KELO'S LESSONS FOR URBAN REDEVELOPMENT: HISTORY FORGOTTEN

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No Supreme Court case created more backlash than *Kelo v. City of New London*,[2] which allowed the use of eminent domain to acquire land for redevelopment. Commentators criticized, while voters and state legislatures acted to prohibit or restrict the use of eminent domain for redevelopment projects. Lost is any historical perspective, and how genetic weaknesses in the redevelopment concept provided opportunities for arguably abusive projects. Protest followed, concluding in the rejection of the *Kelo* decision. This article reviews the origins of urban redevelopment, and how it contributed to the backlash against the redevelopment idea.

Urban redevelopment, then known as urban renewal, began shortly after the Second World War with a federal statute[3] that authorized subsidies for urban renewal projects. A national debate that shaped the statute was carried out in Congress, in published articles and at national conferences. Understanding the issues in this debate, how Congress resolved them, and how the federal agency carried out the statute, is critical to an understanding of the federal program and its influence on state legislation and local urban renewal projects.

Two major issues shaped the federal legislation and how it was implemented: the role of planning and the role of blight as a necessary basis for project approval. The author of this article was an attorney in the U.S. Housing and Home Finance Agency (the "Urban Renewal Agency"), the predecessor to the Department of Housing and Urban Development, when the urban renewal program began, and where the initial decisions

that shaped the future of urban renewal were made. This experience, and research for an article on the role of the planning in urban renewal,[4] provide the basis for this article.

Issues in the Adoption and Implementation of the Federal Urban Renewal Program

Congressional action to establish an urban renewal program was needed because American cities at the time were home to massive, blighted inner-city slums. In St. Louis alone, the Mill Creek valley was an extensive slum area near downtown. Because the cost of acquiring blighted land for redevelopment was prohibitive, federal subsidy was needed to subsidize land acquisition so that redevelopment could be financially practicable. In the law as finally enacted, the federal subsidy was limited to two-thirds of acquisition cost, but the federal Urban Renewal Agency usually accepted the one-third local share in the form of "in-kind" contributions that did not require a cash outlay.

Federal legislation had a decisive effect on the way in which urban renewal was carried out. It detailed the requirements that local urban renewal projects had to meet in order to receive federal subsidies, and this detailing required a fine balance between federal directives necessary to carry out national policy, and the flexibility required for local management. State legislation was also needed to incorporate federal standards into state urban renewal laws. To guide state legislatures, the Urban Renewal Agency drafted a model urban renewal law[5] that complied with federal requirements and that states adopted.

The role of comprehensive planning is critical in urban redevelopment. Planning can produce a comprehensive plan that includes a policy for urban renewal projects, and that can justify the taking of private properties for project development.[6] Each individual taking of property is part of a comprehensive plan that implements agreed-upon

community objectives, rather than a possibly arbitrary decision to take the property of one landowner and give it to another for redevelopment. The definition of blight is also critical as it is a necessary basis for carrying out an urban renewal project under state legislation.[7] The blight finding requirement determines what kinds of projects local governments can undertake.

The Role of Planning[8]

The comprehensive plan is a locally adopted policy document that guides land use decisions under zoning and other land use ordinances and that can also guide public projects. A requirement of consistency with the comprehensive plan is necessary to make it effective. State statutes did not explicitly require zoning decisions to be consistent with an adopted comprehensive plan when Congress considered the enactment of an urban renewal program after the Second World War, though a weak statement in state legislation might have imposed this requirement.[9] Neither was comprehensive planning well established at the local level, and many advocates of urban renewal saw it as a way of strengthening the local planning process.

Debate over the proposed federal urban renewal program found contestants divided over the strength and role of the planning function. One group led by Alfred Bettman, a land use lawyer and nationally prominent figure in land use planning in the interwar period,[10] advocated a strong and detailed planning requirement. A point of view also emerged from discussions at professional meetings and national conferences that planning should have a significant role to play in local urban renewal programs. It could define the geographic scope of urban renewal projects, define their goals, guide project selection and provide a check on decision making.

Two model urban renewal acts that addressed the planning function were available in the period before the adoption of federal legislation. One model, drafted by Bettman for the American Society of Planning Officials, required conformance to a general plan and the preparation of community and detailed project plans as a condition to the approval of urban renewal projects.[11] Some state legislation in this period adopted the Bettman planning requirements and made them a condition to a federal subsidy for urban renewal projects. This law delegated the authority to acquire blighted land for redevelopment to local governments.

A second model, proposed by the national lobby for local public housing authorities, deemphasized planning.[12] It gave public housing authorities the authority to carry out urban renewal, did not contain a planning requirement, and provided only that urban renewal project plans must "indicate" their relationship to local land use and related objectives. Several southern states adopted this model soon after it was published.

