

MERCATUS POLICY SERIES

POLICY COMMENT No. 23

**MOVING PAST *KELO*:
A NEW INSTITUTION FOR
LAND ASSEMBLY—Collective
Neighborhood Bargaining
Associations (CNBAs)**

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FEBRUARY 2009

MERCATUS CENTER
GEORGE MASON UNIVERSITY

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Senior Editor: Frederic Sautet
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Design: Joanna Andreasson
ISSN: 1943-6793

Cover photo: Jordana Starr

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ROBERT H. NELSON AND EILEEN NORCROSS

EXECUTIVE SUMMARY

The 2005 U.S. Supreme Court *Kelo v. City of New London* decision set off a storm of protest across the United States when the Court approved the condemnation of private property by the city of New London, Connecticut. New London then planned to sell the properties for private development. Ordinary Americans, as many people saw the matter, were being involuntarily evicted in order for other private parties to take their property at a bargain price. The coercive powers of the government were in effect being captured for private enrichment. The Supreme Court acknowledged these dangers but found that there was ample precedent in American constitutional law for government use of condemnation powers for a wide range of actions, including those of New London. The states, if they wanted, could remedy the situation through the normal political means.

Eminent domain in circumstances such as New London seeks to address a legitimate concern. Where large numbers of properties must be assembled in order to develop an area efficiently, the transaction costs may be large—so large, in some cases, as to prevent development altogether. There are better solutions, however, than condemnation. It would be better for the land owners to form their own private organization—such as a collective neighborhood bargaining association (CNBA)—to negotiate with land developers. If they receive a reasonable offer for the neighborhood as a whole, the neighborhood property owners could then vote on whether to accept the offer. Both the creation of a CNBA and the decision to accept a developer's offer should each require high supermajority votes of approval (but not unanimity). The creation of such a process, which would require state or local legislative action, would facilitate better-planned, more efficient, and more equitable development of American land areas that require the assembly and participation of many different land owners.

MOVING PAST KELO: A NEW INSTITUTION FOR LAND ASSEMBLY—Collective Neighborhood Bargaining Associations (CNBAs)

I Introduction

ALTHOUGH THE USE of eminent domain for economic development did not begin with the 2005 *Kelo* decision, the case highlighted the inadequacy of condemnation as a means of land assembly.¹ By 2007, more than half of the states had passed legislation to limit the use of takings in response to the Supreme Court decision. This ongoing conflict between private property rights and public land usage is thus due for fresh consideration.

Because land parcels are often more valuable to developers when grouped together, eminent domain attempts to solve the collective action problem by forcing holdout owners to sell. This method tends to advantage the buyers, who can purchase the individual lots at “fair market value”—a price that does not necessarily reflect the value of the land when developed for a new use as part of a larger project. Another aspect of eminent domain is that owners must bear the social and personal costs of uprooting from their neighborhoods.

Building on the land readjustment experiences of Germany, Japan, Australia, South Korea, Taiwan, and the Netherlands, this Policy Comment proposes a new approach to land assembly: Replace eminent domain with the ability of neighborhood residents to collectively bargain for the sale of their entire neighborhood. They might form what is known as a collective neighborhood bargaining association (CNBA).

A CNBA allows neighborhoods to incorporate as entities for the purpose of negotiating for the value of the land and the terms of sale with an interested developer. Formed by a high supermajority vote, a CNBA allows owners to reap greater economic benefits from the sale of their consolidated properties while permitting owners a financial share in future development, reducing the personal burden of moving from the area. By simplifying transactions, CNBAs also benefit developers. Balancing economic efficiency with social justice, CNBAs represent a more acceptable approach to land assembly compared

to eminent domain. By facilitating the consolidation of neighborhood properties, urban neighborhoods could be better planned and developed (privately), potentially improving significantly the overall character of urban land use.

Section two of this paper briefly describes the history of land condemnation and takings in the United States. The next section explains the difficult nature of land assembly in the context of the larger problem of any collective action. Section four depicts in detail how other countries have dealt with this problem, some in post-disaster contexts. The fifth section outlines specific proposals for the United States. The next section discusses similar proposals that have been made recently. Section seven delves further into the legal details of establishing something resembling a CNBA. The last section discusses the merits of the tradeoff between the coercive action of these entities and a community interest in urban redevelopment.

Enactment of legislation that would allow for a new land assembly system in the United States would be a fitting response to urban development issues brought to light by *Kelo*.

2 Eminent Domain in the United States

IN JUNE 2005, the U.S. Supreme Court announced its decision in *Kelo v. City of New London, Connecticut*. In what proved to be one of the most controversial decisions of the past decade, the Supreme Court sustained the efforts of New London to condemn the homes of Susette Kelo and eight other property owners. The city was acting to implement an economic revitalization plan for the Fort Trumbull area—90 acres on a peninsula jutting into the Thames River, adjacent to a \$300 million research facility planned by the Pfizer Corporation. New London had succeeded in acquiring the great majority of the properties within the Fort Trumbull area through

1. *Kelo v. City of New London, Connecticut*, 125 S. Ct. at 2655 (2005).

voluntary purchase. It was unable, however, to reach agreement with the nine owners and therefore sought to obtain their properties through the exercise of condemnation procedures (historically based on payment of “fair market value”).

Given past precedents, most legal analysts expected the *Kelo* decision. The Fifth Amendment to the U.S. Constitution declares that “private property [shall not] be taken for public use, without just compensation.” For much of the 19th century, the “public use” requirement had been interpreted by the Supreme Court to mean either the actual use of condemned property by the government or a private use that was open to public entry (such as a private road, railroad, canal, or other transportation facility). Furthermore, the Fifth Amendment was not considered applicable to actions taken by the states—which since the colonial era had often applied their own more liberal standards for condemnation. In the late 19th century, however, the Court (perhaps not coincidentally) reversed both positions. Upon the ratification of the Fourteenth Amendment after the Civil War, the Court began to apply the Bill of Rights to state actions. Consistent with much previous state practice, the Supreme Court also effectively adopted the looser standard that condemnation must simply serve a legitimate public purpose. As the Court found in 1896, “when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation.”²

In the twentieth century, subject to review in Federal Court, condemnation was widely applied by American state and local governments for the purpose of promoting economic development. In many western states, for example, state constitutions authorized condemnation on behalf of even a single private mining company in order to gain access rights for mineral development.³ The U.S. Supreme Court affirmed its expansive interpretation of eminent domain authority in the 1954 *Berman* decision (upholding the condemnation of a Washington, DC, neighborhood in which 64 percent of the properties were regarded as beyond repair, part of a large urban renewal project) and in the 1984 *Midkiff* decision (upholding Hawaii’s condemnation of large areas of leased proper-

ties in order to address an ostensibly anti-competitive circumstance in which only 72 private land owners held title to almost half of the land in the state).⁴

Justice O’Connor, one of the four dissenters in *Kelo*, sought to distinguish its circumstances from those of *Berman* and *Midkiff* on the grounds that the 1954 and 1984 decisions had involved actions by the government to correct actual “harms.” Alone among the dissenters, Justice Thomas advocated the explicit overturning of a century of Supreme Court precedent relating to the understanding of the “public use” requirement, thus returning to the old 19th century understanding that an actual public use must be involved. Thomas noted that in retrospect, the urban renewal program described by Justice William Douglas in *Berman* in such glowing terms—involving as many as a million displaced people—had come to be known as “Negro removal.” Thomas referred to the research of Bernard Frieden and Lynne Sagalyn who had found that “of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite.”⁵

