

EMINENT DOMAIN AS A TOOL FOR REDEVELOPMENT: A CASE  
STUDY ANALYSIS OF BOSTON'S WEST END AND NEW LONDON'S  
FORT TRUMBULL AREA

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Appendix I: Fifth Amendment

Abstract:

By the middle part of the twentieth century, large segments of cities' middle-class and manufacturing companies relocated to the suburbs as new highway and housing policies were adopted. As a result, cities' tax bases declined and their governments were on the verge of collapsing. In an effort to reverse this trend, Title I of the 1949 Housing Act was passed providing cities with funds to use eminent domain to condemn neighborhoods for redevelopment purposes. This paper suggests that property rights throughout the 50s and 60s were compromised as result of this practice. By the 70s, funding for the Act was eliminated; but the widespread use of eminent domain by redevelopment authorities continued until 2005 following the Kelo vs. New London Supreme Court Case decision. The Court ruled that economic development was a permissible public use under the Fifth Amendment and resulted in nationwide reform limiting the powers of eminent domain.

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## **Chapter One: Introduction**

The Fifth Amendment to the Constitution reads, “No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The Fifth Amendment, also known as the Takings Clause has been the center of debate over the last 50 years; first during the urban renewal era of the 1950s and 60s and more recently for its use in relation to economic development purposes. To illustrate the span of this ongoing debate over the Fifth Amendment, this thesis uses two case studies to show how the government’s use of eminent domain over the past fifty years has led to recent state-by-state policy changes calling for a stronger definition of the term “public use.” The first case is Boston’s West End. In the late 1950s, over eight thousand working class residents were relocated using eminent domain. The approximately 48 -acre tract of land was eventually redeveloped into a high-end residential neighborhood that would increase the city’s tax base (Gans, 1982). The second case is New London, CT’s Fort Trumbull area. In the late 1990s the City of New London decided to condemn several properties as part of a ninety-acre redevelopment plan that would also increase the city’s tax base. Similar to Boston’s West End, residents in New London’s Fort Trumbull did not view their neighborhood in need of redevelopment. However, unlike the West End, citizens of Fort Trumbull challenged the condemnation of their land citing that economic development was a violation of the Fifth Amendment’s “takings” clause. The Supreme Court heard

the case in 2005. The Court determined that the City of New London acted within the limits of the Fifth Amendment and ruled against the citizens.

There is inherent tension between individuals' property rights under the Fifth Amendment and the need for cities to evolve in order to compete with increasing global and national economic development. This tension places planners, government officials, and individual citizens in a position that consistently tests the boundaries of the law. When these tolerances are tested, the Courts are used to determine if the actions taken are within the boundaries of the US Constitution.

The use of eminent domain has long been argued as a fundamental necessity of the United States government in order for it to operate efficiently and to protect the welfare of citizens. Equally important to the foundation of the country's Constitution, are personal property rights granted under the Fifth Amendment. The government's use of eminent domain increased as a result of the passage of Title I of 1949 Housing Act, also known as the Urban Renewal Act. The Act, designed to help facilitate the improvement of deteriorating low-income urban neighborhoods, provided local governments with federal funds for the redevelopment of blighted areas. The deployment of these funds triggered a national debate around personal property that would span five decades and reach its pinnacle in 2005 in New London, CT.

The urban renewal actions of the 1950s and 60s were a response to decades of urban deterioration and decline. By the end of WWII, manufacturing cities across the country started to show signs of decay (Lane & Levy, 2006).

With the exception of Military purposes, there had been limited public and private investment in infrastructure or industrial, commercial and residential development in these cities during the Depression and years surrounding the wars (Lane & Levy, 2006). Furthermore, the introduction of cars and trucks made both citizens and companies less dependent on fixed rail lines giving people more mobility than prior generations (Lane & Levy, 2006). The result of these varying confluences eventually led to the decentralization of cities. These changes altered regional land-use patterns contributing to the obsolescence of central business and residential districts across the country.

In 1942, the newly formed Urban Land Institute suggested a post-war “planning program” to reimagine urban cores by empowering local redevelopment authorities to acquire land in blighted areas for redevelopment (Lane & Levy, 2006). Once the land was acquired it would be sold at a discounted rate to developers who would then deploy the land into a more “productive use.” Recognizing that cities most in need of redevelopment were likely the most cash depleted, the Urban Land Institute recommended that federal funds be made available to them. Following the end of the war and a lengthy multi-year debate, in 1949 Congress authorized, and President Truman signed into law, the federal urban renewal program as part of Title I of the Housing Act (Lane & Levy, 2006).

