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# Redevelopment Condemnations: A Blight or a Blessing upon the Land?

*Judge Harold L. Lowenstein\**

## I. INTRODUCTION

Eminent domain has been a hot topic in legal circles since the U.S. Supreme Court's opinion in *Kelo v. City of New London*.<sup>1</sup> Issues such as fair compensation, public use, and the role of government in economic development have been discussed widely. The focus of this article, however, is somewhat different.

This article seeks to provide a practical analysis for the sensitive issue of eminent domain, specifically for situations in which the government seeks to acquire real property via eminent domain in order to foster private redevelopment.

The power to take private property, conferred by the Constitution and reiterated in state constitutions, is nothing short of awesome. Most states provide that property deemed blighted under that state's statutory definition may be taken for redevelopment regardless of whether the proposed use would qualify as a public use. Of course, eminent domain for redevelopment – the taking of unsanitary or dilapidated property to develop that property for the benefit of the common weal – provides a significant benefit to the community. However, the potential for abuse of this power in the name of an enhanced tax base or other economic goals must be weighed against this benefit.

Despite the efforts of legislatures to reform eminent domain, the exercise of eminent domain for private redevelopment still confers a concentrated benefit on a few while imposing the costs of such redevelopment on a discrete set of property owners. To remedy this imbalance, and to prevent developers and development agencies from abusing this power, this article proposes that property owners be accorded remedies at the beginning as well as at the end of the eminent domain process. Part II examines the role of blight in eminent domain and suggests redefining blight in concrete terms and providing meaningful judicial review of blight

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1. 545 U.S. 469 (2005).

determinations. In Part III, this article discusses the concept of condemnation blight and examines whether a condemnor may be required to pay for the diminution in the property's fair market value – the standard for just compensation, occurring after the declaration of blight and prior to the actual day of taking. This Part suggests that the property owner should be afforded the remedy of seeking damages for condemnation blight to avoid imposing the costs of procedural delay upon the landowner. In discussing these remedies, this article will attempt to suggest practical changes to current Missouri law that will not unduly inhibit redevelopment, nor short-change the property owner.

## II. THE BROAD BRUSH OF BLIGHT

### A. *Blight Defined and Reviewed*

Since the 2005 *Kelo* decision, more than thirty states have considered legislation amending or, in some cases, completely redrafting eminent domain statutes.<sup>2</sup> The first wave of reform, primarily during the 2005 legislative sessions, sought to ban condemnation based solely on an economic development rationale.<sup>3</sup> For instance, Missouri Senate Bill 1944, enacted in August 2006, banned the use of eminent domain for purely economic purposes and limited the initiation of eminent domain proceedings to government agencies.<sup>4</sup>

Most of the eminent domain reform in response to *Kelo*, including that in Missouri, has not hit the mark. The legislative response, while on its face sufficient to limit the effect of *Kelo*, is ineffective in addressing eminent domain abuse. Despite widespread eminent domain reform legislation, redevelopment statutes in almost every state retain a loophole – indeed, a legislative back door – to condemnation for economic development in permitting condemnation to eradicate blight. Given that most states define blight in vague and general terms, a finding of blight with regard to a redevelopment area is little more than a procedural hurdle for the developer to overcome.

More importantly, most economic development incentives in Missouri are focused on blight eradication and require a blight declaration.<sup>5</sup> One of the most popular economic development incentives, Tax Increment Financing (“TIF”)<sup>6</sup> – an outgrowth of land clearance for redevelopment policies that

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2. George Lefcoe, *Redevelopment Takings After Kelo: What's Blight Got to Do with It?*, 17 S. CAL. REV. L. & SOC. JUST. 803, 815-16 (2008).

3. David A. Dana, Colloquy Essay, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365, 374 (2007).

4. H.R. 1944, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006). See *infra* note 47 for statutory blight definitions.

5. See, e.g., MO. REV. STAT. § 99.310 (2000).

6. MO. REV. STAT. §§ 99.800-.865 (2000 & Supp. 2008).

permitted cities “to acquire, clear and sell blighted urban property using tax funds to remove blight”<sup>7</sup> – was initially designed to “eradicate blight or, in the alternative, halt the advance of blight.”<sup>8</sup> TIF permits a municipality to abate certain property taxes by freezing the property tax value of the subject redevelopment area at a predevelopment level.<sup>9</sup> Thus, redevelopment can be undertaken without raising the general tax burdens.<sup>10</sup> In Missouri, the Real Property Tax Increment Allocation Redevelopment Act<sup>11</sup> requires a finding that “the redevelopment area on the whole is a blighted area, a conservation area, or an economic development area.”<sup>12</sup>

Developers have increasingly viewed economic development incentives, such as TIF, as *de rigueur* for certain kinds of large scale redevelopment.<sup>13</sup> Securing these incentives has become an integral part of most development projects, and in Kansas City, Missouri, the rate at which they are approved has increased exponentially since the TIF Commission was established in 1982. Only “seven TIF plans were approved between 1982 and 1991[;] eighteen plans were approved between 1992 and 1997.”<sup>14</sup> By 2008, the TIF Commission of Kansas City reported more than fifty active TIF redevelopment projects.<sup>15</sup> Because developers are reluctant to undertake large scale or even small scale redevelopment without the benefit of TIF or other like incentives, a finding of blight has become almost ubiquitous where redevelopment occurs. For this reason, very little economic redevelopment occurs without the application of some kind of economic development incentive – incentives that require a finding that the redevelopment area is blighted or in danger of becoming blighted.<sup>16</sup> By extension, therefore, most redevelopment in Missouri is predicated upon a finding of blight.<sup>17</sup>

7. Richard A. King, *The Continuing Battle to Curb Urban Blight and the Use of Economic Activity Taxes*, 51 J. MO. B. 332, 332 (1995).

8. Josh Reinert, Comment, *Tax Increment Financing in Missouri: Is It Time for Blight and But-For to Go?*, 45 ST. LOUIS U. L.J. 1019, 1020 (2001).

9. *Id.* at 1026.

10. *Id.* at 1025.

11. MO. REV. STAT. §§ 99.800-.865.

12. Reinert, *supra* note 8, at 1020 (quoting MO. REV. STAT. § 99.810.1).

13. *Id.* at 1024.

14. *Id.* at 1026.

15. See Economic Development Corporation Kansas City, TIF Plans & Amendments, [https://www.edckc.com/content/edc\\_agencies/tif/tif\\_plans\\_and\\_amendments/](https://www.edckc.com/content/edc_agencies/tif/tif_plans_and_amendments/) (last visited Feb. 20, 2009).

16. For instance, in Missouri, the application of TIF requires a finding that “[t]he redevelopment area on the whole is a blighted area, a conservation area, or an economic development area.” MO. REV. STAT. § 99.810.1(1). What constitutes blight is discussed *infra* note 47. A conservation area is defined as one in which fifty percent or more of the buildings are at least thirty-five years old and may become blighted because of certain specific conditions. ECONOMIC DEVELOPMENT INCENTIVES, CITY OF KANSAS CITY MISSOURI 1 (2004), <http://www.kcmo.org/planning/econdev/IncentiveBooklet04.pdf>. An economic development area is an area

Legislation that bans the use of eminent domain for purely economic development without addressing head-on the issue of blight provides property owners little effective protection from condemnation. Defining blight presents a difficult balancing problem for legislators – the definition should be objective and specific enough that it can be applied consistently but not so stringent that it would strangle redevelopment in economically disadvantaged areas. Indeed, one commentator has noted that defining blight is more an art than a science.<sup>18</sup> The problem of statutorily defining blight, however, cannot be ignored. To effectively address eminent domain abuse and afford some meaningful protections to the property owner in a process that historically favors the developer, legislators must take a hard look not only at how blight is defined and applied, but also at the mechanism by which a targeted property owner can challenge a blight declaration.

To that end, this section presents two approaches to eminent domain reform in Missouri. First, the legislature must redefine blight, balancing the need for flexibility with a more objective and concrete application of the standard. Second, legislation must provide for some form of meaningful judicial review of a blight declaration when challenged by the property owner. Under the current deferential standard, judicial review of a blight declaration is rarely more than a rubber stamp of the finding. By providing a more objective blight standard under which a court can apply the law to the facts, potential abuse of the awesome power of eminent domain can be stopped early in the process, thereby affording meaningful recourse to property owners faced with potential condemnation of their property.

The tremendous power of the government to take private property is limited by two clauses in the Fifth Amendment – reiterated in state constitutions – requiring that such acquisitions must be for a public purpose and that the property owner must receive just compensation. These limitations have been the subject of intense debate, both within and without the judicial process.

Traditionally, most states, in interpreting their own constitutions, defined public use as requiring public ownership or public access.<sup>19</sup> Under this approach, eminent domain may only be utilized to appropriate land for a post office, highway, or airport, for example.<sup>20</sup> Over time, however, the traditional approach to public use has been dramatically relaxed.

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that fails to meet the criteria for the other two areas, but in which redevelopment is in the public interest to prevent economic development moving to another state or to result in increased employment or enhancement of the tax base. *Id.*

17. As will be discussed *infra* text following note 61 and preceding note 64 the amorphous nature of most definitions of blight encompass almost any property.

18. Dana, *supra* note 3, at 370.

19. Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 12 (2006).

20. *Id.* at 2-3.

The most dramatic relaxation occurred with the advent of urban renewal programs in the first half of the twentieth century.<sup>21</sup> This relaxation was an offshoot of the changing legal definition of public use and the corresponding expansion of what activities could support an eminent domain action.<sup>22</sup> Public use became synonymous with public purpose.<sup>23</sup> To constitute a public benefit, property need not be available to the general public, nor the community, or even any considerable portion of the public, for direct use or enjoyment.<sup>24</sup> Rather, any private use that will ostensibly provide a public benefit, such as an enhanced tax revenue base, is encompassed by the relaxed definition of public use.<sup>25</sup> The expanded public use approach permitted developers to use eminent domain to accumulate real property to build a stadium, a factory, or in some places, even a casino.<sup>26</sup> Thus, the Public Use Clause of the Fifth Amendment no longer places meaningful limitations on the use of eminent domain for private development.

