COPING WITH *KELO*: A POTPOURRI OF LEGISLATIVE AND JUDICIAL RESPONSES

Steven J. Eagle and Lauren A. Perotti*

Editors' Synopsis: This Article examines the legislative and judicial responses to Kelo v. City of New London, *which held that takings for economic development satisfy the public use requirement of the Fifth Amendment. A majority of states have responded to the decision by adopting statutes that limit the scope of public use, address just compensation for the taking, or institute procedural reforms for takings. The Article gives a state-by-state description of these responses and also offers state legislatures several alternatives to the use of eminent domain.*

* Professor of Law and member of Class of 2009, respectively, George Mason University School of Law, Arlington, VA (seagle@gmu.edu).

I. INTRODUCTION

In *Kelo v. City of New London*[1] the United States Supreme Court held that "a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[2] Justice Stevens wrote the 5-4 majority decision. Justice Kennedy filed a concurring opinion,[3] and Justices O'Connor[4] and Thomas[5] filed dissents.

While noting that the respondent would not be able to condemn property to convey a private benefit, either directly or through the pretext of conferring a public benefit, the majority deemed neither situation present in the facts of *Kelo*.[6] "Public use," Justice Stevens wrote, is to be defined broadly with great deference given to the legislative determinations in the field.[7] He determined that the redevelopment plan for the City of New London, which followed from the state legislature's finding that the city had fallen into economic distress and that the plan would result, among other benefits, in increased tax revenues and employment, "unquestionably" served a public purpose.[8]

Concluding that economic development is a "traditional and long accepted function of government," the Court refused to distinguish it from other recognized public purposes[9] or to require the City to prove with "reasonable certainty" that the hoped-for benefits actually would occur.[10] The majority noted, however, that nothing in its opinion would bar any state from enacting a stricter interpretation of public use in the exercise of eminent domain.[11]

Justice Kennedy filed a concurrence, observing that while the redevelopment plan for the City of New London provided private benefits to

---

[1] 545 U.S. 469 (2005).
[2] *Id.* at 477. *See also* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").
[3] *See Kelo*, 545 U.S. at 490 (Stevens, J., concurring).
[4] *See id.* at 494 (O'Connor, J., dissenting).
[5] *See id.* at 505 (Thomas, J., dissenting).
[6] *See id.* at 477–78.
[7] *See id.* at 479.
[8] *Id.* at 483–84.
[9] *Id.* at 484.
[10] *Id.* at 487–88.
[11] *See id.* at 489.

Pfizer, which had developed an adjoining research facility, the plan was intended to stimulate the local economy. The plan therefore passed muster under the rational basis test required of public use determinations.[12]

Justice O'Connor warned that the majority's expanded definition of public use permits the "specter of condemnation" to threaten all property not put to its highest and best economic use.[13] Justice Thomas, also dissenting, reasoned that the majority followed a line of erroneous decisions that had the effect of replacing the public use clause, which provides meaningful limits on the use of eminent domain, with a public purpose clause, which places no such limits.[14]

Most of the legislation proposed in *Kelo*'s wake sought to address Justice O'Connor's concern that *Kelo* gave officials uncabined discretion to take private property for retransfer to others.[15]

Adherents of *Kelo*, on the other hand, stressed the legislative nature of local land use decisions. Professor Thomas Merrill, whose influential early article argued for judicial deference to legislative determinations on public use,[16] urged after *Kelo* that in a majoritarian society, the legislature is in a better position to determine what is and what is not a proper public use.[17] He added that the decision in *Kelo* was not "about legal policy with respect to eminent domain," but rather about which institutions could make that choice best.[18]

Professor Merrill continued:

> The Court was struggling with the question of which institutions in our society should decide what the proper limits of eminent domain are. And what the Court de-

---

[12] *See id.* at 492 (Kennedy, J., concurring).

[13] *Id.* at 503 (O'Connor, J., dissenting) ("Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.").

[14] *See id.* at 506 (Thomas, J., dissenting) ("Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power. Our cases have strayed from the Clause's original meaning, and I would reconsider them.").

[15] *See id.* at 503 (O'Connor, J., dissenting).

[16] *See* Thomas W. Merrill, *The Economics of Public Use,* 72 CORNELL L. REV. 61, 68 (1986).

[17] *See* Douglas W. Kmiec, *The 2006 Templeton Lecture: Eminent Domain Post-Kelo,* 9 U. PA. J. CONST. L. 501, 527 (2007).

[18] *Id.*

> cided, consistent with the Court's long history in this area, is that the one institution which is not well-suited to decide these issues is the United States Supreme Court.[19]

By contrast, other commentators have stressed that *Kelo* countenanced a more permissive approach toward the public use requirement than many officials had assumed the Constitution required.[20] In considering employment of eminent domain prior to *Kelo*, this argument contends that cities had acted with more restraint.[21] After *Kelo*, commentators warn, cities have no reason to act with caution in taking land for retransfer for private development.[22]

The seminal case upholding the condemnation of nonblighted property for retransfer for private revitalization, *Berman v. Parker*,[23] involved commercial property in the middle of a slum neighborhood.[24] In contrast with the lack of widespread public reaction to *Berman*, one scholar asserted that the *Kelo* decision invoked so much outrage and prompted a property rights reform movement because it involved middle class neighborhoods instead of those housing the poor.[25] "[T]his [post-*Kelo*] reform movement privileges the stability of middle-class households relative to the stability of poor households and, in so doing, expresses the view that the interests and needs of poor households are relatively unimportant."[26]

The public uproar over *Kelo* and the wave of legislative action to undo the decision indicate that the public is fearful that government officials and powerful interests would conspire to deprive citizens of their homes and businesses. As information about the increasing use of eminent domain for private economic development has spread, these fears have grown.[27]

---

[19] *Id.*

[20] *See* DANA BERLINER, INSTITUTE FOR JUSTICE, *KELO V. CITY OF NEW LONDON*: WHAT IT MEANS AND THE NEED FOR REAL EMINENT DOMAIN REFORM (2005), *available at* http://www.eminentdomainabuse.org/pdf/Kelo-White_Paper.pdf (last visited Jan. 7, 2008).

[21] *See id.*

[22] *See id.*

[23] 348 U.S. 26 (1954).

[24] *See id.* at 28.

[25] *See* David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV. 365, 365–66 (2007).

[26] *Id.* at 365.

[27] *See generally*, Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183–84 (2007).

To date, 42 states have enacted measures to limit the use of eminent domain. Only Arkansas, Hawaii, Massachusetts, Mississippi, New Jersey, New York, Oklahoma, and Rhode Island have failed to enact any legislation in response to the *Kelo* decision.

II. TYPES OF POST-*KELO* STATUTES

Perhaps anticipating the ensuing furor, Justice Stevens's opinion in *Kelo* explicitly affirmed that the states were free to provide owners with more protection from eminent domain than did the U.S. Supreme Court.[28] In the two years since *Kelo*, most states enacted some form of legislation addressing public use in the context of the eminent domain power. Several states have adopted inclusionary laws, which, in varying degrees of specificity, affirmatively define those public purposes for which eminent domain is permissible. Often, such enumerations include a provision explicitly excluding economic redevelopment as a public use. Other states adopted purely exclusionary rules, which generally prohibit the taking of private property through eminent domain for transfer to another private party. However, these exclusionary rules typically contain an exception for properties characterized by blight, as narrowly defined, or for transfers to regulated utility companies and common carriers.

Other states sought to address the issue of eminent domain abuse by enacting procedural reforms, either freestanding or in conjunction with substantive changes. Yet other states have sought to limit the potential for abuse of eminent domain by requiring compensation above fair market value, attorney's fees for owners successfully challenging a public use designation, or the prior owner's right of first refusal in the event that condemned property is to be sold because it no longer is needed for a public use.

A. Limiting the Scope of "Public Use"

1. Inclusionary Definitions of "Public Use"

Laws enacted in several states define public use in general terms. Illinois requires condemning authorities to prove that the taking is primarily for the benefit of the public.[29] Arizona, Iowa, Kentucky, and Wyoming, to name a few states, define public use as the "possession, occupa-

---

[28] *See* Kelo v. City of New London, 545 U.S. 469, 489 (2005) ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.").

[29] *See* 735 ILL. COMP. STAT. ANN. 30/5-5-5 (West, Westlaw through 2007 Reg. Sess.), *as amended by* S.B. 3086, 2006 Gen. Assemb., Reg. Sess. (Ill. 2006).

tion, and enjoyment" of property by the general public or governmental entities/public agencies.[30] This would seem to rule out mere governmental fee-simple ownership with private parties in possession under long term leases.

Nineteen states employing inclusive or hybrid definitions, including Arizona, Iowa, Wyoming, and Kentucky, also included in their definitions of public use specific types of projects explicitly approved by statute.

Legislators in Alaska, Arizona, Georgia, Florida, Illinois, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Utah, Virginia, West Virginia, and Wyoming created lists, sometimes rather lengthy, of types of projects that would qualify as public uses. Common permissible public uses include public buildings and grounds, schools, sewer facilities, bridges, and public roads. States such as Indiana allow the taking of property for public cemeteries.[31]

The advantage of this approach is that individual states may provide with specificity which projects are public uses according to the needs of the state. In Alaska, for example, legislators chose to reflect the needs of the state's timber industry by designating water pathways for floating logs as a permissible public use.[32] Legislators in Utah allow land to be taken for mills or smelters in areas of small population.[33] Conversely, the states may place limitations on certain public uses not deemed to be as important in the state as in other states. While Louisiana law considers recreational facilities an approved public use,[34] Alaska law allows property to be taken for recreational facilities only if the owner consents.[35]

---

[30] ARIZ. REV. STAT. ANN. § 12-1136 (West Supp. 2007), *as amended by* Proposition 207 (Ariz. 2006); IOWA CODE ANN. § 6A.22 (West Supp. 2007), *as amended by* H.F. 2351, 81st Gen. Assemb., 1st Extraordinary Sess. (Iowa 2006); KY. REV. STAT. ANN. § 416.540 (LexisNexis Supp. 2006), *as amended by* H.B. 508, 2006 Gen. Assemb., Reg. Sess. (Ky. 2006); WYO. STAT. ANN. § 1-26-801(c) (2007), *as amended by* H.B. 124, 59th Leg., 2007 Gen. Sess. (Wyo. 2007).

[31] *See* IND. CODE ANN. § 23-14-75-2 (LEXIS through 2007 Reg. Sess.), *as amended by* H.B. 1010, 114th Gen. Assemb., 2d Reg. Sess. (Ind. 2006).

[32] *See* ALASKA STAT. § 09.55.240(a) (2006), *as amended by* H.B. 318, 24th Leg., Reg. Sess. (Alaska 2006).

[33] *See* UTAH CODE ANN. § 78-34-1 (2002 & Supp. 2007), *as amended by* S.B. 117, 2006 Leg., Gen. Sess. (Utah 2006).

[34] *See* LA. CONST. art. I, § 4(B), *as amended by* S.B. 1, 2006 Leg., Reg. Sess. (La. 2006).

[35] *See* ALASKA STAT. § 09.55.240(d)-(e) (2006), *as amended by* H.B. 318, 24th Leg., Reg. Sess. (Alaska 2006).

Every state employing the inclusive or hybrid approach specifies when transfer of land condemned through eminent domain to a private party is a permitted public use. Indiana law allows private companies to condemn land as authorized for essential services.[36] Similarly, Iowa law considers property taken for common carriers and public utility schemes to be permitted public uses.[37] Alaska, Florida, Montana, Nevada, North Carolina, among other states, allow condemning authorities to take land for railroads and airports.[38] Generally, all states allow property to be taken for private use or control when the owner or controlling entity is a common carrier or utility provider.

The most notable differences between the states utilizing inclusive and hybrid definitions of public use occur when discussing other permitted public uses of property acquired through eminent domain and transferred to private parties. In Illinois, when a condemning authority plans to transfer public land over to private control, the authority may have to prove, depending on the circumstances of the taking, that the private party will be operating a business related to the authority's operation of a public facility.[39] Nevada law allows a private party to control a portion of land acquired through eminent domain if the original owner receives notice, or if the private party participates in a land exchange designed to avoid excessive relocation costs as a result of another eminent domain proceeding.[40]

Alaska law allows the use of eminent domain to establish private rights-of-way and roads, as well as for the construction of storage and transmission facilities for natural gas.[41] Arizona law allows condemning

---

[36] *See* IND. CODE ANN. § 32-24-4-1 (LEXIS through 2007 Reg. Sess.), *as amended by* H.B. 1010, 114th Gen. Assemb., 2d Reg. Sess. (Ind. 2006).

[37] *See* IOWA CODE ANN. § 6A.22(2)(a)(1) (West Supp. 2007), *as amended by* H.F. 2351, 81st Gen. Assemb., 1st Extraordinary Sess. (Iowa 2006).

[38] *See* ALASKA STAT. § 09.55.240(a) (2006), *as amended by* H.B. 318, 24th Leg., Reg. Sess. (Alaska 2006); FLA. STAT. ANN. § 166.411 (West Supp. 2007), *as amended by* H.B. 1567, 2006 Leg., 2d Reg. Sess. (Fla. 2006); MONT. CODE ANN. § 70-30-102 (2006), *as amended by* S.B. 363, 60th Leg., Reg. Sess. (Mont. 2007); NEV. REV. STAT. ANN. § 37.010 (LEXIS through 2007 legislation), *as amended by* A.B. 102, 74th Leg., 2007 Sess. (Nev. 2007); N.C. GEN. STAT. § 40A-3 (2005), *as amended by* H.B. 1965, 2005–2006 Sess. (N.C. 2006).

[39] *See* 735 ILL. COMP. STAT. ANN. 30/5-5-5 (West, Westlaw through 2007 Reg. Sess.), *as amended by* S.B. 3086, 2006 Gen. Assemb., Reg. Sess. (Ill. 2006).

[40] *See* NEV. REV. STAT. ANN. § 37.010 (LEXIS through 2007 legislation), *as amended by* A.B. 102, 74th Leg., 2007 Sess. (Nev. 2007).

