

RETURN TO PUBLIC USE: A PROPOSAL FOR LEGISLATIVE REFORM OF
MICHIGAN’S BLIGHT REDEVELOPMENT STATUTORY SCHEME

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INTRODUCTION

A small manufacturing company, Kalamazoo Tank and Silo Co. (“KTS”), built its headquarters on the shores of the Kalamazoo River in the 1870’s.¹ Today, several of the historic buildings remain. Although the family finally sold most of the manufacturing aspects of the business, it leased the historic buildings to several local businesses. Lured by, tax abatement programs and environmental redevelopment grants, the city of Kalamazoo offered the company a low sum to purchase the riverside property for redevelopment into a mixed-use condominium

¹ Interview with Attorney for KTS. On file with author.

development.² After the company refused the offer, Kalamazoo turned to its power of eminent domain.

Initially, the city asserted the mere economic redevelopment of the property as its basis for “public use.” Realizing the weakness in asserting eminent domain based solely on pure economic development, given the case pending before the Michigan Supreme Court, the city later declared the property “blighted” and sought condemnation of the property under Michigan’s liberal statutes. Its plan was to turn it over to developers for construction. The impudence of the blight designation is exacerbated by the fact that the city *requested* that KTS retain for their historical significance the very buildings the city later declared blighted. Although KTS and Kalamazoo later settled, it was only after KTS was forced to expend significant sums on attorneys’ fees, including appealing the trial court’s denial of KTS’s request for a jury trial.³

Unconstrained by proper operation of market forces, cities across Michigan, and throughout America are using their powers of eminent domain and denoting homes, businesses, vacant land as “blighted,”⁴ pursuant to lenient redevelopment statutory schemes.⁵ Municipalities then condemn entire areas and turn them over to private developers for redevelopment for varied

² For a collection of Kalamazoo’s other projects, including a discussion of the KTS project see Annual Report of Accomplishments City of Kalamazoo Brownfield Redevelopment Authority (2004) at www.redevelopkalamazoo.org/upload_docs%2F2004AnnualReport.pdf.

³ City of Kalamazoo v. KTS Indus. Inc., 687 N.W. 2d 318 (2004).

⁴ Under Michigan Law, a “Blighted area means a portion of a municipality, developed or underdeveloped, improved or unimproved, with business or residential uses, marked by a demonstrated pattern of deterioration in physical, economic, or social conditions, and characterized by such conditions as functional or economic obsolescence of buildings or the area as a whole, physical deterioration of structures substandard building or facility conditions, improper or inefficient division or arrangement of lots and ownerships and streets and other open spaces, inappropriate mixed character and uses of the structures, deterioration in the condition of any public facilities or services or any other similar characteristics which endanger the health, safety, morals, or general welfare of the municipality, and which may include any buildings or improvements not in themselves obsolescent and any real property residential or nonresidential, whether improved or unimproved, the acquisition of which is considered necessary for rehabilitation of the area. It is expressly recognized that blight is observable at a stages of severity, and that moderate blight unremedied creates a strong probability that sever blight will follow. Therefore, the conditions that constitute blight are to be broadly construed to permit a municipality to make an early identification of problems and to take ready remedial action to correct a demonstrated pattern of deterioration and to prevent worsening of blight conditions. Mich Stat. § 125.72(a).

⁵ DANA BELINER, PUBLIC POWER, PRIVATE GAIN 4 (2002).

uses, including shopping malls, discount stores, casinos, hotels, and condominiums.⁶ The concept of blight is vague and its definition uncertain.⁷ Michigan’s current statutory scheme gives municipalities, like Kalamazoo, the freedom to condemn private property for redevelopment projects. With such statutes, traditional rules of property protection are thrown out the window under the guise of protecting the “health, safety and welfare” of citizens. While some private-to-private urban redevelopment projects are above board, with municipalities selecting areas for redevelopment that truly are blighted, and detrimental to the health, and welfare of the citizenry, what about the countless that abuse this power? Some states have extensive statutory regulation over blight determinations.⁸ Under the current model, every potentially “blightable” piece of prime real estate is ripe for the picking by municipal authorities.

Although the Michigan Supreme Court may have saved public use from the theory of pure “economic revitalization” allowed into eminent domain by *Poletown Neighborhood Council v. City of Detroit*,⁹ with its decision in *County of Wayne v. Hathcock*,¹⁰ the Michigan Legislature has left the possibility that economic redevelopment could return, cleverly disguised as something else. The “else” being economic redevelopment of “blighted” areas. The *Hathcock* majority enumerated three situations in which condemned property may appropriately be given to a private entity: (1) where “public necessity of the extreme sort” requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of “facts of independent public significance,” rather than

⁶ BERLINER supra note 3 at 4. (noting that “cities love eminent domain because they can offer other peoples property in order to lure or reward favored developers. Developers love eminent domain because they don’t have to bother with negotiating for property).

⁷ Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URBAN L.J. 305, 305-06 (2004).

⁸ See, e.g. BERLINER, supra note 4 at 2 (noting that the states of South Carolina, Kentucky, North Carolina Illinois, Wyoming are more protective of property rights, at least on paper).

⁹ 304 N.W.2d 455 (Mich. 1981).

¹⁰ 684 N.W.2d 765.

the interests of the private entity to which the property is eventually transferred.¹¹ The third prong of this test refers to the power of a city or municipality to obtain property for redevelopment through a blight designation.¹²

Justice Weaver warned of possible abuse in her separate opinion in *Hathcock*, concurring in part, dissenting in part.¹³ In other states, especially those that declined to follow Michigan's lead in *Poletown Neighborhood Redevelopment Council v. City of Detroit*, municipalities had to discover alternative ways in which to facilitate lucrative redevelopment projects. One way in which they accomplished this goal was to declare an area "blighted" pursuant to lenient State redevelopment acts, condemn the property pursuant to their eminent domain power, and then transfer the property to a private developer.¹⁴ Justice Weaver noted several of these recent blight designations, which included findings that the homes involved did not have two car garages and had less than two bathrooms.¹⁵ Because of *Poletown*, Michigan's blight jurisprudence is relatively minimal. Following *Poletown*, it was unnecessary to find a detriment to the public health, safety or welfare, or a "fact of independent public significance" to take private property for transfer to a private party. However, given the new limits of *Hathcock*, the concept of "blight" is likely to come into the forefront.

This foreshadowing has special significance given Michigan's current blight statute. Once recent article surveying state statutes governing the power use of eminent domain in

¹¹ *County of Wayne v. Hathcock*, 471 Mich 445, 684 N.W.2d 765, 783 (2004) (quoting *Poletown*, Ryan, J., dissenting).

¹² *Id.*

¹³ *Id.* at 797 (Weaver, J., concurring in part, dissenting in part) ("[i]f, instead of the common understanding of 'public use' future courts rely on 'facts of independent public significance' to determine whether a condemnation is for a 'public use' then it is easy to imagine how the people's limit on the exercise of eminent domain might be eroded.").

¹⁴ See generally, BERLINER, *supra* note 4; Gordon, *supra* note 7; George Lefcoe, Finding the Blight That's Right for California Redevelopment Law, 52 HASTINGS L.J. 991 (2000). Jennifer J. Kruckeberg, note, Can Government Buy Everything?: The Takings Clauses and the Erosion of the "Public Use" Requirement, 87 MINN. L. REV. 543 (2002).

¹⁵ *Hathcock*, 684 N.W.2d at 797 (Weaver, J., concurring in part, dissenting in part)

redevelopment noted that Michigan, along with six other states, only require a finding of *one* out of a list of factors to obtain a blight designation.¹⁶ Furthermore, the Michigan Statute requires that its blight factors be “broadly construed.”¹⁷ Although Michigan’s existing blight statutory scheme was already one of the most permissive in the country, the legislature was not satisfied. In 2002, Detroit House Representative Andrew Richner introduced HB 4028, which amended existing law to make it easier to turn blighted property over to developers.¹⁸ This bill was introduced following Detroit’s unsuccessful attempts to clear the riverfront to make room for all three Detroit casinos.¹⁹ Governor Engler, Michigan’s Governor at the time, signed the bill into law in May of 2002.