As the limits of the public use requirement were increasingly expanded, states enacted redevelopment statutes that provided for the condemnation of real property for private development. In light of the burgeoning urban renewal pressures, all but three of the seventeen states that examined the constitutionality of redevelopment statutes upheld the use of eminent domain to condemn private property for private redevelopment.<sup>27</sup> Thus the stage was set for an expanded use of the government power of condemnation for private redevelopment.

The first such redevelopments involved slum clearance for housing – ostensibly a laudable public purpose – followed by slum clearance for commercial or industrial development.<sup>28</sup> In more recent years, however, redevelopment has increasingly involved the “clearance of sound property for arguably more desirable private development.”<sup>29</sup>

21. Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 415 (1983); see also Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 2 (2003) (“The urban renewal program played a critical role in the demise of the Public Use Clause.”).

It should be noted here that, as will be discussed *infra* Parts II.A.1-2, this era also saw the development of the rhetoric of blight, a rhetoric that contributed to the expansion of public use and eminent domain.

22. SAMUEL R. STALEY & JOHN P. BLAIR, *EMINENT DOMAIN, PRIVATE PROPERTY, AND REDEVELOPMENT: AN ECONOMIC DEVELOPMENT ANALYSIS* 8 (2005), available at <http://www.reason.org/ps331.pdf>.

23. Kelly, *supra* note 19, at 3.

24. Pritchett, *supra* note 21, at 12.

25. Kelly, *supra* note 19, at 2-3.

26. *Id.* at 3.

27. Pritchett, *supra* note 21, at 38.

28. Mansnerus, *supra* note 21, at 423.

29. *Id.* Downtown stakeholders enthusiastically welcomed early redevelopment. Indeed, these “stakeholders were eager for older cities to be made more attractive for

In light of eminent domain's new role as a municipal marketing tool<sup>30</sup> and the public's backlash against an eviscerated Public Use Clause, blight has become the primary vehicle by which municipalities and private developers can redistribute property. Any protections from eminent domain abuse must stem from a redefinition of blight and an opportunity for property owners to obtain meaningful review of blight declarations.

### 1. The Rhetoric of Blight

The Chicago School of Sociology first employed the term "blight" to describe urban decline in the early twentieth century,<sup>31</sup> in an approach that analogized the urban landscape to an organic, living organism.<sup>32</sup> A blighted area was viewed both as the source and the result of the crime and the economic and spiritual poverty that infected the living city like a disease.<sup>33</sup> In the new parlance, blight was "a disease that threatened to turn healthy areas into slums,"<sup>34</sup> and thus, "the Chicago School posited that any area on its way to becoming a slum was 'blighted.'"<sup>35</sup> Advocates of urban renewal were reluctant to define this threat in anything more than vague and amorphous terms, employing the rhetoric of blight to promote the reorganization of urban property ownership, arguing that certain properties inherently threatened the future of the city.<sup>36</sup> Blight was not confined to particular structures –

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the types of people who had been fleeing to the suburbs starting back in the 19th century." Lefcoe, *supra* note 2, at 816. "Their idea was to clear out poor minority neighborhoods on the fringe of fading downtowns and convert these areas into buildable sites that could compete with the rapidly expanding suburbs for shiny new development, thriving businesses, and affluent residents." *Id.* at 816-17. Ironically, as redevelopment has expanded, and downtown redevelopment has targeted business districts as well as residential areas, these same stakeholders have been the target of eminent domain in order to replace older businesses with more attractive development.

30. See Dean Starkman, *Take and Give: Condemnation Is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1.

31. Pritchett, *supra* note 21, at 16.

32. *Id.*

33. *Id.*

34. Eric R. Claeys, *Don't Waste a Teaching Moment: Kelo, Urban Renewal, and Blight*, 15 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 14, 15 (2005).

35. Pritchett, *supra* note 21, at 3; see *Berman v. Parker*, 348 U.S. 26, 33 (1954) ("The misery of housing may despoil a community as an open sewer may ruin a river.").

36. *Berman*, 348 U.S. at 34-35. Pritchett also points out that "[b]y elevating blight into a disease that would destroy the city, renewal advocates broadened the application of the Public Use Clause and at the same time brought about a reconceptualization of property rights." Pritchett, *supra* note 21, at 3. Property rights were no longer "rights protected by a property rule," but were increasingly "rights

buildings that violated housing codes or bore other “indicia of dilapidation”<sup>37</sup> – but instead, characterized entire neighborhoods or even greater areas. Blight was more than a description of the physical condition of the land. Rather, tagging a property as blighted undermined the integrity of a parcel of real estate, suggesting that “blight” was “an intrinsic characteristic of the land, rather than a condition upon . . . the land that constitutes a public nuisance.”<sup>38</sup>

## 2. Blight Defined – However Vaguely

Although renewal advocates may assert that “blight results in condemnation,” the more accurate statement would be that “the availability of condemnation results in ‘blight.’”<sup>39</sup> Functionally, blight has become an effective tool for redevelopment in any area of the municipality that the government planners, or the chosen developer, deemed such development necessary. To target an area for redevelopment within the context of a redevelopment plan, and permit the use of most economic development incentives such as TIF, the municipality needs to create a redevelopment area by declaring the area blighted. Such a finding is generally not difficult to obtain, given the vague statutory standards of blight and the availability of consultants willing “to find blight where the agency wants it to be found.”<sup>40</sup> Thus, commercial developers can ask government planners to employ blight

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protected only by a liability rule.” Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833, 842 (2007).

Indeed, the redevelopment solution mandated by the urban disease model was conceptually consistent with the expanding nature of public use. By eradicating deteriorating areas that threatened the viability of the urban organism, redevelopment of blight always constituted an acceptable public use. See MO. CONST. art. I, § 26. The language of blight was the catalyst to the reorganization of property rights within the urban setting.

37. Dana, *supra* note 3, at 377.

38. Eagle, *supra* note 36, at 843. This distinction is important in that the traditional approach to nuisance was abatement, not condemnation. If “blight” could be eradicated by traditional abatement, the “necessity” of condemnation of that property for the health of the urban organism was undermined. In characterizing blight as a characteristic *of* the land, not *on* the land, renewal advocates suggested that only the strongest response – transferring the property to one who could eradicate the condition completely with new development – was appropriate in light of the significant threat blight posed to the urban ecology. The declaration of blight permits the immediate condemnation of the property, within certain procedural limitations, without requiring that the neighborhood be given the opportunity to revive or abate the nuisance.

39. *Id.* at 840.

40. Lefcoe, *supra* note 2, at 821. One commentator notes that there are no discernable limits on how far “blight” can be stretched under most states’ definitions. Dana, *supra* note 3, at 369.



– an accepted basis upon which to redistribute land subject to the fair compensation requirement – to condemn property that the developer would otherwise have to attempt to purchase on the private market at a higher cost.<sup>41</sup>

The definition of blight, and the subsequent application of the term, has become integral to a municipality's ability to site redevelopment. Defining blight is something of an art form,<sup>42</sup> and most definitions of blight are so vague as to be meaningless – indeed, so broad as to encompass almost any parcel of real property.<sup>43</sup> A vague blight standard has its roots in many causes, but two causes seem to predominate. Legislators must walk a tight-rope between a standard general enough to permit flexibility of application in promoting redevelopment and a standard that protects private property rights from abuse.

To establish that a proposed redevelopment area is blighted, the condemning authority must show that the area is characterized by one or more factors that are detrimental to the safety, health, morals, or welfare of the community.<sup>44</sup> Several states<sup>45</sup> require only one factor to find an area blighted. Most states, however, employ a multi-factor, multiple impact test requiring a finding that “blight factors substantially impair or arrest sound growth, retard the provision of housing accommodations, or constitute an economic or social liability and also constitute ‘a menace to public health, safety, or welfare.’”<sup>46</sup> Under this test, the blight factors lead to more than one adverse impact and an overall adverse condition.

An area may be declared blighted where the presence of one or more factors (1) “retards the housing accommodations;” (2) “constitutes an economic or social liability;” or (3) constitutes “a menace to the public health, safety, morals, or welfare.”<sup>47</sup> Missouri, like a majority of the states,

41. Claeys, *supra* note 34, at 16.

42. Dana, *supra* note 3, at 370.

43. As noted on the Missouri Ombudsman for Property Rights website: “You may have the ‘garden of the month,’ the ‘yard of the year,’ and the ‘home of the decade’ and still be considered in a ‘blighted’ area.” Office of the Ombudsman for Property Rights, Frequently Asked Questions, <http://www.eminentdomain.mo.gov/faq.htm> (last visited Feb. 20, 2009).

44. James S. Burling, *Blight Lite*, SH053 ALI-ABA COURSE OF STUDY 43, 48-49 (2003). Some states require a finding that one or more factors contribute to the inability to develop the property or contribute to an adverse economy. *Id.* These states include: Delaware (must show a “social or economic liability”), New York (must show that “but for” redevelopment the factors present would jeopardize the economic well-being of the people), Louisiana (conditions prevent development of the blighted area into “predominantly housing”), and South Dakota (blight must “impair values or prevent a normal use or development of property”). *Id.* at 49.

45. Minnesota, Michigan, New Hampshire, Tennessee, Utah, Virginia, and Wisconsin. *Id.* at 48.

46. *Id.* at 50 (emphasis omitted).

47. MO. REV. STAT. § 99.805(1) (Supp. 2008). Missouri defines blight in three different statutes. The definition employed for TIF, MO. REV. STAT. §§ 99.800-.865

employs a multiple factor, multiple impact test. The blight definition employed by Missouri's TIF statute provides that a "blighted area" is one in which:

by reason of the predominance of defective or inadequate street layout, unsanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use . . . .<sup>48</sup>

Most states define blight utilizing "veritable laundry lists of factors that collect concepts from different ideas and uses of blight over the course of its early development, the mid-century urban renewal movement, and modern incarnations."<sup>49</sup> Many, if not most, of the factors that can lead to a blight declaration are left undefined or defined so broadly as to give little guidance as to the actual conditions to which they refer.<sup>50</sup> Such blight definitions provide little or no concrete bases upon which a blight determination can be objectively justified. A blight declaration need only cite one or more

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(2000 & Supp. 2008), and Land Clearance for Redevelopment, MO. REV. STAT. §§ 99.300-660 (2000 & Supp. 2008), are nearly identical. These chapters define a blighted area as one which:

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

MO. REV. STAT. § 99.320(3) (2000); MO. REV. STAT. § 100.310(2) (2000). Chapter 353, Urban Redevelopment Corporations, defines a blighted area as:

that portion of the city within which the legislative authority of such city determines that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration have become economic and social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes . . . .

