IS THE ILLINOIS EQUITY IN EMINENT DOMAIN ACT TRULY EQUITABLE?

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INTRODUCTION

Since the Supreme Court's controversial decision in *Kelo v. City of New London*,[1] state legislatures across the country have been struggling with the same question: under what circumstances is it appropriate for the government to utilize its power of eminent domain to take privately-owned property without the owner's consent? The right of eminent domain refers to the inherent power of every independent government to take privately owned land within its borders.[2] The exercise of eminent domain within the United States is limited by the Fifth Amendment to the Constitution, which provides that "private property [shall not] be taken for public use, without just compensation."[3] Since the taking of private property is limited to situations that serve a "public use," the interpretation of this term controls the force of the limitation. Historically, the taking of private property to build a school[4] or a public road[5] has been deemed to satisfy the public use requirement because the new use of the land is available to, and directly benefits, the public at large. However, the legality of taking privately owned land for the sole purpose of economic development is much less settled. This issue was central in *Kelo*,[6] where the city of New London condemned several non-blighted private properties as part of a redevelopment project.[7] The Supreme Court approved these takings, and held that "there is no basis for exempting economic development from our traditionally broad understanding of public pur-

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1. 545 U.S. 469 (2005).
2. Miss. & Rum River Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).
3. U.S. CONST. amend. V.
4. Searl v. Sch. Dist. No. 2 in Lake County, 133 U.S. 553, 564 (1890).
5. W. River Bridge Co. v. Dix, 47 U.S. 507, 533 (1848).
6. 545 U.S. at 472.
7. *Id.* at 475.

pose."[8] This decision has caused great unrest, as many Americans now fear that their homes and businesses are susceptible to government takings.

The use of eminent domain to facilitate economic development within Illinois is not uncommon. A recent survey prepared by the *Chicago Tribune* indicates "that local governments have used eminent domain more than 250 times in the last five years to seize private property for economic development."[9] Often, the threat of condemnation is sufficient to convince property owners to accept the government's best offer for their land in order to avoid costly legal proceedings. This was the case in Lake Zurich, Illinois, where several local property owners reluctantly reached an out-of-court settlement to sell their land to the city.[10] The Village of Lake Zurich had begun condemnation proceedings against the owners with the intent to build restaurants, condominiums, and a parking garage on the land as part of its redevelopment plan.[11]

The *Kelo* Court "emphasize[d] that nothing in [its] opinion precludes any State from placing further restrictions on its exercise of the takings power."[12] In response to this invitation, states across the nation have reconsidered and revised their statutes pertaining to eminent domain in an effort to provide a proper definition of public use.[13] In Illinois, State Senator Susan Garrett introduced the Equity in Eminent Domain Act ("Eminent Domain Act") with the intent of "strik[ing] a balance by enabling economic development while providing adequate protection and due process for property owners."[14] This bill was signed into law by Governor Rod Blagojevich on July 28, 2006, and went into effect January 1, 2007.[15] The provisions of this legislation spell out the situations in which eminent domain powers may be utilized in Illinois, as well as the considerations that will be employed in determining just compensation.[16]

8. *Id.* at 485.

9. Crystal Yednak, *Eminent Domain Bill Pushed: State Senators Seek Limits to Aid Owners,* CHI. TRIB., Jan. 31, 2006, § 2 (Metro), at 3.

10. Susan Kuczka, *Eminent Domain Fight Squashed*, CHI. TRIB., Apr. 21, 2006, § 2 (Metro), at 7.

11. *Id.*

12. 545 U.S. at 489.

13. See National Conference of State Legislatures, Eminent Domain: 2006 State Legislation, http://www.ncsl.org/programs/natres/emindomainleg06.htm (last visited Apr. 9, 2008) for a list of bills considered or passed by the state legislatures since the *Kelo* decision.

14. State Senator Susan Garrett, Update on Eminent Domain Legislation, http://www.garrett98. com/eminent_domain.htm (last visited Mar. 27, 2008).

15. 735 ILL. COMP. STAT. 30/99-5-5 (2006).

16. *Id.* § 30/5-5-5.

The swift action taken by the Illinois legislature in response to *Kelo* shows that the state government recognizes the dangers associated with economic takings. However, the broad definition of blight utilized under the Eminent Domain Act leaves a substantial opportunity for local governments to condemn land primarily for financial gain. In order to ensure that the private property rights of Illinois citizens are protected, the definition of blight in the Eminent Domain Act needs to be revised.

This note examines the public use provisions of the Illinois Eminent Domain Act in light of United States Supreme Court and Illinois Supreme Court precedents, and then suggests a new definition of blight that will ensure that the goals of the Eminent Domain Act are accomplished. Although just compensation is an essential consideration in condemnation proceedings, this note does not address the issue of compensation under the belief that no amount of compensation is "just" if the taking is not for a proper public use.[17] In Part I, this note examines the development of the Supreme Court's "traditionally broad understanding of public purpose"[18] by examining several of the Court's landmark eminent domain cases. Part II traces the evolution of the Illinois Supreme Court's public use doctrine from its original narrow interpretation to the court's current standard. Part III explains the public use provisions of the Eminent Domain Act, and discusses whether each provision helps to achieve the Act's goal of balancing private property rights with the government's desire to employ eminent domain for economic development. In Part IV, this note explores the origin of blight as a public purpose to satisfy the Public Use Clause, and suggests a modified definition of blight for Illinois in order to ensure that the Eminent Domain Act will achieve its goal. Finally, Part V discusses the ramifications of allowing economic takings to continue under the current broad definition of blight in Illinois.

I. UNITED STATES SUPREME COURT EMINENT DOMAIN CASES: THE MOVEMENT TOWARDS A BROAD INTERPRETATION OF PUBLIC USE

The power of eminent domain within the United States is limited by the Fifth Amendment to the Constitution, which provides that "private property [shall not] be taken for public use, without just compen-

17. *Kelo*, 545 U.S. at 477. ("[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation.").