This Comment argues that Michigan’s current Blight Statutory regime is too permissive and allows for abuse of the power of eminent domain. A new blight statute is necessary to prevent municipalities from procuring sham designation of blight, which are merely a guise under which the municipality transfers private property to a private developer, effectively twisting the third prong of *Hathcock* for its own pecuniary gain. Section I examines the history of “blight, and “blight” standards in federal jurisprudence. Section II outlines the current state of blight eminent domain doctrine in Michigan. Section III analyzes Blighted Area Rehabilitation statutes promulgated other jurisdictions as well as Michigan’s current act. Finally, section IV develops a new Michigan Blighted Area Redevelopment Act and discusses why it is a necessary step on Michigan’s road back to traditional understanding of public use.

¹⁶ James S. Burling, *Blight Light*, SH053 ALI-ABA 43, January 9-11 2003.

¹⁷ Blighted Area Rehabilitation Act, 33 P.A. 1945, M.C.L. § 125.71.

¹⁸ Development of Blighting Propety, 2002 P.A. 27, M.C.L. § 125.2801. This act “establishe[ed] a procedure for municipalities to designate individual lots or structures as blighting; to purchase or condemn blighting property; and to transfer blighting property to developers.”; See BERLINER, *supra* note 4 at 100 (noting that this bill “makes it easier to condemn individual properties and transfer them to private developers”).

¹⁹ BERLINER, *supra* note 4 at 100.

I. BACKGROUND

A. Early Urban Redevelopment Movement

Current ideas surrounding blight and urban redevelopment have evolved from those held by proponents of the tenement reform and slum-clearance movements of the late nineteenth and early twentieth century.²⁰ The first redevelopment efforts focused on the housing plight of the poor. At that time, many poor American citizens and immigrants lived tenements or run down “slum” housing.²¹ Early writers defined “slums” as “a residential area in which the housing is so deteriorated, so substandard or so unwholesome as to be a menace to the health, safety, morality or welfare of the occupants.”²² Slum and tenement areas housed 600 to 1000 persons per acre, often without windows, toilets, bath facilities or hot water.²³ Infested with rodents and other vermin, tenements were rotting, filled with garbage and pollution and were often structurally unsound.²⁴ These conditions in turn, according to proponents of reform, bred immorality, illness and disease.²⁵ As one early writer noted, tenement houses were “totally unfit to be shelter for the lower animals.”²⁶ Early efforts focused on piecemeal reform of the squalor and disease-ridden tenements and were often through private efforts and state housing law reform.²⁷ Despite these efforts, however, reformers made no significant dent in ridding the cities of slums. During the

²⁰ROBERT M. FOGLESON, DOWNTOWN: ITS RISE AND FALL 1880-1950 323-43 (2001).

²¹*Id.*

²²JAMES FORD, 1 SLUMS AND HOUSING 13 (1936).

²³FOGLESON, *supra* note 20 at 323-43.

²⁴*Id.*; *See also* Edith Elmer Wood, Federal Emergency Administration of Public Works, Housing Division Bulletin No. 1, Slums and Blighted Areas in the United States (1936).

²⁵Contaminated water led to typhoid fever. Wood, *supra* note 24 at 9. Windowless rooms increased the chance of rickets in infants. *Id.* at 7. Infant mortality in some sections reached including common cold, sore throat, influenza, diphtheria, scarlet fever, measles, mumps, chickenpox, whooping cough, cerebrospinal fever, infantile paralysis, pneumonia, and tuberculosis. *Id.*

²⁶FOGLESON, *supra* note 20 at 322, (quoting B.O. Flower, *The Tenement House Curse: Some Side Lights on the Tenement House Evil*, ARENA 674)

²⁷Originating by reforming local laws, *see eg.* New York Tenement House Law of 1901. *See also* JACOB RIIS, HOW THE OTHER HALF LIVES (1893).

twenties and thirties, inspired by European housing reform, particularly in England,²⁸ reformers began to focus on large-scale solutions.²⁹

Fueled by the findings of the 1930 census that indicated over 1/3 of Americans lived in substandard housing, (i.e. one or two room windowless apartments and farmhouses without plumbing or electricity), the Hoover administration commissioned the Housing Division of the Federal Emergency Administration of Public Works.³⁰ The Housing Division was in charge of pioneering the housing reform movement.³¹ Given an initial grant of \$150,000,000, the agency initially sought to work with private developers on a limited dividend basis.³² However, after determining “that the incentive for private endeavor along those lines could never be sufficient to accomplish the ends in view” the Housing Commission undertook projects on its own.³³ The bulletin assembled by the agency in support of its actions contains surveys conducted on housing conditions throughout the United States.³⁴ The bulletin additionally contains case studies of several successful slum-redevelopment projects in New York and England.³⁵

In support of the government involvement in such issues, the bulletin concluded by noting that the study established connection between housing and the health safety and welfare

²⁸ Reform in England was spurred by Public Health Act of 1848 the Housing of the Working Classes Act of 1890. See BAUER ET AL, THE FUTURE OF CITIES AND URBAN REDEVELOPMENT (Coleman Woodbury ed. 1953).

²⁹ Wood *supra* note 24 at vii. (“The manuscript closes with a discussion of the beneficial results of slum clearance and rehousing, citing particularly the success of a number of such undertakings in Great Britain.”).

³⁰ *Id.*

³¹ *Id.*

As an explanation to the reasons for development of the agency, the foreword notes “In Studying means of advancing the President’s forward-looking policies of rehabilitating our nations, the problem of providing adequate homes and living conditions for America’s lower-income earners presented itself prominently. As a result, and distinct from those other Federal agencies created to save homes from foreclosure, or to arrange better of new construction and repairs, the Housing Division of the Public Works Administration was established.

Id. at vii-viii.

³² For those who are curious, what cost \$150,000,000 in 1935 would cost \$1,970,967,062 in 2003. The Inflation Calculator at <http://www.westegg.com/inflation/infl.cgi>. The agency was granted an additional \$130,000,000 for projects the following year. Wood, *supra* note 24 at x.

³³ Wood, *supra* note 24

³⁴ See generally *Id.*

³⁵ *Id.*

of the public and a conclusion that these conditions constitute a national emergency requiring assistance of the national government.³⁶ After the federal government demolished slums under this redevelopment model, improved housing was built in the same location, suitable for those who were displaced.³⁷ These ideals became the foundation for future federal housing acts. As private financing was unable or unwilling, proponents argued, use of federal and state police power was necessary to lift the poor up out of the dregs of society through improved housing, thereby improving society as a whole.³⁸ The driving force of great social need behind this movement, however, gave way to a different model.

B. “Blight” and the First Federal Housing Acts

In 1935, the Sixth Circuit concluded that the federal government had no police power to condemn properties for low-cost housing and slum clearance.³⁹ In support of its decision, the court concluded “[i]n the exercise of its police power, a state may do those things which benefit the health, morals, and welfare of its people, but the federal government has no such power within the states.”⁴⁰ Fearful of review by the then conservative Supreme Court, Whitehouse

³⁶ *Id.* at x.

- (1) The close connection between housing and health, safety morals, and family welfare
- (2) The vast extent in the United States of housing sufficiently bad to exert an acutely deteriorating influence in those respects
- (3) The inescapable conclusion that this condition constitutes a national emergency in which only the national Government (with the cooperation of State and local housing authorities) can cope
- (4) The impossibility of the evils being corrected by private enterprises either working for maximum profit or accepting limited dividends.
- (5) That a large-scale effort to demolish slums and replace them with good low-rental housing just at this time would have the additional effect of providing greatly needed work and building trades, thus meeting another even more urgent national emergency.

Id.

³⁷ FOGLESON, *supra* note 20 at 351-52.

³⁸ BAUER *supra* note 28.

³⁹ *United States v. Certain Lands in City of Louisville*, 78 F.2d 684 (6th Cir. 1935).

⁴⁰ *Id.*

advisors elected not to pursue the issue further.⁴¹ Following this decision, the modern model of the federal urban renewal act was born.

The United States Housing Act of 1937,⁴² passed in response to the sixth circuit ruling, decentralized the slum-clearing movement, placing the federal government solely in the role of financier and states and municipal housing agencies in charge of the actual condemnation and redevelopment.⁴³ The Act's general purpose and mandates followed along those of its predecessor, the Housing Division.⁴⁴ This act was focused primarily on clearing the worst slums and rebuilding proper housing to replace them. The statute was there mention of "blight."⁴⁵ The focus of subsequent Housing Acts would prove to be much broader.