[41] *See* ALASKA STAT. § 09.55.240(a) (2006), *as amended by* H.B. 318, 24th Leg., Reg. Sess. (Alaska 2006).

authorities to acquire abandoned property for transfer to private parties.[42] Kansas law allows for the transfer of surplus land from a lawful public project to a private party.[43]

Iowa law lists in its definition of public use the elimination of slums and blighted properties,[44] as does Georgia,[45] Minnesota,[46] Montana,[47] New Hampshire,[48] and Virginia.[49] Other states list the elimination of threats to the public health and safety as an acceptable public use. Examples of states employing such provisions are Arizona,[50] Kansas,[51] Louisiana,[52] Nevada,[53] New Hampshire,[54] and Wyoming.[55]

Florida law, which allows "other public improvement[s] deemed necessary or expedient for the preservation of the public health,

---

[42] *See* ARIZ. REV. STAT. ANN. § 12-1136(5)(a)(iv) (West Supp. 2007), *as amended by* Proposition 207 (Ariz. 2006).

[43] *See* S.B. 323, 2005–2006 Leg., Reg. Sess. (Kan. 2006).

[44] *See* IOWA CODE ANN. § 6A.22(2)(a)(1) (West Supp. 2007) , *as amended by* H.F. 2351, 81st Gen. Assemb., 1st Extraordinary Sess. (Iowa 2006). Agricultural properties may not be designated as blighted. *See id.*

[45] *See* GA. CODE ANN. § 22-1-1 (Supp. 2007), *as amended by* H.B. 1313, 2005–2006 Leg., Reg. Sess. (Ga. 2006).

[46] *See* MINN. STAT. ANN. § 117.186(11)(a) (West, Westlaw through 2007 Sess.), *as amended by* S.F. 2570, H.F. 2846, 84th Leg., Reg. Sess. (Minn. 2006). This law also allows for the remediation of contaminated areas. *See id.*

[47] *See* MONT. CODE ANN. § 70-30-102(12), *as amended by* S.B. 363, 60th Leg., Reg. Sess. (Mont. 2007).

[48] *See* N.H. REV. STAT. ANN. § 162-K:2(IX-a)(a)(3) (LexisNexis Supp. 2006), *as amended by* S.B. 287, 159th Gen. Ct., 2006 Sess. (N.H. 2006).

[49] *See* VA. CODE ANN. § 1-219.1(A) (Supp. 2007), *as amended by* H.B. 2954, S.B. 781, S.B. 1296, 2007 Leg., Reg. Sess. (Va. 2007).

[50] *See* ARIZ. REV. STAT. ANN. § 12-1136(5)(a)(iii) (West Supp. 2007), *as amended by* Proposition 207 (Ariz. 2006).

[51] *See* S.B. 323, 2005–2006 Leg., Reg. Sess. (Kan. 2006). Kansas legislators did not ban expressly private transfers or enumerate allowed public uses. Instead, this legislation enumerated certain exceptional conditions that would allow condemning authorities to transfer land acquired through eminent domain to private parties. *See id.*

[52] *See* LA. CONST. art. I, § 4(B), *as amended by* S.B. 1, 2006 Leg., Reg. Sess. (La. 2006).

[53] *See* NEV. REV. STAT. ANN. § 37.010 (LEXIS through 2007 legislation), *as amended by* A.B. 102, 74th Leg., 2007 Sess. (Nev. 2007). The threat must be an "imminent" threat to the public health and safety. *See* A.B. 102, 74th Leg., 2007 Sess. (Nev. 2007).

[54] *See* N.H. REV. STAT. ANN. § 162-K:2(IX-A) (LexisNexis Supp. 2006), *as amended by* S.B. 287, 159th Gen. Ct., 2006 Sess. (N.H. 2006).

[55] *See* WYO. STAT. ANN. § 1-26-801 (2007), *as amended by* H.B. 124, 59th Leg., 2007 Gen. Sess. (Wyo. 2007).

or . . . connected in anywise with the public welfare,"[56] may seem to allow for the removal of blighted properties for transfer to private parties, as many other states allow. However, as broad as this provision may read, Florida law creates no exceptions—such as for economic development or blight removal—to the requirement that private property be taken only for a public use.[57]

2. *Exclusionary Definitions of Public Use*

Several states define public use by way of listing those transfers from public to private use which are specifically prohibited impermissible uses, such as economic redevelopment. Many states, by providing blight removal as an allowed public use, appear to imply that eminent domain may not be used for other transfers to private parties.

Other states, especially with exclusionary definitions of public use,[58] list blight removal as an exception to a general prohibition on transfer of condemned property to private parties. The statutory construction of the "prohibit all, except as enumerated" provisions is stronger than the enumerated list approach. Inclusionary definitions of public use are arguably more open to interpretation than the exclusionary approach.

The Alabama legislature, in 2005, was the first to react to *Kelo* with an exclusionary definition of public use. Senate Bill 68, in language later echoed elsewhere,[59] provides: "Notwithstanding any other provision of law, a municipality or county may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity."[60] Other states employing the exclusionary approach include Colorado, which enacted a measure explicitly excluding economic development or increasing tax revenue from the definition of public use.[61] Michigan law contains a similar provision.[62] North Dakota

---

[56] FLA. STAT. ANN. § 166.411 (West Supp. 2007), *as amended by* H.B. 1567, 2006 Leg., 2d Reg. Sess. (Fla. 2006).

[57] *See* FLA. CONST. art. X § 6, *as amended by* H.J.R. 1569, 2006 Leg., Reg. Sess. (Fla. 2006).

[58] *See infra* text accompanying notes 59–67.

[59] *See, e.g.*, ME. REV. STAT. ANN. tit. 1, § 816 (Supp. 2006), *as amended by* L.D. 1870, 122d Leg., 2d Reg. Sess. (Me. 2006).

[60] ALA. CODE § 11-47-170(b) (LexisNexis Supp. 2006), *as amended by* S.B. 68, 2005 Leg., Reg. Sess. (Ala. 2005).

[61] *See* COLO. REV. STAT. § 38-1-101(1)(a) (2006), *as amended by* H.B. 1411, 65th Leg., Reg. Sess. (Colo. 2006).

[62] *See* MICH. CONST. art. X, § 2, *as amended by* S.J.R. E, 93d Leg., 2005 Reg. Sess.

law employs a slightly different tactic in achieving the same result by excluding from the definition of public use the public benefits of economic development,[63] as does the new legislation in Tennessee.[64] Pennsylvania law bars condemners from using eminent domain to take property for the use of a private enterprise.[65] Texas law prevents condemning authorities from taking land through eminent domain if the taking confers a private benefit on a private party, is for a public use that is merely pretextual to a private benefit, or is for economic redevelopment purposes.[66] South Dakota, in one of the shortest of the post-*Kelo* statutes, enacted a blanket prohibition on taking property under the power of eminent domain for transfer to any private party or for the purpose of increasing tax revenue.[67]

Several states incorporated intent language into their exclusionary public use definitions. In Connecticut and Nebraska, condemning authorities may not take private property for the primary purpose of increasing tax revenue.[68] In Oregon, authorized condemners may not take residences, businesses, farms, or forest land through eminent domain if they intend to convey all or part of the property to another private party.[69] Such measures require judges to examine "the subjective motivations of city officials," which is undesirable because intent is very difficult to prove as a factual matter.[70] Also, such inquiries are intrusive and contrary to the general principle that courts do not examine legislative motivation.[71]

3. "Hybrid" Provisions

In addition to specifying permissible public uses, several states with inclusive definitions of public use apparently wished to clarify that eco-

---

(Mich. 2005) (approved 2006).

[63] *See* N.D. CONST. art. I, § 16, *as amended by* Measure 2 (N.D. 2006).

[64] *See* TENN. CODE ANN. § 29-17-102(b) (LexisNexis Supp. 2007), *as amended by* S.B. 3296, H.B. 3450, 104th Leg., Reg. Sess. (Tenn. 2006).

[65] *See* 26 PA. CONS. STAT. ANN. § 204 (West Supp. 2007), *as amended by* S.B. 881, 2005–2006 Leg., Reg. Sess. (Pa. 2006).

[66] *See* TEX. GOV'T CODE ANN. § 2206.0001(b) (Vernon Supp. 2006), *as amended by* S.B. 7, 79th Leg., 2d Sess. (Tex. 2005).

[67] *See* S.D. CODIFIED LAWS § 11-7-22.1 (Supp. 2007), *as amended by* H.B. 1080, 2006 Leg., Reg. Sess. (S.D. 2006).

[68] *See* CONN. GEN. STAT. ANN. § 8-193 (West, Westlaw through 2007 Sess.), *as amended by* S.B. 167, 2007 Leg., Reg. Sess. (Conn. 2007); NEB. REV. STAT. § 76-710.04 (Supp. 2006), *as amended by* L.B. 924, 99th Leg., 2d Sess. (Neb. 2006).

[69] *See* Measure 39 § 2 (Or. 2006).

[70] BERLINER, *supra* note 20, at 7.

[71] *See, e.g.*, Fletcher v. Peck, 10 U.S. 87, 130–31 (1810).

nomic redevelopment is not a permissible public use. In crafting these seemingly "just to be safe" provisions, legislators in states employing hybrid approaches to defining public use employ some of the language adopted by states with purely exclusionary definitions of public use. For example, Alaska generally bars the transfer of condemned property to a private person for economic redevelopment purposes as an acceptable public use,[72] as does Georgia,[73] Kentucky,[74] Minnesota,[75] and West Virginia.[76]

Other states seek to address precisely what types of takings are prohibited. For example, Arizona law prohibits the exercise of eminent domain for the purpose of achieving the public benefits of an increase in the tax base, an increase in tax revenue, more employment, or general economic stability.[77] Florida law bars authorities from transferring land acquired through eminent domain for 10 years, which has the natural and intended result of preventing takings for economic development.[78]

Condemning authorities in Louisiana may not consider economic development, enhancement of tax revenue, and other incidental benefits to the public in determining whether a taking is for a public use.[79] New Hampshire prohibits takings of property by eminent domain for direct or indirect transfer to a private party for the purpose of private development or other private use.[80] Virginia law requires condemning authorities to ensure that the public interest outweighs the private gain and that the

---

[72] *See* ALASKA STAT. § 09.55.240(a) (2006), *as amended by* H.B. 318, 24th Leg., Reg. Sess. (Alaska 2006). This law excepts common carriers, private entities with oil and gas leases, utility providers, and takings for private rights of way. *See id.*

[73] *See* GA. CODE ANN. § 22-1-1 (Supp. 2007), *as amended by* H.B. 1313, 2005–2006 Leg., Reg. Sess. (Ga. 2006).

[74] *See* KY. REV. STAT. ANN. § 416.540 (LexisNexis Supp. 2006), *as amended by* H.B. 508, 2006 Gen. Assemb., Reg. Sess. (Ky. 2006).

[75] *See* MINN. STAT. ANN. § 117.186(11)(a) (West, Westlaw through 2007 Sess.), *as amended by* S.F. 2570, H.F. 2846, 84th Leg., Reg. Sess. (Minn. 2006).

[76] *See* W. VA. CODE ANN. § 54-1-2 (LexisNexis Supp. 2007), *as amended by* H.B. 4048, 77th Leg., 2d Reg. Sess. (W. Va. 2006).

[77] *See* ARIZ. REV. STAT. ANN. § 12-1136(5)(b) (West Supp. 2007), *as amended by* Proposition 207 (Ariz. 2006).

[78] *See* FLA. STAT. ANN. § 166.411 (West Supp. 2007), *as amended by* H.B. 1567, 2006 Leg., Reg. Sess. (Fla. 2006).

[79] *See* LA. CONST. art. I, § 4(B), *as amended by* S.B. 1, 2006 Leg., Reg. Sess. (La. 2006).

[80] *See* N.H. CONST. Pt. 1, art. 12-a, *as amended by* C.A.C.R. 30, 159th Gen. Ct., 2006 Sess. (N.H. 2006).

primary purpose of the taking is not private gain, benefit, or an increase in tax revenues or employment.[81]

The 2007 New Mexico legislation operates by excision. Legislators, in specifying permissible public uses for its Metropolitan Redevelopment Code, granted municipalities all the powers needed to carry out redevelopment projects except for the power of eminent domain.[82]

4. Exemptions from the Exclusionary Approach

Most states have enacted, with these exclusionary definitions of public use, exceptions to general prohibitions on eminent domain takings for transfer to private entities. Alabama law contains an exemption for takings of blighted properties, takings for utility providers, and other traditional publicly owned or operated uses.[83] The 2007 Ohio legislation contains similar exemptions, but allows private parties to occupy an "incidental" portion of the property otherwise put to a valid public use.[84] Tennessee law also contains an incidental private use exemption.[85] To avoid confusion, states explicitly have exempted public utilities and public projects such as schools and public buildings from laws against private ownership of land acquired through eminent domain.[86]

Legislators in Texas, perhaps reflecting a passion for football, created an exemption for "sports and community venue projects" approved before a certain date.[87] This exemption primarily benefits the Dallas Cowboys' new stadium project.[88] Tennessee law looks favorably on industrial parks, which are exempt from the general prohibition on eminent domain use for private commercial enterprise.[89] The most common exception to

---

[81] *See* VA. CODE ANN. § 1-219.1(D) (Supp. 2007), *as amended by* H.B. 2954, S.B. 781, S.B. 1296, 2007 Leg., Reg. Sess. (Va. 2007).

[82] *See* N.M. STAT. ANN. § 3-60A-10 (LexisNexis Supp. 2007), *as amended by* H.B. 393, 48th Leg., 2007 Reg. Sess. (N.M. 2007).

[83] *See* ALA. CODE § 11-47-170(b) (LexisNexis Supp. 2006), *as amended by* S.B. 68, 2005 Leg., Reg. Sess. (Ala. 2005).

[84] OHIO REV. CODE ANN. § 1.08 (LexisNexis Supp. 2007), *as amended by* S.B. 7, 127th Leg., Reg. Sess. (Ohio 2007).

[85] *See* TENN. CODE ANN. § 29-17-102(b) (LexisNexis Supp. 2007), *as amended by* S.B. 3296, H.B. 3450, 104th Leg., Reg. Sess. (Tenn. 2006).

[86] *See, e.g.*, ME. REV. STAT. ANN. tit. 1, § 816 (Supp. 2006), *as amended by* L.D. 1870, 122d Leg., 2d Reg. Sess. (Me. 2006); TEX. GOV'T CODE ANN. § 2206.0001(b) (Vernon Supp. 2006), *as amended by* S.B. 7, 79th Leg., 2d Sess. (Tex. 2005).

[87] TEX. GOV'T CODE ANN. § 2206.0001(c)(6) (Vernon Supp. 2006), *as amended by* S.B. 7, 79th Leg., 2d Sess. (Tex. 2005).