18. *Id.* at 485.

sation."[19] The Supreme Court's interpretation of this clause establishes the "federal baseline," or the outermost limits, for the exercise of eminent domain within the states.[20] Although the Court has always held that a purely private taking is unconstitutional,[21] it has emphasized that its role in determining whether a taking is "for a public purpose is an extremely narrow one."[22] Thus, the Court has shown great deference to legislatures in determining what qualifies as a public use to satisfy the constitutional limits,[23] and has essentially invited the states to set their own limits on public use.[24]

A. Decisions Prior to 1950

In the decade after the Fifth Amendment was ratified, the Supreme Court wrote that "[i]t is against all reason and justice, for a people to entrust a Legislature with SUCH powers" as to create "a law that takes *property* from A[] and gives it to B."[25] Although the case being decided did not involve the use of eminent domain, this axiom has consistently been quoted in the Court's decisions regarding the Public Use Clause for the principle that property cannot be taken from one private party and given to another.[26] In light of this principle, eminent domain has traditionally been used to acquire land for roads, canals, mills, and other projects that are available to the public at large.[27] Accordingly, many early state court decisions "endorsed 'use by the public' as the proper definition of public use."[28] However, from the early 1900s the Supreme Court has found this definition "inadequa[te] . . . as a universal test" because it believes that under certain circumstances the public welfare requires the taking of one individual's land for the benefit of another.[29] Instead, the Court adopted the "public purpose" standard that was first announced in *Fallbrook Irrigation District v. Bradley*.[30] In *Fallbrook*, the Court upheld the taking of one individual's land to construct an irrigation ditch that would provide a water source to another

19. U.S. CONST. amend. V.
20. *Kelo*, 545 U.S. at 489.
21. *Id.* at 477.
22. Berman v. Parker, 348 U.S. 26, 32 (1954).
23. *Kelo*, 545 U.S. at 482.
24. *Id.* at 489.
25. Calder v. Bull, 3 U.S. 386, 388 (1798).
26. *See, e.g.*, W. River Bridge Co. v. Dix, 47 U.S. 507, 537 (1848).
27. *Id.* at 533.
28. *Kelo*, 545 U.S. at 479.
29. Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906).
30. 164 U.S. 112, 158–164 (1896).

individual's land.[31] The Court chose not to apply the "use by the public" standard, and held that "[i]t is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in the improvement in order to constitute a public use."[32] This broad interpretation of the Public Use Clause has evolved into the Court's current standard.[33]

In the same year that the Court established the "public purpose" standard in *Fallbrook*, it announced in *United States v. Gettysburg Electric Railway Co.* that "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation."[34] This statement spawned the Court's "longstanding policy of deference to legislative judgments" in the area of eminent domain.[35] Although the *Gettysburg* Court suggested that a court's role in reviewing the merits of a public use declaration should be increased when the land is not going to be used by the government,[36] this limitation on judicial deference has not withstood the test of time.

The potential problems arising from a broad interpretation of the Public Use Clause combined with great deference to legislative determinations of public use were recognized long before the standards were adopted by the Court. One land owner faced with the threat of condemnation in the 1840s argued that since the state alone has the power to determine when the use of eminent domain is necessary, if the state is also allowed to determine what purposes satisfy the public use requirement, then the Public Use Clause provides no limitation at all.[37] However, the Court has not been persuaded by this argument, and has consistently held that deference to legislative decisions is proper because the legislature is more familiar with the circumstances creating the necessity for the taking.[38]

31. *Id.* at 161–62.
32. *Id.*
33. *Kelo*, 545 U.S. at 480.
34. 160 U.S. 668, 680 (1896).
35. *Kelo*, 545 U.S. at 480.
36. *Gettysburg*, 160 U.S. at 680.
37. W. River Bridge Co. v. Dix, 47 U.S. 507, 520 (1848).
38. See Robert J. Hopperton, *Standards of Judicial Review in Supreme Court Land Use Opinions: A Taxonomy, an Analytical Framework, and a Synthesis*, 51 WASH. U. J. URB. & CONTEMP. L. 1, 16–19 (1997), for a discussion of judicial review in eminent domain cases.

B. Berman v. Parker

The Court's broad interpretation of public use and its policy of great deference to legislative determinations were cemented in *Berman v. Parker*, where the Court held that private property may be condemned and transferred to private developers in an effort to redevelop slum areas and remove urban blight.[39] The *Berman* Court's decision came on the heels of several state court decisions upholding blight removal as a proper public use even when the condemned land is immediately transferred to private developers.[40] At the time *Berman* was decided, urban areas across the country viewed the use of eminent domain to facilitate urban redevelopment as a necessity because they were facing rapidly deteriorating conditions.[41] While the Court may have wanted to simply carve out an exception to the Public Use Clause in order to solve a growing problem, its decision in *Berman* resulted in a drastic shift in the way courts viewed condemnations. Instead of focusing only on the manner in which the property would be used after it was condemned, courts could look at the condition of the property before it was taken to determine if the condemnation satisfied the Public Use Clause.[42] From this perspective, the condemnation itself could serve a public purpose since it would eliminate a harmful property use. Therefore, the subsequent use of the property was irrelevant, since the public purpose was already achieved. The merits of blight removal as a public use to satisfy the Takings Clause are discussed in more detail in Part IV of this note.

In *Berman*, the Court analyzed the taking of private property within the city of Washington, D.C. in accordance with a comprehensive redevelopment plan initiated by Congress.[43] Over 60% of the dwellings within the project area were beyond repair, and many of the other buildings lacked indoor plumbing and central heating.[44] In light of these conditions, Congress declared that the area was injurious to the public health and that redeveloping the area was a public use.[45] However, the department store building that was being condemned in the case before the Court was not in disrepair, and could not be con-

39. 348 U.S. 26, 33 (1954).

40. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 38–40 (2003).

41. *Id.* at 33–35.

42. *Id.* at 25–26.

43. *Berman*, 348 U.S. at 28–29.

44. *Id.* at 30.

45. *Id.* at 28–29.

sidered harmful to the community.[46] The business owner argued that taking his property and transferring it to a private developer served an unconstitutional private purpose.[47]

In deciding to uphold the taking, the Court wrote that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[48] The Court noted that its role in determining whether the exercise of eminent domain was for a proper public use is "extremely narrow,"[49] and held that if Congress decided that "the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."[50] Furthermore, the Court held that transferring the property to a private developer did not negate the public purpose of the taking,[51] and that the non-blighted department store could be condemned because the redevelopment project was to be viewed as a whole rather than "on a piecemeal basis."[52] In essence, the *Berman* Court implied that property may be taken from A and given to B, as long as the purpose of the taking is to benefit the public. This reasoning would become the foundation for the Court's later decisions.

C. Hawaii Housing Authority v. Midkiff

Thirty years after upholding the taking of properties in the poorest neighborhood of Washington, D.C., the Court applied its broad public use doctrine to the condemnation of properties belonging to the wealthiest citizens of Hawaii. In 1967, the Hawaii legislature enacted laws allowing individual tenants to obtain title to the land on which they were living by asking the government to condemn the property.[53] The legislature intended to use these condemnation proceedings to redistribute the island's land, thereby breaking up the land oligopoly that had existed throughout Hawaii's history.[54] At the time the laws were enacted, nearly 96% of the state's land was owned either by the government or by one of only seventy-two private land owners.[55] The

46. *Id.* at 31.
47. *Id.*
48. *Id.* at 32.
49. *Id.*
50. *Id.* at 33.
51. *Id.* at 33–34.
52. *Id.* at 35.
53. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 233 (1984).
54. *Id.*
55. *Id.* at 232.

legislature found that the consolidated ownership of the land resulted in artificially high real estate values, and determined that redistributing the land would be in the best interest of the public.[56]

One of the land owners faced with condemnation challenged the constitutionality of the Hawaiian law, arguing that the taking would be for a purely private purpose. On appeal, the circuit court held that the law violated the public use requirement because it represented a "naked attempt on the part of the state of Hawaii to take the private property of A and transfer to B solely for B's private use and benefit."[57] This holding set the stage for the Supreme Court's next expansion of the Public Use Clause.