MO. REV. STAT. § 353.020(2) (Supp. 2008).

48. MO. REV. STAT. § 99.805(1).

49. Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177, 197 (2007).

50. For instance, in Missouri, the blight factors include "unsanitary or unsafe conditions" without reference to whether these conditions must constitute violations of health or buildings codes, "deterioration of site improvements" without giving any guidance to the extent of such deterioration to constitute incipient blight, and even more broadly, "conditions which endanger life or property by fire and other causes." MO. REV. STAT. § 99.805(1).

conditions of the property that, in the consultant's opinion, fall under the expansive category of "unsafe or unsanitary conditions."<sup>51</sup> The condemning agency need only determine that these conditions constitute a menace to the public health, safety, morals, or welfare of the community to justify condemnation for blight. Just as beauty is in the eye of the beholder, blight, under such broad constructs, is evidently in the eye of the consultant.

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51. In this sense, blight declarations are both absolute and narrowly focused in that they only look to detrimental conditions without weighing these conditions against the benefits or advantages of the current state of the proposed redevelopment area. For instance, the West Edge redevelopment district, an area off of the thriving shopping and commercial district of Kansas City, Missouri, the Country Club Plaza, was created to "reduce or eliminate blight and enhance the tax base." Kansas City, Mo., Ordinance No. 030397 (Apr. 17, 2003). The properties that were acquired and demolished under the plan included apartment buildings that provided affordable housing in close proximity to both retail and commercial centers. Such housing was of limited availability in that area.

To sustain the finding that the redevelopment area was blighted, a blight study was prepared. The ordinance recited the findings of the study, including standing water in a parking structure and exposed wiring in the basement of one of the buildings, to justify the blight declaration for the entire area and the creation of the redevelopment district in this high-end neighborhood. Kansas City, Mo., Ordinance No. 030397 (Apr. 17, 2003).

However, any benefit from demolishing affordable housing and replacing it with office and retail space, including a "boutique hotel," solely for the purpose of enhancing the tax base was not weighed against the loss of that housing. Housing provides the footprint of a neighborhood, affecting job and transportation choices. Long-term development is frequently contingent upon the housing stock available. When redevelopment projects disregard the long-term cost of the lost housing in favor of short-term tax base enhancement, the long-term viability of the neighborhood may be threatened.

This is the sense in which redevelopment purported to eradicate blight employs a very narrow analysis to establish the basis upon which broad, long-term changes are imposed upon an area. Under most blight tests, certain conditions of a particular property provide the basis upon which the parcel is determined to be blighted, regardless of whether those conditions could be abated without condemnation or whether the property confers benefits on the area. A property found to be blighted may have provided such socially laudable benefits as providing affordable housing or, in the case of a neighborhood gas station for instance, services to the neighborhood and a livelihood for a family. Nevertheless, the cited conditions of the property are frequently sufficient to sustain a finding that the property is blighted. This "blighted" parcel may then be found to "infect," or even potentially infect, neighboring non-blighted parcels – sustaining a finding that "the area as a whole is blighted" – although under most blight definitions, any parcel of real property could be determined to be blighted.

For an excellent discussion of blight definitions, the impact of "social liability," and the quantum of proof necessary to condemn, see Justice Laura Denvir Stith's concurring opinion in *Centene Plaza Redevelopment Corp. v. Mint Props.*, 225 S.W.3d 431, 435 (Mo. 2007) (en banc).

Generally, blight factors fall into several broad categories. The first refers to the condition of the structures, conditions that are generally within the property owner's control. Usually left undefined within the statutes,<sup>52</sup> these factors may include dilapidation, obsolescence, overcrowding, lack of ventilation, lack of light, lack of sanitary facilities, failure to install utilities, abandonment, defective or unusual conditions of title, property tax delinquency, building or health code violations, and conditions that endanger life or property by fire.<sup>53</sup> Some blight definitions employ even broader concepts, such as "unsanitary or unsafe conditions" or "deterioration,"<sup>54</sup> without defining the concepts within the statute or providing any kind of test by which these conditions may be determined.

Second, many blight definitions include factors that are not within the property owner's control, such as excessive land coverage, deleterious land use, obsolete layout, lack of community planning, irregularity of lot size, inadequate street layout, excessive traffic,<sup>55</sup> "improper or inefficient division or arrangement of lots,"<sup>56</sup> or incompatible mixed use character.<sup>57</sup> These factors are under the control of, and result from, the failure of the municipalities' subdivision or zoning controls.

Third, blight factors may refer to endemic conditions of urban property – such as "age of [the] structures" or "diverse ownership" – that characterize urban parcels but are, likewise, not within the property owner's control.<sup>58</sup> When a municipality bases its blight condemnation solely on these factors, the property owner, who may be in full compliance with local building and health codes, is forced to bear the cost of the municipality's regulatory failures.<sup>59</sup>

Economic factors are frequently the basis of a blight declaration. These economic blight factors include "high business vacancy rates, an excess of

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52. Lefcoe, *supra* note 2, at 824.

53. See Burling, *supra* note 44, at 48-52.

54. See, e.g., MO. REV. STAT. § 99.805(1).

55. Michael Shultz notes that "[b]light determinations based on street design and traffic congestion generally arise only when a state has enacted a detailed definition of conditions that constitute blight and has included these conditions within that statutory definition." Michael M. Shultz, *Urban Redevelopment and the Elimination of Blight: A Review of Missouri's Chapter 353 and Related Statutes in Other States*, ALI-ABA COURSE OF STUDY 1667, 1686 (1989). However, the first factor in Missouri's blight definition refers to "defective or inadequate street layout," but the statute does not define this term or provide any guidance as to what constitutes defective or inadequate layouts. See MO. REV. STAT. § 99.805(1).

56. See Shikha Dalmia, *Blight Loophole Could Allow Cities to Grab Homes, Land*, DETROIT NEWS, Nov. 3, 2005, at 19A, available at [http://www.reason.org/commentaries/dalmia\\_20051103.shtml](http://www.reason.org/commentaries/dalmia_20051103.shtml).

57. See Shultz, *supra* note 55, at 1688-89.

58. *Id.* at 1683, 1689.

59. Lefcoe, *supra* note 2, at 824.

liquor stores or adult-oriented businesses, or stagnant property values.”<sup>60</sup> In some states, blight declarations can be predicated on a finding that the property is being economically underutilized, “not fully productive,” or, a conclusory phrase, “in need of redevelopment.”<sup>61</sup>

As earlier discussed, many legislatures, including that of Missouri, responded to the outcry over *Kelo* by providing that the exercise of eminent domain reform for purely economic purposes was not a public purpose.<sup>62</sup> But under many of these same states’ blight definitions, a finding that property is economically underutilized may be the basis, or part of the basis, for a blight condemnation. As noted above, blight eradication is always a public purpose. Thus, by couching an economic condemnation in terms of blight, the developer and the condemning agency can still exercise eminent domain to take property – a taking otherwise prohibited by the plain language of many eminent domain statutes. As such, even where a taking would otherwise be prohibited by clear statutory language, those same statutes provide an open back door to achieve the same result.

The “laundry list” nature of most blight definitions, replete with undefined or at best amorphous terms, enables developers and condemning agencies to liberally paint virtually any property with the broad brush of blight. The breadth and inexact nature of these definitions do not provide property owners with any effective protection from eminent domain abuse in the name of blight eradication.

As municipalities seek large-scale redevelopment through economic incentives, they must be able to assemble large contiguous tracts of land to site the development. Since many states, including Missouri, have prohibited the use of eminent domain solely for economic development,<sup>63</sup> the city’s governing body must find that the area *as a whole* is blighted. Missouri statutes only require that a preponderance of the parcels in the area are blighted, whereupon the municipality “may proceed with [the] condemnation of any parcels in [the] area.”<sup>64</sup> The governing body is not required to make any explicit findings as to the inclusion of non-blighted properties.<sup>65</sup> Rather,

60. *Id.* at 820.

61. *Id.* at 824.

62. *See, e.g.*, ALA. CODE § 11-47-170(b) (Supp. 2007) (“a municipality or county may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue”); MO. REV. STAT. § 523.271.1 (Supp. 2008) (“No condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes.”); TEX. GOV’T CODE ANN. § 2206.001(b)(1)-(2) (Vernon 2008) (prohibiting “the use of eminent domain if the taking . . . confers a private benefit” or “is for a public use that is merely a pretext to confer a private benefit”).

63. *See* MO. REV. STAT. § 523.271.1.

64. MO. REV. STAT. § 523.274.1 (Supp. 2008).

65. *Tierney v. Planned Indus. Expansion Auth. of Kansas City*, 742 S.W.2d 146, 151 (Mo. 1987) (en banc). Contrast Missouri’s approach with that of Minnesota, requiring that more than fifty percent of the structures be “structurally substandard” to

the governing body must conclude only that the inclusion of all the parcels in the redevelopment area, blighted and non-blighted, is “reasonably necessary for the redevelopment of [that] area.”<sup>66</sup> Accordingly, “a blighted *area* may include parcels which are not themselves blighted if these parcels are necessary to provide a tract of sufficient size or accessibility to attract redevelopers.”<sup>67</sup>

The boundaries of the redevelopment area are not currently circumscribed by the extent of blight, but rather, the blighted area is circumscribed by the area necessary to site the redevelopment. Indeed, in most states, even vacant land can be taken, clearly not blighted in any traditional sense, if it is reasonably necessary to the redevelopment and included within the general blighted area.<sup>68</sup> A finding of blight quickly expands from specific conditions of a parcel’s structure that qualify as blight, to the entire parcel, or even to an entire area, if a preponderance of the properties are individually found to be blighted.<sup>69</sup>

The procedural protections provided in the eminent domain statutes are simply not enough to protect a property owner from potential eminent domain abuse.<sup>70</sup> Without directly addressing the vague and expansive nature of how blight is defined and applied, the ills sought to be solved will never be corrected.