URBAN RENEWAL IN SAN FRANCISCO

Indeed, this bleak story in American political and legal history is only now coming to an end. In July 2008, the *San Francisco Chronicle* reported that the “San Francisco Redevelopment Agency will leave the Western Addition in January [2009], ending a 40-year ‘urban renewal’ project that was touted as a move to wipe out blight but actually destroyed the city’s most prominent African-American neighborhood.” Once a “thriving black neighborhood and business district” filled with “nightclubs, barbershops, banks, and retail stores,” the Fillmore area was razed as part of one of the largest urban renewal projects in the western United States. About 2,500 Victorian homes were demolished and 4,729 households were forced to move away. Many were promised a future home in the redeveloped project, but instead “the area sat empty for years.” The Fillmore area today is “known for its violence and is home to a number of fast-food restaurants and empty storefronts.” A pastor in the area for decades, the Reverend Amos Brown (now the head of the San Francisco NAACP) told the *Chronicle* that the past urban renewal efforts “wiped out our community, weakened our institutional base, and never carried out their promise to bring people back.”¹

1. Leslie Fulbright, “Sad Chapter in Western Addition History Ending,” *San Francisco Chronicle*, July 21, 2008.

2. *United States v. Gettysburg Electric R. Co.*, 160 S. Ct. 427 (1896), quoted in Thomas dissent, *Kelo v. City of New London*, 125 S. Ct. at 2684 (2005).
3. Alexandra B. Klass, “The Frontier of Eminent Domain,” *Regulation*, Summer 2008.
4. *Berman v. Parker*, 75 S. Ct. 98 (1954); *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984).
5. Bernard Frieden and Lynne Sagalyn, *Downtown Inc.: How America Rebuilds Cities* (Cambridge, MA: MIT Press, 1988), cited in Thomas dissent, *Kelo v. City of New London*, 125 S. Ct. at 2687 (2005).

Historically, the majority of condemnations for economic development (New London's stated purpose in *Kelo*) had involved either raw land or private business properties. In those cases when individual residential homes had been involved, as in many of the widespread condemnations for urban renewal, the typical victims of the condemnation were racial minorities in inner cities and other poorer and politically weaker members of society. In *Kelo*, by contrast, the average American could easily identify with the circumstances of Susette Kelo and her fellow middle-class, white petitioners to the Supreme Court. One had been born in 1918 and lived her entire life in the same New London home that the city proposed to take from her.

Moreover, there was greater skepticism by 2005 with respect to the skills of professional planners and their ability to guide successfully the course of economic development. As early as 1961, Jane Jacobs had argued that comprehensively planned neighborhoods were often sterile and unattractive compared to areas developed more spontaneously through the individual efforts of many separate owners.⁶ As in the San Francisco case, many urban renewal projects had proven to be outright failures, leaving the previously condemned land sitting undeveloped for long periods.⁷

Authorized by the Federal Housing Act of 1949, the American Urban Renewal Program was a centerpiece for the progressive goal that expert planners and managers should act to revive the American city. Their schemes were typically grounded in "utopian" hopes of a "high modernist" faith that sought in the United States and other nations "the rational design of social order commensurate with the scientific understanding of natural laws."⁸

Now urban renewal is best known for its major economic inefficiencies and large social injustices. Over the course of the 20th century, an American judiciary that often shared the progressives' hopes placed almost no limits on the powers of American governments to condemn the property of individual home owners in the service of wider social and economic "progress."

With such memories still fresh for many people, *Kelo* raised the specter of middle-class American homes being condemned in the name of high ideals but with the practical result mainly to increase the profits of a few private developers. The briefs submitted to the Supreme Court described a number of such instances, many of which were published in studies by the Institute for Justice (which was assisting Susette Kelo).⁹ It appeared that a surprisingly large number of American cities might be substituting condemnation actions in order to bypass the normal give-and-take of private negotiations among willing sellers and willing buyers—and thus lending state power to advantage a few buyers to obtain property at less cost than the likely normal market outcome (conceivably involving corruption in some cases).

Reflecting such factors, and even though it was consistent with a century of Supreme Court decisions, the announcement of the *Kelo* decision in 2005 nevertheless provoked a storm of public protest. As one legal analyst wrote, "An earthquake shook the nation when the Supreme Court handed down its decision in *Kelo v. City of New London*."¹⁰ By 2007, more than half the states had enacted legislation to limit the acceptable state exercise of eminent domain powers. In many cases, as Justice O'Connor had proposed in her dissent that the Supreme Court should itself rule as a matter of constitutional interpretation, new state laws banned altogether the use of eminent domain authority for the purpose of ordinary economic development. In Iowa, a newly enacted statute set strict rules for the exercise of eminent domain. For example, in condemnation actions, aesthetic considerations could be only secondary, a condemned area with residential properties must be at least 75 percent blighted, and increased tax revenues or jobs could not be the primary project purpose. Alabama, Florida, Illinois, Michigan, Minnesota, New York, Ohio, Pennsylvania, Tennessee, and Texas were all either considering or had already enacted legislation preventing or limiting the use of eminent domain authority for the purpose of promoting "private development or private benefit or transfer to a private owner."¹¹ Reflecting a special concern for the fate of individual homes, a new Michigan law required a

6. Jane Jacobs, *The Death and Life of Great American Cities* (New York: Random House, 1961).

7. See Martin Anderson, *The Federal Bulldozer* (Cambridge, MA: MIT Press, 1964).

8. James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press, 1998), 4.

9. See Dana Berliner, *Public Power, Private Gain* (Washington, DC: Institute for Justice, 2003).

10. Julie A. Degen, "The Legislative Aftershocks of *Kelo*: State Legislative Response to the New Use of Eminent Domain," *Drake Journal of Agricultural Law* 12, no. 2 (Summer 2007).

11. *Ibid.*, 13.

payment of 125 percent of fair market value for any condemned properties that were the principal residence of the owner.

In some ways, admittedly, this outpouring of state action vindicated the *Kelo* majority. As the five justices siding with New London declared, there was nothing in *Kelo* that limited the ability of states to set new rules for the exercise of eminent domain powers. If the Supreme Court had ruled against New London in *Kelo*, yet another area of government action would have been shifted from the democratic to the judicial arena. The federal and state courts would have been burdened with large numbers of new cases in which they would have had to consider the facts and then decide whether they fell within a new understanding of constitutionally acceptable condemnation procedures.

Moreover, the courts would have been limited in their flexibility to frame a new law of condemnation. Any major departures from past precedent would have had to be justified, perhaps requiring awkward legal reasoning. New rules would have to conform to the formalities and slow pace of judicial decision making. If the U.S. Supreme Court had undertaken to set a federal rule for the exercise of condemnation powers, it might have undesirably imposed a single national standard everywhere, ignoring significant differences among the states. The opportunity for the states to fulfill their function as the laboratories of democracy would have been blocked. In short, there is a strong case that eminent domain law in the United States very much needs to be revisited (and *Kelo* served the valuable function of highlighting this fact), but also that it is best to act state by state—and through the instruments of state legislative and executive bodies.

This is not to say, however, that the states thus far have always acted wisely. The post-*Kelo* state legislation of the past three years was enacted in the heat of the moment. There was little opportunity for wide give-and-take in order to further clarify the circumstances in which eminent domain might be more or less appropriate. Perhaps most importantly, there was little discussion of new political and economic institutions that might address problems of land assembly in better ways. It might well have been desirable to prohibit the future exercise of condemnation powers for purposes of promoting economic development, as a number of states did. But it might also have been desirable for states to create new and improved methods of land assembly that would serve economic development needs.