[88] *See id.*

[89] *See* TENN. CODE ANN. § 29-17-102(b)(5) (Supp. 2006), *as amended by* S.B. 3296,

exclusionary rules, is an exception for blight. This "vague, amorphous term" marks conditions dangerous to health or safety, but more generally is "a rhetorical device that enabled renewal advocates to reorganize property ownership by declaring certain real estate dangerous to the future of the city."[90] Property rights advocacy groups have denounced provisions permitting condemnation for blight as the "blight loophole."[91] States with exclusionary rules as well as inclusionary rules typically have some sort of provision for the elimination of blighted areas, however defined by the state. Both kinds of approaches indicate, although they differ by means, that the taking of private property for transfer to a private individual is acceptable, provided the neighborhood meets a certain standard of undesirability to the community.

Oregon law exempts contaminated, dilapidated, or unsanitary properties from its protection.[92] Idaho, which bars pretextual and deliberate takings for the purpose of bringing about private economic development, also exempts blight from its prohibition.[93] Alabama law also excludes blight from its rule,[94] as does Michigan,[95] Missouri,[96] New Hampshire,[97] North Carolina,[98] Ohio,[99] Pennsylvania,[100] South Carolina,[101] Utah,[102]

H.B. 3450, 104th Leg., Reg. Sess. (Tenn. 2006).

[90] Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 3 (2003). "By elevating blight into a disease that would destroy the city, renewal advocates broadened the application of the Public Use Clause and at the same time brought about a re-conceptualization of property rights." *Id.*

[91] Castle Coalition, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE KELO, VERMONT LEGISLATION REPORT CARD (2007), http://www.castlecoalition.org/pdf/publications/report_card/states/vermont.pdf (last visited Jan. 7, 2008).

[92] *See* Measure 39 § 2 (Or. 2006).

[93] *See* IDAHO CODE ANN. § 7-701A (Supp. 2007), *as amended by* H.B. 555, 58th Leg., 2d Reg. Sess. (Idaho 2006).

[94] *See* ALA. CODE § 24-2-2 (LexisNexis Supp. 2006), *as amended by* H.B. 654, 2006 Leg., Reg. Sess. (Ala. 2006).

[95] *See* MICH. COMP. LAWS ANN. § 213.23 (West Supp. 2007), *as amended by* H.B. 5060, S.B. 693, 93d Leg., 2006 Reg. Sess. (Mich. 2006).

[96] *See* MO. ANN. STAT. § 523.271 (West Supp. 2007), *as amended by* H.B. 1944, 93d Leg., 2d Reg. Sess. (Mo. 2006).

[97] *See* N.H. REV. STAT. ANN. § 205:1 (LexisNexis Supp. 2006), *as amended by* S.B. 287, 159th Gen. Ct., 2006 Sess. (N.H. 2006).

[98] *See* N.C. GEN. STAT. § 160-A-503 (Supp. 2006), *as amended by* H.B. 1965, 2005–2006 Sess. (N.C. 2006)

[99] *See* OHIO REV. CODE ANN. § 1.08 (LexisNexis Supp. 2007), *as amended by* S.B. 7, 127th Leg., Reg. Sess. (Ohio 2007).

[100] *See* 26 PA. CONS. STAT. ANN. § 205(b) (West Supp. 2007), *as amended by* S.B.

Vermont,[103] Virginia,[104] and others. Michigan allows authorities to take property for transfer to a private party if the particular property is "selected on facts of independent public significance or concern, including blight, rather than the private interests of the entity to which the property is eventually transferred."[105] In other words, as long as a parcel is taken because it is blighted, and not because the private entity wants the parcel, the property may be transferred to the private entity.

Generally, the states are expressing through their statutory language that dilapidated and decaying parcels are bad for the community and that local legislatures need the flexibility to use eminent domain to alleviate blight despite the possibilities of abuse. In fact, the only states to not exclude blight from limitations on the eminent domain power, or allow blight removal as a public use, are Florida, New Mexico, North Dakota, and South Dakota.[106]

Because conditions ranging from the most severe to the most trivial could be designated as "blight," several states adopted reform measures that attempted to specify what kinds of properties and neighborhoods could be designated as blighted to avoid what are seen as the more pervasive forms of abuse.[107] Occasionally, higher burdens of proof accompany these changes in definition, thus rejecting the tone of judicial deference adopted in *Kelo*.[108]

A common variation in blight definitions is some incorporation of or appeal to the state police power. Several states invoke their police power

---

881, 2005–2006 Leg., Reg. Sess. (Pa. 2006).

[101] *See* S.C. CONST. art. I, § 13(B), *as amended by* S.B. 1031, 116th Leg., 2d Reg. Sess. (S.C. 2006), *as ratified by* S.B. 155, 117th Leg., 1st Reg. Sess. (S.C. 2007).

[102] *See* Utah H.B. 365, 2007 Leg., Gen. Sess. (Utah 2007).

[103] *See* VT. STAT. ANN. tit. 12, § 1040(a) (Supp. 2007), *as amended by* S.B. 246, 2005–2006 Leg. (Vt. 2006).

[104] *See* VA. CODE ANN. § 1-219.1(B) (Supp. 2007), *as amended by* H.B. 2954, S.B. 781, S.B. 1296, 2007 Leg., Reg. Sess. (Va. 2007).

[105] MICH. COMP. LAWS ANN. § 213.23(2)(c) (West Supp. 2007), *as amended by* H.B. 5060, S.B. 693, 93d Leg., 2006 Reg. Sess. (Mich. 2006).

[106] *See* Castle Coalition, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE KELO (2007), http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf (last visited Jan. 7, 2008) (making, perhaps because of the lack of a "blight loophole," Florida, North Dakota, and South Dakota the only states to receive its highest rating of property rights protection).

[107] *See* DANA BERLINER, INSTITUTE FOR JUSTICE, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-*KELO* WORLD (2006), http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf (last visited Jan. 7, 2008).

[108] *See infra* Part II.C.1.

in their post-*Kelo* legislation through the adoption of blight designations that require a property to pose a threat to the public health, safety, or welfare.

Alabama law, for example, defines a property as blighted if it contains a structure that is unfit for human habitation due to vermin infestation, dilapidation, lack of air, or missing utility lines.[109] Authorities may designate properties as blighted by virtue of serious overcrowding, fire hazard, serious building code violations, or environmental contamination.[110] North Carolina law defines blighted parcels as those that impair the growth of the community, foster ill health and disease transmission, and increase infant mortality and juvenile delinquency by virtue of any of several enumerated factors.[111] Virginia redefined blight to mean a property that endangers the public health or safety and is either a public nuisance or a structure or improvement that is beyond repair or unfit for human use.[112] Statutes in Indiana and Wisconsin limit authorities from using blight condemnations to condemn nonblighted parcels in blighted areas.[113]

Condemning authorities in Vermont and West Virginia must prove that an area, due to any one or combination of several enumerated factors, retards growth or housing accommodations, constitutes an economic or social liability, or is a menace to the public health and safety in order to qualify as blighted.[114]

Similarly, Alabama law also provides factors reflecting economic underutilization of a given area or parcel as grounds for a blight designation. Such factors include a substantial number of tax delinquencies in the area, where the delinquencies exceed the value of the land to which they attach, and a high number of defective titles, making private transfer of properties on the open market unlikely.[115] Indiana, Ohio, Pennsylvania, South Carolina, West Virginia, and Wisconsin passed statutes in the wake

---

[109] *See* ALA. CODE § 24-2-2 (LexisNexis Supp. 2006), *as amended by* S.B. 68, 2005 Leg., Reg. Sess. (Ala. 2005).

[110] *See id.*

[111] *See* N.C. GEN. STAT. § 160-A-503 (Supp. 2006), *as amended by* H.B. 1965, 2005–2006 Sess. (N.C. 2006).

[112] *See* VA. CODE ANN. § 1-219.1(B) (Supp. 2007), *as amended by* H.B. 2954, S.B. 781, S.B. 1296, 2007 Leg., Reg. Sess. (Va. 2007).

[113] *See* Dana, *supra* note 25, at 377.

[114] *See* VT. STAT. ANN. tit. 24, § 3201 (Supp. 2007), *as amended by* S.B. 246, 2005–2006 Leg. (Vt. 2006); W. VA. CODE ANN. § 16-18-3(c) (LexisNexis Supp. 2007), *as amended by* H.B. 4048, 77th Leg., 2d Reg. Sess. (W. Va. 2006).

[115] *See* ALA. CODE § 24-2-2 (LexisNexis Supp. 2006), *as amended by* S.B. 68, 2005 Leg., Reg. Sess. (Ala. 2005).

of *Kelo* that contain similar provisions, with some variations. Michigan considers tax-reverted properties, as well as properties owned by a land bank fast track authority, blighted whatever physical condition they may be in.[116] In South Carolina, legislators have determined that "deleterious land use" could constitute a "danger to the safety and health of the community."[117]

However, in Vermont, condemning authorities may not consider what the land might be worth if put to another use under a redevelopment plan when designating properties as blighted.[118]

Idaho legislators revised the definition of blight to limit the designation only to properties that are dilapidated or otherwise dangerous; pose a threat to the public health by disease transmission, juvenile delinquency, or crime; and pose an "actual risk to the public health, safety, morals, or general welfare."[119]

Several midwestern states, perhaps reflecting the importance of farming in their areas, created special policies for agricultural lands in terms of blight designations. For example, agricultural properties may not be designated as blighted in Missouri,[120] or in Ohio, unless the agricultural parcel poses a public health or environmental hazard.[121] Likewise, Nebraska extends its protection from blight designations to horticultural lands as well as agricultural lands.[122]

In practice, local authorities rarely use the condemnation process to address problems certain properties may pose to the public health and safety because of the length of time and the cost the process entails.[123] Local authorities have other tools in their arsenal, such as policing, tax

---

[116] *See* MICH. COMP. LAWS ANN. § 213.23 (West Supp. 2007), *as amended by* H.B. 5060, S.B. 693, 93d Leg., 2006 Reg. Sess. (Mich. 2006) (A land bank fast track authority is a state agency directed to assemble or dispose of public property.).

[117] S.C. CONST. art. I, § 13(B), *as amended by* S.B. 1031, 116th Leg., 2d Reg. Sess. (S.C. 2006), *as ratified by* S.B. 155, 117th Leg., 1st Reg. Sess. (S.C. 2007).

[118] *See* VT. STAT. ANN. tit. 24, § 3201 (Supp. 2007), *as amended by* S.B. 246, 2005–2006 Leg. (Vt. 2006).

[119] IDAHO CODE ANN. § 7-701A(2)(b)(ii) (Supp. 2007), *as amended by* H.B. 555, 58th Leg., 2d Reg. Sess. (Idaho 2006).

[120] *See* MO. ANN. STAT. § 523.271 (West Supp. 2007), *as amended by* H.B. 1944, 93d Leg., 2d Reg. Sess. (Mo. 2006).

[121] *See* S.B. 7, 127th Leg., Reg. Sess. (Ohio 2007).

[122] *See* NEB. REV. STAT. § 76-710.04 (Supp. 2006), *as amended by* L.B. 924, 99th Leg., 2d Sess. (Neb. 2006).

[123] *See* Dana, *supra* note 25, at 370.

collection, and enforcement of the housing code to abate immediate problems.[124]

Rather, the undesirability that many states attempted to capture through new definitions of blight largely refers to poor areas, particularly urban and poor areas.[125] In exempting blighted areas from general prohibitions on the use of eminent domain for economic development, the reform laws "privilege blight condemnations over economic development condemnations and, by extension, privilege the interests of owners and occupants of non-'blighted' property over that of owners and occupants of 'blighted' property."[126] Professor David Dana argues that most, if not all, blight condemnations could be considered economic development condemnations, as the goal of removing blight would be economic redevelopment of the blighted area or property.[127] However, by creating narrower standards for blight designations, the states that have enacted these standards really are trying to protect middle-class households from authorities using blight designations "as an end-run around a ban on economic development condemnations."[128] He predicts that, in practice, local authorities operating under the authority of new blight rules will continue to identify blight in poor areas—areas a judge could readily understand as blighted[129]—while working-class and middle-class areas will be much more difficult to condemn.[130]

The opposing view is that condemnation for blight only in poor areas is a realistic problem only in a few states.[131] At least one author has concluded that most of the states enacting legislation in the wake of *Kelo* either banned economic development takings and blight takings, or defined blight so broadly as to allow the taking of any property.[132] He notes that while eminent domain proceedings disproportionately affect the poor, nothing indicates that the post-*Kelo* reform enacted in the states exacer-

---

[124] *See id.*
[125] *See id.*
[126] *Id.* at 376.
[127] *See id.* at 369.
[128] *Id.* at 381.
[129] *See id.* at 380.
[130] *See id.* at 377.
[131] *See* Ilya Somin, *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. 1931 (2007) (enumerating Alabama, Arizona, Georgia, Idaho, Indiana, Louisiana, Michigan, New Hampshire, and Oregon as states where blight removal targets mostly poor areas).
[132] *See id.*

bated the problem.[133] Furthermore, the inadequate measures passed by the states still may provide some protection to the poor.[134]

Many states apparently retained blight removal as a permitted public use (or an exception to a general ban) because of the value revitalization projects have to deteriorating localities. Although many see the urban renewal scheme of the mid-20th century as a failure,[135] smaller, localized revitalization projects, as seen in *Kelo*, still appeal to municipal politicians looking to "clean up" a neighborhood and increase the tax base. However, one commentator has noted that the limits placed on eminent domain will lead to "less efficient, less effective, and much less fair" revitalization projects in the future.[136] She argues that eminent domain is necessary to urban revitalization. The examples of successful plans undertaken without eminent domain that critics cite, she notes, are either small and "uni-dimensional," involve private developers using secret buying agents to avoid holdouts (which is not possible for a government agent), or are successful due to the threat of eminent domain, if not its use.[137] Urban revitalization projects of the future, in this view, will be limited to blighted areas, as opposed to the most suitable or most efficient areas.[138] Also, effective provisions against retransfer mean that condemnors might find themselves in the business of running commercial enterprises rather than litigating the legality of public-private partnership revitalization plans, likely resulting in less efficiently run enterprises.[139]

B. "Just Compensation"

Just compensation requires that condemnees be paid the fair market value of their parcels. It does not include the owner's sentimental value, commercial goodwill or customization for a particular business, or the many costs associated with moving.[140] The federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform

---

[133] *See id.*

[134] *See id.*

[135] *See generally* Jon C. Teaford, *Urban Renewal and Its Aftermath*, 11 HOUSING POL'Y DEBATE 443 (2000); Howard Blum, *Urban Renewal: Lesson in Failure*, N.Y. TIMES, May 24, 1983.

