices1_06.pdf.

¹³⁶ *Ibid.*

IV. 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 schools district 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.¹³⁷

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 (PILOT) from subsidized firms or developers.¹³⁸ PILOTs never fully replace revenues lost to TIF.¹³⁹ (2) Some states make up all or most of the local school district revenue loss due to TIF.¹⁴⁰(3) In some states the schools receive notice of proposed TIF funded projects that would divert revenues from schools, and the opportunity to comment.¹⁴¹ (4) In other states school districts take a seat on a TIF advisory committee.¹⁴²(5) Some states impose an absolute ban on the use of the school district's share of future property tax receipts.¹⁴³ (6) A handful of states allow school districts to exercise a veto over any redevelopment plan that diverts tax increments from schools.¹⁴⁴ 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 counties and other taxing entities.)

The National Education Association 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. They see this as the "first line of defense," enabling school districts to "effectively protect education."¹⁴⁵

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 argue that economic development is bound to lift all ships as tax rolls rise. But according to the U.S. Department of Commerce the only states with public accounting systems in place that are equal

¹³⁷ NEA, Protecting Public Education from Tax Giveaways to Corporations (January, 2003).
<http://www.goodjobsfirst.org/pdf/edu.pdf>

¹³⁸ NEA, Protecting Public Education from Tax Giveaways to Corporations, Table 3.4 (January, 2003).
<http://www.goodjobsfirst.org/pdf/edu.pdf>

¹³⁹ NEA, Protecting Public Education from Tax Giveaways to Corporations 17 (January, 2003).
<http://www.goodjobsfirst.org/pdf/edu.pdf>

¹⁴⁰ Michigan, Minnesota, and Ohio. NEA, Protecting Public Education from Tax Giveaways to Corporations, Table 3.3 (January, 2003)

¹⁴¹ Michigan, Minnesota, and Ohio. NEA, Protecting Public Education from Tax Giveaways to Corporations, Table 3.3 (January, 2003).
<http://www.goodjobsfirst.org/pdf/edu.pdf>

¹⁴² Missouri, Nevada, Ohio, Wisconsin, and Utah. NEA, Protecting Public Education from Tax Giveaways to Corporations, Table 3.3 (January, 2003).
<http://www.goodjobsfirst.org/pdf/edu.pdf>

¹⁴³ Florida, Louisiana, Kentucky, Maryland, and Washington. NEA, Protecting Public Education from Tax Giveaways to Corporations 12 (January,2003).
<http://www.goodjobsfirst.org/pdf/edu.pdf>

¹⁴⁴ These states are Colorado, Georgia, Kansas, Minnesota, Ohio, Oklahoma, Pennsylvania, South Carolina, and Texas. NEA, Protecting Public Education from Tax Giveaways to Corporations 2 and Table 3.3(January,2003)..

¹⁴⁵ Id. at 3.

to the task of estimating the fiscal impacts of tax incentives are Maryland and New York.¹⁴⁶ Most states collect no data on tax dollars lost to tax breaks— called tax expenditures.¹⁴⁷ They only report on direct budget appropriations, not on revenue that would have been received but for the tax breaks.¹⁴⁸ 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 specific public support, do not create long-term jobs with decent wages, and contribute little to community infrastructures as a whole.”¹⁴⁹ 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.

North Carolina has come up 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 20% 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.¹⁵⁰ 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 indebtedness.¹⁵¹ Another statute prohibits development financing districts from placing more than five percent of their geographic areas into TIF projects.¹⁵²

V. 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 except to greatly enhance local tax revenues.

¹⁴⁶ U.S. Department of Commerce (August, 1999), Evaluating Business Development Incentives, Economic Development Administration, Washington, D.C.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ NEA, Protecting Public Education from Tax Giveaways to Corporations 7(January, 2003).

¹⁵⁰ N.C.G.S.A. § 158-7.3 (2006): “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.” North Carolina has enacted several other 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).

¹⁵¹ §2, N.C. Sess. Laws at 1159. P. Michael Juby, *Tax Increment Financing in North Carolina: The Myth of the Countermajoritarian Difficulty*, 83 N.C. L. Rev. 1526, 1532-33 (2005).

¹⁵² §§18-19, 2003 N.C. Sess. Laws at 1173-77.