To begin its analysis of the Hawaii legislation, the Court reiterated that great deference must be given to the legislature, and that a compensated taking will not be proscribed by the Fifth Amendment as long as it is "rationally related to a conceivable public purpose."[58] The Court then went one step further than it had in *Berman* by expressly stating that eminent domain may be employed to transfer property directly from one private entity to another as long as the purpose of the taking serves to benefit the public.[59]

D. Kelo v. City of New London

In light of the Supreme Court's broad interpretation of the Public Use Clause throughout its prior decisions, its approval of eminent domain proceedings to condemn non-blighted properties as part of an economic development plan should have come as no surprise. In 2000, the city of New London approved a redevelopment plan that was intended to create new jobs and increase tax revenues by capitalizing on the arrival of a new Pfizer Inc. research facility.[60] In order to complete the renovations, the plan required the acquisition of properties either through purchase or the use of eminent domain.[61] Several home owners, including an elderly woman who had lived in her home for more than eighty years, challenged the city's proposed use of eminent domain, claiming that the takings were for a purely private use since the properties were to be transferred to a private developer.[62] The area in

56. *Id.*
57. Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983).
58. *Haw. Hous. Auth.*, 467 U.S. at 241.
59. *Id.* at 243–44.
60. Kelo v. City of New London, 545 U.S. 469, 473–74 (2005).
61. *Id.* at 475.
62. *Id.*

which the condemned properties were located was not claimed to be blighted, nor were any of the individual properties.[63]

Predictably, the Court began its analysis of the proposed takings by reaffirming its broad interpretation of the Public Use Clause, as well as its policy of deference to legislative decisions.[64] In spite of the fact that the redevelopment plan did not claim to target the elimination of blight or any other social harm, the Court determined that the "program of economic rejuvenation" was entitled to its deference and "unquestionably serve[d] a public purpose."[65] The Court emphasized the importance of the "integrated development plan" in allowing the transfers to a private developer to be considered a public use, but stopped short of declaring that the transfers would have been purely private if executed outside of such a plan.[66]

In concluding its analysis, the Court stressed that it was merely establishing the "federal baseline" for the exercise of eminent domain under the Public Use Clause, and that states were free to set more stringent limits on their use of the power.[67] It is unclear, however, what takings would be prevented by this "federal baseline." Regardless, *Kelo* made clear that any meaningful limitations on the exercise of eminent domain would need to be established at the state level.

II. ILLINOIS SUPREME COURT CASES: A MORE NARROW VIEW OF PUBLIC USE

The use of eminent domain within Illinois is limited by the Illinois Constitution[68] and the Fifth Amendment to the United States Constitution, which is made applicable to the States through the Fourteenth Amendment.[69] The state and federal constitutions both provide that private property may not be taken for public use without just compensation.[70] The Illinois Supreme Court, however, has employed a more narrow interpretation of the term "public use" than is applied by the United States Supreme Court. Although the Illinois Court has softened its original view that "public use" literally means "use by the public," it

63. *Id.*
64. *Id.* at 480.
65. *Id.* at 483–84.
66. *Id.* at 487.
67. *Id.* at 489.
68. ILL. CONST. art. I, § 15.
69. Sw. Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 7 (Ill. 2002).
70. *Id.*

has maintained a larger role for the courts in determining if a proposed taking is for a public use than is reserved by the federal courts.

A. The Initial Interpretation of Public Use in Illinois: Use by the Public

In accord with the decisions of the United States Supreme Court, the Illinois Supreme Court has always held that the State's right to take private property without the consent of the owner is limited to cases where the property is taken for public use.[71] Thus, the legislature cannot take the property of one citizen and give it to another without the owner's consent.[72] However, the Illinois Supreme Court has shown less deference to legislative determinations of public use than the federal courts have shown. In Illinois, it is clear that the legislature's task is to determine when it is necessary to exercise the power of eminent domain, but it is the court's task to decide whether that exercise of the power is for a public use.[73] The Illinois Supreme Court has emphasized that the power of eminent domain should be exercised with restraint, and that the security of private property rights should not "be overlooked" in a "desire to promote the public good."[74] Therefore, the court has urged the legislature to state the purpose for its use of eminent domain in a definite manner so that the proposed public use is clear.[75]

Throughout its decisions in the nineteenth and early twentieth centuries, the Illinois Supreme Court held that the public must have a subsequent right to use or access the property in order for a condemnation to be an appropriate public use. For example, the court held that the legislature could not condemn land for a right of way over an individual's land without his consent unless the right of way is intended to benefit the community rather than another individual.[76] The court asserted that the property owner's right to exclude others from his land must be supreme unless the right of way is needed for use by the public, and that to hold otherwise would "open the way to other and more serious encroachments upon the right of property."[77] Similarly, the court held that eminent domain could not be used to create a right of way between a factory and a local railroad because the right of way

71. Limits Indus. R.R. Co. v. Am. Spiral Pipe Works, 151 N.E. 567, 569 (Ill. 1926).
72. *Id.*
73. Chicago & E.I.R. Co. v. Wiltse, 6 N.E. 49, 49–50 (Ill. 1886).
74. City of East St. Louis v. St. John, 47 Ill. 463, 466 (1868).
75. *Id.* at 466–67.
76. Nesbitt v. Trumbo, 39 Ill. 111, 118 (1866).
77. *Id.*

would not be made available to the public and would exclusively benefit the company.[78] The court reasoned that the "expression 'public use' *ex vi termini* implies an interest or right of some kind in the public," and that parties "condemning property for such purposes assume certain obligations and duties to the public."[79] If the company would have no obligation to allow public access to the right of way, then the condemnation could not be for a public use.[80]

In 1903, the court summarized its view of the Public Use Clause in *Gaylord v. Sanitary District of Chicago*. The court asserted that in order for a condemnation to be for a public use, "[t]he public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right."[81] This quote would continue to play a role in the court's opinions throughout the following century, although sometimes only in dissent, as the court struggled with increasing pressure from local governments to broaden its view of public use.