[136] Lynn E. Blais, *Urban Revitalization in the Post*-Kelo *Era*, 34 FORDHAM URB. L.J. 657, 680–81 (2007).

[137] *Id.* at 683–84.

[138] *See id.* at 685.

[139] *See id.* at 685–86.

[140] *See* Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988) ("Compensation in the constitutional sense is therefore not full compensation.").

Relocation Act) has a partially ameliorative effect.[141] However, state and local projects not employing any form of federal assistance are exempt from the Act's provisions requiring payment for moving expenses, business reestablishment, and other relocation costs.

To address this issue, several states enacted provisions seeking to limit or reduce the impact legitimate state-based projects may have on property owners. Some provisions, such as the increased payments required to constitute just compensation, may have the effect of limiting the use of eminent domain altogether. Part of the just compensation in some formulas includes a comparable replacement dwelling or a right of first refusal if the property is no longer needed for a public use. By awarding attorney's fees in the event the owner successfully challenges the agency's designation or offer, other states encourage owners who legitimately believe that their property will not be put to a public use or who legitimately believe that they received too low an offer from the local agency to take that agency to court.[142]

1. Fair Market Value

The Constitution requires that an owner whose property has been condemned receive just compensation; just compensation is typically defined as payment of fair market value.[143] However, several states require enhanced compensation, typically expressed as an additional percentage of fair market value. These provisions seemingly address the notion that "fair market value" is not always "fair" to the seller. Often, certain types of property are privileged over others. For example, Indiana law specifies that the price to be paid for agricultural land taken through eminent domain must be either 125% of the fair market value of the land or a transfer of ownership interest to a lot of equal acreage plus losses incurred to a trade or business.[144] Residential land must be compensated at 150% of the fair market value and payment of relocation costs.[145] Simi-

---

[141] *See* Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601–55 (2000).

[142] *See infra* Part II.B.5.

[143] *See* United States v. 50 Acres of Land, 469 U.S. 24, 25–26 (1984) (quoting United States v. Miller, 317 U.S. 369, 374 (1943) (defining fair market value as "what a willing buyer would pay in cash to a willing seller")).

[144] *See* IND. CODE ANN. § 32-24-4.5-8(1) (LexisNexis Supp. 2006), *as amended by* H.B. 1010, 114th Gen. Assemb., 2d Reg. Sess. (Ind. 2006).

[145] *See id.* § 32-24-4.5-8(2).

larly, Michigan law requires condemning authorities taking an individual's home to pay the owner no less than 125% of the fair market value.[146]

Missouri law adds "heritage value," or an additional 50% of the fair market value, for property owned by the same family for 50 or more years, including property owned by small businesses, to the total compensation package.[147] Compensation for homestead takings is equal to 125% of the fair market value of the property.[148]

In Minnesota, business owners who lose what is commonly known as goodwill (or "going concern" value) shall receive compensation for such a loss unless the condemning authority can prove by clear and convincing evidence that such compensation will already be awarded as part of the compensation package, that the taking did not cause the loss, or that the loss reasonably can be prevented by relocating to a similar location and taking such steps as a reasonable, prudent person would take.[149]

Both Wyoming and Maryland raised the limits of compensable relocation costs. Wyoming removed the upper ceiling of $10,000 in reimbursable expenses for relocation of a farm, nonprofit organization, or small business at its new site.[150] Maryland now allows a $45,000 additional payment (raised from $22,500) to displaced homeowners for additional expenses such as recording titles, increased interest and debt servicing as a result of financing a new dwelling, and the difference between the purchase price and the price needed to purchase a comparable dwelling.[151] Renters may receive up to $10,500 (up from $5,250) to rent a comparable dwelling for up to 42 months or to put the money towards the down payment on a comparable dwelling.[152] Maryland farmers, small business owners, or nonprofit organizations may recover up to $60,000 of reasonable costs to reestablish their businesses.[153]

---

[146] *See* MICH. CONST. art. X, § 2, *as amended by* S.J.R. E, 93d Leg., 2005 Reg. Sess. (Mich. 2005) (approved 2006).

[147] *See* MO. ANN. STAT. § 523.001(2) (West Supp. 2007), *as amended by* H.B. 1944, 93d Leg., 2d Reg. Sess. (Mo. 2006).

[148] *See id.* § 523.039.

[149] *See* MINN. STAT. ANN. § 117.186 (West, Westlaw through 2007 Sess.), *as amended by* S.F. 2570, H.F. 2846, 84th Leg., Reg. Sess. (Minn. 2006).

[150] *See* WYO. STAT. ANN. § 16-7-103 (2007), *as amended by* H.B. 124, 59th Leg., 2007 Gen. Sess. (Wyo. 2007).

[151] *See* MD. CODE ANN. REAL PROP. § 12-202 (LexisNexis Supp. 2007), *as amended by* S.B. 3, 2007 Leg., Reg. Sess. (Md. 2007).

[152] *See id.* § 12-204.

[153] *See id.* § 12-205(4).

2. *Right of First Refusal*

States providing condemnees with rights of first refusal should the condemnor subsequently resell their property may do so, in part, to prevent agencies from accumulating too much land for public projects in the anticipation of reselling unused land later for a profit. The right of first refusal laws also recognize the idiosyncratic value owners place on their properties and the idea that, in the absence of a sufficient public need, the owners should have the opportunity to buy their property back from the condemning agency.

Alabama law offers a right of first refusal to property owners who have lost their land through its eminent domain law. When a property taken through eminent domain later is placed for sale without being used for the purpose for which it was condemned or for another public use, the original owner or his or her heirs or assigns has a 90-day option to repurchase the property at the original purchase price minus income and transaction taxes.[154] Only after the condemning authority makes such an offer and gives public notice can the authority offer the property for sale to the public.[155] Minnesota law provides that when a property acquired through eminent domain is no longer needed for a public use, the authority first must offer to sell the property back to the original owner at the original purchase price or the current fair market value, whichever is lower.[156]

South Dakota law provides that no redevelopment commission may transfer property acquired through or under threat of eminent domain within seven years without first offering the property for resale to the original owner or the original owner's heirs or assigns for the current fair market value or the original sale price, whichever is less.[157] Similarly, condemnors in Connecticut first must offer property taken but not used for a public use for sale to the original owner or the owner's successor in interest for the fair market value of the property or the price originally paid for the property, whichever is less.[158]

By requiring the condemning agencies to resell the property to the original owner for the original price or lower if the original owner wishes

---

[154] *See* ALA. CODE § 11-47-170(c) (LexisNexis Supp. 2006), *as amended by* S.B. 68, 2005 Leg., Reg. Sess. (Ala. 2005).

[155] *See id.*

[156] *See* MINN. STAT. ANN. § 117.226 (West Supp. 2006), *as amended by* S.F. 2570, H.F. 2846, 84th Leg., Reg. Sess. (Minn. 2006).

[157] *See* S.D. CODIFIED LAWS § 11-7-22.2 (Supp. 2007), *as amended by* H.B. 1080, 2006 Leg., Reg. Sess. (S.D. 2006).

[158] *See* CONN. GEN. STAT. ANN. § 8-193(c) (West, Westlaw through 2007 Sess.), *as amended by* S.B. 167, 2007 Leg., Reg. Sess. (Conn. 2007).

to repurchase, the Alabama, Connecticut, Minnesota, and South Dakota provisions may discourage extraneous condemnations made under a profit-seeking motive. For this reason, the right of first refusal offered to Montana property owners likely will not be effective: Montana owners may repurchase their properties taken through eminent domain only by offering a price equal to the highest bid received at public auction within 30 days or by indicating their desire to purchase the property at its current fair market value if the authority receives no bids.[159]

Rights of first refusal also pressure redevelopment authorities to use condemned land within a reasonable amount of time and discourage land hoarding. In addition to the right of first refusal in South Dakota extending for seven years,[160] Georgia provides that a condemnee may petition the condemnor for reconveyance, or additional compensation if the property is not put to a public use (or a good faith effort is not made to do so) within five years.[161]

An amendment to the Louisiana constitution requires a condemning authority to identify condemned property not needed for a public project within one year and to declare the property surplus.[162] The condemnor must offer the surplus property for sale to the original owner or the owner's heirs or assigns within two years of the completion of the project at the current fair market value.[163] If the condemning authority does not declare the land surplus, the original owner or the owner's successor in interest may petition to have the property declared surplus.[164]

In 2007, Virginia legislators removed a 15-year limitation on the requirement that a condemning authority offer property subsequently deemed surplus to the original owner, or the original owner's heirs or assigns.[165] Condemning authorities must provide written notice when they intend to abandon the stated public use of the property; then the former owner or his or her successors in interest may demand that the condemn-

---

[159] *See* MONT. CODE ANN. § 70-30-322 (2007), *as amended by* S.B. 363, 60th Leg., Reg. Sess. (Mont. 2007).

[160] *See* S.D. CODIFIED LAWS § 11-7-22.2 (Supp. 2007), *as amended by* H.B. 1080, 2006 Leg., Reg. Sess. (S.D. 2006).

[161] *See* GA. CODE ANN. § 22-1-2(c)(1) (Supp. 2007), *as amended by* H.B. 1313, 2005–2006 Leg., Reg. Sess. (Ga. 2006).

[162] *See* LA. CONST. art. I, § 4(G), *as amended by* H.B. 707, 2006 Leg., Reg. Sess. (La. 2006).

[163] *See id.*

[164] *See id.*

[165] *See* VA. CODE ANN. § 25.1-108(A) (Supp. 2007), *as amended by* H.B. 2954, S.B. 781, S.B. 1296, 2007 Leg., Reg. Sess. (Va. 2007).

ing authority declare the property surplus.[166] The sale price cannot exceed the current fair market value.[167]

3. Limitations on Conversion

Georgia law provides that property condemned for a public use may not be used for any other use for 20 years.[168] Indiana law provides that limitations on the right of a condemning authority to transfer land to a private party for a private use expire after 30 years.[169] Such provisions appear to require condemning authorities to consider carefully the life of proposed projects. Like right of first refusal provisions, limitations on conversion create obstacles to the redevelopment authority seeking a quick, profitable turnaround on surplus property. However, conversion limitations also could create administrative burdens and impose heavy holding costs on localities if the public project becomes obsolete sooner than anticipated and no alternative public use for the land is found.

4. Comparable Replacement Dwelling

The Uniform Relocation Act provides an additional payment to homeowners who would not be able to purchase a comparable dwelling with the compensation the condemning agency paid them.[170] Echoing that provision, Arizona enacted a law that requires that owners of residential property in Arizona may receive a comparable, replacement dwelling if their home is taken through eminent domain.[171] If they so wish, owners may elect monetary compensation in an amount no less than the amount needed to purchase a replacement dwelling "that is decent, safe, and sanitary."[172] In Minnesota, however, the law does not allow a condemning authority to require the owner to take any substitute property provided to him or her, but the authority must pay an amount so that the owner could purchase a comparable property in the community.[173]

---

[166] *See id.*

[167] *See id.*

[168] *See* GA. CODE ANN. § 22-1-2 (Supp. 2007), *as amended by* H.B. 1313, 2005–2006 Leg., Reg. Sess. (Ga. 2006).

[169] *See* IND. CODE ANN. § 32-24-4.5(b)(c) (LEXIS through 2007 legislation), *as amended by* H.B. 1010, 114th Gen. Assemb., 2d Reg. Sess. (Ind. 2006).

[170] *See* Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4623 (2000).

[171] *See* ARIZ. REV. STAT. ANN. § 12-1133 (West Supp. 2007), *as amended by* Proposition 207 (Ariz. 2006).

[172] *Id.*

[173] *See* MINN. STAT. ANN. § 117.187 (West, Westlaw through 2007 Sess.), *as amended by* S.F. 2570, H.F. 2846, 84th Leg., Reg. Sess. (Minn. 2006).

5. Attorney's Fees

Attorney's fee award provisions long have been used to indemnify the cost of litigating inadequate agency just compensation determinations.[174] Post-*Kelo* statutes extend that principle to indemnification of the cost of a successful legal challenge against a condemning authority either on public use grounds or on the basis of unfair dealing. Unfair dealing largely would comprise situations where the authority offered too low a price for the property.

For example, Arizona law grants reasonable attorney's fees, costs, and expenses when an owner successfully challenges a public use designation.[175] In eminent domain cases, owners have the right to attorney's fees and costs when a judge or jury finds that the proper value of the property exceeds the offer made by a condemning authority.[176] Similarly, Minnesota law requires the condemning authority to pay reasonable attorney's fees and other litigation costs if the valuation judgment is at least 20% greater than the last offer made by the condemning authority or if the court determines that the taking is for an unlawful (for example, not public) use.[177] If an owner successfully challenges a taking solely on the issue of public use in the courts, the owner is entitled to reasonable attorney's fees.[178]

Delaware legislators shifted authority to the court, instead of the condemning agency, to decide when to award attorney's fees and plaintiff's other reasonable costs when a condemnation proceeding is abandoned or the final judgment is that the property cannot be taken.[179]

Indiana law allows a court to order a condemning authority to pay the owner's litigation expenses (including attorney's fees) up to $25,000 or the value of the property or easement being taken, whichever is lower, if the defendant successfully challenges a condemnation proceeding.[180] Oregon law similarly rewards victorious homeowners by awarding attor-

---

[174] *See* 8A JULIUS SACKMAN, NICHOLS ON EMINENT DOMAIN § G15.01 (Rev. 3d ed. 1997).

[175] *See* ARIZ. REV. STAT. ANN. § 12-1135(b) (West Supp. 2007), *as amended by* Proposition 207 (Ariz. 2006).

[176] *See id.* § 12-1135(c).

[177] *See* MINN. STAT. ANN. § 117.031 (West, Westlaw through 2007 Sess.), *as amended by* S.F. 2570, H.F. 2846, 84th Leg., Reg. Sess. (Minn. 2006).

[178] *See id.*

[179] *See* DEL. CODE ANN. tit. 29, § 9503 (Supp. 2006), *as amended by* S.B. 217, 143d Leg. (Del. 2005).