Civic Enhancement Projects. The area-wide ‘beautification’ projects generate broad public benefits through a transformation in the appearance and utility of the re-used 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.¹⁵³ 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.¹⁵⁴ 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 very wealthiest areas.

Property owners challenging civic enhancement projects as not being for a public use emphasize the important role that the private firm designated as the master developer plays in the formulation of these plans.¹⁵⁵ But they discount the public benefits of the project. A 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.”¹⁵⁶

Applying *Kelo*, 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.¹⁵⁷

¹⁵³Ch. 338, 63 Stat. 416 (Act of July 15, 1949) (codified at 42 U.S.C. _1453 (a) (2) (B)) (omitted 1988).

¹⁵⁴42 U.S.C.A. § 1451

¹⁵⁵ One blogger's view carries this headline: *Bruce Ratner Calls the Shots. Bloomberg, Pataki and the Empire State Development Corporation Dance the Dance.* <http://www.dailygotham.com/blog/mole333/>

¹⁵⁶*Goldstein v. Pataki*, --- F.3d ----, 2008 WL 269100 (2d Cir. 2008).

¹⁵⁷ *Ibid.*

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 U.S. Supreme Court limits on the authority of local governments to require land dedications and exactions roughly proportional to the spillover harms created by private projects.¹⁵⁸ 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 20 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 2,000 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 project¹⁵⁹although it 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.¹⁶⁰ 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 cites 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.¹⁶¹ Proponents of this planning vision believe that only with higher density development can Colorado preserve open space by enforcing urban growth boundaries, minimize the carbon footprint of new growth, and reduce auto dependency. TIF funded subsidies of basic infrastructure in two prominent massive redevelopment sites— 4,700 acres at the now closed Stapleton Airport and 1,866 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.¹⁶² The Town Center in Lowry will create the “density, synergy, and energy” of a mixed use European city ambience.¹⁶³ “When completed Stapleton will provide 12,000 new homes and apartments, three million square feet of retail space, and ten million square feet of office space.”¹⁶⁴

¹⁵⁸ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

¹⁵⁹ Subdividers can’t be obliged to align their proposed subdivisions to features of the comprehensive plan that haven’t been implemented. Elizabeth K. Arias, *Batch v. Town of Chapel Hill*. *Takings Law and Exactions: Where Should North Carolina Stand?*, 21 *Campbell L. Rev.* 49 (1998).

¹⁶⁰ 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.

¹⁶¹ Jennifer Lang, *New Urban Renewal in Colorado’s Front Range* (Independence Institute, Issue Paper 2-2007, Feb. 2007).

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

Some Coloradans see this as a colossal waste of taxpayer dollars through which the 80% of the population favoring single family homes with usable back yards are being compelled to subsidize the 20% who might prefer living in clustered, mixed use, transit oriented urban settings.¹⁶⁵ 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. 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.

Colorado is not alone in its use of TIF to subsidize the cost of public infrastructure needed to support private development—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 known as Pabst Farms received the benefit of TIF funding even though the state’s law clearly defines as unblighted predominantly open land developed only for agricultural use. ¹⁶⁶TIF 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.¹⁶⁷ Homebuilders lure prospective buyers to Pabst Farms by promoting the advantages of a living in a master planned community with “the conveniences of an urban area in a historically rich, breathtaking Lake Country setting.”¹⁶⁸

The developer proposed an outdoor life style mall that city officials welcomed and big box retailers backing up to a highway and freeway that city officials wanted re-designed to put a more congenial face towards the heavily trafficked abutting roadways. 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.¹⁶⁹

A state senator who noted that the Pabst Farms was ‘anything but blighted’ tried to change the state’s blight definition to no avail.¹⁷⁰

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 of necessity, and empowers

¹⁶⁵ Ibid.

¹⁶⁶ WIS. STAT. ANN. §66.1105.

¹⁶⁷ David N. Farwell, *A Modest Proposal: Eliminating Blight, Abolishing But-For, and Putting New Purpose in Wisconsin’s Tax Increment Financing Law*, 89 MARQ. L. REV. 407, 408-09 (2005).