B. The Effects of Blight Removal on Illinois's Public Use Standard

Similar to its role at the federal level, urban blight played a key part in leading the Illinois Supreme Court to expand its interpretation of the Public Use Clause. In the decade preceding the United States Supreme Court's decision in *Berman v. Parker*, the Illinois Supreme Court was forced to decide whether blight removal was a public use in *Zurn v. City of Chicago*. In *Zurn*, the Illinois Supreme Court considered the constitutionality of a law providing the power to utilize eminent domain to transfer blighted properties to a private corporation for redevelopment.[82] Under the statute, the government would not have control over the use of the land once the blight conditions were removed.[83]

This law would have been unconstitutional under the Illinois Supreme Court's traditional interpretation of the Public Use Clause because the condemned property would not be made available for use by the public, and the redevelopment corporation would have no obligation to use the property for any public purpose once the blight condi-

78. Sholl v. German Coal Co., 10 N.E. 199, 201 (Ill. 1887).
79. *Id.*
80. *Id.*
81. Gaylord v. Sanitary Dist. of Chi., 68 N.E. 522, 524 (Ill. 1903).
82. Zurn v. City of Chicago, 59 N.E.2d 18, 25 (Ill. 1945).
83. *Id.*

tions were removed. However, the *Zurn* court upheld the law because the "declaration of public policy . . . by the legislature [wa]s entitled to great weight."[84] Similar to the *Berman* Court, the Illinois Supreme Court found that the manner in which the private corporation would use the land after the redevelopment was "wholly immaterial."[85] The public use was accomplished once the blight conditions were removed, and the subsequent use of the land had no effect on this purpose.[86]

The *Zurn* court's shift away from the traditionally narrow understanding of public use was likely a result of increased pressure being applied by municipalities in an effort to obtain the power of eminent domain to facilitate urban renewal. This type of pressure was increasing in urban areas across the country during the 1940s.[87] In any event, the shift was not an unconscious one. Relying on the court's holding in *Gaylord*, the dissent asserted that the court must make a distinction between "a purpose which is to the advantage of the public and a purpose which is for a public use."[88] Accordingly, the dissent argued that the takings contemplated under this law were unconstitutional because the public could not assert any right to use the property, and the private corporation would not have an obligation to use the land for any public purpose after the initial removal of the blight conditions.[89] The majority rejected this argument, evidencing a willful movement towards a broader understanding of the Public Use Clause.

C. The Illinois Supreme Court's Current Interpretation of Public Use

The Illinois Supreme Court established its current public use doctrine in *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.* (SWIDA).[90] In 2002, the *SWIDA* court established limits for condemnations that satisfy the Public Use Clause by precluding the use of eminent domain when the primary purpose of the condemnation is to foster economic development and the primary beneficiary is a private entity.[91] The court explicitly rejected the notion that the legislature's determination of public use is beyond judicial

84. *Id.* at 22.
85. *Id.* at 25.
86. *Id.*
87. Pritchett, *supra* note 40, at 28–30.
88. Zurn, 59 N.E.2d at 28 (Murphy, J., dissenting).
89. *Id.* at 29.
90. 768 N.E.2d 1 (Ill. 2002).
91. *Id.* at 11.

scrutiny, and asserted that "[t]he power of eminent domain is to be exercised with restraint, not abandon."[92]

In *SWIDA*, a private corporation that owned a race track attempted to obtain land from a neighboring business in order to build a parking lot. When the business refused to sell the land, the race track owner contacted a local redevelopment corporation to initiate condemnation proceedings, asserting that the acquisition of the land would serve a public use because it would promote economic development and increase tax revenues.[93] The court began its analysis of the proposed taking by acknowledging the deference owed to legislative decisions regarding the use of eminent domain, but then asserted that the ultimate determination of whether the power is being employed for a public use is a judicial function.[94] The court cited its nearly one-hundred-year-old holding in *Gaylord* for the proposition that a taking cannot satisfy the public use requirement simply by benefiting the public in some incidental manner.[95] Rather, the public must have some vested right in the use of the land.[96] In light of these principles, the court held that the condemnation was unconstitutional because the race track owner's primary purpose in taking the land was to increase its private profits rather than to serve the public.[97]

While the court stated that the public need not take possession of the property to satisfy the Public Use Clause, its citation to *Gaylord* signaled a clear intention to return to a more narrow interpretation of public use. Specifically, the court emphasized that "revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power," and that eminent domain should be used with restraint.[98]

III. THE ILLINOIS EQUITY IN EMINENT DOMAIN ACT

The public outcry against the Supreme Court's ruling in *Kelo* was heard throughout the country, and Illinois was no exception. Private property owners feared that their homes or businesses could be taken without their consent any time the government found a new use for the property that would generate more tax revenue. However, many

92. *Id.*
93. *Id.* at 4.
94. *Id.* at 8.
95. *Id.* at 9.
96. *Id.*
97. *Id.* at 11.
98. *Id.* at 10–11.

municipalities argued that eminent domain reform in Illinois was unnecessary in light of the Illinois Supreme Court's holding in *SWIDA*.[99] In their view, Illinois case law already prevented the taking of private property for purely economic considerations, and there was no reason to impose additional restrictions on the use of eminent domain power within the state. Many municipalities rely on the power of eminent domain to modernize and improve their cities in a cost effective manner, and do not want unnecessary restraints placed on the power. Illinois residents and business owners have countered these arguments by asserting that local governments regularly condemn private property for economic development in spite of the Illinois Supreme Court precedent, and that additional limitations on the use of eminent domain are necessary to strengthen individual property rights. Evidence in support of this view can be found in a recent *Chicago Tribune* study showing that eminent domain has been used more than 250 times for economic development in just six Illinois counties during a five-year period.[100]

Faced with these two opposing views, State Senator Susan Garrett introduced legislation in an attempt to codify the Illinois Supreme Court's holdings, and to clarify the rights and protections of Illinois property owners that are faced with condemnation proceedings.[101] The bill was designed to reach an accord between the individuals seeking stronger private property rights and the government entities lobbying for broad eminent domain powers. According to Senator Garrett's website, "[t]he objective of the legislation is to strike a balance by enabling economic development while providing adequate protection and due process for property owners."[102] After several amendments in the House of Representatives, the bill introduced by Senator Garrett was approved by the General Assembly and signed into law as the Eminent Domain Act.[103]

This section explains the public use provisions of the Eminent Domain Act, and provides commentary on whether each provision weighs in favor of strong private property rights or the government's ability to employ the power of eminent domain for economic develop-

99. *See, e.g.*, Brian Martin, *Eminent Domain in Illinois After Kelo*, ITIA NEWSL. (Ill. Tax Increment Ass'n, Springfield, Ill.), Fall 2005, at 4, *available at* http://www.illinois-tif.com/Resources/News letters/2005FallNewsletter.pdf.