[180] *See* IND. CODE ANN. § 32-24-1-14 (LexisNexis Supp. 2006), *as amended by* H.B. 1010, 114th Gen. Assemb., 2d Reg. Sess. (Ind. 2006).

ney's fees, costs, and "other disbursements reasonably incurred to defend against the proposed condemnation."[181] At least 20 days before a trial on compensation issues in California, the plaintiff and defendant must file on each other their final demands/offers for compensation. If the court finds that the plaintiff offered an unreasonable amount and the defendant demanded a reasonable amount, then the court will award the defendant litigation expenses.[182]

Iowa law provides that when an owner prevails in a public use challenge, the condemning authority must pay the costs, including reasonable attorney's fees, of the prevailing party.[183]

Pursuant to its provision requiring good faith negotiations from condemning authorities, Wyoming law provides that if a court finds that the condemning authority did not negotiate in good faith, the authority must reimburse the owner of the property for all reasonable litigation expenses.[184]

C. Procedural Reforms

Several states have combined public use definitions with procedural reforms to address perceived eminent domain abuse. Addressing the judicial tone of deference adopted by the *Kelo* majority, several states now require condemning agencies to make a stronger showing and prove to a court that their proposed use is a public one. Other measures require localities to form redevelopment plans that are subject to certain time or other restrictions. Other states enacted provisions seemingly designed to prevent stealth condemnation, by setting certain requirements for offers and notice to property owners.

1. Burden of Proof

Arizona voters approved Proposition 207 in 2006, which addresses the issue of judicial deference for legislative condemnation actions. Arizona law now requires the judiciary to review challenged determinations of public use "without regard to any legislative assertion that the use is public."[185] Oregon similarly requires a court to determine independently

---

[181] Measure 39 § 2 (Or. 2006).

[182] *See* CAL. CIV. PROC. CODE § 1250.410 (West 2007), *as amended by* S.B. 1210, 2005–2006 Reg. Sess. (Cal. 2006).

[183] *See* IOWA CODE ANN. § 6B.33 (West Supp. 2007), *as amended by* H.F. 2351, 81st Gen. Assemb., 1st Extraordinary Sess. (Iowa 2006).

[184] *See* WYO. STAT. ANN. § 1-26-509(g) (2007), *as amended by* H.B. 124, 59th Leg., 2007 Gen. Sess. (Wyo. 2007).

[185] ARIZ. REV. STAT. ANN. § 12-1132(A) (West Supp. 2007), *as amended by*

whether a property designated as blighted meets the requirements of the law "without deference to any determination made by the public body."[186]

Arizona law requires a condemning authority to show by clear and convincing evidence that each parcel is "necessary to eliminate a direct threat to the public health or safety . . . and that no reasonable alternative to condemnation exists" in cases of blight removal.[187] In Minnesota, when the taking is for blight removal, nuisance removal, reduction of abandoned property, or remediation of an environmentally contaminated area, the condemning authority must show the taking is necessary by preponderance of the evidence.[188]

Iowa law provides that an agency wishing to receive a court declaration that the agency's finding of public use is appropriate under the applicable law must prove by a preponderance of the evidence that the use is a public one.[189]

In essence, in all cases challenging whether condemnation is for a public use, these states are employing the requirement for heightened scrutiny that Justice Kennedy, the fifth concurring vote in *Kelo*, believed might be appropriate for some category of takings.[190]

2. Redevelopment Plans

California law places time limits on the activities of redevelopment authorities acting according to redevelopment plans. Authorities have 30 years to gauge the effectiveness of the redevelopment plan.[191] Authorities have 45 years to pay off the debts incurred through the redevelopment plan with property taxes.[192] Lastly, authorities have only 12 years to bring eminent domain proceedings in the project area unless they can prove that significant blight remains and eminent domain is the only way to elimi-

---

Proposition 207 (Ariz. 2006).

[186] Measure 39 § 2 (Or. 2006).

[187] ARIZ. REV. STAT. ANN. § 12-1132(B) (West Supp. 2007), *as amended by* Proposition 207 (Ariz. 2006).

[188] *See* MINN. STAT. ANN. § 117.075(1) (West Supp. 2007), *as amended by* S.F. 2570, H.F. 2846, 84th Leg., Reg. Sess. (Minn. 2006).

[189] *See* IOWA CODE ANN. § 6A.24(3) (West Supp. 2007), *as amended by* H.F. 2351, 81st Gen. Assemb., 1st Extraordinary Sess. (Iowa 2006).

[190] *See* Kelo v. City of New London, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring) (providing, as a potential example, "private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause").

[191] *See* CAL. HEALTH & SAFETY CODE § 33333.2(a)(2) (West Supp. 2007), *as amended by* S.B. 53 2005–2006 Sess. (Cal. 2006).

[192] *See id.* § 33333.2(a)(3).

nate the blight.[193] Condemning authorities may specify in their plans that they cannot take residential property or property in certain areas in the redevelopment area.[194]

West Virginia law provides that only slum and blighted areas in need of redevelopment, as declared by the local legislative body in a resolution to that effect, may be subject to a redevelopment plan.[195] Such a plan must detail the area under redevelopment, information showing land coverage and building densities after development, and any zoning changes necessary to effect the changes.[196] The authority must consider whether its plan will lead to the sound development of the community and whether the use of public funds will be "wise and efficient."[197] Each owner of properties in the redevelopment plan must get notice by certified letter of public hearing dates and their rights under the law.[198]

Wyoming law removed the power of municipalities to allow urban renewal agencies to exercise eminent domain.[199]

In Maryland, condemning authorities must move to acquire the land within four years of receiving authorization to do so; otherwise, the authorities must seek reauthorization.[200]

3. Offers

Indiana requires that a condemning authority serve an offer in person or by certified mail on the owner or the owner's designated representative.[201] Service may be effected by publication according to a form published in the statute.[202] Condemning authorities must establish a proposed price, provide the owner with an appraisal or other evidence used to come to that price, and conduct good faith negotiations with the owner.[203]

---

[193] *See id.* § 33333.2(a)(4).

[194] *See id.* § 33342.7(a).

[195] *See* W. VA. CODE ANN. § 16-18-6 (LexisNexis Supp. 2007), *as amended by* H.B. 4048, 77th Leg., 2d Reg. Sess. (W. Va. 2006).

[196] *See id.* § 16-18-6(d).

[197] *See id.* § 16-18-6(f).

[198] *See id.* § 16-18-6(h).

[199] *See* WYO. STAT. ANN. § 15-9-133 (2007), *as amended by* H.B. 124, 59th Leg., 2007 Gen. Sess. (Wyo. 2007).

[200] *See* MD. CODE ANN. REAL PROP. § 12-105.1 (LexisNexis Supp. 2007), *as amended by* S.B. 3, 2007 Leg., Reg. Sess. (Md. 2007).

[201] *See* IND. CODE ANN. § 32-24-1-5 (LexisNexis Supp. 2006), *as amended by* H.B. 1010, 114th Gen. Assemb., 2d Reg. Sess. (Ind. 2006).

[202] *See id.* §§ 32-24-1-3, 32-24-1-5.

[203] *See id.* § 32-24-1-5(c).

In Missouri, condemning authorities must present a written offer at least 30 days before filing for condemnation, with accompanying documentation supporting the proposed price.[204] Condemning authorities must engage, in good faith, in negotiations with the owner by providing timely notice, offering an amount that reflects the amount reached in an appraisal of the property, and allowing the owner an opportunity to obtain an appraisal from a professional of the individual's own choosing.[205] If a court finds that the condemning authority did not negotiate in good faith, the court will dismiss the action and order the authority to reimburse the owner for attorney's fees and costs.[206]

Oregon property owners must receive an offer at least 40 days in advance of a condemnation proceeding; the condemnation authority must provide at least 15-days written notice of when the condemning authority plans to visit the property for an appraisal, and the owner or the owner's representative may accompany the authority's appraiser.[207]

Utah law requires condemning authorities to negotiate in good faith with the property owner for the purchase of the property before filing an eminent domain action, to advise the owner of the right to mediation and arbitration, and to inform the owner that oral promises made during the negotiation process are not binding on the person seeking to acquire the property.[208]

Wyoming altered its law to require (rather than merely permit) condemning authorities to negotiate in good faith with the owners of private property sought to be taken under eminent domain.[209] Good faith negotiation includes informing the owner of the proposed project so that the owner may "evaluate the effect of the proposed project . . . on the condemnee's use of the land."[210]

In order to proceed with condemnation proceedings, Montana law requires a condemning authority to prove by a preponderance of the

---

[204] *See* MO. ANN. STAT. § 523.253 (West Supp. 2007), *as amended by* H.B. 1944, 93d Leg., 2d Reg. Sess. (Mo. 2006).

[205] *See id.* § 523.256.

[206] *See id.*

[207] *See* OR. REV. STAT. § 35.246(3) (West, Westlaw current through 2005 Reg. Sess.), *as amended by* Measure 39 (Or. 2006).

[208] *See* UTAH CODE ANN. § 78-34-4.5 (Supp. 2007), *as amended by* S.B. 117, 2006 Leg., Gen. Sess. (Utah 2006).

[209] *See* WYO. STAT. ANN. § 1-26-509 (2007), *as amended by* H.B. 124, 59th Leg., 2007 Gen. Sess. (Wyo. 2007).

[210] *Id.*

evidence that it attempted to purchase the property through negotiation and that the negotiation failed.[211]

4. Notice

In 2005, the Delaware legislature enacted Senate Bill 217, which requires an agency seeking to use eminent domain to acquire a property to act in accordance with a public use specified at least six months in advance of the condemnation proceedings in a certified planning document, a public hearing addressing the condemnation, or in a published report of the agency.[212]

Minnesota law provides that condemning authorities must notify targeted owners in writing of a public hearing on the proposed taking, post the information on the government web site, and publish notice in the official newspaper at least 30 days, but no more than 60 days, in advance of the hearing.[213] House File 2846, as it originally passed the Minnesota House of Representatives, contained a unique public notice provision requiring the Minnesota Attorney General to prepare a statement available to the public, revisited annually, that describes the significant portions of Minnesota's eminent domain law and provides an overview as to how the eminent domain process works in that state.[214] However, that provision did not survive in the Minnesota Senate and did not appear in the final bill.[215]

Missouri law established a property rights ombudsman within the office of public counsel to provide guidance to individuals wishing information regarding the condemnation process, document the use of eminent domain within the state, and make an annual report.[216]

In 2007, Wyoming enacted House Bill 124, which requires a public entity seeking to use eminent domain on an identifiable private parcel to notify the owner of its intent to consider the location for its project by

---

[211] *See* MONT. CODE ANN. § 70-30-111 (2007) , *as amended by* S.B. 363, 60th Leg., Reg. Sess. (Mont. 2007).

[212] *See* DEL. CODE ANN. tit. 29, § 9505 (Supp. 2006), *as amended by* S.B. 217, 143d Leg. (Del. 2005).

[213] *See* MINN. STAT. ANN. § 117.0412 (West Supp. 2007), *as amended by* S.F. 2570, H.F. 2846, 84th Leg., Reg. Sess. (Minn. 2006).

[214] *See* H.F. 2846, 5th Engrossed Version, 84th Leg., Reg. Sess. (Minn. 2006).

[215] *See* S.F. 2570, 5th Engrossed Version, 84th Leg., Reg. Sess. (Minn. 2006).

[216] *See* MO. ANN. STAT. § 523.277 (West Supp. 2007), *as amended by* H.B. 1944, 93d Leg., 2d Reg. Sess. (Mo. 2006).

letter describing the public need and necessity for the project and allow the owner to confer with the entity regarding the project.[217]

Connecticut requires development agencies to hold public hearings on proposed acquisitions of property by eminent domain, publish notice of the hearing in major newspapers within 10 days, and mail such notice to record owners of land subject to acquisition as well as owners of land within one hundred feet of the subject property.[218]

Washington House Bill 1458 amends condemnation procedures to require the condemnor to send, by certified mail, notice of the planned final action to the owner of each property potentially subject to condemnation at least 15 days prior to the final action.[219] The condemnor must also publish notice in newspapers. If the owner of the property subject to condemnation proceedings is notified improperly, all subsequent proceedings are void.[220]

5. Voting Provisions

Georgia law requires the elected governing body of the city or county where the property is located to approve each condemnation of private property for redevelopment purposes.[221] Local eminent domain laws must be approved by a referendum vote.[222]

Kansas law provides that the governing body of a city must approve property taken in accordance with a redevelopment plan by a two-thirds vote.[223]

In Minnesota, the local governmental body must approve the use of eminent domain at a meeting at least 30 days after a public hearing.[224]

Missouri law requires condemning authorities, when they consist of boards of political appointees, to adopt a resolution declaring the necessity of taking an individual parcel under the power of eminent domain.[225]

---

[217] *See* WYO. STAT. ANN. § 1-26-504 (2007), *as amended by* H.B. 124, 59th Leg., 2007 Gen. Sess. (Wyo. 2007).

[218] *See* CONN. GEN. STAT. ANN. § 8-193(b)(2) (West, Westlaw through 2007 Sess.), *as amended by* S.B. 167, 2007 Leg., Reg. Sess. (Conn. 2007).

[219] *See* H.B. 1458 § 1, 60th Leg., 2007 Reg. Sess. (Wash. 2007).

[220] *See id.*

[221] *See* GA. CONST. art. IX, § 2, *as amended by* H.R. 1306, 2005–2006 Leg., Reg. Sess. (Ga. 2006).

[222] *See id.* § 1(b).

[223] *See* S.B. 323 § 3, 2005–2006 Leg., Reg. Sess. (Kan. 2006).

[224] *See* MINN. STAT. ANN. § 117.0412 (West Supp. 2007), *as amended by* S.F. 2570, H.F. 2846, 84th Leg., Reg. Sess. (Minn. 2006).

[225] *See* MO. ANN. STAT. § 99.120 (West Supp. 2007), *as amended by* H.B. 1944, 93d Leg., 2d Reg. Sess. (Mo. 2006). *See also id.* § 99.460.