¹⁶⁸ <http://www.internest.com/homebuilder/homebuilder21639.asp>

¹⁶⁹ Pabst Farms Gets Oconomowoc’s OK But Questions Remain, 20 February 2008.

http://www.redorbit.com/news/science/1261305/pabst_farms_gets_oconomowocs_ok_but_questions_remain_who_will/index.html?source=r_science

¹⁷⁰ Id. at 420-21.

cities to spend public money for infrastructure in those areas.¹⁷¹ Earlier versions of the urban redevelopment law had restricted its application to areas of slum or blight. But in 1985 that law was amended to give cities the economic development option with no ‘slum or blight’ strings attached.¹⁷² 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.”¹⁷³

The City of West Des Moines, Iowa, entered a development agreement with a nationally prominent mall developer, Chicago-based General Growth, for a \$150,000,000 shopping center at Jordan Creek. The developer promised not just a typical cookie-cutter regional mall but a true town center. In exchange, the city committed to placing the proposed shopping center site into a newly designated economic development area in order to use tax increment financing 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.¹⁷⁴ 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.¹⁷⁵

These improvements weren’t 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. This would allow 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 mentioned all this infrastructure for a decade by the time the Jordan Creek project materialized,¹⁷⁶ 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.¹⁷⁷

Jordan Creek was located a mile south of Interstate 80 in a residential and agricultural area with no blight in sight. 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.¹⁷⁸

¹⁷¹ Economic Development Authorized for Urban Renewal Act, ch. 66, § 3, 1985 Iowa Acts 153 (codified as amended at Iowa Code § 403.5(1)).

¹⁷² Note, *Financing the Future: Interpreting the ‘Economic Development Area’ Provision of the Iowa TIF Statute*, 50 DRAKE L. REV. 159 (2001).

¹⁷³ Brad Perri, *Financing the Future: Interpreting the “Economic Development Area” Provision of the Iowa TIF Statute*, 50 DRAKE L. REV. 159, 177-78 (2001).

¹⁷⁴ *McMurray v. City Council of City of West Des Moines*, 642 N.W.2d 273, 283 (Iowa, 2002).

¹⁷⁵ 642 N.W.2d at 275.

¹⁷⁶ *Id.* at 282.

¹⁷⁷ Kristin B. Flood, *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 (2006).

¹⁷⁸ IOWA C.A. §403.4. Cities can enact a resolution of necessity for the designation of an urban renewal area as slum, blighted or economic development. Plaintiffs didn’t allege that the law required a finding of blight. Their claim was that the law impliedly required findings concerning the existence of unemployment or housing shortages. Because the city’s plan for the area involved no residential uses, statutory provisions

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. Later, the city would consider the development agreement and other land use aspects of the new mall project. Although the economic development area was designated for commercial and industrial use—no residential, the accompanying plan made no mention of any specific commercial projects.

Phasing the project this way completely undermined the law suit filed by two established malls in the same market area and two area residents. The economic development plan contemplated no use of eminent domain so the ‘public use’ question wasn’t 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.¹⁷⁹ Project opponents, taxpayers, lost on summary judgment at trial and on appeal.¹⁸⁰ The Iowa Supreme Court’s reasoning was straight forward: “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.”¹⁸¹

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 75% of the project area fell within the statutory definition of blight.¹⁸² However, the legislature precluded as a “public use” or “public purpose” or “public improvement”: “economic development activities resulting in increased tax revenues,” “increased 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.” 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. It could not take property from private owner A for conveyance to private owner B to enhance the tax base or create jobs.

Purely Tax Driven Projects. The ‘takings’ that have the greatest difficulty overcoming the ‘public use’ hurdle are for 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

concerning low and moderate income housing were inapplicable. 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.. 642 N.W. 2d at 279.

¹⁷⁹ IOWA CONST. art. III, § 31.

¹⁸⁰ *McMurray v. City Council of City of West Des Moines*, 642 N.W.2d 273, 283 (Iowa,2002).

¹⁸¹ 642 N.W. 2d at 283.