Although incorporated within many early state redevelopment acts, including the District of Columbia, "blight" emerged as an official trigger for redevelopment at the federal level through the federal Housing Act of 1949.⁴⁶ The Act gave cities powers to eliminate "substandard and other inadequate housing through the clearance of slums and other blighted areas."⁴⁷ Although included within the statute, the legislature did not define "blight." The use of the term

⁴¹ Wendell E. Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain. 21 Yale L. & Pol'y Rev. 1, 24 (2003).

⁴² 42 U.S.C. § 1404 (1937)

⁴³ § 1404

("AN ACT To provide financial assistance to the States and political subdivisions thereof for the elimination of unsafe and insanitary housing conditions, for the eradication of slums, for the provision of decent, safe, and sanitary dwellings for families of low income, and for the reduction of unemployment and the stimulation of business activity, to create a United States Housing Authority, and for other purposes.").

⁴⁴ § 1404; *see also* Gordon, *supra* note 7 at 310.

⁴⁵ FOGLESON, *supra* note 20 at 351-52; BAUER, *supra* 28.

⁴⁶ Housing Act of 1949, Public Law 171, 81st Cong 1949. Catherine Bauer, a prominent critic of urban redevelopment, asserted that the 1949 Act passed without fanfare due to the wide base of supporters, each with divergent ideas of its purpose. BAUER, *supra* note 28 at 9. To proponents of original slum-clearance movement, it was merely another way to rid America of substandard living conditions. *Id.* To the newly emerging proponents of "urban redevelopment," the act served as a tool to save central business areas, stop falling property values and clear slums without building housing suitable for those same individuals to return. *Id.* Finally, city developers viewed the act as a tool to reorganize their city and remove inefficient uses of land. *Id.*

⁴⁷ Housing Act of 1949, Public Law 171, 81st Cong 1949.

“blight” first emerged in the early 1910’s amidst discussions surrounding the cause of slums.⁴⁸

Some viewed blight as the precursor of the slum, a dreaded cancer that slowly spread unless discovered early and removed.⁴⁹ Others thought blight was an economic rather than social problem, indicated by falling property values.⁵⁰

In addition to its more expansive language, the Act did not require that municipalities replace housing torn down with suitable housing for those displaced by the clearance.⁵¹ The act also allotted substantial federal monies to provide loans “[t]o assist local communities in eliminating their slums and blighted areas and in providing ... opportunity for the redevelopment ... by private enterprise.”⁵² With these changes, the act essentially gave municipalities free range to pursue myriad redevelopment options, and facilitated a change in purpose for the urban development movement. As one author noted, “if it was hard to define blighted districts, it was easy to find them.”⁵³ Utilizing the subjective nature of “blight,” eager municipal bodies and central city business owners began to see a different use for this newfound power. Central business districts were declining because of decentralization and large mass exodus to the suburbs.⁵⁴ Frustrated with poor public transportation and traffic jams, those individuals who once came downtown for all of their shopping and business needs were content to patronize branch offices and local suburban stores.⁵⁵ Lower income, racially integrated neighborhoods often surrounded the central business districts. Although not “slums” under any definition of the word, the homes were often older and less maintained than their suburban cousins, and residents were

⁴⁸ Gordon, *supra* note 7 at 309-310.

⁴⁹ FOGLESON, *supra* note 20 at 349

⁵⁰ *Id.* at 351-52.

⁵¹ Housing Act of 1949, Public Law 171, 81st Cong 1949.

⁵² Housing Act of 1949, Public Law 171, 81st Cong 1949.

⁵³ FOGLESON, *supra* note 20 at 351-52.

⁵⁴ *Id.*

⁵⁵ *Id.*

often fiscally unable to patronize the large downtown department stores.⁵⁶ By ridding the central business district of the ugly ring surrounding it, planners argued, and replacing the area with homes for individuals who are able to patronize downtown establishments, the downtown districts would thrive again.⁵⁷ But one question remained: could this new model survive constitutional scrutiny?

In 1954, the Supreme Court answered with a resounding “yes.” In line with the trend of upholding economic regulation legislation, the Court upheld the taking as a “public use”⁵⁸ In *Berman*, Property owners challenged the District of Columbia’s taking of their property pursuant to the District of Columbia Redevelopment Act of 1945.⁵⁹ Congress promulgated the Redevelopment Act to allow the District of Columbia to eliminate substandard housing and redevelop obsolescent portions of the city through assemblage, eminent domain or otherwise.⁶⁰ This power was extended to slums, blighted areas, blighting factors or causes of blight.⁶¹

The level of underdevelopment in the area in question was significant. According to reports, approximately 60% of the dwellings were still using outhouses and had no baths, over

⁵⁶ *Id.*

⁵⁷ *Id.* at 349. For an interesting analogy see Herbert J. Gans, *The Failure of Urban Renewal* in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 537 (James Q. Wilson ed., 1966).

Suppose that the government decided that jalopies were a menace to public safety and a blight on the beauty of our highways, and therefore took them away from their drivers. Suppose then, that to replenish the supply of automobiles, it gave these drivers a hundred dollars each to buy a good used car and also made special grants to general Motors, Ford, and Chrysler to lower the cost—although not necessarily the price-of Cadillacs, Lincolns, and Imperials by a few hundred dollars. Absurd as this may sound, change the jalopies into slum housing, and I have described, with only slight poetic license, the first fifteen years of a federal program called urban renewal.

Id.

See also MARTIN ANDERSON, *THE FEDERAL BULLDOZER* (1964)

This latter “urban renewal” movement, however, could not peacefully coexist with its slum-clearance background. “[W]hereas one of the prime purposes of urban renewal is to improve housing conditions for all income groups, in reality it improves housing conditions for the high income groups and lowers it for the low income groups.”⁵⁷ By evicting the poor and enticing the wealthy, “the federal urban renewal program makes it possible for local renewal officials to create a new neighborhood of an entirely different character than that of the old neighborhood.”

⁵⁸ *United States v. Carolene Products Co.*, 304 U.S. 144 (1937).

⁵⁹ *Berman v. Parker* 348 U.S. 26 (1954). For a thought-provoking discussion of the effects of *Berman* on the Civil Rights movement see Pritchett, *supra*, note 41 at 44.

⁶⁰ *Berman*, 348 U.S. at 28-29 (1954) (quoting District of Columbia Redevelopment Act of 1945, 28 U.S.C. § 1253).

⁶¹ *Id.*

80% lacked wash basins and were without central heat, and approximately 30% had no electricity.⁶² However, plaintiff's property, although located in this area, was not residential or in substandard condition.⁶³ It was a commercial department store, included in the redevelopment project based only on the fortuitousness of its location.

The Supreme Court concluded that the "plan to eliminate not only slums as narrowly defined by the District Court but also the blighted areas that tend to produce slums. . . ." including those buildings which standing by themselves are unoffending is completely within the purview of congressional police power.⁶⁴ And, "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. . . . nothing in the Fifth Amendment Stands in its way."⁶⁵ With that, the Supreme Court sent a message that judicial review was minimal, and congress was free to do as it wished to achieve its housing and urban redevelopment goals.⁶⁶

In the 1960's many critics spoke out against the urban redevelopment movement and the waste and overreaching it fostered.⁶⁷ This sharp criticism and lack of concrete results culminated in the retooling of the federal urban redevelopment model.⁶⁸ Although federal funds dried up in the 1970's, following these reforms States continued to follow this model and utilize the powers of eminent domain to redevelop their cities.⁶⁹

⁶² *Id.* at 26, 30.

⁶³ *Id.* at 26, 31.

⁶⁴ *Id.* at 26, 34-35.

⁶⁵ *Id.* at 33.

⁶⁶ This goal was affirmed in *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984). To satisfy the Public Use Clause, a taking need only be "rationally related to a conceivable public purpose." *Id.* at 241. "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." *Id.*

⁶⁷ Pritchett, *supra* note 41 at 48 (noting that "the movement against urban renewal was led by Jane Jacobs, whose best-selling critique of urban redevelopment *The Death and Life of Great American Cities* . . . argued that the diversity of cities was central to their survival") (citing JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 5 (1993) (1st ed Random House 1961). *See also e.g.* ANDERSON, *supra* note 57.

⁶⁸ Pritchett, *supra* note 41 at 48 (noting that "[t]he urban renewal program was terminated by the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 (1994)).

⁶⁹ Pritchett, *supra* note 41 at 48; see also Gordon, *supra* note 7 at 313 (noting that with the absence of federal funding, States adopted Tax Increment Financing to fill the void). For a discussion of Tax Increment Financing in

Soon, the Supreme Court will add a new chapter to its eminent domain jurisprudence. Although *Kelo v. City of New London*,⁷⁰ argued in February 2005, challenged the constitutionality of pure economic takings, its repercussions will assuredly be far reaching on the doctrine of eminent domain as a whole.