One of the most famous examples of the use of eminent domain under the urban renewal program was the redevelopment of the City of Boston’s West End. With assistance of federal tax dollars, the Boston Housing Authority condemned 48-acres of land in a working class neighborhood near the city’s center. The

project eventually displaced over 8,000 residents; demolished their homes, community centers, businesses, and schools in order to make way for 2,400 luxury high-rise apartments (Teaford, 2000). For decades scholars, planners, politicians, and private citizens have cited the West End as a failure of urban renewal policies for its unjust approach to individual property rights.

Forty years after the redevelopment of the West End, the City of New London used eminent domain to condemn houses in the Fort Trumbull neighborhood to make way for an “urban village” that was planned to include condominiums, retail and a hotel. This new “urban village” would bring additional tax revenues to the economically depressed city –similar to the case made by public officials in the City of Boston in the 1950s. Unlike the West End, several residents of the Fort Trumbull community challenged the takings clause under the Fifth Amendment. The Supreme Court eventually heard the case. In a 5-4 vote, they determined that economic development via the promise of higher tax revenues qualified as a public use under the Fifth Amendment.

The Supreme Court’s decision in New London strengthened the arguments made by municipalities, planners and private corporations, which suggested that eminent domain is an effective vehicle for economic based urban renewal. (Gibson, 2005). When *The Baltimore Sun* ran an article leading up to the Kelo Case they quoted Baltimore’s City Solicitor Ralph S. Tyler III. In a statement in a friend of the court brief supporting the City in the New London he said “If cities are prohibited from using the power of eminent domain to stimulate economic development, then cities will not develop. And if cities don’t develop, if they do



not adapt to changing times and changing economic circumstances, city residents suffer” (Gibson, 2005).

There are cases where eminent domain has improved neighborhoods and helped to facilitate parcel assemblage that enabled development projects to move forward. The redevelopment of Baltimore’s Inner Harbor is one of those instances (Gibson, 2005). However, there are also instances where there are similarities between today’s uses of eminent domain for economic development purposes and the way it was used during the urban renewal era. Throughout the following decades the “public use” clause has been used to develop headquarters for multinational corporations, sports arenas for national franchises, private research facilities, shopping centers, casinos, and even private houses. (Vitulo-Martin, 2005).

Using the two case studies selected, this thesis draws comparisons between the uses of eminent domain during the urban renewal era and today, and suggests that – despite widespread agreement surrounding the deficiencies of urban renewal – personal property rights continued to be abused at a similar scale in the following decades when it has been used for economic development purposes. It illustrates that the urban renewal act was the impetus for the widespread use of eminent domain as a tool for political favoritism, that it fell short in its promise to restore neighborhoods following the Depression, and that the use of eminent domain for economic development continues to not fulfill its objective of restoring neighborhoods today. Moving forward, both planners and politicians should conduct a cost benefit analysis of large scale eminent domain

projects. This analysis should take into consideration the time needed to secure permits and funding; as well as the mistakes made with prior large scale master plans.

It is only after the Kelo decision that there has been substantial backlash from citizens, planners, government officials and the media to gain enough momentum to make the legislative changes needed to protect citizen's property rights and put an end to planners and politicians' abuse of the Fifth Amendment. For the first time in fifty years the pendulum has shifted back in favor of citizens as it relates to personal property rights.

The first half of this thesis discusses the evolution of planning and major government actions leading up to the passing of the 1949 Housing Act. This section serves as a literature review, setting the context of the social and economic challenges that preceded urban renewal, as well as the legislation that established it. Subsequently, by presenting a brief history of the West End, analyzing key factors, and discussing the plans for redevelopment, this thesis illuminates why the proponents of urban renewal wanted to redevelop the West End, and what they hoped to achieve. Then, by reviewing a variety of sources, this thesis discusses the mistakes that were made in the processes of displacement and relocation, and the unfortunate consequences for the neighborhood and its residents. Using a similar lens of analysis, this thesis examines the factors leading up to the Supreme Court decision on *Kelo v The City of New London* (2005), involving a controversial redevelopment project that was enabled through the use of eminent domain. These two case studies highlight the importance of public

participation as a method to influence to inform policy makers who control redevelopment agendas.