¹⁸² IOWA C.A. § 6A.22 (5a) (2006). The Governor vetoed Acts 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.

city where the sale takes place.¹⁸³ “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.”¹⁸⁴

A Colorado appellate court opinion describes how these one-shot deals work.¹⁸⁵ After determining that it could condemn a certain prime corner as blighted, the Wheat Ridge Urban Renewal Authority contacted a commercial developer who builds stores for Walgreens to see if his client was interested in operating a drug store at this location. 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 25 year lease of the site, and construct a drug store there. At some point the Authority decided to abandon its deal with Walgreens and sought termination of its Development and Disposition Agreement. Walgreens and its developer 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 on hand and denied the developer and Walgreens specific performance. On appeal the court affirmed the injunction, overturned the denial of specific performance and remanded.¹⁸⁶

Condemnations of this sort raise public use issues and are also 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 through redevelopment consumption-based businesses such as hotels and shopping centers rather than seeking out firms engaged in production, the city is not increasing “the total wealth of a region as a whole” but “merely redistributes 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.”¹⁸⁷ Virtually all of these projects would probably have been built elsewhere in the market area—though maybe not in the particular city whose redevelopment agency lured them there.¹⁸⁸

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,

¹⁸³ “Here, the urban renewal project consists of the undertakings listed in the Jordan Creek Urban Renewal Plan. The Plan’s proposed activities include the construction of public improvements within the urban renewal area.... None of these activities violates the comprehensive plan. Because the shopping mall project is not an undertaking of the City, we do not consider whether GGP’s proposed shopping center conforms to the comprehensive plan. Opponents quite correctly point out the Plan does not state what type of private commercial development, if any, will arise out of the City’s infrastructure improvements. However, the Plan also does not condition the infrastructure improvements on the completion of the GGP shopping mall or any other private commercial development. There is undisputed evidence in the record the infrastructure improvements provided for in the Plan have been a part of the City’s capital improvement plan for years, even as far back as 1991.” 642 N.W. 2d 282 (2002).

¹⁸⁴ Greg LeRoy, *TIF, Greenfields, and Sprawl: How an Inventive Created to Alleviate Slums Has Come to Subsidize Upscale Malls and New Urbanist Developments*, 60 Planning and Environmental Law 3, (February, 2008). Footnote 12: “Paul G. Lewis and Eliza Barbour, *California Cities and the Local Sales Tax*. Public Policy Institute of California, 1999. Their survey covered all 471 California cities in existence in 1998.”

¹⁸⁵ *Cornerstone Group XXII, L.L.C. v. Wheat Ridge Urban Renewal Authority*, 151 P.3d 601(Colo. App. 2006).

¹⁸⁶ 151 P. 3d at 609.

¹⁸⁷ *Regus v. City of Baldwin Park*, 70 Cal.App.3d 968, 983, 139 Cal.Rptr. 196 (1977).

¹⁸⁸ “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, *Tax Increment Financing Opportunities and Concerns* (Tennessee Advisory Commission on Intergovernmental Relations, March, 2007).
http://www.state.tn.us/tacir/PDF_FILES/Taxes/Tax%20Increment%20Financing.pdf

it fulfills its tax generating mission. A cash cow isn't necessarily expected to be an object of beauty.

Comparing Project Specific with District Wide Projects. Two attorneys who specialize in this area of redevelopment practice compare the pros and cons of each type of development—area wide vs. project specific.¹⁸⁹ TIF funds go for major regional infrastructure in the big projects. In smaller projects, public improvements or subsidies tend to assist a single firm in one-off arrangements. Smaller projects involve fewer participants; are executed in short, predictable time lines; require minimal public financing; usually don't need eminent domain; and can be targeted to close a financing gap that would otherwise have made the project impossible. On the other hand, small projects are riskier because they depend for their success on a single project or developer, contain the seeds of 'the appearance of impropriety'— government favoritism for a particular developer or landowner, and seldom fulfill any articulated planning vision for improvement of the community.¹⁹⁰

Big projects have the advantage that large public investments in infrastructure 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. Among their disadvantages are long time lines 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.¹⁹¹

Community Benefit Agreements (CBA). Community activists are well aware of the adverse consequences of past publicly funded renewal efforts on the socially disadvantaged —“inner-city gentrification, creation of low-wage dead end jobs lacking health benefits, and the loss of affordable housing frequently occur.”¹⁹² In exchange for their support for land use entitlements and public subsidies, community groups negotiate contracts with developers, sometimes embodied in development agreements with the city.¹⁹³ Deal points often include specified numbers of new affordable housing units, a commitment to hire local labor first, a developer commitment to create a specified number of jobs at living wages, and job training. “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, care centers or job training facilities.”¹⁹⁴ Community representatives come from the neighborhood and from