100. Yednak, *supra* note 9, at 2.

101. State Senator Susan Garrett, *supra* note 14.

102. *Id.*

103. 735 ILL. COMP. STAT. 30/1-1-1 (2006).

ment. Finally, this section highlights the provisions that weigh most heavily on each side of the debate that the legislation is designed to balance.

A. The Public Use Provisions of the Eminent Domain Act

The Eminent Domain Act establishes five categories of public use under which the power of eminent domain may be utilized in Illinois. Each category describes a set of purposes for which eminent domain may be employed, and sets the burden of proof for establishing the public purpose. It is important to note that the provisions of the Eminent Domain Act "do not apply to the acquisition of property under the O'Hare Modernization Act"[104] or to the "acquisition or damaging of property in furtherance of the goals and objectives of an existing tax increment allocation redevelopment plan."[105] In order for a tax increment allocation redevelopment plan to be exempt from the provisions of the Eminent Domain Act, the plan must have been established prior to April 15, 2006 and have included property assembly costs as of that date.[106] The exemption for tax increment financing districts weighs heavily in favor of the municipal governments seeking to utilize eminent domain for economic development, and will be discussed in more detail below.

The first category of public use established by the Eminent Domain Act provides the authority to take property for public use and public control.[107] In order to satisfy the Public Use Clause under this subsection, the "condemning authority must prove that: (i) the acquisition of the property is necessary for a public purpose; and (ii) the acquired property will be owned and controlled by the condemning authority or another governmental entity."[108] This category of takings encompasses the traditional types of condemnations that allow for the construction of public roads, government buildings, and other related projects. There is no doubt that the takings authorized under this subsection would satisfy even the narrowest interpretation of the Public Use Clause. Therefore, this subsection has no effect on the current public use debate.

104. *Id.* § 30/5-5-5(a-5).
105. *Id.* § 30/5-5-5(a-10).
106. *Id.*
107. *Id.* § 30/5-5-5(b).
108. *Id.*

A second category of public use created by the Eminent Domain Act provides the authority to take property for private use or private control so long as the property will be utilized for a qualifying purpose.[109] The Public Use Clause is satisfied under this subsection when the condemning authority proves by a preponderance of the evidence that: (i) the acquisition of the property is necessary for a public purpose; (ii) an enforceable written agreement has been or will be executed to ensure that the acquired property will be utilized for the proposed purpose for at least forty years; and (iii) the acquired property will be applied to one of nine specific purposes.[110] The qualifying purposes include: 1) a project incorporating residential units for low-income households; 2) mass transportation facilities; 3) public utilities; 4) railroad use; 5) waste disposal facilities; 6) open space and parks; 7) libraries or museums; 8) charter schools that are open to the public; and 9) historic resources and landmarks.[111] The majority of these purposes are likely to satisfy a narrow interpretation of the Public Use Clause because the property will be made available for use by the public in the traditional sense approved by the Illinois Supreme Court in *Gaylord v. Sanitary District of Chicago*.[112] However, advocates for strong private property rights are likely to take exception to the provision allowing condemnation of property for the purpose of building housing units for low-income households because the provision allows the acquired property to be developed for "mixed-use" projects that include non-residential properties. In addition, the provision requires only 20% of the residential units to qualify as low-income housing.[113] As a result, this provision leaves substantial room for condemnations that are motivated primarily by economic considerations, and weighs in favor of the municipalities.

The third category of public use established by the Eminent Domain Act provides the authority to take property for public ownership and private control if the property will be used for certain specified purposes.[114] In order to comply with the Public Use Clause under this subsection, the condemning authority must prove by a preponderance of the evidence that: (i) the acquisition of the property is necessary for a public purpose; (ii) the acquired property will be owned by the con-

109. *Id.* § 30/5-5-5(e).
110. *Id.*
111. *Id.*
112. 68 N.E. 522, 524 (Ill. 1903).
113. 735 ILL. COMP. STAT. 30/5-5-5(e)(1).
114. *Id.* § 30/5-5-5(f).

demning authority or another governmental entity; and (iii) the acquired property will be used in the "operation of a university, medical district, hospital, exposition or convention center, mass transportation facility, or airport."[115] In general, these purposes are likely to face little opposition from property rights advocates because the use of the property will directly benefit the public as a whole. However, this subsection does leave some room for economic development. According to State Representative John Bradley, the sponsor of the bill in the House of Representatives, this subsection is intended to allow for the use of eminent domain to acquire land for "the Starbucks Coffee that's in the county hospital" and the "Avis Rent A Car that's in . . . an airport" in addition to acquiring land for the principal facility.[116]

The fourth public use category created by the Eminent Domain Act affords the authority to condemn property for private use and private control provided that the primary basis for the condemnation is the elimination of blight.[117] The Public Use Clause is satisfied under this subsection so long as the condemning authority proves by a preponderance of the evidence that: (i) the acquisition of property is necessary for a public purpose, (ii) the property to be acquired is located in an area that has been designated as a blighted area or a conservation area, (iii) the required blighting factors existed in the area at the time of the designation or any time thereafter if the existence of such factors is challenged within six months of the date the condemnation is filed, and (iv) at least one of the three following requirements is satisfied: (A) the condemning authority has entered into a written agreement with a private entity to redevelop the area that details the reasons for which the property is required; (B) the acquisition and proposed use of the property are consistent with a regional redevelopment plan adopted in the last five years; or (C) the acquired property will be used in accordance with a comprehensive redevelopment plan, and an enforceable agreement has been executed to ensure that the use of the property will remain consistent for at least forty years.[118]

The Eminent Domain Act does not define the term blight. Instead, it relies on the definition set forth in the Tax Increment Allocation Re-

115. *Id.*

116. *See* 122nd Leg. Day, 94th Gen. Assembly, at 17 (Ill. 2006), *available at* http://ilga.gov/house/ transcripts/htrans94/09400122.pdf (transcript of Illinois House of Representatives Regular Session).

117. 735 ILL. COMP. STAT. 30/5-5-5(d).

118. *Id.*

development Act[119] as the default definition. Blight is defined using ambiguous factors such as dilapidation, obsolescence, deterioration, and lack of ventilation.[120] As a result of the vague terms used in this definition, this subsection of the Eminent Domain Act creates the most expansive opportunity for municipalities to exercise the power of eminent domain for purely economic reasons. The provisions of this subsection are the focus of Part IV of this note.