Alaska law provides that when a second class city wishes to use the power of eminent domain, the taking is permissible only if the voters approve the ordinance by a majority.[226]

Connecticut law requires that local legislatures consider whether the public benefits outweigh the private benefits of the proposed taking, that the property cannot be incorporated into a redevelopment plan in its current use, and that the property be necessary for the plan when voting to approve exercises of the eminent domain power.[227] Notice of such approval must then be published in a major newspaper in the municipality within 10 days.[228]

III. DESCRIPTION OF POST-*KELO* LAWS BY STATE

Alabama

Alabama law prohibits takings for transfer to private persons but excepts takings of blighted properties, takings for utility providers, and other traditional publicly owned or operated uses from the prohibition.[229] Original owners may repurchase their property, if it is no longer used for a public use, for the original purchase price minus income and transaction taxes.[230]

Alaska

With the exception of utility projects, common carriers, and some others, transferring private property to a private person for economic development purposes is prohibited. Permissible public uses include public buildings and grounds, water projects, communications and sewer lines and pipes, wharves, ports, bridges, pathways for floating logs, facilities for transmitting and storing gas, public roads, and recreational facilities if the owner consents.[231] When a second class city wishes to use eminent domain, the voters must approve the taking by a majority vote.[232]

---

[226] *See* ALASKA STAT. § 29.35.030(a) (2006), *as amended by* H.B. 318, 24th Leg., Reg. Sess. (Alaska 2006).

[227] *See* CONN. GEN. STAT. ANN. § 8-193(3) (West, Westlaw through 2007 Sess.), *as amended by* S.B. 167, 2007 Leg., Reg. Sess. (Conn. 2007).

[228] *See id.*

[229] *See* ALA. CODE § 11-47-170(b) (LexisNexis Supp. 2006), *as amended by* S.B. 68, 2005 Leg., Reg. Sess. (Ala. 2005).

[230] *See id.*

[231] *See* ALASKA STAT. § 09.55.240 (2006), *as amended by* H.B. 318, 24th Leg., Reg. Sess. (Alaska 2006).

[232] *See id.* § 29.35.030(a).

Arizona

A citizen-led initiative approved by voters in 2006 defines public use as "the possession, occupation, and enjoyment of the land by the general public, or by public agencies."[233] Other permitted public uses include utility services and takings to abate a public health threat or to acquire abandoned property.[234] Arizona law expressly prohibits the exercise of eminent domain for the purpose of achieving the public benefits of an increased tax base and revenue, employment, or general economic stability.[235] In cases of blight removal, the authority must prove by clear and convincing evidence that the taking is necessary and that no reasonable alternative exists.[236] Homeowners displaced by eminent domain may get a comparable replacement home or a cash payment if they so choose.[237] The court should not grant deference to any legislative determination that a proposed use is public.[238] In addition, the court may award attorney's fees if a property owner successfully challenges a public use designation or a property valuation.[239]

Arkansas

No enacted legislation.

California

California enacted several procedural amendments, including time limits on the activities of redevelopment authorities acting according to redevelopment plans.[240] The state amended the "Existence of blighted area; declaration and description" section of the Code to "restrict the statutory definition of blight and to require better documentation of local officials' findings regarding the conditions of blight."[241]

Proposition 90, a citizen initiative that would have prohibited state and local governments from condemning private property for private projects or uses, defined "just compensation" and provided a right of first refusal to an owner of condemned land no longer used for a public use,

---

[233] ARIZ. REV. STAT. ANN. § 12-1136(5)(a)(i) (West Supp. 2007), *as amended by* Proposition 207 (Ariz. 2006).
[234] *See id.*
[235] *See id.* § 12-1136(5)(b).
[236] *See id.* § 12-1133.
[237] *See id.* § 12-1132(b).
[238] *See id.* § 12-1132(a).
[239] *See id.* § 12-1135.
[240] *See supra* discussion Part II.C.2.
[241] CAL. HEALTH & SAFETY CODE § 33030 hist. n.(1)(e) (West Supp. 2007).

but it failed to garner enough support in the November 2006 election due to a controversial provision regarding limits on regulatory takings.[242]

Colorado

Colorado law explicitly excludes from the definition of public use economic development or increasing tax revenue.[243] Blight is an exception to the general prohibition, but blight takings are subject to a higher level of scrutiny.[244]

Connecticut

A 2007 law prohibits the taking of private property for the primary purpose of increasing tax revenue.[245] Property not used for a public use must be offered for sale back to the original owner for the fair market value or the original price, whichever is less.[246] Development agencies must hold public hearings on proposed acquisitions by eminent domain and must publish and mail notice to the record owners and owners of nearby properties.[247] Local legislatures must evaluate redevelopment plans and vote to approve exercises of the eminent domain power.[248]

Delaware

Condemning agencies must specify the public use at least six months in advance of condemnation proceedings in a certified planning document, public hearing, or in a published report.[249] The court, not the condemning agency, decides when to award attorney's fees and plaintiff's other reasonable costs if a condemnation proceeding is abandoned or the final judgment is that the property cannot be taken.[250]

---

[242] *See generally* Ray Ring, *California's Stealth Initiative on Land Use*, SAN FRANCISCO CHRON., Aug. 20, 2006, at E1; LEAGUE OF WOMEN VOTERS OF CALIFORNIA EDUCATION FUND, PROPOSITION 90 (2006), *available at* http://ca.lwv.org/lwvc/edfund/elections/ 2006nov/id/prop90.html (last visited Jan. 7, 2008).

[243] *See* COLO. REV. STAT. § 38-1-101(1)(a) (2006), *as amended by* H.B. 1411, 65th Leg., Reg. Sess. (Colo. 2006).

[244] *See id.* § 38-1-101(2)(b).

[245] *See* CONN. GEN. STAT. ANN. § 8-193 (West, Westlaw through 2007 Sess.), *as amended by* S.B. 167, 2007 Leg., Reg. Sess. (Conn. 2007).

[246] *See id.* § 8-193(c).

[247] *See id.* § 8-193(b)(2).

[248] *See id.* § 8-193(3).

[249] *See* DEL. CODE ANN. tit. 29, § 9503 (Supp. 2006), *as amended by* S.B. 217, 143d Leg. (Del. 2005).

[250] *See id.*

Florida

A constitutional amendment approved by voters in 2006 prohibits transfer of property through eminent domain to other private parties except in certain enumerated circumstances.[251] Accompanying legislation defines allowed public uses, which include streets, drainage, water and sewer pipes, underground wires, city buildings, railroads, school lands, and improvements necessary for the public health and welfare.[252] Blight removal is not a permissible public use.

Georgia

Georgia law defines acceptable public uses as use of the land by governmental entities, laying of roads or public utility lines, acquisition by consent, acquisition of property where all possible owners are impossible to identify, and elimination of blighted areas.[253] Private economic development is not a public use.[254] If a property is not put to a public use in five years, the original owner may petition for reconveyance, quitclaim, or additional compensation.[255] Land condemned for a public use may not be used for any purpose other than a public use for 20 years.[256] An amendment to the Georgia constitution, approved by voters in 2006, provides that the elected governing body must approve each condemnation.[257] Approval by a referendum vote is necessary for eminent domain laws.[258]

Hawaii

No enacted legislation.

Idaho

In Idaho, private transfers of property acquired through eminent domain, including pretextual transfers, are impermissible.[259] Blight

---

[251] *See* FLA. CONST. art. X, § 6(c), *as amended by* H.S. Res. 1569, 2006 Leg., Reg. Sess. (2006).

[252] *See* FLA. STAT. ANN. § 166.411 (West Supp. 2007), *as amended by* H.B. 1567, 2006 Leg., 2d Reg. Sess. (Fla. 2006).

[253] *See* GA. CODE ANN. § 22-1-1 (Supp. 2007), *as amended by* H.B. 1313, 2005–2006 Leg., Reg. Sess. (Ga. 2006).

[254] *See id.*

[255] *See id.* § 22-1-2(c)(1).

[256] *See id.* § 22-1-2(b).

[257] *See* GA. CONST. art. IX, § 2, *as amended by* H.R. 1306, 2005–2006 Leg., Reg. Sess. (Ga. 2006).

[258] *See id.* art. IX, § 1(b).

[259] *See* IDAHO CODE ANN. § 7-701A (Supp. 2007), *as amended by* H.B. 555, 58th

removal is an exception to the general prohibition. Idaho law defines blight removal as properties that are dilapidated or otherwise dangerous to occupants; pose a threat to the public health by disease transmission, juvenile delinquency, or crime; and pose an "actual risk to the public health, safety, morals, or general welfare."[260]

Proposition 2, a citizen-led ballot initiative to amend the Idaho constitution to include these provisions and limit regulatory takings, failed at the polls in 2006.

Illinois

Illinois law requires proof of public use.[261] Condemning authorities must show that the taking is primarily for the benefit of the public.[262] In the case of public ownership and private control, the authority must prove that the private property controlling the land is operating a business related to the authority's operation of a public facility.[263] Illinois law assumes that the elimination of blight is for a public purpose; however, this presumption is rebuttable.[264]

Indiana

Indiana law authorizes eminent domain to acquire property for public cemeteries, transportation improvements, public utility facilities, libraries, and other public uses. Private companies may condemn land as authorized for essential services.[265] Blight removal is permissible. Certified technology parks are also not subject to restrictions on eminent domain use.[266] Offers must be served in person or by certified mail, with appraisals and evidence establishing the offer price.[267] Compensation for residential land must be 150% of fair market value,[268] and compensation for agricultural land must be 125% of fair market value.[269] Condemning authorities may not transfer land to private parties for a private use free of statutory re-

---

Leg., 2d Reg. Sess. (Idaho 2006).

[260] *Id.* § 7-701(A)(2)(b)(ii).

[261] *See* 735 ILL. COMP. STAT. ANN. 30/5-5-5 (West, Westlaw through 2007 Reg. Sess.), *as amended by* S.B. 3086, 2006 Gen. Assemb., Reg. Sess. (Ill. 2006).

[262] *See id.* 30/5-5-5(c).

[263] *See id.* 30/5-5-5(f).

[264] *See id.* 30/5-5-5(c).

[265] *See* IND. CODE ANN. § 32-24-4.5-1(a) (LexisNexis Supp. 2006), *as amended by* H.B. 1010, 114th Gen. Assemb., 2d Reg. Sess. (Ind. 2006).

[266] *See id.* § 32-24-4.5-7.

[267] *See id.* § 32-24-1-5(b).

[268] *See id.* § 32-24-4.5-8(2).

[269] *See id.* § 32-24-4.5-8(1).

strictions for 30 years.[270] The owner may receive attorney's fees of up to $25,000 if he or she successfully challenges a condemnation proceeding.[271]

Iowa

Public use means the "possession, occupation, and enjoyment of property by the general public or governmental entities."[272] Incidental private uses of public lands, as well as land for common carriers and public utilities, are considered public uses also. Blight elimination is permissible after proving several factors, but authorities may never consider agricultural land blighted.[273] An agency seeking a declaration from the court that its finding of public use is appropriate must prove the public use by a preponderance of the evidence.[274] Owners successfully challenging public use designations may receive reasonable attorney's fees.[275]

Kansas

The transfer of land acquired through eminent domain to private parties is permissible if the land is surplus from a lawful public project; if the use is for pipelines or railroads; and if the owner consents, for acquiring unsafe properties, and for acquiring private properties burdened by defective or clouded titles.[276] The local governing body must approve property taken in accordance with a redevelopment plan by a two-thirds vote.[277]

Kentucky

The local authority must employ eminent domain only for a public use. Public use means public ownership, public occupation or enjoyment, use for public facilities, and use for the transfer of property to eliminate slum or blighted areas. Authorities may not transfer private property to a private owner through eminent domain primarily for the purpose of

---

[270] *See id.* § 32-24-4.5-1(b)–(c).
[271] *See id.* § 32-24-1-14.
[272] IOWA CODE ANN. § 6A.22(2)(a)(1) (West Supp. 2007), *as amended by* H.F. 2351, 81st Gen. Assemb., 1st Extraordinary Sess. (Iowa 2006).
[273] *See id.* § 6A.22.
[274] *See id.* § 6A.23(3).
[275] *See id.*
[276] *See* KAN. STAT. ANN. § 26-5016 (Supp. 2006), *as amended by* S.B. 323, 81st Leg., Reg. Sess. (Kan. 2006).
[277] *See* S.B. 323, 81st Leg., Reg. Sess. (Kan. 2006).

economic development, where the public benefit is only indirect (for example, by increasing the tax base).[278]

Louisiana

A constitutional amendment passed by voters in 2006 prohibits transfer to private parties or predominant use by private parties of land acquired through eminent domain.[279] Permitted public uses include public buildings, roads, ports, parks, and removal of a threat to the public health.[280] Economic development, enhancement of tax revenue, and other public incidental benefits are not to be considered in determining whether the taking is for a public use.[281] The local authority must declare surplus within one year property condemned but not needed for a public project and must offer such property for sale first to the original owner within two years of the completion of the project.[282]

Maine

Condemning property for the purpose of private commercial development, for transfer to a private party or public-private partnership, and for the primary purpose of increasing tax revenue is prohibited. This prohibition does not apply to public utilities, schools, roads, public buildings or parks, or blighted property within a redevelopment plan area.[283]

Maryland

Homeowners may receive an additional payment of up to $45,000 (from $22,500) for additional relocation-related expenses not otherwise compensated.[284] Renters may receive up to $10,500 (up from $5,250) to rent a comparable dwelling or finance a new home.[285] Small business owners, nonprofits, and farmers may recover up to $60,000 to reestablish their businesses.[286] Condemning authorities acting according to a redevel-

---

[278] *See* KY. REV. STAT. ANN. § 416.540 (LexisNexis Supp. 2006), *as amended by* H.B. 508, 2006 Gen. Assemb., Reg. Sess. (Ky. 2006).

[279] *See* LA. CONST. art. I, § 4(B), *as amended by* S.B. 1, 2006 Leg., Reg. Sess. (La. 2006).

[280] *See id.*

[281] *See id.*

[282] *See id.* art. I, § 4(G).

[283] *See* ME. REV. STAT. ANN. tit. 1, § 816 (Supp. 2006), *as amended by* L.D. 1870, 122d Leg., 2d Reg. Sess. (Me. 2006).

[284] *See* MD. CODE ANN. REAL PROP. § 12-202 (LexisNexis Supp. 2007), *as amended by* S.B. 3, 2007 Leg., Reg. Sess. (Md. 2007).

[285] *See id.* § 12-204.

[286] *See id.* § 12-205(4).

opment plan must acquire land within four years of receiving authorization before having to seek reauthorization.[287]

Massachusetts

No enacted legislation.