¹⁸⁹ Jennifer LeGrand and John Stalfort, CREATION OF TAX INCREMENT FINANCING DISTRICTS. [http://www.cdfa.net/cdfa/cdfaweb.nsf/fbaad5956b2928b086256efa005c5f78/b508447b57fe939686257390006e54a8/\\$FILE/Stalfort%20LeGrand%20November%201%20-%20CDFA%20-%20TIF%20Presentation.pdf](http://www.cdfa.net/cdfa/cdfaweb.nsf/fbaad5956b2928b086256efa005c5f78/b508447b57fe939686257390006e54a8/$FILE/Stalfort%20LeGrand%20November%201%20-%20CDFA%20-%20TIF%20Presentation.pdf)

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Id. text at fn 17.

¹⁹³ Gross, *supra* fn 51 at p. 2.

¹⁹⁴ Id. text at fn 4.

labor, environmental and religious organizations, often assisted by public interest lawyers¹⁹⁵ and city staff, and encouraged by elected city officials.¹⁹⁶

Though there are no legal barriers to negotiating a CBA in 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.”¹⁹⁷

VI. 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.”¹⁹⁸

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 nation wide revolt against property taxes—the mainstay of local government finance in the U.S.¹⁹⁹ Local governments in California lost 57% of their revenues over night following Prop 13. Essentially, the property tax was frozen at its 1978 levels, local tax rates were capped at 1% (plus enough extra to cover previously incurred bonded indebtedness), and the tax base could only rise by 2% a year for inflation. For property tax purposes, tax assessed values would be adjusted to market when the property was sold or new construction added. 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.²⁰⁰ For local governments to raise property taxes or float bonds the proposition required a two-thirds vote of the local electorate.

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

¹⁹⁵ Sheila R. Foster and Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999 (2007).

¹⁹⁶ Julian Gross, et al, *Community Benefits*

¹⁹⁷ Id. text at fn 101.

¹⁹⁸ Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation*, 59 SMU L. Rev. 177, 180 (2006).

¹⁹⁹ Property taxes, the largest source of city revenues, accounted for 21.4% of city revenues in 2000, down from 27.1% in 1997. See Bruce A. Willin, *Budgeting for Basics: The Changing City Landscape* (Brookings Institution, 2005). http://www.brookings.edu/metro/pubs/20050823_BudgetingBasics.pdf

²⁰⁰ Cal. St. Controller, *Community Redevelopment Agencies Annual Report for Fiscal Year 1987-88*.

13, the number of localities with redevelopment agencies nearly doubled.²⁰¹ In 1975 redevelopment agencies received \$50,000,000 a year in tax increments. By 2005, that number had risen to \$3.5 billion.²⁰² State-wide over the past two decades redevelopment agencies have tripled their share of property tax revenues, from 3.6% in 1982-83 to 9.8% in 2003-04—three billion dollars annually.²⁰³

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.²⁰⁴ 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 tax—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.

The Politics of TIF. 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.²⁰⁵ 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 2003-04.²⁰⁶ 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.²⁰⁷

²⁰¹ From 1980 to 1996, the number of local redevelopment agencies grew from 197 to 399 and the number of project areas from 300 to 744. Jeffrey I.Chapman, Proposition 13: Some Unintended Consequences, p 12 (Public Policy Institute of California). http://www.ppic.org/content/pubs/op/OP_998JCOP.pdf

²⁰² Cal. St. Controller, Community Redevelopment Agencies Annual Report for the Fiscal Year Ended June 30, 2005 xii fig. 9 (May 31, 2006).

²⁰³ Table Two, Redevelopment and Blight, Briefing Paper for the Joint Interim Hearing, Oct. 26, 2005. <http://www.sen.ca.gov/locgov/BRIEFINGPAPER10-26-05.doc>

²⁰⁴ For a clear and convincing though fictional account of how even the most determined NIMBYs 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* p.20 (2007).

²⁰⁵ These projects are of no particular benefit to low income households. See UCLA Center for Labor Research and Education & Los Angeles Alliance for a New Economy, *Who Benefits from Redevelopment in Los Angeles?: An Evaluation of Commercial Redevelopment Activities in the 1990s* (Mar. 1999), at <http://www.laane.org/research/reports.html>.