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declare the area blighted, MINN. STAT. ANN. § 117.025.6(2) (West Supp. 2009), or that of Iowa, requiring that at least seventy-five percent of the parcels be found blighted before the redevelopment district as a whole can be found blighted. IOWA CODE ANN. § 6A.22.2(b)(5)(a) (West 2008).

66. *Tierney*, 742 S.W.2d at 151.

67. *Id.* (emphasis added).

68. Shultz, *supra* note 55, at 1694.

69. *See supra* text accompanying notes 42-50, 64-65. Such a requirement does little to limit the expansive use of blight declarations for economic development. Where the blight definition is so broad and definitionally vague that it provides no threshold of the quantum of adverse conditions to establish blight, identifying a property that cannot be found blighted in any way is much more difficult than finding properties, no matter how attractive, that do qualify as blighted.

70. *See Dana, supra* note 3, at 374-78. The bottom line is that while some states impose procedures limiting how redevelopment authorities may condemn property, these procedures provide little protection for property owners. Definitions of “blight” are generally vague enough to allow condemnation of almost any property. Public hearing rules do not provide property owners with meaningful opportunities to object, but create various traps and tricks that bar judicial review. Timothy Sandefur, *The “Backlash” So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 725.

## B. Recommendations

### 1. Redefine Blight in Concrete and Measurable Terms

The first step to rebalancing the scales between government's eminent domain power and private property rights is to address how blight is defined. Some states have engaged in meaningful eminent domain reform and redrafted their blight statutes to provide more concrete tests for blight and more substantive definitions for the conditions that lead to blight.

As a preliminary matter, the exercise of the municipality's eminent domain power should always be a last resort, rather than a hammer a developer can hold over a reluctant property owner.<sup>71</sup> Although most acquisitions for redevelopment are voluntary and very few condemning agencies are forced to resort to condemnation proceedings, these acquisitions nevertheless take place under the shadow of eminent domain.<sup>72</sup>

Some commentators posit that property-specific factors within the property owner's control are the only basis upon which any blight condemnation should be predicated. Thomas Merrill and Henry Smith note that when a property owner lets his or her property deteriorate below minimally acceptable community standards, that property owner is "morally blameworthy in a way that the owner of nonblighted property is not, namely because the owner of blighted property is imposing harm on neighboring properties. The taking of blighted property, therefore, can serve as an appropriate collective response to harm-causing or immoral behavior."<sup>73</sup> George Lefcoe argues that every line of the blight test should answer the property owner's question, "Why me?"<sup>74</sup> As is discussed below, such a specific, actionable standard is a predicate to meaningful eminent domain reform.

The approach taken by two states is particularly instructive if Missouri is to substantially address a meaningful statutory definition of blight. Pennsylvania has one of most stringent blight tests in the nation.<sup>75</sup> Under the Pennsylvania statute, private property cannot be taken for private enterprise unless that enterprise fits into a very narrow set of exceptions.<sup>76</sup> While Pennsylvania has retained a blight loophole, blight is very narrowly defined as conditions presenting a danger to public health or safety.<sup>77</sup>

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71. Claey's, *supra* note 34, at 15.

72. Lefcoe, *supra* note 2, at 839, 842, 848.

73. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1883 (2007).

74. Lefcoe, *supra* note 2, at 819.

75. Sandefur, *supra* note 70, at 760-61.

76. 26 PA. CONS. STAT. ANN. § 204 (West Supp. 2008).

77. 26 PA. CONS. STAT. ANN. § 205 (West Supp. 2008). For the purposes of taking a single property for redevelopment, the physical condition of the property is the prime consideration in determining if a property is blighted. The definition

Florida,<sup>78</sup> on the other hand, completely closed the blight loophole in 2006 when it enacted legislation lauded as “one of the nation’s strongest eminent domain reform bills.”<sup>79</sup> Florida’s legislation clearly stated that “the prevention or elimination of a slum area or [a] blighted area . . . and the preservation or enhancement of the tax base are not public uses . . . and do not satisfy the public purpose requirement.”<sup>80</sup>

For the citizens of Missouri to enjoy meaningful eminent domain reform and feel confident in their private property rights, the legislature must address the broad, and virtually meaningless, definition of blight upon which much eminent domain activity is predicated. Like Pennsylvania, Missouri should define vague terms such as “dilapidation” or “obsolescence”<sup>81</sup> in sensible,

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includes properties that: (1) are a “nuisance at common law” or “declared a public nuisance [for violations of] the municipality housing, building, plumbing [or] fire . . . codes”; (2) are an “attractive nuisance to children” because of the physical condition of the property; (3) have been determined to be “unfit for human habitation” by the responsible government agency; (4) have structures that are “fire hazards or [are] otherwise dangerous to the safety of persons or property”; (5) have structures without necessary utilities; (6) are vacant parcels that have been neglected and has become a haven for trash and rodents; (7) have been “tax delinquent for a period of two years”; (8) have “not been rehabilitated within one year of the receipt of notice to rehabilitate from the appropriate enforcement agency”; (9) have been abandoned according to the statute’s definition of abandoned; (10) have “defective or unusual conditions of title or no known owners”; or (11) constitute an environmental hazard. *Id.*

78. Florida was the source of some of the most egregious eminent domain abuse. See *Zamecnik v. Palm Beach County*, 768 So. 2d 1217, 1218 (Fla. Dist. Ct. App. 2000) (per curiam). As reported by S. William Moore in “*Blight*” as a Means of Justifying Condemnation for Economic Redevelopment in Florida, 35 *STETSON L. REV.* 443, 453 (2006):

Consider, for example, the case of homeowners in West Palm Beach, Florida, whose Spanish mission-style house sat adjacent to a proposed county golf course. The golf course project was part of a larger county redevelopment effort on land near Palm Beach International Airport. The homeowners, John and Gwendolyn Zamecnik, did not want to sell their classic home. Palm Beach County condemned the property, won a contested taking, and proceeded to turn the Zamecniks’ home over to the golf course manager to use as his home.

79. Sandefur, *supra* note 70, at 762.

80. *FLA. STAT. ANN.* § 163.335(7) (West Supp. 2009).

81. Although not addressed substantially in this article, Missouri provides for two additional forms of redevelopment districts. The first, a “conservation area,” is defined in *MO. REV. STAT.* § 99.805(3) (Supp. 2008). A conservation area is found where fifty percent of the improved area is at least thirty-five years old and where the governing body finds that, although the “area is not yet . . . blighted,” it is, nevertheless, “detrimental to the public health, safety, morals, or welfare and may become a blighted area” based on any three of fourteen factors listed. *Id.* (emphasis added). Again, the conservation area factors, like blight factors, use terms subject to broad interpretation that are left undefined in the statute. The author would note, additionally, that the first three conservation area factors – “dilapidation,”



public health and nuisance terms or eliminate them altogether.<sup>82</sup> Every line of Missouri's definition of blight should answer the property owner's question, "Why me?" by pointing to defects left uncured in the subject property.<sup>83</sup> Definitions linked to applicable housing and health codes provide a concrete basis upon which property owners can evaluate their properties and reviewing courts can make objective blight determinations. Moreover, for residential property condemnation, the governing body should be required to show that the property suffers from actual or imminent blight and has been the subject of attempted abatement.

Eliminating vague and highly subjective blight factors, redefining the remaining factors in concrete terms linked to traditional notions of nuisance and health and building codes for existing blight, while limiting the geographic and temporal effects of a blight declaration, are just the first steps to meaningful eminent domain reform.<sup>84</sup> For all intents and purposes, once a property has been declared blighted by the governing body, the game is over for the Missouri property owner reluctant to sell; the only issue left to be resolved is the amount of "just compensation" the property owner will receive. In order to ensure that true blight – and not just conveniently asserted blight – is the predicate for a taking, Missouri must also provide

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"obsolescence," and "deterioration" – are all shades of the same description. Thus, the governing body need only find one condition that can be described by these three terms to justify the exercise of eminent domain.

82. Dalmia, *supra* note 56.

83. Lefcoe, *supra* note 2, at 819.

84. Missouri should look, additionally, at its provisions for "conservation areas" and "economic redevelopment areas," both of which are predicated on potential or incipient blight or purely economic considerations. The Supreme Court of Ohio, in *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), discussed redevelopment criteria based on the potential for blight. Specifically, the court addressed predicating eminent domain on a finding that an area is "deteriorating," a term left undefined in the statute. *Id.* at 1144-45. The court noted that the factors "of a deteriorating area describe[] almost any city" and, therefore, such a determination was suspect. *Id.* at 1144. The court decried the "host of subjective factors that invite ad hoc and selective enforcement" upon which a condemning agency could determine that an area "[was] in danger of deteriorating into a blighted area." *Id.* at 1145. The court invalidated the "deteriorating area" standard, holding that the standard "[was] void for vagueness and offends due-process rights because it fails to afford a property owner fair notice and invites subjective interpretation." *Id.* at 1146. "[T]he term 'deteriorating area' [could not] be used as a standard for a taking, because it inherently incorporates speculation as to the future condition of the property into the decision on whether a taking is proper rather than focusing that inquiry on the property's condition at the time of the proposed taking." *Id.* The author would suggest that the Ohio analysis – finding that a taking may only be predicated on the state of the property at the time of the taking – is a standard Missouri should well consider in any meaningful eminent domain reform. This catchment of a pre-blight category for development may well be a subject for further examination and evaluation.

these property owners with meaningful judicial review of the blight declaration.