Early proposals for federal urban renewal legislation put forward by an earlier wartime housing agency adopted much of this approach. They placed the planning function in a public agency that would not be responsible for urban renewal projects, but emphasized the adequacy of the local planning process rather than the substantive content of plans. Federal legislation was based on this model,[13] and stripped the detailed planning language from the Bettman model act that was in an earlier bill. As enacted, the federal law required only a local legislative finding that an urban renewal project plan "conforms to a general plan for the development of the locality as a whole."[14] State legislation need not go any further.[15] Federal agency regulations further weakened the statutory planning requirement. The author's study of urban renewal projects in St. Louis and Nashville

found that the statutory planning requirement was inadequate to guide the urban renewal process. Major changes occurred in project redevelopment that distorted original plans.[16]

Weakness in the planning function helped to produce urban renewal projects in which individual property owners could claim they lost their homes for projects that did not serve the public interest. Without a comprehensive plan, projects could be selected that advanced the interests of private entities rather than community policy. Interestingly, Justice Stevens in *Kelo* emphasized the role of planning in his defense of the New London project,[17] but did not explicitly require planning as a condition to the use of eminent domain. In that case, in any event, planning was at the project, not the community, level.

Blight, Public Use, and the Constitutional Defense of Urban Renewal

A second major issue is the legislative requirement for the type of area that qualifies for an urban redevelopment project. The federal law did not require a blight finding as the basis for project selection,[18] but a blight finding was one of the requirements included in the model state law drafted by the Urban Renewal Agency.[19] It addressed the slum clearance problem that was the major issue at the time by authorizing projects for the removal of physical blight, but went beyond this authority and allowed areas to be declared socially and economically blighted. State legislation followed this model.[20] It was the second alternative that opened up opportunities for abuse, because the definition of social and economic blight could authorize the approval of housing that is in physically good condition for questionable projects. The courts upheld this extension of urban renewal authority. A New Jersey case, for example, upheld the condemnation of vacant land for a shopping center.[21]

Statutory authority was not enough, however, as urban renewal faced a major constitutional problem in the requirement that property can be taken by eminent domain only for a public use. This problem was created by the claim that urban renewal does not serve a public use because it authorizes condemnation to transfer property from one private property owner to another private property owner for redevelopment.

Although state cases on the public use question in urban renewal had largely been favorable at the time the federal urban renewal program began[22] and had found ways to avoid or eliminate the transfer of property problem, the Urban Renewal Agency was concerned about a probable federal court challenge. As the author recalls, the Urban Renewal Agency faced a major choice in deciding how to defend a court challenge. One alternative would have based the public use defense on the requirement that redevelopment projects must conform to a comprehensive plan. The argument was that compliance with the redevelopment policies in a plan provides the public use that defeats a claim that urban renewal is simply an excuse to transfer property from one private owner to another. Another alternative would have based a defense on the requirement that a redevelopment project can only be approved for blighted areas under state laws. This argument held that the removal of blight is enough of a public use to defeat the transfer of property argument. The Urban Renewal Agency chose the second alternative, with important consequences for the future of urban redevelopment. The courts were not given an opportunity to make comprehensive planning a required element of the public use requirement.

The public use issue came to a head in *Berman v. Parker*.[23] Justice William Douglas held the District of Columbia urban renewal legislation, which had been used in

a seriously blighted slum area, satisfied the public use requirement. He addressed the blight and transfer of property issues, but eliminated any opportunity for judicial review that could discipline urban renewal programs. He decided instead to defer to the legislative decision on when eminent domain could be used for urban renewal. In a now-famous statement, he held that "[w]e do not sit to determine whether a particular housing project is or is not desirable."[24] This meant he was not concerned about how urban renewal legislation defined the type of areas that could be approved for urban renewal projects. His only reference to blight was a statement in which he said that "[m]iserable and disreputable housing conditions" could be a "blight on the community."[25]

Douglas then downgraded the importance of the property transfer issue. He held that authorizing a property transfer from one property owner was simply a question of means that was also for the legislature to decide:

> Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.[26]

The Douglas opinion left no real constitutional barriers to the use of eminent domain for redevelopment. Statutory compliance was all that was needed, and this has not been a difficult problem in most cases in state court. State urban renewal statutes based on the federal model ease the finding of blight for most projects, though the blight definition has now been reformed in some states. Comprehensive planning was not an issue in *Berman*.

Conclusion

The use of eminent domain to acquire land for urban redevelopment raises critical legal questions, both statutory and constitutional. The Supreme Court's *Kelo* decision confirmed this use of the eminent domain power, but state constitutional and legislative change has since diminished it. Practically forgotten in the midst of change and protest are the legislative origins of the urban renewal program and the weaknesses it contained. The role of planning, which might have disciplined the use of urban renewal authority, was diluted. The blight finding needed to approve an urban renewal project was so weakened by statute and court decision that it became practically meaningless.