C. Evolution of Blight in Michigan

Michigan's first statute addressing the urban housing crises appeared in 1934. In order to meet the requirements for participation under the National Industrial Recovery Act, which allocated spending for low cost housing and slum-clearance, each state was required to have appropriate legislation.⁷¹ The Michigan legislature held an emergency session, and passed the Michigan Housing Act of 1933. The act applied to cities and other municipalities with a population of over 500,000, authorizing them to "purchase acquire, construct, maintain, operate, improve, extend, and/or repair housing facilities and to eliminate housing conditions which are detrimental to the public peace, health, safety, morals, and/or welfare."⁷²

In *New York City Housing Authority v. Miller*⁷³, the New York court of appeals held that condemnation of blighted properties for slum clearance constituted a public benefit and was therefore a public purpose.⁷⁴ Following this decision, many states revamped their redevelopment

Michigan, see Joseph F. Luther, comment, *Tax Increment Financing: Municipalities Avoiding Voter Accountability*, 1987 DET. C. L. REV. 90.

⁷⁰ 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (Sept. 28, 2004) (No. 04-108).

⁷¹ National Industrial Recovery Act, title 2. 50 Stat. 888, 42 U.S.C § 1401 et seq (1932).

⁷² *In re Brewster Street Housing Project*, 289 N.W. 493, 406 (1939) (quoting Michigan Housing Act, 1933 P.A. 18).

⁷³ 270 N.Y. 333, 338 -339 (N.Y. 1936).

⁷⁴ *New York City Housing Authority v. Muller* 270 N.Y. 333, 338 -339 (N.Y. 1936) The pertinent language of the statute was as follows:

"in certain areas of cities of the state there exist unsanitary or substandard housing conditions owing to overcrowding and concentration of population, improper planning, excessive land coverage, lack of proper light, air and space, unsanitary design and arrangement, or lack of proper sanitary facilities; that there is not an adequate supply of decent, safe, and sanitary dwelling accommodations for persons of low income; that these conditions cause an increase and spread of disease and crime and constitute a menace to the health, safety, morals, welfare, and comfort of the citizens of the state, and impair economic values; that these conditions cannot be remedied by the ordinary operation of private enterprise."

statutes and adopted the broad language legitimized by the decision.⁷⁵ Additionally, fearful that the courts would hold these new statutes unconstitutional, many states strove to provide broad support under police powers for the necessity of such statutes.⁷⁶ Michigan's housing statute was one of many which adopted this broad language.⁷⁷

1. Michigan Supreme Court Approves Blight

During this era, the Michigan Supreme Court had several opportunities to review the relevant housing redevelopment acts promulgated by the legislature.⁷⁸ The first analysis by the Court on the constitutionality of the slum clearance movement came in its 1939 decision in *In Re Brewster Street Housing Site in City of Detroit*.⁷⁹ In *Brewster*, the Michigan Supreme Court upheld the constitutionality of the Michigan Housing Act.⁸⁰ Similar to the plaintiffs in *Berman*, (although decided prior to *Berman*) the property of the *Brewster* plaintiffs was merely fortuitously in the path of the slum redevelopment area, and not part of the slums themselves. Notably, the initial condemnation petition only indicated that the acquisition was necessary to

⁷⁵ Comment, *Corporate Prerogative "Public Use" and a People's Plight: Poletown Neighborhood Council v. City of Detroit*, 1982 Det. C. L. Rev. 907, 913.

⁷⁶ Pritchett, *supra* note 41 at 16, 22 (2003).

⁷⁷ Blighted Areas Rehabilitation Act, 1944 P.A. 344.

⁷⁸ In addition to the cases noted in the text see *In Re Edward J. Jeffries Homes Housing Project*, 11 NW.2d 272 (1943).⁷⁸ In *Jeffries*, the Michigan Supreme Court received another opportunity to comment on the issue. The housing deficiencies in this area were not nearly as dilapidated as those in the Brewster street projects. As trial, the city presented what was essentially a public policy argument, through testimony on the social effects of clearing and successful reduction of crime and disease in other areas. *Id.* at 277. Jurors were given a tour of the Brewster street housing project, as well as tours of the area at question in trial. *Id.* Although the plaintiffs noted that the city failed to present specific evidence on the health conditions and delinquency of the area, or traffic accidents from the irregular and narrow streets, jurors nonetheless concluded that the jury found that it was necessary to acquire the land for slum clearance and low-cost housing. *Id.* As the jury decided such, the court noted that it was unnecessary to "decide whether a municipality can validly condemn property where the main purpose may be better housing, but slum clearance is also involved." *Id.* at 287. For photographs of the recently demolished Jeffries Projects see <http://www.angelfire.com/de2/detroitpix/Jeffries1.html>.

⁷⁹ 289 N.W. 493 (1939). The Brewster Street project was designated as the African American housing project. A similar project was constructed for whites, but housing shortages forced integration, which led to the 1943 race riots in Detroit. Vivian M. Baulch and Patricia Zacharias DET. NEWS at <http://info.detnews.com/history/story/index.cfm?id=185&category=events>.

⁸⁰ 1933 P.A. 18. This act provided that "any city or incorporated village having a population of over 500,000 is authorized 'to purchase, acquire, construct, maintain, operate, improve, extend, and/or repair housing facilities and to eliminate housing conditions which are detrimental to the public peace, health, safety, morals, and/or welfare.'" *In re Brewster*, 289 N.W. at 497-498.

construct housing facilities for persons of low income.⁸¹ Only at trial did the city add “and for slum clearance.”⁸² In concluding that there was no such limitation on the State’s power for slum-clearance, the Court relied on the power of the State to take property to build jails to protect the public from criminals, to build hospitals beneficial to the health of the people, and to build facilities for the control of juvenile delinquency.⁸³ Similarly, “there seems to be no reason why the State, in the exercise of its police power, may not ...condemn property for what may be termed slum-clearance purposes because such property may be a menace to the health, peace and safety of the inhabitants of the city other than those who occupy the premises.”⁸⁴

In *In re Slum Clearance*⁸⁵, the Michigan Supreme further expanded the definition of public use. In *Slum Clearance*, the Court concluded that subsequent sale of condemned slum properties to private parties did not violate the public use clause of the Michigan constitution.⁸⁶ Such a transfer, the court noted, was merely incidental to the public purpose of slum clearance.⁸⁷ In step with the national urban redevelopment movement, Michigan municipalities used these powers to create new urban centers. The power to eminent domain appeared almost limitless, and in 1981, the Michigan Supreme Court affirmed these fears.

⁸¹ *Id.* at 499.

⁸² *Id.*

⁸³ *Id.* at 501.

⁸⁴ *Id.* at 501.

⁸⁵ *In re Slum Clearance in City of Detroit*, 50 N.W. 2d 340 (1951).

⁸⁶ *Id.*

⁸⁷ *Id.*

2. Michigan's Expansion and Retraction of the Definition of Public Use

In *Poletown Neighborhood Council v. City of Detroit*⁸⁸, the court conflated the definition of “public use” with that of “public purpose,” and held that demolition of a non-blighted ethnic neighborhood and subsequent transfer to a private company for pure economic redevelopment was sufficient to constitute public use.⁸⁹ The *Poletown* Court rejected plaintiffs request that the court distinguish between the term “use” and “purpose,” concluding that “the terms have been used interchangeably in Michigan statutes and decisions in an effort to describe the protean concept of public benefit.”⁹⁰ The court then essentially twisted plaintiff’s usage of “use” and “purpose,” and asserted that “[t]here is no dispute about the law. All agree that condemnation for a public *use or purpose* is permitted.”⁹¹ The court reached this conclusion, although plaintiffs obviously challenged the pure private transfers of condemned land for the purpose of general economic development. Justices Fitzgerald and Ryan sharply criticized this determination, with Justice Fitzgerald pointing out “[w]hat constitutes a public purpose in a context of governmental taxing and spending power cannot be equated with the use of that term in the context of eminent domain.”⁹²

The Michigan Supreme Court finally attacked this line of reasoning in *County of Wayne v. Hathcock*.⁹³ In *Hathcock*, the County of Wayne sought to condemn several properties for inclusion in a planned technology park.⁹⁴ After first determining that the economic revitalization in question satisfied the broader statutory definition of “public purpose,” the court analyzed the

⁸⁸ 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W. 2d 765 (Mich. 2004).