American land developers in the 20th century often bypassed the weaknesses of the U.S. land assembly system by moving to more and more distant places in the suburbs where large farms or other consolidated properties could be found (they were also in many cases bypassing restrictive zoning laws). The low density of American land development patterns has many explanations, including historically low energy prices and the strong appeal of the “American dream” of an individually owned home and a private yard. But the difficulty of obtaining suitably large areas for land development close to cities has also been an important factor. Yet, if recent increases in energy prices are sustained and new highways remain as difficult to build, there will be growing pressures for more intensive use of existing developed areas. Simply as a matter of economics, wholesale redevelopment of some inner city and inner suburban neighborhoods will be desirable—and actively sought by private land developers aiming to satisfy the emerging housing and other demands of the marketplace. In short, owing to various pressures that are now building, urban land-assembly methods are likely to become an increasingly important policy issue for the American government.

3 The Problem of Land Assembly

THE PROBLEM OF urban land assembly arises because in many situations, a group of properties will have a significantly higher total value when developed together than when developed individually. If a developer wants to build a shopping center, for example, it will be necessary to assemble a large block of land. Taking into account the physical and other interactions among the various stores and other properties in the shopping center—their full land-use “synergies”—the total economic value of the shopping center may significantly exceed the value of the same group of properties developed individually (as part of say a highway “strip development” where the stores are spaced far apart with individual parking lots). Owners of the land that might be turned into a shopping center thus face a collective action problem. If they can succeed in organizing themselves to consolidate their individual properties into one sales package, the overall selling price of their land might be substantially higher than the sum of the individual selling prices if the properties were sold separately.

In this respect, the land owners' problem is not in principle different from many other problems of local collective action. It is often possible to collect garbage, run schools, patrol the streets, offer fire protection, plow snow, and provide many other local services on a common basis more efficiently than for each household to contract individually for these services. A solution to this problem is the American system of local government.¹² But in the special case of selling all the individual properties within a given jurisdiction as a form of collective action, the traditional American understanding of local government does not allow for this possibility. While it is possible to incorporate a municipality for the purpose of providing local services, it is not possible—at least under existing law—to incorporate a new public jurisdiction for the collective purpose of selling all the properties in the jurisdiction (public and private alike) in one consolidated transaction.

This circumstance, admittedly, may be changing somewhat. Increasingly across the United States, local public governments are being replaced—at least with respect to many “micro” services such as garbage collection and street cleaning—by private governments.¹³ Although fewer than 1 percent of Americans lived in a private community association in 1970, that figure reached 20 percent by 2008. Between 1980 and 2000, fully half of the new housing units built in the United States were subject to the private governance of a community association. Unlike an incorporated public municipality, a community association, as a private entity, can in concept vote to “terminate” itself. The declarations of many community associations—their “private constitutions”—allow for this possibility, often on the basis of a high supermajority vote (such as 80 percent). Hence, in concept, although this has seldom happened to date, a private community association could vote to dissolve itself in response to a high enough bid by a developer seeking

to purchase the full package of association properties in one transaction.

Where community associations are present and their boundaries correspond with the needs of developers, the land assembly problem is mitigated. Under current law, however, it is for practical purposes impossible to create a new private community association in a neighborhood that is already developed and has separately owned properties. Forming a community association on a strictly voluntary basis would require unanimous consent, normally involving prohibitively high transaction costs. In previous writings, one of this paper's authors has suggested retrofitting full-fledged new private community associations into existing developed neighborhoods on the basis of a high supermajority vote.¹⁴ This would offer a new private solution to many local collective action problems—including the collective sale of the entire package of neighborhood properties. However, this option is not presently available anywhere in the United States.

Lacking any other legal alternative, a few groups of land owners have been able to organize themselves to sell their properties collectively by unanimous consent¹⁵. In 2005, illustrating the potentially large gains from such collective action, the *New York Times* reported that

In many parts of the country, developers are buying up older homes, tearing them down and building million-dollar mansions in their place. Now, 22 homeowners here [in North Carolina] are taking matters into their own hands with an unusual marketing proposal. They've put their entire neighborhood up for sale.

Homeowners in Sherbrooke, a neighborhood about six miles from downtown [Charlotte], are betting that a developer will pay a premium for 15

12. George Liebmann, "The New American Local Government," *The Urban Lawyer* 34, no. 93 (Winter 2002).

13. See Robert H. Nelson, *Private Neighborhoods and the Transformation of Local Government*, (Washington, DC: The Urban Institute Press, 2005).

14. See, for example, Nelson, *Private Neighborhoods*, part IV. See also Robert H. Nelson, "The Privatization of Local Government: From Zoning to RCAs," in *Residential Community Associations: Private Governments in the Intergovernmental System?* (Washington, DC: Advisory Commission on Intergovernmental Relations, May 1989); Robert H. Nelson, "Privatizing the Neighborhood: A Proposal to Replace Zoning with Collective Private Property Rights to Existing Neighborhoods," *George Mason Law Review*, Summer 1999; and Robert H. Nelson, "Local Government as Private Property," in *Private Property in the 21st Century: The Future of an American Ideal*, Harvey M. Jacobs, ed. (Northampton, MA: Edward Elgar in association with the Lincoln Institute of Land Policy, 2004).

15. In the late 1980s, land owners in Atlanta and Northern Virginia were able to form agreements based on unanimous consent to sell all their neighborhood properties collectively. In one example, the 24 residents of the Courtlands neighborhood in Northern Virginia signed a contract in 1988 to sell their neighborhood—located near a new subway stop—as a single package to the Moyarta Corporation, thus doubling their existing home sale values. By and large, however, few neighborhoods had the energy even to attempt such collective organization and, among those that did make the effort, the great majority failed.

acres of prime real estate under their 1950's [sic] ranch houses. Their asking price: about \$700,000 a lot, triple the individual value of most of their homes. More than 20 developers have been in touch since the owners advertised their proposal in the local paper in the spring. Several developers have told the neighborhood they planned to put together proposals.

The homeowners aren't the first to realize that their lots are worth more together than separately. Neighborhoods in urban areas like Orange County, Calif., Washington and Chicago have sold collectively to home builders, pocketing thousands more than they would have individually. But analysts who track teardowns said it's still rare for a neighborhood to initiate the idea. "It makes sense from an economic point of view, but it's a tricky thing to organize," said John K. McIlwain, senior fellow for housing at the Urban Land Institute, a nonprofit research center in Washington.¹⁶

Collective action, given the high transaction costs of organizing, is a main reason for the existence of local government. To address the problem of collective sale of neighborhood properties, new state or local laws could be enacted under which neighborhood land owners would be able to vote (probably requiring a supermajority such as 60 percent) to create a collective neighborhood bargaining association (CNBA) to represent them in negotiations with developers.¹⁷ If the collective bargaining resulted in agreement on a proposed sale price for the entire package of properties, the potential proceeds from this sale would be allocated according to some rule among the individual property owners. Based on this potential allocation, the offer would then be submitted for a collective vote. It would presumably require another supermajority vote—perhaps 70 percent in the case of owners of undeveloped land, perhaps 80 percent for owners of existing residential properties—in order to approve the offered price and the collective sale of all the neighborhood properties. All neighborhood property

owners, including those who might have voted against the sale, would be bound by the results of this vote.

In considering this option, it will be helpful to review other experiences in facilitating land assembly as well as a growing body of American writings—partly based on foreign experiences—addressing new institutional mechanisms that might be adopted in the United States.