## 2. Provide Meaningful Judicial Review of Blight Determinations

Before *Berman v. Parker*,<sup>85</sup> courts “played a significant role in reviewing government condemnations.”<sup>86</sup> With *Berman*, however, the Supreme Court adopted a deferential approach to the exercise of eminent domain.<sup>87</sup> Under this approach, reiterated in *Kelo*,<sup>88</sup> courts routinely defer to the governing body’s decision in eminent domain actions. This approach was the result of a change in the view of personal property rights that began at the turn of the twentieth century when “federal law began to de-emphasize rights grounded in property ownership.”<sup>89</sup> During the nineteenth century, the law gave property rights equal status with personal rights such as speech, religion, and due process.<sup>90</sup> At the turn of the last century, however, federal law began to assume that property rights were “largely indistinguishable from one another for constitutional purposes.”<sup>91</sup> Increasingly, property rights were subject to a cost-benefit analysis – whether “the benefits of a particular project outweigh the rights of property owners to keep their [property]” – that renders “[t]he judicial standards for weighing property rights . . . far more arbitrary.”<sup>92</sup>

Meaningful review of a taking for redevelopment is out of reach for most property owners. Traditionally, the public use requirement was the vehicle by which property owners challenged a taking for redevelopment. However, as discussed above, the Public Use Clause has been virtually eviscerated by recent Supreme Court decisions.<sup>93</sup> Even where a property owner seeks to challenge a taking, the court may only reverse a blight determination if the taking “reeks of cronyism, corruption, or favoritism, and

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85. 348 U.S. 26 (1954).

86. Pritchett, *supra* note 21, at 2.

87. *Id.* at 2.

88. 545 U.S. 469 (2005).

89. STALEY & BLAIR, *supra* note 22, at 9.

90. *Id.*

91. Mansnerus, *supra* note 21, at 430. Laura Mansnerus points out that such an approach disregards other dimensions of property ownership, such as “home and community, social and family ties, a way of life and . . . of livelihood.” *Id.* at 428. Moreover, ownership of real property has a distinct personal element, and is frequently an extension of basic personal choices. *Id.* at 430-31.

92. STALEY & BLAIR, *supra* note 22, at 9.

93. See, e.g., *Kelo*, 545 U.S. at 488-89 (“Just as we decline to second-guess the City’s considered judgments about the efficacy of its development plan, we also decline to second-guess the City’s determinations as to what lands it needs to acquire in order to effectuate the project.” (emphasis added)).

. . . is devoid of redeeming features serving the public good.”<sup>94</sup> In most states, Missouri included, the blight finding by the municipality will stand, absent a showing in court that the decision is “so arbitrary and unreasonable as to amount to an abuse of the legislative process.”<sup>95</sup>

Blight declarations are considered legislative determinations,<sup>96</sup> and, consequently, enjoy substantial deference from the courts. Legislative determinations are presumptively valid and conclusive absent a showing of fraud or suspect motive.<sup>97</sup> Given this deference, judicial review is generally limited to a procedural review to determine whether “the redevelopment project is consistent with an adopted land-use or development plan, the hearings and deliberations were open to the public, and a legal vote of the city council was approved.”<sup>98</sup> Under such review, the court “acknowledges its obvious, minimal duty to guard against procedural abuses”<sup>99</sup> but opts out of substantial review of the decision.

Because the judiciary confers such deference to a legislative declaration of blight and views the legislative action as presumptively valid, the burden is on the challenging property owner to show that the governing body’s decision was arbitrary, or induced by fraud, collusion or bad faith.<sup>100</sup> Where the governing body’s determination is “fairly debatable,” the finding of blight will be upheld<sup>101</sup> – a bar set so high that even the most affluent property owners have difficulty overcoming this presumption.<sup>102</sup>

Challenging a blight declaration involves great expense. The property owner may have to personally commission a blight study<sup>103</sup> at substantial cost and legal expense. Weighing the potential cost of an action challenging a blight determination against the limited potential of relief, and given the present deference the courts accord a legislative blight determination, most property owners are dissuaded from seeking judicial review. Indeed, most cases involving a challenge to a redevelopment district or a blight

94. Lefcoe, *supra* note 2, at 812.

95. Tierney v. Planned Indus. Expansion Auth. of Kansas City, 742 S.W.2d 146, 150 (Mo. 1987) (en banc).

96. *Id.* (“Whether a particular area is blighted . . . is a matter for the legislative body to resolve.”).

97. Mansnerus, *supra* note 21, at 438. On a similar note, Missouri case law specifically excludes citizen efforts through initiative or referendum on zoning changes in charter cities where the charter so forbids. *State ex. rel. Petti v. Goodwin-Raftery*, 190 S.W.3d 501 (Mo. App. E.D. 2006).

98. STALEY & BLAIR, *supra* note 22, at 9.

99. Mansnerus, *supra* note 21, at 438.

100. Allright Mo., Inc. v. Civic Plaza Redev. Corp., 538 S.W.2d 320, 324 (Mo. 1976) (en banc).

101. *Id.*

102. STALEY & BLAIR, *supra* note 22, at 8-9.

103. Lefcoe, *supra* note 2, at 821.

determination are brought by parties with substantial means.<sup>104</sup> Thus, most blight declarations, even those based on insubstantial or thin evidence, may go unchallenged.

Without providing for meaningful judicial review, even the most stringent blight standard is meaningless. In proposing a new standard for judicial review, this article simply echoes some of the recommendations of the Missouri Eminent Domain Taskforce (“the Taskforce”), appointed by executive order from Governor Matt Blunt in 2005.<sup>105</sup>

First, a legislative blight declaration must be subject to a full factual court hearing. Given the huge sums of money, the potential for political overreaching, and the important constitutional property rights at stake, a blight determination in the exercise of eminent domain for private redevelopment should require an in-depth determination that takes account of all relevant factors.

Second, the blight determination must be subject to heightened scrutiny. To that end, the court should not give a legislative determination of blight the high degree of deference other legislative enactments enjoy. The Taskforce recommended:

[T]here should be an appeals process where either a condemning authority or a landowner can file a declaratory judgment in the circuit court of the county where the property is located to obtain judicial review. The standard of review should be changed from the current standard to a *de novo* standard, which means that the courts would independently review the determination.<sup>106</sup>

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104. *See, e.g.*, *Clay County Realty Co. v. City of Gladstone*, 254 S.W.3d 859 (Mo. 2008) (en banc) (plaintiffs were the owners of a shopping center and an investment company); *Centene Plaza Redev. Corp. v. Mint Props.*, 225 S.W.3d 431 (Mo. 2007) (en banc) (plaintiffs were a consortium of Clayton real estate owners); *Tierney v. Planned Indus. Expansion Auth. of Kansas City*, 742 S.W.2d 146 (Mo. 1987) (en banc) (relators were owners of a large structure in downtown Kansas City); Appellant’s Reply Brief at 2, *Allright Props., Inc. v. Tax Increment Financing Comm’n of Kansas City*, 240 S.W.3d 777 (Mo. App. W.D. 2007) (No. WD 68406) (plaintiff was the owner of a substantial number of parking lots in Kansas City); *Mutual Auto Parks v. Kansas City*, 537 S.W.2d 820 (Mo. App. W.D. 1976) (plaintiffs were owners of parking lots and an investment company); *Land Clearance for Redev. Auth. v. Massood*, 526 S.W.2d 354 (Mo. App. W.D. 1975) (plaintiffs were real estate brokers who assembled commercial property).

105. MISSOURI EMINENT DOMAIN TASK FORCE, FINAL REPORT AND RECOMMENDATIONS OF THE MISSOURI EMINENT DOMAIN TASKFORCE (2005), available at <http://www.eminentdomain.mo.gov/documents/finalrpt.pdf>. Although the legislature chose to incorporate some of the Taskforce’s recommendations in its 2005 legislation, some of the most effective, and arguably, most difficult, recommendations were disregarded. These recommendations, as set forth in the Final Report of the Taskforce and reiterated in this article, are key to substantial, effective eminent domain reform. Hopefully, many of them will soon see the light of day.

106. *Id.* at 25.

At a minimum, the standard of judicial review of a blight determination should be changed from substantial evidence to a preponderance of the evidence, and the condemnor should bear the burden of proof, not the property owner.

The taking of non-blighted property as part of a redevelopment project should be pursued with great reluctance. The condemnor must be required to show more than just a “reasonable” necessity for the taking and that more than “a preponderance” of the properties in the redevelopment area are blighted. The legislature should set a minimum threshold of blighted properties in the redevelopment area, whether two-thirds or three-quarters, that must be met before non-blighted property is subject to eminent domain. Moreover, the condemnor should be required to show that the subject non-blighted property is “indispensable” to the project, rather than that it is “reasonably necessary” in a quantum of proof similar to the West Virginia standard.

### C. Conclusion

Absent a narrowing of the blight standard, the current broad brush approach to blight as codified in statute, and liberally interpreted by courts, will put few, if any, restrictions on the definitional, geographic, and temporal effect of a blight declaration. Under the current approach, an individual property owner can do little to limit his exposure to the risk of a taking when a municipality is determined to replace that property with other, more favored development. This relative powerlessness is reflected in the advice of the Office of the Ombudsman for Property Rights, an office created by Missouri’s eminent domain reform legislation that does nothing more than counsel concerned property owners to seek legal advice when faced with a condemnation proceeding.<sup>107</sup> Missouri must provide its citizens with more protections at the beginning of the process by redefining blight in more concrete terms and providing *de novo* judicial review of the blight declaration under a preponderance of the evidence standard.

## III. PRE- CONDEMNATION BLIGHT

This section proposes that fair compensation for a taking of private property include damages for the pall cast over the target property by the establishment of a redevelopment district<sup>108</sup> and the corresponding legislative

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107. Office of the Ombudsman for Property Rights, *supra* note 43.

108. At the outset, this section *does not* attempt to examine or address:

(1) The various available or proposed remedies suggested by appellate opinions or commentators, such as writs of prohibition, declaratory judgments, damages for inverse condemnation, consequential damages for lost income (including lost rents), or other types of tort actions raised by separate suit or by counterclaim;

declaration that property in the boundary area is blighted or about to be blighted. The sole thrust of this section is to propose a practical and economic method by which a property owner, reluctant to part with his or her real property, may receive fair compensation for any diminution of the property's value occurring between the time of the declaration of blight by the condemnor and the payment of the commissioner's award into the registry of the court.<sup>109</sup>

Even where the redevelopment process proceeds smoothly, there is often a significant delay between the governing body's declaration of blight and establishment of the project's boundaries and the actual taking. The question becomes, then, whether the property owner has suffered a diminution of the fair market value of the property during that interval. If the question is answered in the affirmative, and the property owner is able to show, by a necessary quantum of proof, the diminishment of value, then Missouri should afford that property owner recompense for that lost value.