Michigan

A constitutional amendment, approved by voters in 2006, explicitly excludes from the definition of public use any taking of property for transfer to a private party for reasons of economic development and increase in tax revenues.[288] Private transfers are impermissible, unless the property remains subject to public oversight and use, extreme public necessity requires the taking, or the property is "selected on facts of independent public significance or concern, including blight, rather than the private interests of the entity to which the property is eventually transferred."[289] Compensation for homestead takings should be 125% of fair market value.[290]

Minnesota

Public use means public ownership or possession, use by a public service corporation (such as a utility provider), remediation of blighted or environmentally contaminated areas, reduction in abandoned property, and removal of public nuisances. Economic development and economic health, in and of themselves, do not qualify as public uses or purposes.[291] Blighted areas are areas in which more than 50% of the buildings are dilapidated; nonblighted properties within blighted areas are subject to taking only in cases of "absolute necessity."[292] Tax Increment Financing (TIF) districts are exempt from the law for the time being. Going concern value must be compensated.[293] Notice is necessary at least 30 days, but no more than 60 days, in advance of a public hearing to address the proposed

---

[287] *See id.* § 12-105.1.

[288] *See* MICH. CONST. art. X, § 2, *as amended by* S.J.R. E, 93d Leg., 2005 Reg. Sess. (Mich. 2005) (approved 2006).

[289] MICH. COMP. LAWS ANN. § 213.23(2)(c) (West Supp. 2007), *as amended by* H.B. 5060, S.B. 693, 93d Leg., 2006 Reg. Sess. (Mich. 2006).

[290] *See* MICH. CONST. art. X, § 2, *as amended by* S.J.R. E, 93d Leg., 2005 Reg. Sess. (Mich. 2005) (approved 2006).

[291] *See* MINN. STAT. ANN. § 117.186(11)(a) (West, Westlaw through 2007 Sess.), *as amended by* S.F. 2570, H.F. 2846, 84th Leg., Reg. Sess. (Minn. 2006).

[292] *Id.* § 117.027(1)–(2).

[293] *See id.* § 117.186.

taking.[294] When a property is no longer necessary for a public use, the original owner has the right to repurchase at the original price or the current fair market value, whichever is lower.[295] Condemning authorities cannot force a homeowner to take a comparable dwelling in lieu of cash payment.[296] A court is to award attorney's fees if the owner successfully challenges a public use designation and attorney's fees and other reasonable litigation costs if the valuation offered is 20% lower than what the court determined.[297]

Mississippi

No enacted legislation.

Missouri

No condemning authority may take land through the power of eminent domain solely for economic development, except for blighted areas.[298] If a preponderance of the parcels qualifies as blighted in an area, the condemning authority may take any of the parcels in that area.[299] Farmland can never be subject to taking on the basis of blight.[300] Compensation for homestead takings is 125% of the fair market value of the property.[301] The total compensation package for takings of property owned by the same family for more than 50 years must include the heritage value, or 50% of the fair market price.[302] Good faith negotiations are necessary to sustain an action for condemnation.[303] A property rights ombudsman, who will produce an annual report, provides guidance to individuals seeking information regarding the condemnation process.[304]

Montana

Condemning authorities may take land for any one of 45 listed public uses, including airports, public buildings, utilities, stream-widening

---

294 *See id.* § 117.1905.
295 *See id.* § 117.226.
296 *See id.* § 117.187.
297 *See id.* § 117.031.
298 *See* MO. ANN. STAT. § 523.271 (West Supp. 2007), *as amended by* H.B. 1944, 93d Leg., 2d Reg. Sess. (Mo. 2006).
299 *See id.* § 523.274.
300 *See id.* § 523.283.
301 *See id.* § 523.039.
302 *See id.* § 523.001(2).
303 *See id.* § 523.256.
304 *See id.* § 523.277.

projects, parking areas,[305] urban renewal projects,[306] and other statutorily authorized uses. Condemning authorities may take blighted properties, provided the condemning authority is not acting as a pass-through entity for transfer to a private party.[307] Good faith negotiations are necessary before a condemnation proceeding can begin.[308] Original owners may repurchase property not used for a public use if they offer a price equal to the highest bid at a public auction or to the current fair market value if no one else bids.[309]

Nebraska

Condemning authorities cannot take private property through eminent domain for the primary purpose of economic redevelopment. This rule does not affect public uses, such as acquiring land for pipelines, roads, or common carriers.[310] Authorities may take blighted land through eminent domain for transfer to a private party, but not if the property is agricultural or horticultural land.[311]

Nevada

Allowed public uses include public buildings, parks, roads, bridges, railroads, irrigation projects, public utilities, and airports.[312] Property may be taken for transfer to a private party if the private party operates a public service (such as a utility provider), leases only a part of the land from the government with notice to the original owner, or participates in a land exchange designed to avoid excessive relocation costs.[313] Private transfers are permissible also if the condemning authority takes the prop-

---

[305] *See* MONT. CODE ANN. § 70-30-102 (2007), *as amended by* S.B. 363, 60th Leg., Reg. Sess. (Mont. 2007).

[306] *See* MONT. CODE ANN. § 7-15-4259 (2007), *as amended by* S.B. 41, 60th Leg., Reg. Sess. (Mont. 2007).

[307] *See id.* § 7-15-4204.

[308] *See* MONT. CODE ANN. § 70-30-111 (2007), *as amended by* S.B. 363, 60th Leg., Reg. Sess. (Mont. 2007).

[309] *See id.* § 70-30-322.

[310] *See* NEB. REV. STAT. § 76-710.04 (Supp. 2006), *as amended by* L.B. 924, 99th Leg., 2d Sess. (Neb. 2006).

[311] *See id.*

[312] *See* NEV. REV. STAT. ANN. § 37.010 (LEXIS through 2007 legislation), *as amended by* A.B. 102, 74th Leg., 2007 Sess. (Nev. 2007).

[313] *See* A.B. 102, 74th Leg., 2007 Sess. (Nev. 2007).

erty in order to abate an imminent threat to the public health and safety.[314] Two constitutional amendment measures are pending.[315]

New Hampshire

Public use means public ownership, occupation, and enjoyment of property; the act of acquiring property for a public utility; or the act of acquiring property to remove dangerous, dilapidated, or nuisance improvements.[316] Private economic development is impermissible, except when related to blight removal.[317]

New Hampshire voters approved a constitutional amendment in 2006 prohibiting takings of property by eminent domain for direct or indirect transfer for the purpose of private development or other private use.[318]

New Jersey

No enacted legislation.

New Mexico

New Mexico amended the Metropolitan Redevelopment Code to prevent authorities from using eminent domain for redevelopment projects.[319] Defined public uses include public buildings or parks, roadways, storm drains, public cemeteries, and correcting obsolete platting in a particular vacant and undeveloped subdivision.[320]

New York

No enacted legislation.

North Carolina

North Carolina allows takings of blighted parcels. Blighted parcels are parcels that impair the growth of the community; foster ill health and

---

[314] *See id.*

[315] The legislature must re-approve State Question No. 2, a citizen-led initiative approved by voters in November 2006, again in November 2008 in order for it to become law. The legislature must also approve A.J.R. 3 (2007) a second time before it will appear on the November 2009 ballot.

[316] *See* N.H. REV. STAT. ANN. § 162-K:2(IX-a) (LexisNexis Supp. 2006), *as amended by* S.B. 287, 159th Gen. Ct., 2006 Sess. (N.H. 2006).

[317] *See id.* §162-K:6.

[318] *See* N.H. CONST. Pt. 1, art. 12-a, *as amended by* C.A.C.R. 30, 159th Gen. Ct., 2006 Sess. (N.H. 2006).

[319] *See* N.M. STAT. ANN. § 3-60A-10 (LexisNexis Supp. 2007), *as amended by* H.B. 393, 48th Leg., 2007 Reg. Sess. (N.M. 2007).

[320] *See id.* § 38-18-10(B)(3).

disease transmission; and increase infant mortality and juvenile delinquency by virtue of the presence of old, dilapidated, obsolete, overcrowded, unsanitary, or unhealthy structures.[321]

North Dakota

A citizen-led initiative, approved by the voters in 2006, amended the constitution to exclude explicitly the public benefits of economic development from the definition of public use.[322] Private property may be subject to taking for retransfer to another private party only when the private party is a common carrier or utility and the land is necessary for that purpose.[323] Senate Bill 2214 updates the North Dakota Century Code to reflect the 2006 amendment.[324]

Ohio

A bill Ohio passed in the summer of 2007 expressly excludes from the definition of public use private economic redevelopment and transfer to private parties, unless a public utility or common carrier receives the land, a private party occupies it only incidentally, or the property proves to be blighted.[325]

Oklahoma

No enacted legislation.

Oregon

A citizen-led measure, approved by voters in 2006, bars condemnation authorities from taking residences, businesses, farms, or forest land under the power of eminent domain if they intend to convey all or part of the property to another private party.[326] The law does not apply to contaminated, dilapidated, or unsanitary properties.[327] Owners who successfully challenge a condemnation may receive attorney's fees, costs, and other reasonably incurred costs related to the challenge.[328] A court must review

---

[321] *See* N.C. GEN. STAT. § 160A-503 (2006), *as amended by* H.B. 1965, 2005–2006 Sess. (N.C. 2006).

[322] *See* N.D. CONST. art. I, § 16, *as amended by* Measure 2 (N.D. 2006).

[323] *See id.*

[324] *See* S.B. 2214, 60th Gen. Assemb., Reg. Sess. (N.D. 2007).

[325] *See* OHIO REV. CODE ANN.§163.01(H)(1)(a)–(c) (LexisNexis 2007), *as amended by* S.B. 7, 127th Leg., Reg. Sess. (Ohio 2007).

[326] *See* Measure 39, § 2 (Or. 2006).

[327] *See id.*

[328] *See id.*

blight designations without deference to any determination made by the condemning authority.[329]

Pennsylvania

Pennsylvania law bars condemnors from using eminent domain to take private property for the use of a private enterprise.[330] The law does not apply if the owner consents, if a common carrier or public utility will receive the property, or if the property is a designated threat to the public health or safety. The statute alters the definition of blight.[331] First and second class cities, and home rule municipalities, may continue to make designations under the old blight designation until 2012.[332]

Rhode Island

No enacted legislation.

South Carolina

Voters approved an amendment to the state constitution in 2006 that requires all property taken through eminent domain be for a public use. Local authorities may not take private property for a private use without the consent of the owner, unless the property is blighted.[333] Blight is "private property that constitutes a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, [and/or] deleterious land use."[334]

South Dakota

South Dakota enacted a blanket prohibition on taking property under the power of eminent domain for transfer to any private party or for the primary purpose of increasing tax revenue.[335] Property taken through eminent domain may not be sold within seven years without first offering

---

[329] *See id.*

[330] *See* 26 PA. CONS. STAT. ANN. § 204 (West Supp. 2007), *as amended by* S.B. 881, 2005–2006 Leg., Reg. Sess. (Pa. 2006).

[331] *See id.* § 205(b).

[332] *See id.* § 203(b)(6).

[333] S.C. CONST. art. I, § 13(B), *as amended by* S.B. 1031, 116th Leg., 2d Reg. Sess. (S.C. 2006), *as ratified by* S.B. 155, 117th Leg., 1st Reg. Sess. (S.C. 2007).

[334] *Id.*

[335] *See* S.D. CODIFIED LAWS § 11-7-22.1 (Supp. 2007), *as amended by* H.B. 1080, 2006 Leg., Reg. Sess. (S.D. 2006).

the property for sale to the original owner for the original sale price or the current fair market value, whichever is less.[336]

Tennessee

Tennessee law excludes from the definition of public use "either private use or benefit, or the indirect public benefits resulting from private economic development and private commercial enterprise."[337] Industrial parks, incidental private uses, and acquisition of property to implement an urban renewal or redevelopment plan in a blighted area are excepted public uses.[338] Authorities may not designate agricultural lands as blighted.[339]

Texas

Texas law forbids condemning authorities from taking land through eminent domain if the taking confers a private benefit on a private party, is for a public use that is merely pretextual to a private benefit, or is for economic redevelopment purposes.[340] Blight removal, public transit, libraries, public buildings, common carriers, and "sports and community venue project[s]" are exceptions to this rule.[341]

Utah

Public use includes public buildings and grounds, water projects, bicycle paths, roads, railways, tunnels, public utilities, telephone and power lines, cemeteries, public parks, pipelines, and sites for mills and smelters in areas of small population.[342] Local authorities may designate properties as blighted for eminent domain purposes.[343] Good faith negotiations are necessary for filing a condemnation proceeding.[344]

---

[336] *See id.* § 11-7-22.2.

[337] TENN. CODE ANN. § 29-17-102(b) (LexisNexis Supp. 2007), *as amended by* S.B. 3296, H.B. 3450, 104th Leg., Reg. Sess. (Tenn. 2006).

[338] *See id.*

[339] *See id.* § 13-20-201(c).

[340] *See* TEX. GOV'T CODE ANN. § 2206.0001(b) (Vernon Supp. 2006), *as amended by* S.B. 7, 79th Leg., 2d Sess. (Tex. 2005).

[341] *Id.*

[342] *See* UTAH CODE ANN. § 78-34-1 (2002 & Supp. 2007), *as amended by* S.B. 117, 2007 Leg., Reg. Sess. (Utah 2006).

[343] *See* H.B. 365, 2007 Gen. Sess. (Utah 2007). Previous legislation removed the power of blight removal from Utah's redevelopment agencies. *See* S.B. 1841, 2005 Gen. Sess. (Utah 2005).

[344] *See* UTAH CODE ANN. § 78-34-4.5 (Supp. 2007), *as amended by* S.B. 117, 2006 Leg., Gen. Sess. (Utah 2006).

Vermont

In Vermont, condemning authorities may not take private property through eminent domain primarily for the purpose of economic redevelopment, unless the property is part of an urban renewal project.[345] This law does not apply to public uses such as roads, utilities, public buildings, or water and waste control projects.[346]

Virginia

Blight elimination is an allowed public use. Blighted property, as defined by House Bill 699 in 2006, includes "any area that endangers the public health, safety, or welfare; or any area that is detrimental to the public health, safety, or welfare" due to dilapidated or deteriorated structures.[347] In 2007, however, the legislature redefined blight to mean a property that endangers the public health or safety and is either a public nuisance or a structure or improvement that is beyond repair or unfit for human use.[348] Authorities must offer surplus property for sale to the original owner first.[349]

Washington

Condemning authorities must notify affected property owners in condemnation proceedings via certified mail at least 15 days prior to the public meeting at which a final decision on condemnation will be made.[350] If the owner does not receive proper notice, all proceedings are void.[351]

West Virginia

West Virginia law defines public use to include railroads, canals, public roads, parks, telephone and power lines, pipelines and storage facilities, water and sewer facilities, public buildings, and public cemeteries. Public use does not mean "the exercise of eminent domain primarily for private economic development."[352] Localities may target only slum or

---

[345] *See* VT. STAT. ANN. tit. 12, § 1040(a) (Supp. 2007), *as amended by* S.B. 246, 2005–2006 Leg. (Vt. 2006).