4 "Land Readjustment" Abroad

ALTHOUGH SELDOM, IF ever, used in the United States, many other countries have adopted legal procedures for "land readjustment" that provide for the organization of property owners in order to benefit them collectively through more intensive (and more profitable) use of their land.¹⁸ In some cases, these land readjustment procedures have been applied in the wake of human disasters, such as war, or natural disasters, such as an earthquake, that left whole large areas in need of collective redevelopment. In other cases, the purpose has simply been to provide a better means for assembly of a large and diverse set of properties in order to encourage a higher level of economic and other development. Germany, Japan, South Korea, Taiwan, the Netherlands, and Australia have been among the pioneers in developing land readjustment methods.¹⁹

In a land readjustment system, a set of land owners joins together for the common redevelopment of their properties. In some cases, the land readjustment process may be mandated by a public entity, but in other cases, a private association is formed through a supermajority vote. Dissenting owners are typically entitled to opt out of the land readjustment process, receiving the appraised value of their properties. Once a land readjustment is approved, individual owners give up their properties to the body that will be responsible for designing and implementing a redevelopment plan for the overall area, including

16. Michelle Crouch, "A Neighborhood in North Carolina is Put Up for Sale," *New York Times*, August 14, 2005.

17. As will be discussed further, law professors Michael Heller and Rick Hills recently made a similar proposal for the creation of Land Assembly Districts (LADs). See Michael Heller and Rick Hills, "Land Assembly Districts," *Harvard Law Review* 121, no. 6 (April 2008).

18. See George W. Liebmann, "Land Readjustment for America: A Proposal for a Statute," *The Urban Lawyer* 32, no. 1 (Winter 2000).

19. See William A. Doebele, ed., *Land Readjustment: A Different Approach to Financing Urbanization* (Lexington, MA: Lexington Books, 1982); Gerhard Larsson, *Land Readjustment: A Modern Approach to Urbanization* (Brookfield, VT: Aldershot, 1993); and Yu-Hung Hong and Barrie Needham, eds., *Analyzing Land Readjustment: Economics, Law, and Collective Action* (Cambridge, MA: Lincoln Institute of Land Policy, 2007).

the establishment of new patterns of land and housing ownership. As compensation for their losses, the original owners receive a share in the future development—a new parcel of land, a new home, or in other cases a stock certificate giving them a share of ownership. (They do not necessarily receive the same property that they owned prior to land readjustment.) Hence, in contrast to urban renewal in the United States, the original owners can capture their share of the overall financial gains from the collective redevelopment of their properties.

As employed in other nations, land readjustment systems have often been used to fund the construction of roads, water, sewers, and other infrastructure. Governments often commit to providing a share of the infrastructure funding as part of the readjustment project. Funding is also sometimes obtained by borrowing against the future value of the project. Some of the redeveloped land may also be set aside for future public sale. Finally, the land owners may be assessed directly for monetary shares to assist in constructing the infrastructure, receiving deferred compensation in the form of the increased value of their future ownership in the redevelopment project.

In some cases, a land readjustment organization is controlled by the property owners who collectively undertake the planning for a future set of land uses and then build the necessary roads, water, sewer, and other infrastructure. In other cases, the original property owners enter into a joint venture with a land developer who undertakes this task. In the latter case, the shareholdings in the future project would be divided in some fashion between the original property owners and the incoming developer. Again, in order to have a viable project, it would have to be a win-win situation in which both parties gain financially. That will often be possible, however, because of the increased value of the newly consolidated project relative to the possible use of the properties separately.

Germany

MORE THAN 100 years ago, Germany pioneered new institutional mechanisms for land readjustment. Land readjustment procedures were adapted to urban set-

tings after first being employed to consolidate agricultural lands. Initially, land readjustments involved raw urban land, but in 1950 the system was extended to lands containing structures as well. German land readjustment projects work approximately in the manner described above, although there is usually no vote of the involved property owners.²⁰

After consultation with land owners, a municipality designates a set of mandatory land readjustment boundaries. Owners within these boundaries are required to participate in the land redevelopment plan. They receive shares in the future redevelopment project in proportion to the value of their original land holdings. As much as 30 percent of the land may be transferred to the municipality as compensation for its infrastructure construction and other involvement in the land readjustment project. In some cases, if the redevelopment is exceptionally profitable, a direct monetary contribution to the municipality is also required. In a recent review of this system, Benjamin Davy reports that “in Germany, the practice of mandatory land consolidation has been refined to an art form. Most landowners whose properties have been included in land readjustment are happy with the process . . . German land readjustment blends planning law, real estate appraisal, and land surveying in a most productive way.” Including both “mandatory and voluntary elements, land readjustment [in Germany] has become an effective, efficient, and fair way to prepare land for development.”²¹

Japan

LIKE MANY NATIONS in the late 19th and early 20th centuries, Japan looked to Germany for models of social organization and governance. The first land readjustment law in Japan was the City Planning Act of 1919. After the great earthquake of 1923, a Special City Planning Law was enacted to assist in the process of rebuilding. Since then, land readjustment procedures have played a greater role in the Japanese land development process than in any other country.²² By 2003, there had been 11,000 land readjustment projects involving 350,000 hectares, having a significant impact on the overall urban development of Japan.²³ There has been a steady process of

20. Walter Seele, “Land Readjustment in the Federal Republic of Germany,” in *Land Readjustment*, Doebele, ed.

21. Benjamin Davy, “Mandatory Happiness?: Land Readjustment and Property in Germany,” in *Analyzing Land Readjustment*, Hong and Needham, eds., 42.

22. Michio Miyazawa, “Land Readjustment in Japan,” in *Land Readjustment*; and Kitotaka Hayashi, “Land Readjustment in Nagoya,” in *Land Readjustment*.

23. Andre Sorensen, “Consensus, Persuasion, and Opposition: Organizing Land Readjustment in Japan,” in *Analyzing Land Readjustment*, 89.

learning and refinement as the Japanese laws were significantly rewritten in 1946, 1954, 1975, and 1982.

Many Japanese land readjustment projects are led by private associations of property owners. For these association-led projects, at least 66 percent of the landowners, owning at least 66 percent of the land, must agree to the creation of the project. Before they vote, the proposed boundaries of the readjustment area must be set and a governing body, including land owners, designated. A survey of all lands must be conducted and proposed plans for infrastructure installation developed. If the proposed readjustment is approved, a full redevelopment plan, including the land contribution of each owner and the future land shares to be redistributed, is prepared. A second vote of all property owners must then be held, again requiring a two-thirds vote for approval. If all these steps are successfully completed, the overall land readjustment process moves forward to completion.

Besides land owners themselves, land readjustments in Japan can also be initiated by local governments or the national government. In these cases, there is no requirement for a vote of approval of the land owners, but, as Andres Sorenson reports, “in practice all [land readjustment] projects require a high degree of consent. If they do not have adequate consent, they are extremely difficult to implement.” Perhaps surprising to many people in light of the reputation of the Japanese for deference to collective authority, there is a longstanding deep reluctance on the part of governments in Japan to condemn private property—a reluctance even greater than that traditionally seen in the United States. As Sorenson states, in Japan “the use of expropriation to assemble large plots of land is legally possible but in practice extremely difficult. Expropriation courts have long sided with landowners and have tended to award generous compensation, even for undeveloped rural land.” Hence, in Japan land readjustment methods have often been required as a practical matter if rural lands were to be converted to urban uses. Compared with condemnation, they offer a more acceptable “means to protect existing land ownership rights, since the original landowners still own the bulk of the land after project redevelopment.”²⁴ In the wake

of the *Kelo* decision and perhaps because of a growing reluctance in this country to condemn property in order to facilitate urban economic redevelopment, the long historical experience of land adjustment in Japan and other nations may offer particularly helpful lessons.