The final category of public use established by the Eminent Domain Act is designed to govern takings that do not fall into one of the other four categories, and is described by Representative Bradley as a "catch-all" provision.[121] Under this subsection, the condemning authority "must prove by clear and convincing evidence that the acquisition of the property for private ownership or control is: (i) primarily for the benefit, use, or enjoyment of the public; and (ii) necessary for a public purpose" in order to satisfy the Public Use Clause.[122] The burden of proof on the condemning authority is higher under this subsection than any of the others. However, the two requirements set forth above are rebuttably presumed to be satisfied if the power to condemn the property is granted under one of the several statutes listed in the subsection, or if the primary purpose for the condemnation is the elimination of blight.[123] Thus, condemning authorities have the option of proceeding under this "catch-all" provision even when the taking would normally fall under one of the other categories. This may be an attractive option when the condemning authority believes that it can meet the higher burden of proof, because this subsection does not include the detailed restraints on the subsequent use of the property that are contained in some of the other subsections. The effect of including this "catch-all" provision will not be known until the courts decide what types of condemnations will satisfy the heightened burden of proof. Therefore, it is difficult to predict which side of the public use debate will benefit from this subsection.

119. 65 ILL. COMP. STAT. ANN. 5/11-74.4-3(a)(West 2006).

120. *Id.*

121. *See* 122nd Leg. Day, 94th Gen. Assembly, at 17 (Ill. 2006), *available at* http://ilga.gov/house/ transcripts/htrans94/09400122.pdf.

122. 735 ILL. COMP. STAT. 30/5-5-5(c) (2006).

123. *Id.*

B. The Eminent Domain Act's Key Provisions in Favor of Private Property Rights

The Eminent Domain Act significantly strengthens the rights of private property owners by increasing the burden of proof on the condemning authority in two ways. First, under the blight clearance category, the Eminent Domain Act requires the condemning authority to prove that the necessary blighting factors actually existed in the area at the time that it was designated as a blighted area or at some point thereafter.[124] Prior to the enactment of this legislation, a condemning authority could create a strong presumption of blight by simply declaring that an area was blighted.[125] The owner of the property bore the burden of proof to show that his property did not contain the alleged blighting factors.[126] This shift in the burden of proof should significantly increase the ability of private property owners to contest an allegation of blight because they no longer have to produce sufficient evidence to overcome a strong presumption on the side of the condemning authority. Rather, the condemning authority has the burden to produce evidence of each alleged blighting factor, and the property owner can challenge each assertion on a level playing field. As stated by bill sponsor John Bradley, this shift is a "substantial win[] for private landowners in the State of Illinois."[127]

Private property owners also achieved a significant victory in the Eminent Domain Act's provisions that require a condemning authority to prove that the specific property to be acquired is necessary for the proposed public purpose. Courts have long held that once the public use has been established, it is within the legislature's discretion to determine what property is to be acquired.[128] According to bill sponsor Susan Garrett, these provisions are intended to increase the burden on the condemning authority by "requir[ing] the condemning authority to prove the property is essential to the success" of the proposed pro-

124. *Id*. § 30/5-5-5(d).

125. Reed-Custer Cmty. Unit Sch. Dist. v. City of Wilmington, 625 N.E.2d 381, 385 (Ill. App. Ct. 1993).

126. *Id.*

127. 122nd Leg. Day, 94th Gen. Assembly, at 13 (Ill. 2006), *available at* http://ilga.gov/house/transcripts/htrans94/09400122.pdf.

128. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 35–36 (1954) ("Once the question of the public purpose has been decided, the amount and character of the land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.").

ject.[129] This requirement should help to prevent the taking of surplus property that is not vital to the achievement of the public purpose.

C. The Eminent Domain Act's Key Provisions in Favor of Economic Development

Illinois municipal governments lobbied fervently against the initial draft of the Eminent Domain Act because they believed it would significantly reduce, if not eliminate, their ability to redevelop obsolete areas within their communities in a cost effective manner by needlessly restricting their power to obtain property through eminent domain.[130] These lobbying efforts were successful in at least two ways. First, the municipalities were able to convince the legislature to exclude existing Tax Increment Financing districts from the provisions of the Eminent Domain Act. Second, the lobbyists were successful in maintaining the state's broad definition of "blight."

Municipalities lobbied extensively to exclude existing Tax Increment Financing districts (TIFs) from the provisions of the Eminent Domain Act so that existing projects would not be subjected to the Act's increased restrictions on the use of eminent domain.[131] As a result of this lobbying, TIFs that were established prior to April 15, 2006 are not governed by the provisions of the Eminent Domain Act, and therefore can continue to employ eminent domain in accordance with the laws in effect prior to the Act.[132] According to the Illinois Tax Increment Association, TIFs are designed to help rebuild "run-down" or "economically sluggish" communities by freezing the amount of tax revenues made available to the local community at the time of the TIF designation, and diverting all future increases in tax revenue to use in the redevelopment projects.[133] Under the Tax Increment Redevelopment Act, municipalities may exercise eminent domain within a TIF in order to achieve their goal of economic redevelopment.[134] Currently, there are 375 TIFs in Cook County alone, representing approximately 9% of the properties located in the county.[135] Given the prevalence of

129. State Senator Susan Garrett, *supra* note 14.

130. Yednak, *supra* note 9.

131. 122nd Leg. Day, 94th Gen. Assembly, at 15 (Ill. 2006), *available at* http://ilga.gov/house/transcripts/htrans94/09400122.pdf.

132. 735 ILL. COMP. STAT. 30/5-5-5(a-10) (2006).

133. What is Tax Increment Financing?, Illinois Tax Increment Association Frequently Asked Questions, http://www.illinois-tif.com/FAQ1.asp (last visited Mar. 28, 2008).

134. 65 ILL. COMP. STAT. ANN. 5/11-74.4-3(a) (West 2006).

135. *See* Press Release, Cook County Clerk's Office, County TIF District Report Released (Aug. 15, 2006), *available at* http://www.cookctyclerk.com/sub/news_view.asp?NEWS_ID=89.

TIFs in Illinois, and the fact that a TIF designation can last for up to twenty-three years, the exclusion of these areas from the provisions of the Eminent Domain Act creates a significant opportunity for municipalities to exercise eminent domain for purely economic purposes.

Municipalities seeking to utilize eminent domain powers for economic development will also benefit from the fact that the Eminent Domain Act does not include a definition of blight. Although condemning authorities are now required to prove the existence of blighting factors, the blighting factors contained in the TIF statute, which serves as the default definition of blight, are quite vague and easy to manipulate.[136] In addition, the opportunity to employ eminent domain for economic development is expanded by the fact that condemning authorities are only required to show blighting factors in the area rather than in the particular property that is to be condemned.[137] Part IV of this note further explores the meaning of blight under Illinois law, and asserts that a new definition is needed in order to finish balancing the strength of private property rights with the power of the local governments to utilize eminent domain for economic development.