The Missouri Constitution, article I, section 26 guarantees that private property "shall not be taken or damaged for public use without just compensation."<sup>110</sup> That the condemnor should not benefit from any sag in value during the interval between the condemnor's declaration of blight and the actual condemnation action is consistent with this constitutional statement. The unwilling property owner should not be made to bear the loss caused by the inevitable delays of the redevelopment project. The condemnor, and indeed the public that ultimately benefits from redevelopment, is better suited to absorb this loss. Because redevelopment is a long process even when it proceeds smoothly, a delay between the blight declaration and the actual taking is commonplace. Because delay is pervasive, the measure in the diminution of value should be part of the just compensation equation; the property owner should not be required to file a separate suit to recover for damages.

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- (2) Ulterior motives of condemning authorities – particularly cities and local governments – or of potential developers of land acquired by condemnation;
  - (3) Acts of a condemning authority such as denying building permits to the property owner or diminishing services and repair of sidewalks and streets;
  - (4) Untoward delay in the process of land acquisition following the announcement of the redevelopment plan, or the designation of blight caused either by the sloth of the condemnor or by unforeseeable forces or events.

Many Missouri cases, particularly the recent case, *Clay County Realty Co. v. City of Gladstone*, 254 S.W.3d 859 (Mo. 2008) (en banc), and cases from other state and federal courts, involve facts containing all or part of the above list.

109. The date the award is paid into the registry of the court is traditionally the date of taking.

110. MO. CONST. art. I, § 26.

Indeed, “[i]n large projects, such as urban renewal and public housing, several years may pass after the petition in condemnation is filed before the proceeding is completed.”<sup>111</sup> These delays frequently stem from the complexities involved in planning and financing such large-scale projects.<sup>112</sup> When a property is targeted as part of a redevelopment area, the market reaction may limit the property owner’s options as to the property.<sup>113</sup> Private investors will be reluctant to invest in or purchase the property given the shadow cast by imminent condemnation. Diminution in market value may be simply a by-product of the redevelopment project and the delay simply the by-product of the process itself.

Where the property owner has suffered diminution in value, regardless of how the property owner seeks redress, whether through suit in tort, nuisance, or inverse condemnation, the central question remains the same: What is just compensation under such circumstances? Professor Michelman argues that, in the face of such delay, compensation must be founded upon principles of fairness and social utility, and the property owner must be placed in the financial position he enjoyed before any delay ensued.<sup>114</sup> Otherwise, he contends, the public, which receives the benefit of a new development, does so at the expense of the individual property owner.<sup>115</sup> Even though the condemnee’s loss, as measured in damages, may be difficult to discover and to measure, the directive of just compensation so mandates.<sup>116</sup> The constitutional guarantee that no person may be deprived of his/her property without due process and the payment of just compensation<sup>117</sup> mandates that state governments ensure that individual property owners are not forced to bear burdens that should be borne by the public as a whole.<sup>118</sup> As Justice Holmes stated: “We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change . . .”<sup>119</sup>

Where the government designates property for condemnation, the condemning agency is intervening in private markets, essentially competing

111. Comment, *Delay, Abandonment of Condemnation, and Just Compensation*, 41 S. CAL. L. REV. 862, 862 (1968).

112. *Id.* at 863.

113. *Id.* at 862 (citing Donald W. Glaves, *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 U. CHI. L. REV. 319, 328 (1963)).

114. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1224 (1967).

115. *Id.* at 1223-24.

116. Comment, *supra* note 111, at 872.

117. U.S. CONST. amend. V.

118. 7 JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § G1.05 (3d ed. 2008) (citing *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1373 (Fed. Cir. 2004)).

119. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

with potential private parties in the real estate market.<sup>120</sup> Relative to private actors in the market, however, the government's power to take – upon a determination of public purpose and fair compensation – is a trump. When property is designated for condemnation, the governing body essentially freezes, or even depresses, the property's market value and eliminates potential buyers.<sup>121</sup> The market value inevitably decreases unless speculation pushes the market higher, a rare event. The net result, in most cases, is that the value of property in a designated redevelopment area will decrease in value over time, “while in the long-run the effect will usually be to increase the value of other property.”<sup>122</sup> “A particular valuation date will effectively determine where the burdens and benefits of the market effects will fall. If designation of property for condemnation depresses the market value of the property, who should assume the loss? A value date subsequent to designation will place the loss on the individual owner.”<sup>123</sup> The choice of the valuation date effectively determines who will bear the burden of any decline in value that occurs before the property is ultimately taken. In Missouri, and most other states, the date of taking is the date the commissioner's award is paid into the registry of the court.<sup>124</sup> The issue then becomes how to determine a fixed date of taking that would compensate the owner for the diminution in value following the declaration of intent to take.

In a nutshell, the concept now widely known as “condemnation blight”<sup>125</sup> refers to damages to land value suffered when a legislative authority causes a “cloud of condemnation” over a landowner's property by targeting that property for government acquisition through eminent domain.<sup>126</sup> When this “cloud of condemnation” becomes visible to the public – that is, when the possibility of government condemnation become publicly known – property values fall, tenants in residential or commercial properties

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120. Glaves, *supra* note 113, at 321.

121. *Id.*

122. *Id.*

123. *Id.*

124. MO. CONST. art. I, § 26; State *ex rel.* Mo. Highway & Transp. Comm'n v. Starling Plaza P'ship, 832 S.W.2d 518, 520 (Mo. 1992) (en banc).

125. Condemnation blight typically arises from urban redevelopment programs in metropolitan areas. State *ex rel.* Wash. Univ. Med. Ctr. Redev. Corp. v. Gaertner, 626 S.W.2d 373, 375 (Mo. 1983) (en banc), *abrogated by* Clay County Realty Co. v. City of Gladstone, 254 S.W.3d 859 (Mo. 2008) (en banc). Redevelopment programs generally begin with a statutory grant of the state's condemnation powers to urban redevelopers approved by the city. *Id.* The municipal legislative body declares that a tract of land targeted for redevelopment is “blighted.” *Id.* Once the land is declared blighted the tract of land “becomes subject to redevelopment.” *Id.* As noted, *supra* note 36, the Missouri Constitution, explicitly finds that eradication of blight is a public purpose and authorizes laws reclaiming blighted areas for redevelopment. MO. CONST. art. VI, § 21.

126. Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO. L. REV. 721, 757 (2006).



depart, and the property as a whole is rendered unmarketable.<sup>127</sup> Damage then results as few people are willing to buy or rent property that may be taken from them by the government at some unknown point in the future. As a result, condemnation blight damages fall squarely on the property owner.<sup>128</sup> Before proposing a legislative solution to this problem, this Section will first examine both early Missouri cases and the Missouri Supreme Court's 2008 statement on the issue of blight damages.

### *A. Condemnation Blight Denied*

Before the Supreme Court of Missouri's recent decision in *Clay County Realty Co. v. City of Gladstone*,<sup>129</sup> Missouri courts routinely found that a property owner could not recover damages resulting from delay in the condemnation process.<sup>130</sup> In *St. Louis Housing Authority v. Barnes*, the Missouri Supreme Court held that a drop in the value of the property after the announcement of its imminent condemnation would not be compensable as a part of constitutional damages.<sup>131</sup>

The 1961 *Barnes* holding was buttressed in *Land Clearance for Redevelopment Authority of St. Louis v. Morrison*,<sup>132</sup> where the condemnee sought, via counterclaim, damages for the diminution in value from the date the plan and its boundaries were filed, September 1964.<sup>133</sup> The property owner alleged that his tenants began leaving after hearings during which the condemning authority made it clear that the apartment building would be taken.<sup>134</sup> The property owner sought relief for the eighteen-month aggravated delay during which the property deteriorated and city services declined.<sup>135</sup>

127. *Id.*

128. *Id.* at 757-58.

129. 254 S.W.3d 859.

130. This line of cases was influenced by the Project Influence Doctrine, which denied a property owner either the benefit or damages for diminishment arising from the effect of the proposed project on the subject property. The doctrine is implicated when the comparable sales method is utilized to determine the fair market value of a property to be taken. Properties comparable to the property being taken must be of a similar nature, in the same general vicinity, sold not too remote in time, and the sale of that property must have been voluntary.

The Project Influence Doctrine, as it relates to the evidence of comparable sales, prohibits the trier of fact from considering either enhancements or depreciation brought about because of the improvement to be made to the subject property. Thus, the doctrine limits the loss to that which the owner sustains at the time of the taking. This doctrine prevents the trial court from considering the effect of condemnation blight on the subject property.

131. 375 S.W.2d 144, 147-48 (Mo. 1964).

132. 457 S.W.2d 185 (Mo. 1970) (en banc).

133. *Id.* at 186.

134. *Id.* at 193.