South Korea, Taiwan, and Australia

SOUTH KOREA AND Taiwan were Japanese colonies from the early 20th century until the end of World War II. The Japanese influence is reflected in the wide use of land readjustment procedures in these nations.²⁵ In South Korea, partly reflecting the urgency of redevelopment after the devastation of the Korean War, 84 percent of all cities have employed land readjustment procedures. In Seoul, more than half of the total land area was redeveloped in this manner.²⁶ Following the Japanese model, a land readjustment project can be initiated in South Korea by an association of land owners who must approve it by a vote of at least two thirds including at least two thirds of the land area of the project. In the land readjustment projects in Seoul, on average 60 percent of the land is returned to the land owners as their new ownership share in redeveloped land, about 30 percent is used to locate infrastructure and other public improvements, and another 10 percent is designated for public sale to help fund the improvements. In Australia, land readjustment procedures have long been employed in the state of Western Australia.²⁷

Netherlands

SINCE WORLD WAR II, the Netherlands has adopted land readjustment procedures on a large scale. Allied bombings during the war destroyed about 11,000 buildings in the city of Rotterdam. In restoring the city, the complicated historic system of property rights as it had evolved over centuries was abolished and a new, better-defined, and more workable set of rights established through a system of compulsory land readjustment. Farm land ownership in the Netherlands had also long been excessively fragmented and otherwise ill-suited to modern agriculture.

24. *Ibid.*, 98.

25. Robert T. C. Lee, “Agricultural Land Consolidation in Taiwan,” in *Land Readjustment*; T. C. Chou and S. K. Shen, “Urban Land Readjustment in Kaohsiung, Taiwan,” in *Land Readjustment*; and Ik-Jin Kim, Myong-Chan Hwang, and William A. Doebele, “Land Readjustment in South Korea,” in *Land Readjustment*.

26. Michael M. Shultz and Frank Schnidman, “The Potential Application of Land Readjustment in the United States,” *The Urban Lawyer* 22, no. 2 (Spring 1990): 227.

27. Ray W. Archer, “Land Pooling by Local Government for Planned Urban Redevelopment in Perth,” in *Land Readjustment*.

In order to address this problem, as Barrie Needham reports, “land readjustment has had a huge effect on the Dutch countryside. More than two-thirds of the total agricultural land of the Netherlands has been consolidated, reallocated or readjusted and improved during the second half of the twentieth century.”²⁸

Under the Dutch agricultural system, the government consults with farmers before designating a land readjustment area and the lands to be included. The provisions for obtaining collective farmer consent (including a 1954 law pertaining to farmer holders of leasehold as well as freehold rights) have varied historically and now depend on the type of land readjustment project.²⁹ A common procedure has been a requirement that either a majority of the farmer owners, or else the owners of a majority of the land, must agree to the project. Assuming such agreement is obtained, the lands within the readjustment area come under the temporary control of the land readjustment authority (a government body). Some lands are set aside for new roads and other infrastructure. Because the Dutch government pays fully for the infrastructure installation, farmers have often been enthusiastic supporters. When the project is completed, new rights to agricultural lands are then allocated in proportion to the land shares originally contributed by each farmer. In this process, a farmer might end up with an altogether new set of lands to work.

Based on the success of agricultural land readjustment, the Dutch have applied similar methods, if on a considerably smaller scale, to urban land readjustment. In such cases, the project is usually compulsory for property owners. In the past 20 years, land readjustments in rural areas have also been extended to encompass ecological, recreational and other purposes besides simply improving agricultural efficiency. It thus might be possible today to designate a rural project area where land readjustment would include new allocations of land for wetlands and wildlife habitats. The success of land adjustment procedures in the Netherlands partly reflects a high level of confidence and trust in governing capabilities in that homogeneous nation. As Needham reports, land readjustment in the Netherlands has been sustained in part by “a broad-based, well-informed platform of interest and support among the people (in particular the land-owners concerned) for the changes being proposed and implemented.”³⁰

Americans might be surprised to learn that in other nations, individual land owners are sometimes more securely protected from government condemnations than in the United States. In Japan, farmers refusing to sell have held up the construction of a badly needed additional runway at Tokyo’s Narita airport for many years. This is not necessarily because the Japanese have a higher regard for property rights than Americans do, but because farmers have a special place in Japanese history and culture, thus usually insulating them from government land takings. In the United States, property rights are typically considered efficient instruments of industrialization and economic progress. As long as they appear to be contributing to progress, they are securely protected. But when property rights seem to stand in the way of economic progress, American governments have shown little reluctance to remove this obstacle, often using eminent domain powers that in a country such as Japan—with a much different cultural tradition—would not be socially acceptable.

The *Kelo* case, however, suggests that American attitudes may be evolving. In another area of historic economic concern, for example, sustaining a “healthy ecosystem” has replaced the maximally efficient use of the public lands as the guiding public ethos. Libertarian values are today challenging economic efficiency in multiple domains of American life. Such trends may offer further reason to learn from the land readjustment histories and other land assembly methods employed in foreign countries. Land readjustment systems are superior to eminent domain to promote economic redevelopment in four fundamental respects:

1. The land readjustment process is designed to serve the needs of the current property owners. The property owners are not permanently displaced, but at the end of the process have well-defined rights to obtain new properties in the same general neighborhood.
2. Because property owners receive a share in the future redeveloped property (often a future parcel of land or a future home), they can benefit fully from the financial and other windfalls that result from redevelopment of the whole neighborhood.
3. In many cases, property owners must give their formal consent through a high supermajority vote to commence the land readjustment. There may

28. Barrie Needham, “The Search for Greater Efficiency: Land Readjustment in the Netherlands,” in *Analyzing Land Readjustment*, 121.

29. *Ibid.*

30. *Ibid.*, 129.

be a small minority of dissenting owners, but it is their fellow neighborhood property owners, not an outside government issuing an imperial decree, who make the decision to go ahead with the land readjustment and redevelopment in the project area. (Mandatory readjustment, admittedly, is also common.)

4. Land readjustment's main purpose is to provide an institutional mechanism to plan and fund installation of roads and other infrastructure through proceeds derived from the land redevelopment itself. Taxpayers far removed from the project area are not asked to subsidize potentially large windfall profits of particular land owners and developers.

Americans can learn much from these features, but it is also important to keep in mind that land readjustment differs significantly from nation to nation. The best land readjustment method for any given nation is historically and culturally sensitive. The United States should learn from foreign experiences, but in the end adopt its own land assembly approaches that are best suited to its national traditions.

5

Facilitating Land Assembly: American Proposals

ONE OF THE authors of this paper first studied the problems of land assembly in the United States more than 30 years ago. In Robert Nelson's 1977 book *Zoning and Property Rights*, he argued that it was misleading to think of American zoning as a form of public regulation.³¹ Rather, at least in an existing neighborhood subject to tight zoning controls, the real purpose was to protect neighborhood quality by excluding any uses that the neighbors did not want. That is to say, zoning amounted in practice to an informal, partially disguised, but nevertheless effective collective property right to the neighborhood environment. Yet, because it remained nominally a public right, a major problem arose whenever it might be desirable to transfer this right. Private rights are generally regarded as transferable by their sale, but the sale of a public regulation is against the law—it is an act of bribery.

Hence, partly to allow for the wholesale assembly and transfer of neighborhood rights, Nelson proposed that zoning should be privatized and the sale of neighborhood collective rights thus legally authorized. *Zoning and Property Rights* described this proposal as follows:

[When a neighborhood becomes much more valuable in a different use], a new mechanism for neighborhood transition is badly needed. It should have several key features. Changes in use that represent the onset of transition should not be permitted at all in a neighborhood until a formal collective determination has been made by neighborhood residents that transition should proceed. In making such a determination, residents should be able to balance their own desire to stay in and maintain their existing neighborhood environment against the broader social needs for use of neighborhood properties. As a practical matter, these needs will be shown by the value of neighborhood properties in new uses and the prices that developers are willing to offer for them. Procedures should be employed to ensure that the financial benefits of neighborhood transition will be fairly distributed among residents, presumably allowing gains in some reasonable proportion to the value of personal property owned in the neighborhood.