²⁰⁶ Redevelopment and Blight, Briefing Paper for the Joint Interim Hearing, Oct. 26, 2005. <http://www.sen.ca.gov/locgov/BRIEFINGPAPER10-26-05.doc>

²⁰⁷ 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. Indiana doesn't allow sales taxes to be pledged that way, and economic directors in northwest Indiana don't like it: "The reason Illinois gets high-end stores and Northwest Indiana only middle-market players is simple, Super said. Illinois offers sales tax increment financing, which allows for a portion of sales taxes collected to go into infrastructure development." Robert Super is the principal partner for real estate development at Precision Construction Inc. in Highland, Indiana. Keith Benman, *Times of Northwest Indiana*, TIF Big Weapon in Retail Wars, *Indiana Economic Digest*, 12/17/2007.

Why has the state legislature allowed this? Planning consultant Larry Kosmont explains the practical politics of TIF by asking us to imagine we were elected to a local city council.²⁰⁸ 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 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 appeal as to many a local elected council member.

The fiscal dilemmas facing local elected officials shouldn't hamper state legislators from preventing school and county tax coffers to be diminished by local redevelopment agencies, especially since the state is the financier of last resort for schools and counties. Since 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.²⁰⁹ We can only speculate about why state legislatures have been so reluctant to pull the plug on these tax shifting schemes since the state legislators will be left to fill the emptying coffers of school districts and counties.

Community Redevelopment Association²¹⁰ 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 officials.²¹¹ By and large, post- *Kelo* reforms have strengthened the hand just a bit of 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. ²¹² As a Wisconsin-based researcher for a non profit, public policy group put it, "Many citizens want their tax rates - and government spending- as frozen as the February tundra."²¹³ The only way for public revenues to keep pace with increasing costs and demands for public service without raising tax rates by augmenting the tax base. By being used to subsidize public infrastructure improvements and developers, TIF revenues can be leveraged to increase the tax base.

²⁰⁸ Interview by author with Larry Kosmont, 01/26/08 (notes on file with author). Larry Kosmont is the principal of Kosmont Companies, 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. <http://www.kosmont.com/>

²⁰⁹ "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." Staff Briefing Paper for the Joint Informational Hearing, Redevelopment and the Governor's Budget, January 23, 2003, <http://sinet2.sen.ca.gov/locgov/REDEVELOPMENTPAPER.htm>

²¹⁰ This is the association that represents local redevelopment agencies in California.

²¹¹ Interview by author of John Shirey (on file with author), 05/16/07.

²¹² 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 2/3 vote of its governing body, typically four votes out of a five-member council. Cal. Civ. Proc. §§ 1245.350, 1245.240 (West 2005).

²¹³ Ryan Horton, How to get out of tax hell? Use TIF in State's Cities, Milwaukee Journal Sentinel, Feb. 20, 2005. <http://www.jsonline.com/story/index.aspx?id=302860>

VII. Judicial Review of Economic Development Takings

A. *Kelo v. City of New London* ²¹⁴

The *Kelo* majority didn't endorse the 'rational basis' test articulated in *Berman v. Parker*²¹⁵ 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 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."²¹⁶ 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.

"Public goods" represent a different type of market failure. Markets have difficulty producing goods with "two distinct aspects—'nonexcludability' and 'nonrivalrous consumption.'"²¹⁷ "Nonexcludability" means that nonpayers cannot be excluded from the benefits of the good or service. "Nonrivalrous" means that additional consumers don't diminish the utility of the good or service to others or increase the cost of providing it.²¹⁸ 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.²¹⁹

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.²²⁰ 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 U.S. Coast Guard Museum and new condo units and a hotel linked by walkways to the rest of the project.²²¹ 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 U.S. Supreme Court—although the facts were in the record before the Court.²²²

²¹⁴ 125 S. Ct. 2655 (2005).

²¹⁵ 348 U.S. at 32, 75 S.Ct. 98 ("when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation..")

²¹⁶ Tyler Cowan, Public Goods and Externalities, The Concise Encyclopedia of Economics. <http://www.econlib.org/library/Enc/PublicGoodsandExternalities.html>

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ "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." 125 S. Ct. at 2666

²²⁰ 125 S. Ct. 2566 (2005).