IV. DRAWING THE LINE FOR PUBLIC PURPOSE: DEFINING BLIGHT

Eminent domain cases involving the elimination of blight and slum areas have played a very significant role in broadening the interpretation of the Public Use Clause at both the state and federal level. It is now well settled that private property may be condemned in order to eradicate a blighted area "regardless of the subsequent use of the property."[138] The elimination of blighted areas is said to be a public use because such areas are "detrimental to the health, safety, morality or welfare" of the public.[139] However, many states, including Illinois, have failed to establish a concrete definition of what constitutes a blighted area. Instead, many blight definitions are based on vague concepts such as dilapidation, obsolescence, and lack of community planning. These amorphous terms have allowed municipalities to acquire properties for economic development when the original use of the property was in no way detrimental to society. This section explores the origin of the term blight in the context of eminent domain proceedings, discusses the current definition of blight under Illinois law, and

136. See 65 ILL. COMP. STAT. ANN. 5/11-74.4-3(a) for a list of blighting factors.
137. 735 ILL. COMP. STAT. 30/5-5-5(d).
138. Sw. Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 9 (Ill. 2002).
139. Zurn v. City of Chicago, 59 N.E.2d 18, 23 (Ill. 1945).

suggests a new definition of blight in order to align the meaning of the term with the stated goal of eliminating property uses that are harmful to society.

A. The Development of Blight as a Public Use

In the first half of the twentieth century, there was a major push for urban redevelopment in many American cities—one spurred by deteriorating conditions within the city limits and the mass exodus of middle and upper class citizens from the cities to the outlying suburbs.[140] Sections of the cities, referred to as slums, were plagued with high crime and rundown buildings. In this context, the term "blight" was created to describe the conditions that spawn slum areas.[141] Blighting factors, such as decaying or overcrowded buildings, were viewed as a disease that would turn a healthy section of the city into a slum if they were not eliminated.[142] It was asserted by advocates for urban renewal that these blight conditions resulted from a lack of proper urban planning,[143] and that only large scale redevelopment could eliminate these conditions and guarantee the survival of the urban neighborhoods.[144]

The power to obtain these blighted properties through the use of eminent domain was seen as an essential component of urban renewal because private developers would not be willing to invest large amounts of capital in low-income areas without the added incentive of low acquisition costs.[145] The advocates for employing eminent domain to facilitate large scale urban redevelopment included city politicians that wanted to increase tax revenues, housing reformers that wanted to improve urban living conditions, and private developers that wanted to seize an opportunity to obtain large amounts of potentially profitable land for a relatively low cost.[146]

Renewal advocates viewed the Public Use Clause as the main obstacle to urban redevelopment because they feared that courts would not allow the use of eminent domain to secure privately owned property for redevelopment that was to be carried out by private corpora-

140. Pritchett, *supra* note 40, at 13–14.
141. *Id.* at 16–18.
142. *Id.*
143. *Id.* at 17.
144. *Id.* at 18–19.
145. *Id.* at 29.
146. *Id.* at 14.

tions.[147] In order to overcome this obstacle, the activists urged courts to focus on the condition of the property prior to being condemned rather than the subsequent use of the property after the condemnation.[148] This tactic proved to be very successful, as evidenced by the Illinois Supreme Court's ruling in *Zurn*[149] and the United States Supreme Court's ruling in *Berman*.[150] Each of these courts held that eliminating blighted areas is a public purpose regardless of the subsequent use of the property. Once blight removal was approved as a public purpose to satisfy the Public Use Clause, the process of taking privately owned land for economic development became routine. A municipality could obtain the power to take a desired property by simply asserting that the surrounding area was blighted. Since a firm definition of blight has never been established in most jurisdictions, municipalities have been shown great deference by the courts in determining what areas are blighted and need to be redeveloped.

B. The Current Definition of Blight in Illinois

According to State Senator Steven Rauschenberger, "[t]he statutory definition of blight in Illinois is broader than the Mississippi River at its mouth," and has led to "everything from underdeveloped lakefront property to open green-grass farmfields . . . being defined as blighted."[151] Senator Raushenberger's statement illustrates the expansive manner in which municipalities have utilized blight removal as a method to obtain desired properties through eminent domain. In recent years, Illinois municipalities have been successful in applying the blight designation to a multitude of different properties, including thriving shopping plazas,[152] suburban residences,[153] and even a Jimmy John's sandwich shop.[154] While blight was originally used to describe deteriorating urban neighborhoods with high crime rates, it has become a rhetorical tool used to facilitate the government's ability

147. *Id.* at 13.

148. *Id.* at 26.

149. Zurn v. City of Chicago, 59 N.E.2d 18, 25 (Ill. 1945).

150. Berman v. Parker, 348 U.S. 26, 33 (1954).

151. Maura K. Lannan, *States Scramble After Court's Land-Grab Ruling*, BRONZEVILLEONLINE, July 20, 2005, http://www.bronzevilleonline.com/newsarchive/eminentdomain.htm.

152. John Stossel, *Property Owners Win One: Target Won't Build Store on 'Blighted' Property in Illinois*, ABC NEWS, June 13, 2007, http://abcnews.go.com/2020/story?id=3273932.

153. Kuczka, *supra* note 10, at 7.

154. Jonathan Bilyk, *EMINENT DOMAIN: 'The Hammer is Smaller'—Cities, Property Owners Mull Impacts of New State Law*, MYWEBTIMES, Aug. 12, 2006, http://mywebtimes.com/ottnews/archives/ottawa/display.php?id=265443.

to condemn properties for economic development. This departure from its original meaning has been made possible by the vague factors used to define blight, combined with the courts' almost complete deference to legislative determinations of blight.

In spite of the weaknesses of the current definition, the Illinois legislature decided not redefine blight in the Eminent Domain Act. Instead, the Eminent Domain Act relies on the definition contained in the Tax Increment Redevelopment Act as its default definition.[155] Under the Tax Increment Redevelopment Act, an improved property is blighted if any five of thirteen factors are "present" and "reasonably distributed" in the area surrounding the property.[156] The required blighting factors include dilapidation, obsolescence, deterioration, the presence of structures below code standards, illegal use of structures, vacancies, lack of ventilation or light, inadequate utilities, overcrowding, deleterious land use, environmental clean-up, lack of community planning, and decreasing property values.[157] The statute does not indicate what percentage of the area must be affected by these factors in order for the area to qualify as blighted, but it is clear that the factors do not have to be present in the particular property that is being condemned.