135. *Id.*

The court ruled for the condemnor on the property owner's claim, stating that damages were not recoverable by way of counterclaim.<sup>136</sup> The court did suggest that, in urban redevelopment condemnations, the landowner might have an action for personal damages for the effect of an early blight declaration followed by "aggravated delay."<sup>137</sup> In a stinging dissent, joined by two other judges, Judge Finch cited several cases from other states in which delays of years between the announcement and the taking ensued before the eventual plan was adopted and the award paid into the court.<sup>138</sup>

Judge Pete Somerville wrote a most eloquent and incisive opinion on the effect of pre-condemnation activity on land values before the day of taking in *Land Clearance for Redevelopment Authority of Kansas City v. Massood*.<sup>139</sup> In this case, a redevelopment plan was discussed in 1965, and, in June 1967, the planning commission declared the redevelopment area blighted.<sup>140</sup> Two months later, the city council passed an ordinance declaring the area blighted, and a revised plan was approved in October 1970.<sup>141</sup> In July 1971, the condemnation petition was filed, and the award was paid into the registry in September 1971 – the date of taking.<sup>142</sup> The Western District of the Missouri Court of Appeals ruled against the property owners on their assertion that public knowledge that the area was "blighted . . . for purposes of redevelopment" acted as a depressant on the market value and that this depressant should have been taken into account in determining damages.<sup>143</sup>

Prevailing case law was clearly against the property owner's contention.<sup>144</sup> However, Judge Somerville noted in the opinion that "[the] court senses a growing awareness that the debilitating effect of threatened condemnation is a recurring problem that may well require a revisitation of the obtaining law [of the] state."<sup>145</sup> The opinion, in insightful dicta, declared that "a premature announcement of condemnation may well cast a devastating pall over property in a given area with the end result that by the time a de jure taking occurs the fair market value . . . has become noticeably depressed."<sup>146</sup>

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136. *Id.* at 199.

137. *Id.* at 193-94, 199.

138. *Id.* at 204. The dissenters' view is supported by one commentator who noted, quoting from *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961), that "it would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . of the construction of a government project and then to take advantage of this depression in the price which it must pay for the property." J. Nelson Happy, *Damnum Absque Injuria: When Private Property May Be Damaged Without Compensation in Missouri*, 36 MO. L. REV. 453, 465 (1971).

139. 526 S.W.2d 354 (Mo. App. W.D. 1975).

140. *Id.* at 355.

141. *Id.*

142. *Id.* at 354-55.

143. *Id.* at 356-57.

144. *Id.* at 357.

145. *Id.*

146. *Id.*

Referring back to the language in *Morrison* suggesting that the landowner needs to show aggravated delay or untoward activity by the condemning authority, Somerville stated that if condemnors are given the benefit of the doubt, "it is difficult to envision a situation, unusual circumstances excepted," where an authority could be shown to have committed undue delay in bringing the case to fruition.<sup>147</sup> He opined that "a grossly premature announcement . . . may [well] depreciate the value of [the] property" and that the property owner will be victimized by such a situation.<sup>148</sup> A separate action as suggested by *Morrison*, he stated, was not an adequate remedy.<sup>149</sup>

Five years after *Massood*, the plaintiffs in *Gould v. Land Clearance for Redevelopment Authority of Kansas City*,<sup>150</sup> owners of an eight-unit apartment house in an urban redevelopment area, filed a petition for damages asserting that the delay in the project process damaged the value of the property.<sup>151</sup> In 1967, the plaintiffs were notified that an area of some 4,000 properties was subject to condemnation for redevelopment.<sup>152</sup> At that time, the plaintiffs' apartments were fully occupied.<sup>153</sup> In August 1967, the city council adopted an ordinance approving the redevelopment area.<sup>154</sup> In January 1969, the council adopted the plan for the subject property's area, and a representative of the condemnor talked to each tenant and told the owners not to put any money into improvements.<sup>155</sup> The rate of occupancy continued to decline after further hearings in December 1970, and by January 1977, the last two tenants had moved out.<sup>156</sup> The property's windows were boarded over, the utilities were shut off, and thieves finished off the rest.<sup>157</sup>

The property owners testified at the trial that the building was worth \$30,000 to \$35,000 before the initial contact by the condemnor, and worth nothing as of the April 1978 trial date.<sup>158</sup> On appeal, the property owners cited numerous cases from other jurisdictions that provided damages for such delay.<sup>159</sup> The court, relying on *Morrison*, rejected the property owner's arguments and affirmed.<sup>160</sup> The opinion noted that although at first blush the lapse of time from August 1967 to April 1978 might seem "extraordinary," there was no culpability on the part of the condemnor.<sup>161</sup> The court cited the

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147. *Id.* at 358.

148. *Id.*

149. *Id.*

150. 610 S.W.2d 360 (Mo. App. W.D. 1980).

151. *Id.* at 361.

152. *Id.* at 363.

153. *Id.* at 362.

154. *Id.*

155. *Id.*

156. *Id.* at 363-64.

157. *Id.* at 364.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 365.

size and complexity of the project, both physically and financially, as the reasonable reason for the delay.<sup>162</sup>

Two years later, in *State ex rel. Washington University Medical Center Redevelopment Corp. v. Gaertner*, the Supreme Court of Missouri recognized problems that had “plagued the judiciary for some time without satisfactory resolution.”<sup>163</sup> The opinion acknowledged the time delays in the blight declaration when the power of eminent domain is put in the hands of a proposed redeveloper.<sup>164</sup> The Court also recognized that “[b]ecause of the blight designation and the general public knowledge that the property will be acquired for redevelopment, an exodus . . . ensues, . . . the property depreciates and . . . [the property owner], anticipating the eventual taking . . . , does not expend money to improve [the property].”<sup>165</sup> However, by law, the Court stated, the date of taking is the date the commissioners’ award is paid into the court or the time of trial.<sup>166</sup> The court stated that it is not uncommon for a great deal of time to pass between the designation of blight and the date of taking.<sup>167</sup> Missouri law, however, made “no provision . . . for compensating a landowner for the decline in value,” as these acts prior to the taking are not considered a taking but, rather, are considered to be “incidents of ownership” that do not implicate constitutional considerations.<sup>168</sup>

The condemnor in *Gaertner* argued that, under the law, a counterclaim was not cognizable in an action for condemnation.<sup>169</sup> The condemnee countered that, as the focus of a condemnation suit was the amount of fair and just compensation to be paid the condemnee for the property, the issue of pre-condemnation diminution in value was relevant to that determination.<sup>170</sup> Reluctantly, the Court ruled that the counterclaim sounded in tort and was not to be tried in the eminent domain action.<sup>171</sup> Rather, the Court contended, echoing *Massood* and *Morrison*:

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162. *Id.* at 365-66. Again, the discussion of lost rental income is beyond the scope of this article, but the author would note, however, that a pre-condemnation blight designation in many redevelopment projects significantly decreases the amount of fair market value a property owner may receive.

163. 626 S.W.2d 373, 376 (Mo. 1982) (en banc), *abrogated by* *Clay County Realty Co. v. City of Gladstone*, 254 S.W.3d 859 (Mo. 2008) (en banc).

164. *Id.* at 375-76.

165. *Id.* at 375.

166. *Id.*

167. *Id.* at 375-76.

168. *Id.* at 376. The court distinguished, *Danforth v. United States*, 308 U.S. 271 (1939) when addressing urban renewal projects. *Id.* Numerous cases, however, have distinguished *Danforth* as related to urban renewal projects because the facts in *Danforth* relate to the United States government condemning land for the purpose of flood protection.

169. *Id.* at 375.

170. *Id.*

171. *Id.* at 377-78.

The ideal solution to landowner's problem would be for the legislature to make provision for the allowance of damages in appropriate circumstances and upon proper proof of loss or damage, or to provide for a different time of taking in cases where the condemnor has cast a cloud of blight upon the property in advance of the actual taking.<sup>172</sup>

### B. Clay County Realty Co. v. City of Gladstone

Handed down in June 2008, the holding of the Supreme Court of Missouri in *Clay County Realty Co. v. City of Gladstone*<sup>173</sup> represents recognition of the constitutional rights of property owners faced with condemnation for redevelopment. The plaintiffs, Clay County Realty Company and Edith Investment Company, brought a complaint "against the City of Gladstone . . . alleging that the City . . . unlawfully [took] their property without just compensation."<sup>174</sup> In May 2003, the city had declared the area in which the property owners' parcel was located "blighted"<sup>175</sup> for purposes of redevelopment.<sup>176</sup> "In May 2004, the City entered [into an] agreement with a [private] developer."<sup>177</sup> That agreement was subsequently cancelled in August 2005.<sup>178</sup> The city then decided to treat the redevelopment as a TIF project and solicited TIF proposals for redevelopment pursuant to the TIF Act.<sup>179</sup> In October 2005, the city approved a TIF plan and adopted another ordinance declaring the property owner's parcel blighted under the TIF provisions.<sup>180</sup> The city did not proceed with formal condemnation of the parcel, however, and failed to move forward with the redevelopment project.<sup>181</sup>

Rather than wait for the city to initiate condemnation, the property owners filed suit seeking damages that they claimed were caused by the city's delay in pursuing the condemnation.<sup>182</sup> They alleged that the blight declaration, coupled with the subsequent delay, resulted in "significant diminution of the value of the property."<sup>183</sup> Specifically, the property owners

172. *Id.* at 378.

173. 254 S.W.3d 859 (Mo. 2008) (en banc).

174. *Id.* at 861.

175. The city acted pursuant to The Urban Redevelopment Corporations Law, MO. REV. STAT. §§ 353.010-.190 (2000 & Supp. 2008).

176. *Clay County Realty Co.*, 254 S.W.3d at 861.

177. *Id.*

178. *Id.*

179. *Id.* at 861-62; see MO. REV. STAT. §§ 99.800-.865 (2000 & Supp. 2008).

180. *Clay County Realty Co.*, 254 S.W.3d at 862.

181. *Id.*

182. *Id.*

183. *Id.*

claimed that the blight declaration in 2003 caused numerous retail tenants to choose not to renew their leases with the property owners.<sup>184</sup>

The trial court granted summary judgment in favor of the city.<sup>185</sup> On appeal, the Supreme Court of Missouri noted that Missouri had previously rejected claims alleging damages from condemnation blight and that no statutory provision provided for relief for the property owners.<sup>186</sup> Nonetheless, the court recognized that “common, long delays associated with blight designations and condemnation proceedings can damage property owners’ interests.”<sup>187</sup> The court held that property owners suffering such damages may bring an action for condemnation blight under the theory of inverse condemnation.<sup>188</sup> The court, however, narrowed the thrust of its holding, finding that only a showing of “aggravated delay” in the acquisition of property declared blighted or “untoward activity” in instituting condemnation proceedings will support such an action.<sup>189</sup>

In *Clay County Realty*, the court, speaking through Judge Mary R. Russell, recognized the theory of condemnation blight, providing an avenue for relief, however limited.<sup>190</sup> The court seemed concerned that, without providing some limitations upon relief, “every condemnation case would give rise to a separate cause of action based on precondemnation activity, because the condemnation process involves governmental and judicial decisions that are endemic with delays.”<sup>191</sup>

However, the best laid plans for redevelopment frequently span years, without any culpable negligence or bad acts of the condemning agency or the developer. Developers may be replaced, federal funds may be sought or even terminated, financing sources change. Each of these unforeseen hurdles increases the time between the blight declaration, triggering an eminent domain action, and the actual date of taking. A proposed redevelopment project soon becomes common knowledge, regardless of whether the plans are announced from the steps of city hall or discovered by municipal employees or developers. Moreover, the ever-vigilant real estate market takes special notice that an area may be slated for condemnation.