One approach that meets these requirements is to provide a way to offer zoning rights in a neighborhood to the highest bidder. If neighborhood residents voted to accept the high bid, proceeds from the sale would be divided among neighborhood property owners according to the formula adopted for this purpose. A better approach might be to assemble all property rights in a neighborhood in a single package, including all the rights that are now both personally and collectively [by means of zoning] held, and to offer this package to the highest bidder. Under such a scheme, any prospective developer of a neighborhood could make an offer for all the property rights in the neighborhood. Neighborhood residents would then make a collective decision whether or not to accept the bid. If the bid is accepted, residents would vacate the whole neighborhood within some specified period of time. A 75 percent neighborhood vote—or even higher—could be required for the offer to

31. Robert H. Nelson, *Zoning and Property Rights* (Cambridge, MA: MIT Press, 1977).

be accepted and for neighborhood transition to proceed. By law the minority that voted against acceptance of an offer would still be required to abide by the [super] majority decision. A mechanism for neighborhood transition of this kind would be modeled on existing procedures for sale of other collectively owned properties, such as private business corporations.³²

Since then, Nelson has restated and refined this land assembly proposal on a number of occasions.³³ The proposals have all implied, however, that zoning should be privatized and that the buying and selling of zoning collective—and in effect private—rights should be put in the same category as other ordinary transactions in private rights. Acceptance of this viewpoint would require a wholesale departure from the received legal theories of public zoning, perhaps accounting for why the idea thus far has not been adopted.

Another longstanding advocate for new methods of American land assembly, William Doebele (now professor emeritus at Harvard's School of Design), recalls a moment of inspiration in 1975 in Seoul, South Korea.

I was standing on the south side of the River Han outside the capital city . . . gazing at a broad expanse of rice paddies, dry fields and villages in an area called the Yeongdong District. Here and there bulldozers were already creating what was to become the infrastructure for the so-called "second Seoul." The project would be largely self-financing because part of the future land parcels would be sold to pay for the roads and other infrastructure.

As Doebele relates, "this was my first exposure to land readjustment, and it was a dramatic one. Not only was the process being used to produce a second Seoul, but it was also being applied in many projects throughout the Seoul metropolitan area as well as in major development projects in other Korean cities."³⁴

Doebele would become the leading American student of land readjustment and a prominent advocate for the transfer of lessons learned abroad to the American scene. Partly supported by the Lincoln Institute of Land Policy,³⁵ in 1979 he organized a conference in Taiwan which led to his 1982 book *Land Readjustment: A Different Approach to Financing Urbanization*, the first English text on the subject of land readjustment. In one of the countries studied, Australia, Doebele found that "land pooling" as practiced there is an effective land assembly mechanism that "improves land development by avoiding the problems associated with piecemeal activities and increases the efficiency of financing and construction."³⁶ Reviewing procedures of land adjustment in other countries, Doebele recommends that "no single system of land readjustment can be said to be universally applicable." Yet, land readjustment reflects certain general principles such as that "unlike expropriation, land readjustment recognizes in a unique way the rights to property, returning to each owner, in a location as close as possible to the original site, a substantial portion of the land originally owned." This often makes it "more politically acceptable than outright purchase or expropriation." An especially important advantage is that it offers a way to avoid "the intricate and costly procedures inevitably involved when government attempts to assemble land and land owners are unwilling to sell at the offered price."³⁷

Drawing in part on Doebele's efforts, Frank Schnidman (then a staff member at the Lincoln Institute of Land Policy) led a campaign in the 1980s to persuade American governments to provide new land readjustment tools—or methods of "land pooling," as he labeled them. Schnidman, a lawyer by training, established *The Platted Lands Press*, a journal to advance this cause.³⁸ He argues, for example, that in Florida and other areas, land speculators had sold off large numbers of vacant parcels to unwitting buyers and then often departed the scene (sometimes as a matter of simple business failure, and in some cases involving outright fraud). This dispersed the ownership of such lands among large numbers of Americans all across the country, making any development difficult if not impossible. Schnidman contends that existing

32. *Ibid.*, 178–179.

33. See, in particular, Nelson, *The Transformation of Local Government* (Washington, DC: The Urban Institute Press, 2005), part IV. See also Nelson, "The Privatization of Local Government;" Nelson, "Privatizing the Neighborhood;" and Nelson, "Local Government as Private Property."

34. William A. Doebele, "Foreword," in *Analyzing Land Readjustment*, xvii.

35. Located in Cambridge, MA.

36. William A. Doebele, "Synopsis," in *Land Readjustment*, 11.

37. William A. Doebele, "Conclusions," in *Land Readjustment*, 218.

38. See Robert H. Nelson, "Commentary: The Right Step," *The Platted Lands Press*, Lincoln Institute of Land Policy, August 3, 1984.

American legal institutions for addressing the problems of recreational lands and other circumstances of highly fragmented ownership were altogether inadequate. Summarizing his previous efforts, he argues in a 1990 article (with law professor Michael Shultz) that

Local governments throughout the United States currently face two major problems that are more related than they might realize—the need to remedy inappropriate or misused land in their jurisdictions and the need to provide adequate infrastructure to support existing and future uses More often than not, techniques for remedying the existing misuse of land either do not exist or are embodied in a separate set of laws known as urban renewal [with its associated widespread condemnations of land and property].

A [better] technique used in several foreign countries to remedy land misuse and to construct and finance infrastructure is land readjustment. This technique permits property owners to join together to replat and, in some cases, rezone their properties in a manner that enhances the value of individual, replatted parcels, while also allowing the public to recapture a portion of the enhanced value of the parcels by requiring property owners to dedicate land to the public and to construct and finance infrastructure that meets contemporary needs.³⁹

Shultz and Schnidman consider land readjustment a method of particular promise for the redevelopment of “obsolete neighborhoods” in older areas of cities where properties, though not necessarily blighted, do not use the land optimally. As they state, “it is possible that residential areas that are no longer appropriate for [their existing] residential use” and might be converted to office buildings, shopping centers, or higher end residential uses “are the best candidates for land readjustment.”⁴⁰ In a 2000 article, another prominent urban lawyer, George Liebmann, similarly argues that “private developers rarely assemble significant in-city sites, because of the difficulties of land assembly, preferring to do their

work in ‘greenfield’ locations. Any urban land assembly requires great stealth and the use of dummies, and the last landowners to sell must be paid exorbitant prices.” Drawing upon foreign experiences with land readjustment and adapting them to American political and legal traditions, Liebmann developed a detailed proposal for a “draft statute” that he recommends to American states and localities as a way to make available new legal tools for land readjustment.⁴¹

While most discussions of land readjustment during this period were conceptual, one actual effort was made to undertake a large-scale reassembly of land rights that had become so fragmented as to render them largely useless. Under the system of Native American land ownership created in the late 19th century, land often had to be distributed among a large number of heirs. After a few generations of such an inheritance pattern, a single parcel of land might have hundreds of owners, thus preventing any effective management. In the Indian Land Consolidation Act of 1984, Congress sought to address this problem by transferring the individual land shares to the tribe whenever one of its members died. This approach, however, was challenged in court, eventually reaching the U.S. Supreme Court. In a 1987 opinion, the Court acknowledged the severity of the problem, noting that one tract to which the law might be applied was 40 acres and had 439 owners, two-thirds of whom received less than \$1 per year in land rent payments. Nevertheless, the Supreme Court struck down the land consolidation law as an unconstitutional taking of private property without compensation—defying common sense and making a large legal “mistake” in the opinion of Columbia law professor Michael Heller.⁴²

6 Land Assembly Circa 2008: Solving a “Tragedy of the Anticommons”

FOR HELLER, THE Native American case is a good example of what he sees as a much wider social concern—the “tragedy of the anticommons.”⁴³ The more familiar “trag-

39. Shultz and Schnidman, “The Potential Application of Land Readjustment in the United States,” 197–198.

40. *Ibid.*, 240.

41. Liebmann, “Land Readjustment for America,” 1, 6.

42. Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (New York: Basic Books, 2008), 128.