⁸⁹ *Poletown*, 304 N.W.2d at 455.

⁹⁰ *Id.* The court then essentially twisted plaintiff’s usage of “use” and “purpose,” and asserted that “[t]here is no dispute about the law. All agree that condemnation for a public *use or purpose* is permitted.” *Id.* at 458-59.

⁹¹ *Id.* at 458-59 (emphasis added).

⁹² *Id.* at 463.

⁹³ 684 N.W. 2d 765 (Mich. 2004).

⁹⁴ *Hathcock*, 684 N.W. 2d at 770.

requirements of “use” under Art. 10, section 2 of the Michigan constitution.⁹⁵ The court rejected naked economic redevelopment as a “public use,” relying primarily on Justice Cooley’s rejection of a similar purported “public use” asserted in support of the Mill Acts, which gave Mill Owners the power of eminent domain to flood the properties of private individuals.⁹⁶ With this rejection, the court relegated *Poletown* to an unfortunate blip in Michigan eminent domain jurisprudence, noting “after all, if one’s ownership of private property is forever subject to the government’s determination that another private party would put one’s land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer”⁹⁷ Unfortunately, given Michigan’s blight statutory scheme, Michigan residents still have reason to fear that large discount dealer.

⁹⁵ “[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law.” Mich Const. Art 10 § 2.

⁹⁶ As Justice Cooley explained:

Undoubtedly there may arise circumstances under which it would be convenient if a power to condemn lands for mill purposes might be exercised, but they are so rare that a stretch of governmental power in order to provide for them would be more harmful than beneficial. It would under any circumstances be pushing the authority of government to extreme limits; and unless the reasons for it were imperative, would be likely to lead to abuses rather than tend to the promotion of the general interest, and to breed discords where, in the absence of such legislation, moderate counsels and final agreement might have prevailed. If in individual instances obstacles are encountered in the unreasonable objections of individual land owners, the rare instance cannot justify a general law which would be likely to breed as many grievances as it would cure, for legislation of this sort is always grievous when no great necessity justifies it; and it is always an invasion of liberty and of right when one is compelled to part with his possessions on grounds which are only colorable. A person may be very unreasonable in insisting on retaining his lands; but half the value of free institutions consists in the fact that they protect every man in doing what he shall choose, without the liability to be called to account for his reasons or motives, so long as he is doing only that which he has a right to do.

Ryerson v. Brown, 1877 WL 7142, *5 (Mich. 1877).

⁹⁷ *Hathcock*, 684 N.W.2d at 787.

II. REDEVELOPMENT STATUTORY SCHEMES

A recent survey of redevelopment statutes in the fifty states found three main blight statute methodologies.⁹⁸ Although each state differs, and some have unique approaches, the categories are useful for analysis.⁹⁹

A. Approaches Found Within the Various State Statutes

The first approach was termed the “single impact test.” Under this approach, the statute lists factors for assessing whether it is appropriate to redevelop the area.¹⁰⁰ The level of detriment varies, with some requiring five factors and others, as in Michigan, requiring only one factor.¹⁰¹ The focus of factors differs as well, with some states focusing solely on detriment to public health, safety or welfare, and others focusing solely on whether the conditions have an adverse impact on development, economic vitality, or social welfare, and some, like Michigan, which use a combination of both.¹⁰² In States that use the single impact factor test, the most important distinction is the number of detrimental factors required for a blight designation.¹⁰³

The next approach is a multi-factor approach. According to the author of the study, it is the most widely used approach in the nation.¹⁰⁴ These states typically require that blight conditions similar to those in the single factor approach be a “menace” to the public health,

⁹⁸ James S. Burling, *Blight Light* SH053 ALI-ABA 43 (January 9-11 2003).

⁹⁹ *Id.* at 48.

¹⁰⁰ *Id.* One author grouped these factors into the following categories: (1) structural defects (2) health hazards; (3) Faulty or obsolescent planning; (4) Taxation issues; (5) Lack of necessity amenities and utilities; (6) Condition of title; (7) Character of the neighborhood (8) Presence of blighted open areas; (9) Declared Federal and State disaster areas; (10) Economic use of the land; (11) Presence of vacant lots and abandoned buildings and (12) Physical and Geological factors. Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 *Real Prop. Prob & Tr. J.* 389, 414-15 (2000).

¹⁰¹ Burling, *supra* note 98 at 49.

¹⁰² *Id.* at 49.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

safety and welfare, along with having an adverse impact on development or the general economic welfare of the community.¹⁰⁵

The final approach utilizes both single and multifactor approaches depending on the severity of the condition and the location of the development.¹⁰⁶ For example, in developed and residential areas, the single test approach is utilized. However, these jurisdictions strengthen the “blight” factors, requiring the condition of the area to be conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime to be detrimental to the health, safety and welfare of the public.¹⁰⁷ For other areas, the multifactor test is utilized, looking at a list of detriment to the health safety and welfare along with adverse economic impact.¹⁰⁸

Different aspects of State statutes strive to protect different interests. While the single factor requirement in the single impact test is necessarily more deferential to the redevelopment agency, there are great differences between the degree to which property owners are protected in the multi-factor and combination tests.¹⁰⁹ In addition to multiple factors, some state statutes provide for additional safeguards. Texas requires that blight designations go to a vote before its citizens.¹¹⁰ North Carolina mandates that any property owner faced with a condemnation be entitled to reasonable fees for the attorney of his choosing.¹¹¹ Washington requires that an independent assessor determine whether a property is blighted.¹¹²

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 50.

¹⁰⁹ *Id.*

¹¹⁰ Tex. Gov’t Code § 2306.004 (2002).

¹¹¹ N.C. Gen Stat. § 169A-503.

¹¹² Wash. Rev. Code § 35.81.010.

B. Michigan's Current Blighted Area Redevelopment Act

The current Michigan Blight Statute was originally enacted in 1945.¹¹³ Revisions were made in 1986, but were merely to update language. The Michigan Statute is a single factor test, which means that it only relies on a finding of one factor to reach a blight designation.¹¹⁴ The legislature, essentially presumptively concludes on behalf of the municipality that any finding of blighted conditions compels a finding that blight impairs taxable and economic values, and that private development is infeasible or unavailable.¹¹⁵

The Michigan statute then sets out the many factors that can constitute blight. Not only is the statute single factor, but the statute also encompasses redevelopment for differing levels of blight, including moderate, and commands that a finding of blight be broadly construed. The second section sets out blighting factors.

Sec 2. As used in this act:¹¹⁶

(a) "Blighted area means a portion of a municipality, developed or underdeveloped, improved or unimproved, with business or residential uses, (1) marked by a demonstrated pattern of deterioration in physical, economic, or social conditions, and characterized by such conditions as (a) functional or economic obsolescence of buildings or the area as a whole, (b) physical deterioration of structures substandard building or facility conditions, (c) improper or inefficient division or arrangement of lots and ownerships and streets and other open spaces, (d) inappropriate mixed character and uses of the structures, (e) deterioration in the condition

¹¹³ Michigan Blighted Areas Redevelopment Act 1945 P.A. 344. Michigan's "Uniform" Condemnation Procedures Act was enacted in 1980. 87 P.A. 1980, M.C.L. 213.55.

¹¹⁴ See section II *infra*.

¹¹⁵

Section One: The legislature finds and declares that large areas in the municipalities have become blighted and significant areas in the municipalities of the state are deteriorating in a manner which leads to severe blight with the consequent impairment of taxable values upon which in large part, municipal revenues depend; that those blighted areas are detrimental or inimical to the health safety, morals, and general welfare of the citizens, and to the economic welfare of the municipality; that in order to improve and maintain the general character of the municipality, it is necessary to rehabilitate those blighted areas; that the conditions found in blighted areas cannot be remedied by the ordinary operations of private enterprise, with due regard to the general welfare of the public, without public participation in the planning, property acquisition or disposition, and related implementation and financing of the remedies; that the purposes of this act are to rehabilitate those areas by improving or acquiring and developing properties within the areas and that the necessity in the public interest for provisions enacted in here is hereby declared as a matter of legislative determination to be a public purpose and a public use.

M.C.L. § 125. 71.