[346] *See id.* § 1040(b).

[347] VA. CODE ANN. § 36-4 (Supp. 2007), *as amended by* H.B. 699, 2007 Leg., Reg. Sess. (Va. 2006).

[348] *See* VA. CODE ANN. § 1-219.1(B) (Supp. 2007), *as amended by* H.B. 2954, S.B. 781, S.B. 1296, 2007 Leg., Reg. Sess. (Va. 2007).

[349] *See id.* § 25.1-108(A).

[350] *See* H.B. 1458 § 1, 60th Leg., 2007 Reg. Sess. (Wash. 2007).

[351] *See id.*

[352] W. VA. CODE ANN. § 54-1-2 (LexisNexis Supp. 2007), *as amended by* H.B. 4048,

blighted areas with redevelopment plans.[353] Blighted areas are areas with a predominance of defective street layout, faulty lot layout, unsanitary or unsafe conditions, deterioration, diversity of ownership, tax delinquencies exceeding the value of the land, defective titles, improper subdivision, obsolete platting, or fire hazards. A blighted area is one where, as a result of these factors, community growth is hampered; properties are social or economic liabilities; and the properties are a menace to the public health, safety, morals, or welfare.[354]

Wisconsin

The condemning authority may not acquire through eminent domain property that is not blighted if it intends to transfer the property to a private party.[355] Blighted property means a property that is abandoned, dilapidated, deteriorated, old, or overcrowded; or presents conditions of inadequate light, air, sanitation, or ventilation, faulty lot layout, or fire hazard; and is detrimental to the public health, safety, or welfare.[356] Local authorities cannot designate a multifamily unit blighted unless the property is abandoned or has been converted from a single family unit and the crime on or near the property is higher than the rest of the municipality.[357]

Wyoming

Public use means the possession, occupation, and enjoyment of the land by a public entity.[358] Wyoming law explicitly excludes from this definition the taking of private property by a public entity for the purpose of transferring the property to a private individual.[359] Municipalities may not authorize urban renewal agencies to use eminent domain.[360] Private transfers are permissible when the purpose of the condemnation is to protect the public health and safety.[361] House Bill 124 removed the upper ceiling of $10,000 for reimbursement of relocation of a small business,

---

77th Leg., 2d Reg. Sess. (W. Va. 2006).

353 *See id.* § 16-18-6 (LEXIS through 2007 Sess.).

354 *See id.* § 16-18-3(c).

355 *See* WIS. STAT. § 32.03(6)(b) (West Supp. 2006), *as amended by* A.B. 657, 2005–2006 Leg. (Wis. 2006).

356 *See id.* § 32.03(6)(a).

357 *See id.*

358 *See* WYO. STAT. ANN. § 1-26-801(c) (2007), *as amended by* H.B. 124, 59th Leg., 2007 Gen. Sess. (Wyo. 2007).

359 *See id.*

360 *See id.* § 15-9-133.

361 *See id.* § 1-26-801(c).

farm, or nonprofit.[362] Owners can confer with the condemning agency regarding the project.[363] If the condemning authority does not negotiate in good faith, a court may award all reasonable litigation expenses to the property owner.[364]

IV. ALTERNATIVES TO CONDEMNATION

In their future deliberations, state legislatures might want to consider a number of alternatives to the exercise of eminent domain. The procedures sketched here might facilitate the accomplishment of public goals without incurring the expense and dislocation of condemnation and, in many instances, might achieve positive results more efficiently and quickly.

A. Abatement and Foreclosure as a Preferred Blight Remedy

A common rationale for condemnation is the existence of "blight," meaning a condition on the land which is dangerous to the health, safety, or welfare of the community.[365] However, there is no theoretical basis for blight condemnation, since it is by use of the police power that government abates or eradicates harm to the community. On the other hand, eminent domain is the process through which the State appropriates to itself beneficial property for public use.[366] To put the point succinctly, blighted land is condemned not so that the blight might be enjoyed by the public, but rather so the blight might be abated.

There is a long history of government use of the police power to abate blight and other police power evils that landowners do not undertake to abate of their own accord. As the Supreme Court declared in *Mugler v. Kansas*,[367] "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."[368] Alternatively, as declared in *Lucas v. South Carolina Coastal Council*,[369] a regulation depriving an owner of some or even all value does not work a

---

[362] *See id.* § 16-7-103.
[363] *See id.* § 1-26-504.
[364] *See id.* § 1-26-509(h).
[365] 512 S.W.2d 514 (1974).
[366] *See* Kelo v. City of New London, 545 U.S. 469, 519 (Thomas, J., dissenting) (noting that "*Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States").
[367] 123 U.S. 623 (1887) (upholding prohibition statute depriving brewery owner of substantial value).
[368] *Id.* at 665.
[369] 505 U.S. 1003 (1992).

taking if it merely duplicates the "restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[370]

Under the *Mugler* nuisance rationale, the nuisance is a physical condition inhering in the land, and government efforts to abate it do not imply the arrogation of title. Likewise, under *Lucas*, the landowner does not own the right to engage in the use constituting the nuisance but does own those attributes of fee-simple title consistent with principles of private property rights.

Consistent with this understanding of property rights and the police power, many state courts have limited government's power to demolish unsafe buildings to cases of actual need. Thus, where the owner had ample opportunity to repair an unsafe building but failed to do so, the Commonwealth Court of Pennsylvania upheld an order requiring demolition,[371] but the same court found a municipal ordinance that denied the owner of an unsafe building the opportunity to repair where the costs exceeded 100% of the property's appraised value facially unconstitutional.[372]

In *Johnson v. City of Paducah*,[373] the Kentucky Supreme Court reached a similar holding, which an appellate court subsequently characterized as stating that "the property owner should have been afforded the opportunity to repair or demolish, that the failure to give the owner the choice was arbitrary; that absolute power over a person's property exists nowhere in a republic."[374] Other courts have reached similar results.[375]

One of the authors recently has proposed that the current system of condemnation for blight be replaced with one providing the owner with an opportunity to abate the blighting conditions.[376] Should the owner be unwilling or unable to abate, the locality could do so, and would charge the costs to the owner as a betterment assessment. Should the owner not

---

[370] *Id.* at 1029.

[371] *See* Stacey v. City of Hermitage Bd. of Apps., 789 A.2d 772, 776 (Pa. Commw. Ct. 2001).

[372] *See* Herrit v. Code Mgmt. App. Bd. of Butler, 704 A.2d 186 (Pa. Commw. Ct. 1997).

[373] 512 S.W.2d 514 (1974).

[374] Washington v. City of Winchester, 861 S.W.2d 125 (Ky. Ct. App. 1993).

[375] *See, e.g.*, Village of Lake Villa v. Stokovich, 810 N.E.2d 13 (Ill. 2004); Hawthorne S. & L. Ass'n v. City of Signal Hill, 23 Cal. Rptr. 2d 272 (Cal. Ct. App. 1993); Shaffer v. City of Atlanta, 154 S.E.2d 241 (Ga. 1967).

[376] *See* Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB.LAW. 833 (2007).

pay, the assessment lien could be foreclosed upon. At the resulting tax sale, the parcel could be acquired by the highest bidder, which could be the locality, its designated redeveloper, or another developer or private entity.

The advantages of such a system are two-fold. Conceptually, abatement-and-foreclosure embodies a police power approach, which is more consistent with eradicating harms than the takings power. Practically, it attenuates the abuses that can arise when well-connected redevelopers team with local officials to acquire private land by eminent domain and construct what are sometimes wasteful showcase projects. Abatement-and-foreclosure, on the other hand, opens up the process. It encourages the landowner, a group of neighbors, or an astute bidder at the foreclosure sale to acquire the parcel and abate the blighting conditions in a practical manner.[377]

B. State Attempts to Include Owners in Redevelopment Projects

A few states have enacted legislation facilitating the involvement of condemnees in the redevelopment process. Under California law, "[e]very redevelopment plan shall provide for participation in the redevelopment of property in the project area by the owners of all or part of such property if the owners agree to participate in the redevelopment in conformity with the redevelopment plan adopted by the legislative body for the area."[378] Because the statute left property owners' involvement ambiguous and optional, owners in California have not been able successfully to involve themselves in the redevelopment process.

The California courts have held repeatedly that the development decisions are at the sole discretion of the local redevelopment agency.[379] The leading case is *In re Bunker Hill Urban Renewal Project 1B of Community Redevelopment Agency of Los Angeles*,[380] which declared that "there is no absolute right of owner participation in the redevelopment of

---

[377] *See id.* at 856–57.

[378] CAL. HEALTH & SAFETY CODE § 33339 (West 1999) (requiring that redevelopment agency plans provide for owner participation but not rely on that participation, adopt and publish owner participation rules, give preference to business owners to reenter that same redevelopment area, possess alternative plans in the case that the owners do not participate, and act in good faith to allow owner participation).

[379] *See, e.g.*, *In re* Bunker Hill Urban Renewal Project 1B of Cmty. Redevelopment Agency of L.A., 389 P.2d 538 (Cal. 1964); Huntington Park Redevelopment Agency v. Duncan, 190 Cal. Rptr. 744 (Cal. Ct. App. 1983); Sanguinetti v. City Council of Stockton, 42 Cal. Rptr. 268 (Cal. Dist. Ct. App. 1965); and Felom v. Redevelopment Agency of San Francisco, 320 P.2d 884 (Cal. Dist. Ct. App. 1958).

[380] 389 P.2d 538 (Cal. 1964).

each separately owned parcel of land within the project area" and that "the Community Redevelopment Law does not contemplate that every redevelopment plan shall be so designed as to accommodate a redevelopment of each separate parcel within the financial ability of the present owner."[381] Any owner that does desire to participate first must agree to do so in conformity with the adopted redevelopment plan.[382] Furthermore, "[b]ecause the final plan necessitates assembly of large plots to carry out the proposed uses in certain areas of the project and requires prospective owner-participants to qualify as financially responsible, and thus in some cases renders it impossible for small property owners, as such, to separately participate with the same status, does not in and of itself establish a violation."[383]

While requiring the redevelopment agencies to meet their "duty of reasonableness and good faith" and "act fairly and without discrimination," a California appellate court held, in *Felom v. Redevelopment Agency of City and County of San Francisco*,[384] that the agency had discretion and was not unreasonable or discriminatory when it chose to allow the participation of owners of developed land but not allow the participation of owners of undeveloped land in the redevelopment of a blighted area.[385] The agency had denied participation to 97% of the owners of the undeveloped land, while granting participation to 75% of the owners of developed land.[386]

Similarly, in *Sanguinetti v. City Council of Stockton*,[387] a community plan that designated only three owners in a nine-block area as eligible for owner participation did not deny equal protection.[388] "The Community Redevelopment Law permits, but it does not require owner participation, and whether or not and in what instances owner participation may be permitted is necessarily confided to the sound judgment of the agency in the adoption of the plan."[389] The agency survey of the nine-block neighborhood listed 47 families living in the area, and only eight of them were owners.[390] The area also had a large population of transient individuals,

---

[381] *Id.* at 563.
[382] *See id.*
[383] *Id.*
[384] 320 P.2d 884 (Cal. Dist. Ct. App. 1958).
[385] *See id.* at 889.
[386] *See id.* at 886.
[387] 42 Cal. Rptr. 268 (Cal. Dist. Ct. App. 1965).
[388] *See id.* at 276.
[389] *Id.* at 275.
[390] *See id.* at 272.

creating a difficulty for the agency in providing for their relocation in the redevelopment plan.[391]

More recently, a California court of appeal required the objecting owners to show that the agency abused its discretion, and, as long as the redevelopment agency had substantial evidence to support the adopted redevelopment plan, the court would not overturn the agency's rejection of the alternative proposals of the property owners.[392]

Under Nevada law, "[e]very redevelopment plan must provide for the participation and assistance in the redevelopment of the property in the redevelopment area by the owners of all or part of that property if the owners agree to participate in conformity with the redevelopment plan adopted by the legislative body for the area."[393] Actions questioning the validity of a redevelopment plan must be brought within 90 days of the adoption or amendment of the plan, or of legislative or administrative findings in connection with it.[394]

The Supreme Court of Nevada interpreted this provision to grant any citizen standing to challenge redevelopment agency findings in *Hantages v. Henderson*.[395] However, the court rejected the challenge, filed one year after the redevelopment plan was adopted, on the grounds that the agency's approval of the owner participation agreement was not a formal amendment, nor did it alter materially or deviate from the original plan, and therefore the 90-day challenge period did not restart. So while the plaintiff had the right to challenge the plan, the owner participation agreement was an integral part of the plan, not an amendment to the plan that granted a new challenge period.[396]

Overturning a district court decision in favor of the owners, the Supreme Court of Nevada held, in *City of Las Vegas Downtown Redevelopment Agency v. Pappas*,[397] that a redevelopment agency did not have to accept the owners' proposed participation through ground lease of the property. It found that the district court had substituted its own decision making process for that of the agency and that the agency's finding that the financing of the garage would be unfavorable if it accepted the own-

---

[391] *See id.* at 374.

[392] Huntington Park Redevelopment Agency v. Duncan, 190 Cal. Rptr. 744, 747 (Cal. Ct. App. 1983).

[393] NEV. REV. STAT. ANN. § 279.566(1) (LexisNexis 2002).

[394] *See id.* § 279.609.

[395] 113 P.3d 848 (Nev. 2005).

[396] *See id.* at 851.

[397] 76 P.3d 1 (Nev. 2003).

ers' ground rent proposal was within its power.[398] The State delegated its police power to the agency, and the agency therefore had discretion in the process.[399]

V. CONCLUSION

The legislative enactments responding to the United States Supreme Court's approval of condemnation for retransfer for private economic revitalization in *Kelo v. City of New London*[400] have been extensive in number and varied in character.

Rural states, and others tending toward deference toward private property rights, have been the most active in forbidding condemnation practices that, for the most part, their subdivisions did not engage in anyway. Those states, largely in the northeast, which have engaged in extensive condemnation activity for private revitalization, largely have resisted change.

As perceived local needs evolve, and as localities, developers, and landowners seek to test the meaning of new and often quite general provisions, state courts will have to establish the contours of recently enacted legislation.

---

[398] *See id.* at 16.
[399] *See id.*
[400] 545 U.S. 469, 477 (2005).