43. See Michael A. Heller, “The Tragedy of the Anticommons: Property in the Transition from Marx to Markets,” *Harvard Law Review* 111 (January 1998); and Michael A. Heller, “The Boundaries of Private Property,” *Yale Law Journal* 108, no. 5 (April 1999). Heller brings together these articles in a 2008 book intended for a wider public readership. See Heller, *The Gridlock Economy*.

edy of the commons” arises when property rights are insufficiently defined and no owners can maintain control over use of a common area. By contrast, the tragedy of the anticommons arises from an excessive specification of property rights that subdivides them to such an extent and among so many owners that it becomes difficult or even impossible to assemble them for productive use. As in the case of Native American land rights, if the fragmentation of property rights becomes extreme, it may defeat any and all efforts to make productive use of a resource. Heller gives another example of promising potential cures for cancer and Alzheimer’s disease that have attracted little interest among pharmaceutical companies because too many existing patents would have to be purchased from a large and diverse set of current owners.

Heller sees these problems of land assembly as yet another example of a tragedy of the anticommons. As in other areas, Heller proposes that American governments adopt new institutions to facilitate land assembly, hoping both to make a practical proposal to improve American land use and to illustrate his wider “anticommons” themes. In a 2008 article (with Rick Hills) in the *Harvard Law Review*, he thus argues that the “Land Assembly District” (LAD) should become an important part of the American process of urban land redevelopment.⁴⁴

As Heller and Hills argue, in the post-*Kelo* era, “the time has come for legislatures to stop denouncing eminent domain while governments continue to condemn land.” Land assembly can be an urgent economic necessity, but it is often difficult to accomplish under American legal institutions in any other way than by condemnation of holdouts. The fundamental economic need for land assembly, the lack of available alternatives to eminent domain, and the great liabilities of eminent domain have left state and local governments facing a “fundamental tension” in which the use of eminent domain is both “attractive and appalling. From an efficiency standpoint, we need eminent domain to consolidate overly fragmented land. But such land assembly often works a distributive injustice on the owners whose land is taken. How do we get the efficiencies of land assembly without unfairly enriching developers who receive land at condemnees expense?”⁴⁵

As Heller and Hills now propose, the answer is the LAD, based on the concept that “people can solve problems of land assembly for themselves if the law gives them the right tools.” The goal will be that, for circumstances like *Kelo* where economic redevelopment is the basic governmental purpose, “LADs replace eminent domain as the method of land assembly.”⁴⁶ Heller and Hills develop a detailed blueprint for state and local governments to follow in enacting legislation for the establishment of LADs. Among other features, two votes would be required to complete a transaction to sell off the full set of neighborhood properties through the mechanism of a LAD. A primary vote would be required to create a LAD (thus showing that there is substantial neighborhood interest in the possibility of a future collective sale). The LAD would serve as a bargaining agent for the neighborhood (this might be analogized to the creation of a labor union to bargain collectively for a group of workers). A second vote would be required to accept a particular developer’s offer of a total purchase price for all the neighborhood properties (again analogous to a union vote on a proposed wage settlement). A proposal to create a LAD could be made by a wide range of parties, including the neighborhood property owners themselves, a local government, a developer interested in the site, or other possible actors. According to the Heller and Hills proposal, the local planning commission would have to review and approve the proposed LAD, based on the criteria that the area was of an appropriate size and configuration for a new development and a judgment that a LAD “is necessary to overcome the problem of excessive fragmentation of land.”⁴⁷

Voting rights for such decision making would be allocated according to property ownership rather than one person, one vote. Heller and Hills would allow, moreover, the possibility that holders of leasehold property interests might also participate in the vote. Any losing voters who disagreed with the collective decision of their fellow property owners could opt out of the agreement. If they so requested, they could invoke a provision that would be much like inverse condemnation—in essence receiving the same payment for fair market value that would have resulted from an actual condemnation procedure (they would, to be sure, still be required to vacate the neighborhood in the case of a LAD vote to accept a developer

44. Michael Heller and Rick Hills, “Land Assembly Districts,” *Harvard Law Review* 121, no. 6 (April 2008).

45. *Ibid.*, 1467–68.

46. *Ibid.*, 1472, 1489.

47. *Ibid.*, 1489.

offer). As Heller and Hill sum up the key design elements of their proposal,

The critical facts to emphasize are that (1) the LAD need not accept any proposal (although one would assume that no LAD would be formed unless the residents had some initial interest in land assembly), and (2) the LAD could invite other developers aside from the LAD promoter to submit rival proposals to increase the price offered. In effect, the LAD would auction off the neighborhood in hopes that different bids from rival developers would drive up the price The LAD would have broad discretion to choose any proposal to redevelop the neighborhood—or reject all such proposals.⁴⁸

7

Creating the Legal Foundations for Collective Neighborhood Bargaining

WE OFFER A proposal for legislation that parallels in many respects the Heller and Hills design for LADs. It would make a few modifications, however, and elaborate some further details, drawing in part on the historical experience of land readjustment in other nations and the (admittedly limited) previous body of American writings on the problems of land assembly. For the purposes of discussion, the following six-step process represents an approval procedure for creating a collective neighborhood bargaining association (CNBA), recognizing the possibility of many variations in the specific details. Such procedures would have to be incorporated into a new law by a state or city government.

- 1. Petition Request:** A group of individual property owners in an older, established neighborhood petitions the state to form a CNBA. The petition describes the boundaries of the proposed neighborhood bargaining association and the manner of selecting the board of directors and any other intended instruments of collective private decision making. The petitioning owners must include cumulatively more than 33 percent of the neighborhood property owners.
- 2. State or Local Review:** The state or local government then certifies that the proposed area of private neighborhood bargaining meets certain standards of reasonableness for future land redevelopment, including the presence of a contiguous area; boundaries of a regular shape; an appropriate relationship to major streets, streams, valleys, and other geographic features; and other relevant considerations. The state also verifies that the proposed private procedures for decision making meet state standards for CNBAs.
- 3. Neighborhood Negotiations:** If the application meets state or local government requirements, a neighborhood committee is formed to develop a neighborhood sharing rule. Based on the existing ownership of property in the neighborhood, this rule describes the distribution of the proceeds among the association members of any collective sale of all the neighborhood properties in one packaged transaction. It sets an assessment (presumably quite small) to cover the operating costs of the CNBA.
- 4. A Neighborhood Vote:** Once state certification of the neighborhood proposal to create a CNBA is received, a neighborhood election is called for a future date. The election should occur no less than one year after the certification process is completed and a full description of the neighborhood proposal is available to all interested parties, including the founding documents for the neighborhood bargaining association, estimates of current neighborhood property values, and the sharing rule for distribution of the proceeds among association members from any collective neighborhood sale.
- 5. Required Percentages of Voter Approval:** In the actual election, approval of the creation of a CNBA requires (1) an affirmative vote by 60 percent or more of the individual unit owners in the neighborhood and (2) that these affirmative voters must cumulatively represent 75 percent or more of the total value of neighborhood property. If these conditions are met, all property owners in the neighborhood are required to join the neighborhood bargaining association and are subject to the full terms and conditions laid out in the CNBA's founding documents.
- 6. Rights of Dissenting Owners:** Any property owner opposed to the creation of the CNBA will have a right analogous to that of inverse condemnation. This owner will be entitled, if so requested, to exit the neighborhood and receive payment

48. *Ibid.*, 1495–96.

of “fair market value” as would be determined under legal procedures for the exercise of eminent domain.