²²¹ *Ibid.*

²²² Email to author from John Brooks, Project Manager, Fort Trumhull, 06/29/07.

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 in *Berman* because the properties taken weren’t blighted. *Berman*’s property was taken because it was needed in order to transform “a blighted area into a ‘well-balanced community through redevelopment.”²²³ The *Kelo* Court regarded the public use in *Berman* as the “redesign of 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.”²²⁴

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: “Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.”²²⁵

Justice Kennedy cast the swing vote in the 5-to-4 split in *Kelo*, so his opinion merits special attention.²²⁶ 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 ...”²²⁷

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 can’t condemn one owner’s property acting as an agent for another owner who wants to buy it.* That is what happened in *Southwestern Illinois Development Authority v. National City Environmental, LLC*.²²⁸ 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 agency had subsidized. The auto track had been enormously successful, drawing huge crowds to National City, Illinois (located just across the river from St. Louis). 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 couldn’t handle the crowds. Things got worse when the track operators increased the seating capacity without adding new parking.

²²³ 125 S. Ct. at 2665.

²²⁴ 125 S. Ct. fn 13 at 2666.

²²⁵ 125 S. Ct. at 2667.

²²⁶ Ronald S. Cope, *Kelo v. City of New London—How Safe is Your Castle?*, 94 Ill. B.J. 186, 191 (2006).

²²⁷ 125 S. Ct. at 2670 (Justice Kennedy, concurring).

²²⁸ 199 Ill 2d 225, 768 NE 2d 1 (2002).

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 a reserve for future expansion. The public agency's only involvement was to earn a hefty fee by acting as an acquisition agent for the racing track to acquire the auto shredder's land. 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."²²⁹

The Illinois Supreme Court faulted the economic development agency's decision process: the public agency conducted no "thorough study of the parking situation at Gateway", and promulgated no "economic plan requiring additional parking." 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." The agency's obvious intention was "to act as a default broker of land" for the racing track.²³⁰ Public agencies earning brokerage fees aren't 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.* The case of *Walser Auto Sales v. City of Richfield*²³¹ was brought by the owners of two successful automobile dealerships. Their business occupied approximately seven acres located in the City of Richfield, near Minneapolis, in the northeast quadrant of I-494 and Penn Avenue. 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.²³² Then, after four years of planning effort, the developer abandoned the proposal.

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.²³³ 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.²³⁴ But Best Buy couldn't come to terms with Walser.

²²⁹ 768 N.W. 2d at 9.

²³⁰ 768 N.W. 2d at 10.

²³¹ *Hous. & Redev. Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 669 (Minn. Ct. App. 2001), aff'd by an equally divided court, 641 N.W.2d 885 (Minn. 2002).

²³² 635 N.W.2d at 393.

²³³ 635 N.W. 2d at 395.

²³⁴ *Id.*

The Walser's sued, claiming, among other things, that the area didn't meet the Minnesota blight test, and condemning their land from for a Best Buy headquarters wasn't for a public purpose. The trial court had dismissed the complaint but an appellate court reversed. According to the city's 'blight' consultants, the properties in the district generally appeared to be in good condition and could not "by any means, be classified as 'run down.'"²³⁵ The appellate court found that the use of TIF funds was challengeable under Minnesota law both because the Walser's site wasn't blighted and the trial court hadn't determined whether the primary purpose of the project had been for a public purpose.²³⁶ The appellate court decision became final when on appeal the Minnesota Supreme Court split three to three.²³⁷

If you visit Richfield today, you will find the Best Buy headquarters in four buildings at the TIF site, a project that cost \$160,000,000. In 2005, 4,500 people were employed there. 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.²³⁸ I draw two conclusions from this episode in Minnesota. Condemnors need to establish either the externality of blight or the public goods that the project is going to feature. Further, 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.

(3) *Until a redevelop plan identifies either blight or a firm commitment to deliver specified public goods, takings of private property for private development isn't a public use.* 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.²³⁹ A New Jersey appellate court applied a comparable norm in rejecting an attempt by the City of Camden to acquire 43 owner occupied homes in Cramer Hill, the only neighborhood in the city zoned exclusively for single family residential zoning, located within a larger community well functioning community.²⁴⁰ The city's purpose was to build affordable housing but the city had not committed to any definitive, well analyzed re-use 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

²³⁵ 635 N.W. 2d at 394.