¹¹⁶ Numbers inserted by author.

of any public facilities or services or any other similar characteristics which endanger the health, safety, morals, or general welfare of the municipality, and which may include any buildings or improvements not in themselves obsolescent and (2) any real property residential or nonresidential, whether improved or unimproved, the acquisition of which is considered necessary for rehabilitation of the area. (3) It is expressly recognized that blight is observable at a stages of severity, and that moderate blight unremedied creates a strong probability that sever blight will follow. Therefore, the conditions that constitute blight are to be broadly construed to permit a municipality to make an early identification of problems and to take ready remedial action to correct a demonstrated pattern of deterioration and to prevent worsening of blight conditions.¹¹⁷

Unlike the multifactor tests, Michigan’s blight statute provides that findings of obsolescence of buildings, deterioration, improper or inefficient arrangement or ownership, character of structures, deterioration of public facilities to the health, safety and welfare of the public are demonstrative of degradation in social or economic conditions.¹¹⁸ There is not a separate requirement for one or the other.

In 2002, the Michigan Legislature passed a new statute that essentially turned Michigan’s blight statute to a combination statute.¹¹⁹ The statute is focused on single properties, as opposed to areas for redevelopment. The statute provides relaxed requirements for properties other than industrial properties current on taxes, farms, railroad property and resident-owned single-family homes.¹²⁰ The statute allows a declaration of “blighting,” of individual properties upon a finding that the property is any one of the following: a public nuisance, attractive nuisance, fire or other hazard, permanently disconnected utilities, structure is damaged to such an extent that it does not meet the local building codes, likely to fall, or is a dwelling and because of infestation is likely to cause sickness and disease.¹²¹

¹¹⁷ M. C. L. § 125.72(a).

¹¹⁸ § 125.72(a).

¹¹⁹ Development of Blighting Property, 2002 P.A. 27, M.C.L. § 125.2801 (2005). AN ACT to establish procedures for municipalities to designate individual lots or structures as blighting; to purchase or condemn blighting property; to transfer blighting property for developing; and to repeal acts and parts of acts. *Id.*

¹²⁰ § 125.2801 (2005).

¹²¹

(i) The property has been declared a public nuisance in accordance with local housing, building, plumbing, fire, or other related code or nuisance.

Although this statute offers some protection, through the exclusion of certain properties under its provisions, it still gives the municipality significant leeway. Furthermore, it gives direct authority to turn the property over to developers. As with Michigan's Blighting Rehabilitation Act, municipalities must only find one factor to obtain the "blighting" designation. Properties most affected by these provisions, including commercial properties, rental apartments and homes, have little protection from transfer of their property to a private developer. However, one significant section contains a provision for attorneys' fees. MCL 125.2806 provides:

"If a person with a legal interest in a property that a municipality designates as blighting appeals the municipal decision and the decision is reversed by a court of appropriate jurisdiction and the court determines that the municipality was acting arbitrarily or in bad faith, the court may award the successful appellant the costs, including but not limited to, attorney fees, actually and reasonably incurred by the person in making the appeal."

Finally, the legislature set forth condemnation procedures in the Uniform Condemnation Procedures Act¹²² The Act limits provides only limited procedural safeguards, which condemnees may inadvertently forfeit due to strict requirements and brief statutes of

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- (ii) The property is an attractive nuisance because of physical condition, use or occupancy. A structure or lot is not blighting property under this subparagraph because of an activity that is inherent to the functioning of a lawful business
 - (iii) the property is a fire hazard or is otherwise dangerous to the safety of persons or property.
 - (iv) The property has had the utilities, plumbing, heating or sewerage permanently disconnected, destroyed, removed, or rendered ineffective so that the property is unfit for its intended use.
 - (v) A portion of the building or structure located on the property has been damaged by any event so that the structural strength or stability of the building or structure is appreciably less than it was before the event and does not meet the minimum requirements of the housing law of Michigan¹²¹ or a building code of the city, village, or township in which the building or structure is located for a new building or structure.
 - (vi) A building or structure or part of a building or structure located on the property is likely to fall. Become detached or dislodged, or collapse and injure persons or damage property.
 - (vii) A building or structure located on the property used or intended to be used as a dwelling, including the adjoining grounds, because of dilapidation, decay, damage, or faulty construction, accumulation of trash or debris; an infestation of rodents or other vermin; or any other reason, is unsanitary or unfit for human habitation, is in a condition that a local health officer determines is likely to cause sickness or disease, or is likely to injure the health, safety, or general welfare of the people living in the dwelling.

§ 125.2801.

¹²² 1980 P.A. 280, M.C.L. 213.55 (2005). As an interesting aside, condemnation lawyers drafted the legislation and it is not "uniform" as there is no other act of the same nature within the United States.

limitation.¹²³ In addition, the Act gives the municipality the right to request all tax records for the preceding five years for determining just compensation, or any other documents that the municipality deems necessary.¹²⁴ Homeowners are sanctioned if these documents are not produced in a timely fashion.¹²⁵ Challenges to just compensation must list specific detail and information for the agency to determine value.¹²⁶ If the owner files a claim that is frivolous or in bad faith, the municipality has the right to collect reasonable expenses.¹²⁷ No such similar provision is made on behalf of the property owner.

III. RISING TO THE CHALLENGE: PROTECTING PROPERTY RIGHTS THROUGH NEW LEGISLATION

According to a recent study by the Institute for Justice, Michigan municipalities have filed a total of 138 condemnation actions with an end benefit to private parties and threatened 173 actions.¹²⁸ Michigan is among the highest in terms of private purpose condemnations filed, and Detroit is the worst offender among all cities in the nation.¹²⁹ The abusive eminent domain tactics, fostered by Michigan's current blight and condemnation statutes, will foreclose gains made in the protection of private property rights by the Michigan Supreme Court's decision in *County of Wayne v. Hathcock*.¹³⁰

The slum-clearance movement initiated the erosion of public use.¹³¹ States were quick to jump onto the "slum-clearance" bandwagon, and those efforts became urban renewal.¹³² Urban renewal then evolved to its present state, where the Municipality, through its power of eminent

¹²³ M.C.L. § 213.55(2) ; M.C.L. § 213.56 (7) (providing that "[i]f a motion to review necessity is not filed as provided in this section, necessity shall be conclusively presumed to exist and the right to have necessity reviewed or further considered is waived").

¹²⁴ § 213.55(2). To obtain reimbursement, the homeowner must submit any costs incurred within 45 days. *Id.*

¹²⁵ § 213.55(2).

¹²⁶ § 213.55(3).

¹²⁷ § 213.55(3).

¹²⁸ BERLINER, *supra* note 4 at 2.

¹²⁹ *Id.*

¹³⁰ 684 N.W.2d 765 (Mich. 2004).

¹³¹ *See* section II.B., *infra*.

¹³² *See* section II.B. *infra*.

domain, forces thousands out of their homes, all in the name of large corporations and luxury condominiums masquerading as the public good. As one author commented “If blight does not truly exist, then the “blighted” property is not necessarily being redeveloped to meet a public interest, it is merely being replaced with a more politically favored brand of development.”¹³³ Over inclusive blight statutes can retard important development and force municipalities to undergo unnecessary steps to accomplish their goals.¹³⁴ Under-inclusive statutes fail to protect the rights of property owners.¹³⁵ Faced with this choice, many commentators have proposed different options. Two of the most prevalent arguments including heightened judicial review, and increased compensation.

A. Heightened Judicial Review

Many proponents of the protection of property rights argue that heightened judicial scrutiny on legislative pronouncements would solve the dilemma.¹³⁶ In fact, several states require increased judicial scrutiny.¹³⁷ A few Federal courts have determined that judicial deference under the federal constitution to legislative findings of blight is unnecessary when the blight determination is merely pretextual.¹³⁸

¹³³ Burling, *supra* note 98 at 50.

¹³⁴ LefCoe, *supra* note 14.

¹³⁵ Burling, *supra* note 98 at 50.

¹³⁶ Kruckeberg, *supra* note 14 at 578; Nancy K. Kubasek, *Time To Return to a Higher Standard of Scrutiny in Defining Public Use*, 27 RUT. L. REC. 3 (2003).

¹³⁷ *Cottonwood Christian Center v. Cypress Redevelopment Agency* 218 F.Supp.2d 1203, 1228 (C.D.Cal.2002). “A second problem with Defendants' asserted justification is that the evidence does not necessarily support a finding of blight. Although the City asserts that its 1990 determination of blight is conclusive, examination of local laws under the strict scrutiny analysis requires not only that the government's stated purpose is a compelling interest, but that it is also a genuinely-held purpose.” *Id.* at 1228.