The plaintiffs in the cases cited herein represent property owners who suffer interminable delay but have the financial resources to seek redress in a prolonged suit for relief. But these plaintiffs are not the only property owners who face the same issues. Economic redevelopment frequently targets the properties of racial and ethnic minorities and marginal businesses – property

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184. *Id.*

185. *Id.* at 863.

186. *Id.* at 867-68.

187. *Id.* at 866.

188. *Id.* at 869.

189. *Id.*

190. *Id.* at 864-66.

191. *Id.* at 869.

owners who do not have the financial wherewithal to pursue damages in court.

This article proposes that the rationale of *Clay County* be extended to the condemnation litigation itself instead of requiring that the property owner bring a separate suit for inverse condemnation. Relief may be provided upon sufficient evidence of the debilitating effect of the initial blight declaration on the value of the subject property. Such proof of damage should be sufficient to allow the trier of fact to determine a date of taking earlier than the date of the condemnation action, as currently provided by law.

Missouri is not the only state faced with the problem of fairly allocating the costs of eminent domain; many other states have struggled with the same issues. To that end, New Jersey's legislative effort to address the issue is instructive. Like Missouri, New Jersey has struggled to factor into fair market value the effect of pre-condemnation declarations of blight. In 1971, the Supreme Court of New Jersey noted that the purpose of redevelopment law was not only "slum clearance" but also to encourage interagency cooperation in the funding of private redevelopment.<sup>192</sup> That same year, however, New Jersey enacted legislation that acknowledged the effect of pre-condemnation redevelopment activities on the value of the subject property.<sup>193</sup>

In *Mount Laurel Township v. Stanley*,<sup>194</sup> the Supreme Court of New Jersey noted: "One of the key components in determining what constitutes just compensation in exchange for an eminent domain taking is the date of valuation of the private property subject to condemnation."<sup>195</sup> The court pointed to the New Jersey statute adopted in 1971, which provides for the use of the earliest of several possible dates for determination of the value of the taking: (1) the date the condemnor takes possession; (2) the date the condemnation petition is filed; (3) the date the blight declaration is filed; or (4) the date when an action by the condemnor "substantially affects the use and enjoyment of the property."<sup>196</sup> The legislation providing for this constellation of taking dates was designed "to protect the condemnee from a diminution in value [as a result of] 'the cloud of condemnation' being placed on the property"<sup>197</sup> as well as recognize the legislative presumption that a "declaration of blight would adversely affect value."<sup>198</sup> This purpose is

192. *Levin v. Twp. Comm. of Bridgewater*, 274 A.2d 1, 4 (N.J. 1971).

193. *See generally* Eminent Domain Act of 1971, N.J. STAT. ANN. §§ 20:1-1 to 3-50 (West 1997 & Supp. 2007).

194. 885 A.2d 440 (N.J. 2005).

195. *Id.* at 441.

196. N.J. STAT. ANN. § 20:3-30. Note that the final date – the date when the condemnor affects the property owner's ability to use and enjoy his property – mirrors an element of proof of nuisance.

197. *Stanley*, 885 A.2d at 443 (quoting *Twp. of W. Windsor v. Nierenberg*, 695 A.2d 1344, 1354 (N.J. 1997)).

198. *Nierenberg*, 695 A.2d at 1351.

reiterated in *Township of West Windsor v. Nierenberg*, wherein the Supreme Court of New Jersey stated:

“[A] public body must be afforded a wide range of time within which to reach its final conclusion, and to this end, will publicize various thoughts to test public opinion. But some consideration should be given to the persons whose property is thus placed in the test tube, and boiled in the caldron of public and political bickerings. It is said that this is the price which is paid for the benefit of living in a democracy. But why should these property owners pay the entire cost? Should not the benefited public also share?”<sup>199</sup>

The New Jersey analysis is instructive in that Missouri must address the issue of the cost of a blight declaration, the damages of which are sustained before the date of taking. To that end, this article proposes legislation that so provides.

### *C. Proposed Legislative Solution*

This article suggests the following language as an enactment that could potentially provide a workable statutory procedure by which Missouri courts could account for damages arising from precondemnation blight:

Following a determination by the court, based upon a preponderance of the evidence that land in a project area of a redevelopment plan approved pursuant to the provisions of Chapter 99 or Chapter 353 meets the definition of blight, there shall be a trial by jury, unless timely waived, where the amount of fair and just compensation to be paid the property owner shall be determined. In such a suit for condemnation damages, the date of taking shall be either (1) the date the blight declaration was first

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199. *Id.* at 1352 (quoting EMINENT DOMAIN REVISION COMMISSION, REPORT OF EMINENT DOMAIN REVISION COMMISSION OF NEW JERSEY 27-28 (1965)). In an earlier case, *Washington Market Enterprises, Inc. v. City of Trenton*, a property owner brought suit to procure damages after the city abandoned a plan for redevelopment, leaving the property in limbo. 343 A.2d 408 (N.J. 1975). The court stated “[t]here [could] be no doubt that a declaration of blight ordinarily adversely affects the market value of property” and the market for individual properties in the area, inhibiting any motive by the affected property owner to improve the property. *Id.* at 411. In holding that there had not been a taking since the plan had been abandoned by the condemnor, the court, in a footnote, noted that New Jersey’s constitution does not contain any guarantee for “property taken,” and does not contain immediately thereafter the words, “or damaged.” *Id.* at 416 n.9. As previously noted, Missouri’s constitution does contain the “or damaged” language. See *supra* note 110 and accompanying text.



adopted by the governing body; or (2) the date on which the commissioners' award is paid into the registry of the court. Determination of the date of taking may be made by agreement of the parties, or, if sufficient evidence of loss of value based on the date of declaration of blight is proffered, this question shall be submitted to the jury to then determine damages as of the date found to the date of taking.<sup>200</sup>

#### IV. CONCLUSION

If government can take private property under the umbrella of redevelopment, it should only be able to do so when the area to be taken is truly blighted. Difficult as it may be to define blight, the Missouri General Assembly should take charge and define this most important term in such a way that property being productively used is not taken for a more favored, and arguably, more productive use. Land that has been used for a family business, sustaining a need and supporting citizens, and not in poor repair, should not be condemned to house a boutique hotel.

Therefore, as discussed in Part II, it is proposed, first, that the definition of blight be tightened and based on concrete, definable criteria to prevent the continued use of "blight" as a predicate justification for a project that would otherwise fail the public use test. In doing so, the drafters would be advised to refer to the abandoned legislative amendments cited in *State ex rel. Washington University Medical Center Redevelopment Corp. v. Gaertner*,<sup>201</sup> and in Dale Whitman's article, *Eminent Domain Reform in Missouri: A Legislative Memoir*.<sup>202</sup> Second, it is proposed that the burden of proof in a condemnation action to prove blight be on the condemnor and established, not by substantial evidence, but by a preponderance of the evidence.

This Article also proposes, in Part III, that the Missouri General Assembly – if it truly wants to enact legislation to combat eminent domain abuse and benefit Missouri land owners who have a constitutional right<sup>203</sup> to receive just compensation for property "taken or damaged"<sup>204</sup> – should enact measures that will move up the day of taking for determining these damages. In most instances, the public disclosure of a blight or pre-blight designation by the city coupled with a plan to redevelop will have a depressing effect on the real estate market in the redevelopment area. As the cases point out,

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200. If this or similar legislation were enacted into law, Missouri Approved Instruction 9.01 would have to be modified to instruct the jury to first determine the date of taking and then decide the fair market value pursuant to Missouri Approved Instruction 16.02.

201. 626 S.W.2d 373 (Mo. 1982) (en banc).

202. Whitman, *supra* note 126.

203. MO. CONST. art I, § 2.

204. See MO. REV. STAT. §§ 99.805-.865 (2000 & Supp. 2008); MO. REV. STAT. §§ 353.010-.190 (2000 & Supp. 2008).

planned urban redevelopment is not a quick process, and even working as smoothly and efficiently as it can, the condemnor cannot avoid time delays that are likely to be detrimental to the property owner. It is nigh impossible for an individual landowner to underwrite a suit providing sufficient evidence of intentional foot-dragging or aggravated delay in bringing the plan to fruition. To provide that the unwilling seller is required to bring a separate action, or fumble to determine the correct remedy for their individual sacrifice and loss on a project designed for the public good, is unfair and out of step with the constitutional guarantees of due process and fair compensation.

By far the fairest, quickest, and most economical method of resolving the problem is to do as other states have done and allow the matter of damages to be determined in the condemnation suit itself. The issue of damages can be addressed under strict court control and the determination based on the facts of each case. Legislatively providing for a date of taking determination permits the trier of fact to decide the fair market value either as of the date the condemning authority passed an ordinance declaring the land blighted or, if supported by the facts of the case, the date the commission's award is paid into the court. Like it or not, the establishment of a redevelopment area and the corresponding declaration of blight, and the declaration of the condemning authority's intent to take the property, will almost always cause a drop in the target properties' value under a market approach to fair market value. Whether the delays are purposeful or not, the moral of this story is that the delays endemic to the process of arriving at an agreed-upon value for the target properties inevitably inure to the benefit of the condemnor.

The legislature, in addressing the definition of blight, judicial review of a blight declaration, and a date of taking that accounts for precondemnation blight, can substantially address eminent domain abuse in a manner that both protects Missouri's property owners and does not unduly limit the opportunities for economic redevelopment in the state.