²³⁶ 630 N.W.2d 662, 669 (Minn. Ct. App. 2001).

²³⁷ *Hous. & Redev. Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 669 (Minn. Ct. App. 2001), aff'd by an equally divided court, 641 N.W.2d 885 (Minn. 2002).

²³⁸ Terry Pristin, *Eminent Domain Revisited: A Minnesota Case*, NY Times on line, Oct. 5, 2005, http://www.nytimes.com/2005/10/05/realestate/05domain.html?_r=1&oref=slogin

²³⁹ "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 C.A. § 6B.2C (2006).

²⁴⁰ *Cramer Hill Residents Ass'n, Inc. v. Primas*, 395 N.J.Super. 1,14, 928 A.2d 61(2007).

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.²⁴¹

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.²⁴²

4) *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.' The rationale for quick take procedures resides in the fact that most condemnees are only concerned about the amount of compensation, and don't 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.²⁴³

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*.²⁴⁴ Traditionally, courts had accepted without question the condemnor's assertion of a need for immediate possession.²⁴⁵ "Orders for Immediate Possession are routinely granted, so much so that the condemnation lawyer for the property owner typically stipulates to the OIP."²⁴⁶

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*, wouldn't allow the Rockville Redevelopment Agency to 'quick take' the Magnet Bar when the agency hadn't promulgated a plan sufficiently detailed to indicate why it needed this site in such a hurry, and

²⁴¹ 395 N.J. Super. at 14-15.

²⁴² 395 N.J. Super. 16.

²⁴³ *Department of Public Works & Buildings v. Dust*, 19 Ill.2d 217, 166 N.E.2d 36 (1960).

²⁴⁴ *Rhode Island Economic Dev. Corp. v. The Parking Co.*, 892 A.2d 87 (R.I. 2006) (upholding challenge to *ex parte* feature of quick take statute. Court explained that condemnee could file a separate action challenging whether the taking was for a public use). See Gideon Kanner, *Eminent Domain Law 2006-2007*, SN005 ALI-ABA 91 (2007).

²⁴⁵ "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." Leslie A. Fields and Karen L. Brody, *Owner's Defenses and Quick Take Statutes*, SL050 ALI-ABA 39 (2006).

²⁴⁶ Jay Dushoff, *What Every Arizona Lawyer Should Know About Eminent Domain*, 43-NOV Ariz. Att'y 22 (2006).

the use to which it would ultimately put the condemnee's property. "While it claimed that the property was needed for 'business expansion' the City had not yet issued a Request for Proposals (RFPs) and did not anticipate having a specific plan for the property until after it took possession."²⁴⁷ 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 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 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.²⁴⁸

The Baltimore authorities had contemplated acquiring all of the proposed site and then issuing Requests for Proposals (RFPs) from private developers for re-use of the site. 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 since they envision condemnation for economic redevelopment without specific re use plans for each site acquired.²⁴⁹ 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.

Summary

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

²⁴⁷ John J. Delaney, Recent Court Decisions, SN005 ALI-ABA 11 (2007).

²⁴⁸ *Mayor and City Council of Baltimore City v. Valsamaki*, 397 Md. 222, 260, 916 A.2d 324 (Md. 2007).

²⁴⁹ "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 an 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." Dana Berliner et. al., *The Condemnation Landscape Across the Country Post-Kelo*, SM006 ALI-ABA 433 (2007).

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 isn't 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 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 pre-takings situation; (c) procedural reforms including the right to a notice and hearing to owners, users and residents 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 use 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.²⁵⁰ State courts are doing that. Though not disrupting 'civic betterment' type projects undertaken as part of a comprehensive local plan,²⁵¹ they appear more inclined than ever to reject the purely tax driven projects. As Professor Marc Mihaly puts it, tax driven projects are "off the table" these days. The intangible promises of tax base enhancement aren't enough to overcome the appearance of impropriety when private owner A's land is sought to be

²⁵⁰ 125 S. Ct. at 2668.

²⁵¹ 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).

taken for the benefit of private owner B with no tangible public improvements.²⁵² For this, the property rights advocates who supported Suzette 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.

²⁵² Email from Marc Mihaly to author, 3/13/08.