¹³⁸ *99 Cents Only Stores v. Lancaster Redevelopment Agency* 237 F. Supp.2d 1123, 1129 (C.D.Cal.2001).

If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a 'public use,' and if those officials could later justify their decisions in court merely by positing 'a conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings." *Id.*

First, there is the traditional challenge, asserting that courts should not replace their judgment for that of the legislature.¹³⁹ However, more importantly, judicial review is often too little, too late. Redevelopment projects are years in the making by the time they come to the courts. The blight or slum designation may be placed on the property years before condemnation proceedings even commence.¹⁴⁰ This puts a substantial strain on property owners, fearful of losing their homes. Furthermore, the “cloud” of blight and slum designations also makes their property unmarketable during the challenge.¹⁴¹ Finally, some homeowners are just not financially able to challenge the designation. Attorneys’ fees are steep, and many owners often just accept the blight designation and “just compensation” without challenge.¹⁴² Homeowners need to be protected earlier in the process, and only a tighter statutory scheme will accomplish this.

B. Increased Compensation

In their Article, *Public Ruses*, Professors Krier and Serkin propose a sliding scale approach to compensation as a solution to the conundrum of what constitutes “public use”¹⁴³ According to Krier & Serkin, the difficulty with the current interpretation of “just compensation” is that it often results in under compensation, neglecting to account for the uncompensated increment.¹⁴⁴ Subjective personal values, business good will, and other incidental benefits such as general increase in property values from the improvement, are not considered in valuation.¹⁴⁵ Under this new approach, compensation would range a depending on where it fell on a

¹³⁹ James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 864.

¹⁴⁰ See, e.g. *Washington Market Enterprises v. Trenton*, 68 N.J. 107, 343 A.2d 408 (1975).

¹⁴¹ *Id.*

¹⁴² Lefcoe, *supra* note 14 at 1026.

¹⁴³ Krier & Serkin, *supra* note 139.

¹⁴⁴ *Id.* at 867-68. Krier & Serkin derive the term “uncompensated increment” from Lee Anne Fennel, *Taking Eminent Domain Apart*, 2004 MICH ST. L. REV. 957. Professor Fennel describes three components of the uncompensated increment: “(1) the increment by which the property owner’s subjective value exceeds fair market value; (2) the chance of reaping a surplus from trade (that is of obtaining an amount larger than one’s own true subjective valuation; and (3) the autonomy of choosing for oneself when to sell. *Id.* at 958-959.

¹⁴⁵ Krier & Serkin, *supra* note 139 at 867-68

continuum of uses, increasing from fair market value as the “use” moved along the scale from private use to naked transfer.¹⁴⁶ The end effect gives the condemnee the ability to share in the benefits realized from the seizure of their property through eminent domain.¹⁴⁷

The main problem with this approach, as Krier & Serkin themselves acknowledge, is that it is a liability rule rather than a property rule.¹⁴⁸ “If *A* wants to buy *B*’s house, he has to negotiate with *B* and meet *B*’s price in order to close the deal-unless, of course, *A* is the government and wants *B*’s property for a public use. In that event, *A* can force a sale at a price determined not by *B*, but by a court.”¹⁴⁹ The first example is one of a property rule, where an individual is prohibited from purchasing property without the assent of the owner. In the second, the property owner is unable to prohibit the government from purchasing property, but will receive just compensation for what they have taken.

Liability rules serve several functions.¹⁵⁰ Although tort law regulates behavior through litigation, its purpose is also to compensate those already injured. The product has already injured the individual. The breach of contract caused significant incidental and consequential damages. The toxic dumping killed all of the fish in the stream. There is not the ability to put the injured individual back in the place they were in before the harm occurred, so society provides a monetary solution. Although liability rules force individuals to consider carefully their chosen actions, they do not act as the sole deterrent.¹⁵¹ Laws and regulations are also put in place to deter individuals before offensive conduct occurs. The problem with relying solely on a liability

¹⁴⁶ *Id.* at 867-68.

¹⁴⁷ *Id.* at 871.

¹⁴⁸ *Id.* at 873 (citing Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972)).

¹⁴⁹ Krier & Serkin, *supra* note 137 at 873.

¹⁵⁰ Calabresi & Melamed, *supra* note 144; Edward T. Schroeder, *A Tort By Any Other Name? In Search of the Distinction Between Regulation through Litigation and Conventional Tort Law*.

83 Tex. L. Rev. 897, 897 (2003) (“[O]ne of the principal justifications for the tort system is that it acts as an efficient deterrent to breaches of the duty of care.”).

¹⁵¹ Schroeder, *supra* note 146 at 898.

rule is that “efficient breach,” may still occur.¹⁵² If a liability rule imposes \$2,000,000 in damages, but the party looks to gain \$5,000,000 from the transaction, breaching the rule is the better option.

In the case of eminent domain, the legislature has the ability to prevent the conduct from the outset through use of a property rule.¹⁵³ While creation of liability rules address the concerns raised from problems surrounding “just compensation” and the uncompensated increment, it does not solve the problem of the disingenuous blight designation. Municipalities given free hand to utilize the police power to procure property through eminent domain will be able to find uses that, without review, are “justified” under the police power. A tightly drafted statutory scheme coupled with a liability rule, however, may provide an ideal solution.

C. Proposed Michigan Blight Rehabilitation Act

A successful attempt to prohibit legislative bodies from abusing their powers of eminent domain must be accompanied by legislatively imposed standards, both that give a reviewing court objective substantive and procedural guidelines. The following proposed amendments to the Michigan Blight Rehabilitation act, although not guaranteed to protect from all abuses of eminent domain, will make it more difficult to use blight to offend the protections offered in article 10 of the Michigan Constitution and the Fifth Amendment.¹⁵⁴ This proposed statute adopts the combination approach.¹⁵⁵

¹⁵² See generally Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1719 (2004) (addressing “how pairing property rules with an exclusion strategy has advantages that stem from saving information costs, deterring opportunism by potential takers, and discouraging owners from engaging in wasteful self-help”).

¹⁵³ See generally, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One view of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

¹⁵⁴ U.S. CONST. amend. V.; MICH. CONST. art 10 sec. 2.

¹⁵⁵ See section II, *infra*.

1. *New Definition Section.*

A first necessary step is a revision of the definitions of “slum” and “blight.” The proposed statute adopts a separate multifactor test for slums and for blighted properties. Distinguishing between slums and blighted properties allows for a balance of promoting development, while protecting property rights. Although it is the author’s belief that procedural safeguards will be the most beneficial, requiring a municipality to make specific findings as to the property gives a court a more complete record in the case of review. Substitution of judicial findings is not favored, and as with administrative law, judicial review should remain concentrated on whether the municipality followed the requirements of the statute and whether its action was arbitrary and capricious or not supported by substantial evidence. The following provisions attempt to achieve this balance.

AN ACT to authorize counties, cities, villages and townships of this state to adopt plans to prevent blight and to adopt plans for the rehabilitation of blighted areas

Section One DEFINITIONS: In this chapter

“Blighted area”

- i. *Means an area that, in its present condition and use and, by reason of the presence of at least three (4) of the following factors, substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability, and is a detriment to the public health, safety, morals or welfare:*
 - a. *Deteriorated, or deteriorating structures*
 - b. *Predominance of defective or inadequate street layout;*
 - c. *Faulty lot layout in relation to size, adequacy, accessibility, usefulness;*
 - d. *Unsanitary or unsafe conditions*
 - e. *Deterioration of site or other improvements;*
 - f. *Unusual topography or inadequate public improvements or utilities;*
 - g. *Defective or unusual conditions of title rendering the title nonmarketable;*
 - h. *The existence of conditions that endanger life or property by fire or other causes*
 - i. *Buildings that are unsafe or unhealthy for persons to live or work in because of building code violations, dilapidation, deterioration, defective design, physical construction, or faulty or inadequate facilities*
 - j. *Environmental contamination of buildings or property;*

- k. *The existence of health, safety, or welfare factors requiring high levels of municipal service or substantial physical underutilization or vacancy of sites, buildings, or other improvements; or*
- l. *If there is no objection by the property owner or owners and the tenant or tenants of such owner or owners, if any, to the inclusion of such property in an urban renewal area, “blighted area” also means an area that, in its present condition and use and by reason of the presence of any one of the factors specified in paragraphs (a) to (K) of this subsection (2), substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability, and is a menace to the public health, safety, morals, or welfare.*¹⁵⁶

“Slum area”

- i. *Means an area in which*
 - a. *by reason of*
 - i. *extreme dilapidation, deterioration,*
 - ii. *age or obsolescence,*
 - iii. *inadequate provision for ventilation, light, sanitation, or open spaces,*
 - iv. *high density of population and overcrowding, or any combination of such factors*
 - b. *the area*
 - i. *is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime,*
 - ii. *constitutes an economic or social liability*
 - iii. *and is a menace to the public health, safety, morals or welfare.*¹⁵⁷

2. Added Procedural Safeguards

This added section provides new procedural safeguards for property owners. For owners of proposed slum or blighted property, the municipality must put the question to the voters following a determination that a particular portion of the property in question is blighted, or contributes to the blight. For blighted areas, the required fraction of the property under the condition is 2/3. For slums, this number is decreased to 1/2 to allow a municipality to redress more substantial problems on an expedited basis.