Both issues are arguably part of the public use equation. History should teach that a strong statutory planning function must be an element of urban renewal legislation in order to satisfy the public use requirement. So must a tightly defined definition of blight, or a similarly rigorous definition of the requirements for approving urban renewal projects. Well-defined statutory planning and project approval requirements could then provide a more appropriate basis for project selection and management.

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[2] 545 U.S. 469 (2005).

[3] Housing Act of 1949, Pub. L. No. 81-171, § 102, 63 Stat. 413, 414 (1949).

[4] Daniel R. Mandelker, *The Comprehensive Plan in Urban Renewal*, 116 U. PA. L. REV. 25 (1967). Statements made here on issues considered when urban renewal was first adopted and how they were resolved are based on sources in this article and personal interviews in March 1966 in Madison, Wisconsin with the late Coleman Woodbury as

part of the research for that article. He was an important figure in urban renewal debates in the period during and after the Second World War, and served in earlier national housing agencies and on a committee created by President Roosevelt during the war to study and recommend a national urban renewal program. The author of this article also reviewed Prof. Woodbury's personal documents relating to the Roosevelt committee. The author was also privileged to hear William Wheaton, one of the founders of urban renewal, speak about it at the Salzburg Urban Seminar in February 1977. At twilight, in the library with the fire burning, Bill gave an unforgettable account.

[5] Draft Bill Prepared by the Office of General Counsel, Department of Housing and Urban Development for the Assistance of Local Counsel and Officials in Drafting State Urban Renewal Legislation, or Amendments of Existing State Urban Renewal Laws, §§ 19(h), 19(i) (Nov. 15, 1965) [hereinafter Draft Bill (Nov. 15, 1965)].

[6] The American Planning Association has a policy on urban redevelopment. *See* American Planning Association, Policy Guide on Public Redevelopment, *available at* http://www.planning.org/policy/guides/adopted/redevelopment.htm (last visited Nov. 23, 2008).

[7] The New London project in *Kelo* was carried out under legislation that did not require a blight finding, but otherwise the project was typical.

[8] This discussion of the origins of the planning function in the federal program is based on Mandelker, *supra* note 4, at 33–41.

[9] Most state zoning legislation is based on a model act proposed by the U.S. Department of Commerce. That act, A STANDARD STATE ZONING ENABLING ACT § 3 (1926), required that zoning regulations be made "in accordance with a comprehensive plan." Courts had

not yet interpreted this provision at the time Congress considered federal urban renewal legislation.

[10] Bettman died in 1945 before Congress adopted an urban renewal law.

[11] Bettman, Draft of an Act for Urban Dev. and Redevelopment (American Soc'y of Planning Officials, March 15, 1943).

[12] *General Housing Act of 1945: Hearing on S. 1592 Before the S. Comm. on Banking and Currency*, 79th Cong. 650–58 (1945) (Testimony of William J. Guste).

[13] It includes the "indicate" language from that model. 42 U.S.C. § 1460(b) (1964).

[14] 42 U.S.C. § 1455(a)(iii) (1964). Coleman Woodbury, who participated in the legislative process leading up to the enactment of the urban renewal law, described the planning requirement as a "weak compromise." Interview with Coleman Woodbury, March 1966. Note that the statute required only a legislative finding, not the adoption of a plan with specified content. *See generally* THE FUTURE OF CITIES AND URBAN REDEVELOPMENT (Coleman Woodbury ed., Univ. of Chicago Press 1953).

[15] *See* MO. REV. STAT. § 99.810(2) (2000) (enacting the language of the initial federal law); City of St. Charles v. DeVault Mgmt., 959 S.W.2d 815 (Mo. Ct. App. 1997) (holding that redevelopment project did not conform to plan).

[16] Mandelker, *supra* note 4, at 44–64.

[17] Kelo v. City of New London, 545 U.S. 469, 484 (2005); *see* Nicole Stelle Garnett, *Planning as Public Use?*, 34 ECOLOGY L.Q. 443 (2007).

[18] 42 U.S.C. § 1460(c)(1)(i) (Supp. I 1966).

[19] Draft Bill (Nov. 15, 1965), *supra* note 5. This was done while the author was in the Urban Renewal Agency. It was a matter of great concern since state legislation that incorporated federal requirements was necessary.

[20] *See, e.g.*, MO. REV. STAT § 99.320(3) (2000) (blighted area may constitute "an economic or social liability").

[21] Levin v. Twp. Comm., 274 A.2d 1 (N.J. 1971), *appeal dismissed*, 404 U.S. 803 (1971) (mem.). The statute defined an area as blighted where there existed "[a] growing or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein and other conditions, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare." *Id.* at 3. The court went on to cite several similar statutes from other states.

[22] *See* Daniel R. Mandelker, *Public Purpose in Urban Redevelopment*, 28 TUL. L. REV. 96 (1953).

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

[24] *Id.* at 33.

[25] *Id.* at 32.

[26] *Id.* at 33. Congress, at that time, was responsible for District of Columbia legislation.