Given the ambiguous nature of the factors listed in the statute, it is easy to see how a municipality can find sufficient evidence to declare almost any neighborhood blighted. However, the main defect in this definition is that the factors used to determine blight do not focus on the stated purpose of the law. The statute indicates that the removal of blight is necessary because it threatens the health, safety, morals, and welfare of the public,[158] but it does not indicate how the factors used to determine blight are related to this purpose. For example, it is unclear how the "absence of skylights"[159] or land parcels of "inadequate shape and size"[160] threaten the public's safety in any way. While these factors are useful in identifying areas that would benefit from economic development, they are virtually irrelevant in determining what areas pose a significant threat to public safety. As it is currently defined, any area that is not economically prosperous can be declared

155. 735 ILL. COMP. STAT. 30/1-1-5 (2006).
156. 65 ILL. COMP. STAT. ANN. 5/11-74.4-3(a)(1) (West 2006).
157. *Id.* § 5/11-74.4-3(a)(1)(A) to (M).
158. *Id.* § 5/11-74.4-2(b).
159. *Id.* § 5/11-74.4-3(a)(1)(G).
160. *Id.* § 5/11-74.4-3(a)(1)(L).

blighted. Therefore, the term must be redefined in order to prevent the use of eminent domain for purely economic takings.

C. A New Definition of Blight in the Context of Eminent Domain

The broad terms that define blight under current Illinois law invite local governments to apply the term to any area that is not thriving economically. While this broad application of the term may be appropriate under statutes that are intended to spur economic development, such as the Tax Increment Redevelopment Act from which the definition is borrowed, it is not suitable for an area of the law that is to be "exercised with restraint."[161] The Illinois Supreme Court has held that blight removal satisfies the Public Use Clause, whereas economic development alone does not.[162] In order to give force to this differentiation, the definition of blight must require more than a lack of financial viability. Unless the term blight is redefined, the Eminent Domain Act will fail to achieve its goal of balancing the rights of private property owners with the economic interests of local governments because eminent domain will continue to be employed for purely economic benefits under the pretense of blight removal.

Blight removal satisfies the Public Use Clause because it eliminates property uses that are "detrimental to the health, safety, morality or welfare" of the public.[163] Accordingly, the existence of blight should be based on the presence of property uses that pose a direct threat to public safety. In light of this purpose, this note proposes a new definition of blight in the area of eminent domain as follows:

(1) An area within a municipality qualifies as a "blighted area" if:
    (A) at least 35% of properties within the area qualify as "blighted properties" as defined under this section; or
    (B) the rate of violent crime in the area is significantly higher than the rate of violent crime in the municipality as a whole.[164]
(2) An individual property is deemed a "blighted property" if one or more of the following criteria is satisfied:
    (A) the property contains one or more structures that have continuously violated one or more building codes de-

161. Sw. Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 11 (Ill. 2002).

162. *Id.*

163. Zurn v. City of Chicago, 59 N.E.2d 18, 23 (Ill. 1945).

164. In order to implement this definition, a determination would have to be made as to how large or small of an area could be designated as a single "blighted area."

signed to protect the health or safety of the public for a period of at least one year;

(B) the property contains one or more residential structures that are not fit for human habitation;

(C) the property contains one or more structures that have been proven by clear and convincing evidence to pose a direct threat to the health or safety of the public;

(D) the property contains environmentally hazardous conditions that pose a direct threat to the health or safety of the public;

(E) the property is comprised of a vacant lot within a developed community that poses a direct threat to the health or safety of the public; or

(F) the property qualifies as an abandoned property.

There are two main advantages to this definition compared to the current definition of blight found in the Tax Increment Redevelopment Act. First, the factors used to define blight are directly related to the stated public purpose of ensuring the health and safety of the public. Second, the proposed definition establishes a clear threshold for the government's ability to condemn non-blighted properties within a larger blighted area.

Unlike the factors employed by the current definition, the factors used to establish blight in the proposed definition are all directly related to the safety and welfare of the public. Therefore, condemnations brought under the proposed definition are certain to serve the public purpose of protecting the public welfare by eliminating harmful property uses. Municipalities may argue that the proposed factors for determining blight are too restrictive, but the definition maintains a reasonable level of flexibility by allowing for a finding of blight whenever "a direct threat to the health or safety of the public" can be proven. Furthermore, the definition of blight should be restrictive since the use of eminent domain is to be "exercised with restraint."[165]

Proponents of economic takings argue that large scale redevelopment often requires the condemnation of non-blighted properties within a blighted area in order to prevent holdouts seeking to receive above-market value for their property and to ensure that the area is redeveloped in a consistent manner. Under current Illinois law, a property containing no indications of blight may be condemned if it is located in an area where blighting factors are "present" and "reasona-

165. *Sw. Ill. Dev. Auth*, 768 N.E.2d at 165.

bly distributed"[166] provided that the area is being redeveloped as part of a comprehensive plan.[167] However, the terms "present" and "reasonably distributed" are not defined, thus leaving many property owners without notice of when they may face condemnation. In order to protect the rights of these owners while allowing for large scale redevelopment plans, the proposed definition of blight requires that at least 35% of the properties within a designated area qualify as blighted properties before a non-blighted property may be condemned. As a result, comprehensive redevelopment plans may be carried out in the areas that need it the most, while owners of non-blighted properties have clear notice of when they face potential condemnation proceedings.

CONCLUSION

The people suffering the consequences of allowing government takings for purely economic purposes "will not be random."[168] The "losses will fall disproportionately on poor communities" that are ill-equipped to defend their property rights against the strong economic power and political influence of corporations and development firms.[169] These disadvantaged communities have few resources, and therefore rely heavily on the Constitution to protect their private property rights. Unfortunately, the sanctioning of economic takings has rendered these people virtually powerless in their efforts to defend their property rights against businesses that seek to redevelop the land for financial gain. While the owners will receive "just compensation" for their property, "no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes."[170]

The Illinois legislature recognized the inherent dangers associated with government takings that are motivated solely by economic considerations, and took a strong step towards limiting these dangers by passing the Eminent Domain Act. However, the amorphous definition of blight relied upon by the Eminent Domain Act creates a substantial opportunity for local governments to take land primarily for financial

166. 65 ILL. COMP. STAT ANN. 5/11-74.4-3 (West 2006).

167. 735 ILL. COMP. STAT. 30/5-5-5(d)(C) (2006).

168. Kelo v. City of New London, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting).

169. *Id.* at 521 (Thomas, J., dissenting).

170. *Id.* See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982), for a discussion on the relationship between property rights and the ability to "achieve proper self-development."

gain. Regrettably, this broad definition of blight leaves many communities vulnerable to an expansive use of eminent domain. In order to eliminate this problem and achieve the Eminent Domain Act's goal of balancing the interests of private property owners with the interests of local municipalities, the Illinois legislature should adopt the more restrictive definition of blight set forth in this note.