- 7. Collective Sale of the Neighborhood Properties:** If the CNBA’s board of directors votes to accept an offer for the sale of all the neighborhood properties, this offer will then be put to the vote of all the property owners in the neighborhood. For undeveloped land, approval of the sale will require the affirmative vote of at least 60 percent or more of the individual property owners, representing at least 70 percent of the total property value in the neighborhood. For developed land with existing structures, approval of the sale will require the affirmative vote of at least 70 percent of the individual property owners, representing at least 80 percent of the total property value in the neighborhood. If such approval is obtained, all property owners will receive their appropriate share of the total sale proceeds (according to the established rule for their distribution) and will be legally required to vacate the neighborhood within one year.

In most respects, a CNBA would be quite similar to a LAD, as described in the Heller and Hills 2008 proposal. There may be some advantages, however, in explicitly describing the neighborhood collective organization as a “bargaining association.” Americans have long been familiar with collective bargaining as a process by which a group of employees join together to negotiate a collective price for their labor. CNBAs also have important similarities to the institution of the private community association, which has been growing rapidly as a mechanism of urban local governance in the United States, already giving Americans familiarity with collective decision making in their private residential neighborhoods.

The land readjustment procedures applied in many other nations represent an intermediate step toward the CNBA. Indeed, if the neighborhood property owners wished to do so, the typical land readjustment methods could be accommodated as a special case of the CNBA. Thus, one option in negotiating a neighborhood selling price is to solicit the highest monetary offer, and then for the whole neighborhood to move out. Another option, however, would be to solicit a developer offer in which some part, or even all, of the total neighborhood “price” would consist of a share of land and properties in the future redeveloped neighborhood project. If the neighborhood site holds special attractions, or the existing neighborhood property owners would like to maintain personal ties to the area in the future, they might find a developer offer

of this kind to be more attractive. There could also be a mixed option, such as monetarily compensating property owners who leave entirely and compensating returning property owners through future land and property holdings. Such matters could all be part of the negotiations between the CNBA and the neighborhood’s potential bidders and developers.

8 The Calculus of Consent

THE MOST CONTROVERSIAL element of this CNBA proposal is likely to be the legal requirement that dissenting property owners go along with the collective sales decision of their fellow neighborhood property owners, as affirmed by a high supermajority vote (or else take a buyout and leave the neighborhood). Yet, assuming the neighborhood properties could be developed as a single unit in order to realize their full value, the alternative would be to allow a minority to defeat the wishes and interests of potentially a very large majority or a similarly controversial case of eminent domain. As in many other circumstances of local public goods, there is no escaping the need for collective decision. The incorporation of a local municipality—typically based on a simple majority vote—allows a municipal majority to tax the minority in order to provide police, fire protection, roads, schools, and other common services according to their demands and preferences.

In this case, admittedly, the collective decision has a more radical character—whether to sell out and thus abolish the neighborhood jurisdiction. Nevertheless, it is not, in principle, different from other collective decisions historically made at the local level by public governments—and increasingly over the past few decades by local private governments that have taken over many of the previous functions of the public sector. In all these cases, there may be dissenters who are required to comply with the wishes of a majority (or supermajority) of voters. By setting an appropriate supermajority voting requirement, the potential number of property owners adversely affected by a collective decision can be reduced to whatever maximum number of such losing-side voters is considered acceptable.

Supermajority voting is required in the U.S. Constitution for certain decisions—such as approving a foreign treaty—and has become more common in practice (and although not constitutionally required, since the 1990s

the U.S. Senate has effectively operated for many decisions under a 60 percent supermajority requirement). There is ample precedent for setting different supermajority voting requirements according to the specific characteristics of the question being decided. The issue of trade-offs in setting voting requirements for collective action is famously explored in James Buchanan and Gordon Tullock's 1962 book, *The Calculus of Consent*.⁴⁹ They note that where a group of people are bound together in a common collective fate, simple majority rule is the prevailing standard. However, in their view this rule was more a matter of convention than of any inherent desirability. Indeed, the required percentage for approval ideally should vary with the specific circumstances of each collective decision and the characteristics of the particular political issue being resolved.

Buchanan and Tullock identify a basic trade-off involving two types of costs in collective decision making. One type of cost is the negotiation and decision-making cost involved in reaching any minimum percentage to approve a collective decision. As the required vote approaches unanimity, the costs of decision making will rise and may well eventually become exorbitant. Another type of cost might be labeled the "losing-side" cost. Whenever individuals vote "no," and yet the action is approved, the individual welfare of each of the losing voters will decline at least to some extent.

The great advantage of a rule of unanimity is that these losing-side costs equal zero—each and every voter will have to be no worse or better off. By contrast, a vote requirement of 51 percent tends to minimize the negotiation and other transaction costs. At the same time, the losing-side costs—now as many as 49 percent of all voters—will be at potential maximum. Thus, as losing-side costs go up, transaction costs go down, and vice versa.

As Buchanan and Tullock show more formally through a geometric exposition, there is an "optimal" required voting percentage (in most cases, more than 51 percent) that minimizes the total transaction and other economic costs. Although few, if any, local governments (public or private) go through such formal calculations, many private community associations have set their decision rules for collective action, as Buchanan and Tullock rec-

ommend, at greater than 51 percent. For example, the most common voting requirement in a private community association, in order to change the covenants relating to acceptable land uses, is 66 or 75 percent. In setting their foundational rules, private community associations across the United States are implicitly applying the Buchanan and Tullock principles of "constitutional economics" on perhaps a wider scale than has ever been seen before.

Although seldom invoked (partly because most of them are recently created), many private community associations do have a voting requirement for "termination" of the association. Because this is such a radical step, the "calculus of consent" typically works out to yield a high supermajority requirement. Where it is included in the declaration, a common requirement to terminate a community association is 80 percent of the unit owners. (Absent such a provision, or a state law setting public standards for private association termination, the only remaining possibility would be unanimous consent.) Interestingly enough, in Kobe, Japan, following the great earthquake of 1995 (which registered 7.2 on the Richter scale and destroyed much of the city), it was necessary to establish new rules for collective decisions to rebuild collapsed condominiums. The usual requirement was 80 percent of the condominium unit owners, thus requiring as many as 20 percent of owners to go along with rebuilding (or abandonment) decisions that they might have opposed.⁵⁰ As noted above, we suggest that the owners of at least 80 percent of the total neighborhood property value, as well as at least 70 percent of the individual owners without regard to total shares, would have to agree to the collective sale of all the property in an existing developed neighborhood with structures, given a total neighborhood price negotiated by the CNBA.

9 Conclusion

IN CASES OF basic transformation of neighborhood land use, the use of eminent domain is unsatisfactory for two basic reasons. The selling price, "fair market value", cannot be determined objectively and is only resolved fairly

49. James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1962).

50. Mark D. West and Emily M. Morris, "The Tragedy of the Condominiums: Legal Responses to Collective Action Problems After the Kobe Earthquake," *American Journal of Comparative Law* 53 (Fall 2003): 918.

by the workings of a market process involving the neighborhood property owners soliciting developer offers to find out what they can get. Having tested the waters in the market, the neighborhood property owners might then decide to accept the high bid, or they might reasonably calculate that they would prefer to wait and to seek a higher offer. They might also decide collectively that, given the burdens of moving out of the neighborhood and given also the historic friendships and other attractions that the neighborhood holds for them, any likely available price (now and in the near future) is not likely to compensate them for their losses. The activities of their CNBA could be put on hold indefinitely.

Except perhaps for some rare circumstances (a specific neighborhood is the only one capable of serving some essential public use), a state or local government should not forcibly compel a group of neighbors to vacate their homes. If they leave, it should be their decision to go, necessarily made together through appropriate collective decision-making procedures within the neighborhood. If such a new method of neighborhood land assembly through (largely) voluntary neighborhood choice is adopted in the United States, it is likely to make neighborhoods available for redevelopment with much less social controversy, as compared with the exercise of government powers of eminent domain. The goals of economic efficiency and social justice in land use will be well served.





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