Section 2 PROCEDURES

¹⁵⁶ Colorado Stat. 31-25-103.

¹⁵⁷ Colorado Stat. 31-25-103.

*No agency may acquire title to any land for the purpose of carrying out a development plan unless the following conditions have been met.*¹⁵⁸

1. In the case of a slum

- 1. No such area shall be subject to the power of eminent domain, within the meaning of this article unless
 - 1. it is determined by the planning commission that at least one half (1/2) of the number of buildings within the area or of the character described in this subdivision and substantially contribute to the conditions making such area*
 - 2. the governing body of the municipality adopts a resolution that finds that a slum area exists in the municipality and that the rehabilitation, the conservation, or the slum clearance and redevelopment of the area is necessary as described.*
 - 3. a majority of the municipality's voters voting in an election held as provided by subsection (2) favor adoption of the resolution**
- 2. Before adopting the resolution, the governing body must give notice of the proposed resolution and must hold an election on the question. The notice must be published at least twice in the newspaper officially designated by the governing body and must state that, on a date that is specified in the notice and that is after the 60th day after the date the notice is first published, the governing body will consider the question of holding an election to determine whether it should adopt the resolution. On the date specified in the notice to consider the question, the governing body may order an election on its own motion to consider the resolution. The governing body shall order an election on the date in question if it receives a petition during the notice period that is signed by at least five percent of the qualified voters of the municipality.*
- 3. If a majority of the voters voting in the election are against the resolution, the governing body may not adopt it and may not propose the resolution again for a one-year period.*¹⁵⁹

2. In the case of a blighted area

- 1. No such area shall be subject to the power of eminent domain, within the meaning of this article unless
 - 1. It is determined by the planning commission that at least two thirds (2/3) of the number of buildings within the area or of the character described in this subdivision and substantially contributes to the conditions making such area.*
 - 2. the governing body of the municipality adopts a resolution that finds that a blighted area exists in the municipality and that the rehabilitation, the conservation, and redevelopment of the area is necessary as described below.**

¹⁵⁸ Kent. Gen. Stat. 99.370.

¹⁵⁹ Tex Gen. Stat § 374.002

- 3. a majority of the municipality's voters voting in an election held as provided by subsection (2) favor adoption of the resolution*
- 2. Before adopting the resolution, the governing body must give notice of the proposed resolution and must hold an election on the question. The notice must be published at least twice in the newspaper officially designated by the governing body and must state that, on a date that is specified in the notice and that is after the 60th day after the date the notice is first published, the governing body will consider the question of holding an election to determine whether it should adopt the resolution. On the date specified in the notice to consider the question, the governing body may order an election on its own motion to consider the resolution. The governing body shall order an election on the date in question if it receives a petition during the notice period that is signed by at least five percent of the qualified voters of the municipality.*
- 3. If a majority of the voters voting in the election are against the resolution, the governing body may not adopt it and may not propose the resolution again for a one-year period.¹⁶⁰*

3. Post Designation Safeguards

Under the final section, a property owner is given several opportunities to challenge the blight designation, and provided review by a circuit court. In addition, a cause of action is given to the Michigan Attorney General.¹⁶¹ A challenger has 120 days to appeal, which assures that the property has sufficient time to mount a challenge. The section provides for notice and opportunity to be heard at the designation hearing. Following the hearing, property owners may appeal a designation they believe in error to the circuit court for review. If the circuit court, or higher appellate court, determines that the municipality acted arbitrarily or in bad faith in designating the property as slum or blighted, the court must award the successful challenger all costs, including attorneys fees.

¹⁶⁰ Tex Gen. Stat § 374.002

¹⁶¹ Under a California proposal, an office of State redevelopment review authority, within the office of Attorney General, would be established to police redevelopment within the state. This authority is funded by fees charged to local redevelopment authorities. All new redevelopment proposals would be subject to review by the attorney general, who also had a cause of action to challenge such designations. See Lefcoe, *supra* note 14 at 1027. While development of such an authority is outside the scope of this comment, the author believes that this would also prove to be an exceptional tool to balance the needs of the public with the rights of property owners.

Section 3 DESIGNATION CHALLENGE

1. *A person with a legal interest in the in the property or a representative of the office of the Michigan Attorney General may contest the proposed designation of any property as slum or blighted at the hearing held by the municipality under section 4 by doing 1 of the following:
 - a. *Appear at the hearing and show cause why the property should not be designated as slum or blighted*
 - b. *If incarcerated, impaired, or otherwise unable to attend a public hearing, submit a written presentation to show cause why the property should not be designated as slum or blighted.**
2. *If a person with a legal interest in the property demonstrates at the hearing that improvements to the property have been made or are actively being made that will cause the property to no longer meet the definition of slum or blighted, the municipality shall delay the designation of the property as slum or blighted for 91 days. If, at the end of that 91 days the municipality finds that the property no longer meets the definition of slum or blighted property, the municipality shall issue a certificate stating that the property is not a slum or blighted.*
3. *If after the notice and hearing required by this act the municipality determines that the property is slum or blighted property, the municipality shall designate the property as slum or blighted and provide public notice of the designation.*
4. *A municipality may at any time suspend proceedings leading to the designation of property as slum or blighted if a person with a legal interest in the property enters into an agreement with the municipality establishing an improvement plan for the property and a schedule for completion of the improvements.*
5. *A person with a legal interest in property or representative of the office of the Michigan Attorney general that a municipality has designated as slum or blighted property may appeal that decision to the circuit court in the jurisdiction within which the property is located within 120 days of the designation. The circuit court shall review the municipal decision using the standard of review for administrative decisions that is set forth in section 28 of article VI of the statue constitution of 1963.*
6. *If a person with a legal interest in a property that a municipality designates as slum or blighted property appeals the municipal decision and the decision is reversed by a court of appropriate jurisdiction and the court determines that the municipality was acting arbitrarily or in bad faith, the court shall award the successful appellant the costs, including but not limited to attorneys fees, actually and reasonably incurred by the person in making the appeal¹⁶²*

CONCLUSION

Michigan's current blight statute, and the ideas surrounding its adoption, is outdated.

One or two room windowless tenements, outhouses, widespread disease and other problems

¹⁶² Mich Stat. 125.

facing developers in the 1930's and 1940's are not present. Although removal of slums and blighted areas can be an important community service, the practice can also seriously impair the rights of property owners. Adopting a new statute with added procedural safeguards will limit municipalities' ability to act as the "super developers" they have become. Requiring that municipalities make more detailed findings, and putting the question to the voters assures that the communities affected have sufficient input in the decision.

Not all, however, would agree. A recent article criticizing California's redevelopment scheme adopted in 1993 asserted that "restrictive definitions endure property owners with a de facto veto of some redevelopment projects, enabling them to extract far more than "just compensation."¹⁶³ This, however, is the very purpose of tightly drawn restrictive blight statutory schemes. The more attenuated the blight designation, the more the government should have to pay. If blight was truly present, the municipality could proceed with condemnation and allow the jury to determine just compensation

Property Owners, like KTS Industries, should not be forced to endure condemnation for redevelopment based on disingenuous blight designations. Although other proposals such as increased compensation and heightened judicial review may protect property owners from the actions of municipalities, like Kalamazoo, these protections come too late in the process. Property owners need tools to fight municipalities earlier in the process. The foregoing proposal attempts to address this concern through addition of many procedural safeguards. The Michigan Supreme Court righted its wrongs with its decision in *County of Wayne v. Hathcock*. Michigan legislators, now it's your turn.

¹⁶³ Lefcoe, *supra* note 14 at 1008.