The second half of the paper explores how, despite the deemed failures of urban renewal, the definition of what qualifies as a public use under eminent domain has been expanded through judicial review and legislative deference over the years. This section surveys a series of Court cases and identifies the precedent each case established. The major cases discussed include: *Berman v Parker* (1954), *Poletown Neighborhood Council v The City of Detroit* (1981), *Hawaii Housing Authority v Midkiff* (1984), and *Kelo v The City of New London* (2005). The paper concludes with a discussion of reforms following the 2005 Kelo decision and pending cases in front of the Supreme Court surrounding eminent domain and property rights.

## **Chapter Two: An Evolution of Planning in American (1900 -1950)**

### *The Changing City*

Urban renewal, as the name implies, was designed to empower local governments to reverse the trend of physical and economic decline in cities around the country. The first part of the twentieth century was a period of economic, political and social transformation in America. Following the industrial revolution, two world wars, the introduction of the automobile, and mass immigration, the country's urban infrastructure had aged and its cities were becoming obsolete (O'Connor, 1993). The once productive ports, rail yards and factories were rundown, dirty and faced increased foreign competition. As urban infrastructure deteriorated, industry moved south and middle class citizens fled to the suburbs in search of new opportunities. Cities were left with declining tax revenues, disinvestment and inadequate housing conditions. The motivating factors and goals of urban renewal in the 1950s and 60s were clearly tied to the changing character of the American City (Goodman, 1971).

New Deal policies such as the National Housing Act of and multiple Highway Acts during the first part of the century were established with the hopes of creating forward progress and new opportunities for a great deal of people during the height of the depression, but over time it was these policies that inadvertently led to the decentralization and eventual decline of the nation's inner cities (O'Connor, 1993). The Federal Aid Highway Act of 1956 was responsible for expanding America's highway infrastructure and encouraged the use of automobiles as an efficient means of transportation. This newly found

convenience was a contributing factor to the suburban migration that played a role in the deteriorating of urban centers. Under the National Housing Act of 1934 the Federal Housing Administration (FHA) was formed. The FHA was responsible for insuring mortgages and produced a government-backed finance system for homeownership. Then in 1944 the Servicemen's Readjustment Act, also known as the GI Bill, provided low mortgage rate options to veterans if they purchased single-family homes outside the city. The financial ease of owning a home for various segments of the population and the introduction of accessible highway travel incentivized those who could afford to leave the city to do so.

Increased migration from the city to the suburbs had larger financial implications for older urban neighborhoods. Even in the midst of the Depression, urban policy makers understood the impacts of the decentralization trends (O'Connor, 1993). A 1937 New Deal Report titled "Our Cities: Their Role in the National Economy" described the challenges of cities as not just old buildings and slums, but a fundamental shift in land-use patterns, manufacturing and consumer behavior contributing to their decline (Lane & Levy, 2006). By the 1940s and 50s banks and insurance companies classified low-income, often ethnic, urban neighborhoods as "depressed" or "blighted," and refused to grant mortgages, assign home improvement loans, or insure properties in these communities. This policy became known as "redlining," and propelled these economically depressed neighborhoods into even further deterioration (O'Connor, 1993). The combination of the 1949 National Housing Act, the 1944 GI Bill and 1956 Highway Act over

several decades left inner city communities suffering from business divestment, population decline and growing health and social issues. (O'Connor, 1993).

While America's cities' economies declined, so did their populations. For instance, between 1950 and 1960 Philadelphia's suburbs grew by 44%, while the city's population, which peaked at 2.1 million, began to decline (Lane & Levy, 2006). Retail followed the demographic trends and new shopping centers and office parks with ample free parking were developed to meet the growing demand. New schools, hospitals and civic centers also followed the outward growth leaving the middle class with little reason to travel back into the cities. With a dwindling middle class to spend money in the city and the disappearance of manufacturing jobs, urban areas experienced a drop in tax revenues. The demographic shifts led to growing social challenges including poverty, health conditions, and unemployment. Decreasing tax dollars made it difficult to address the growing number of issues (Abramson, 2012).

*Urban Renewal: A Radical Approach and Needed Policy?*

By the 1950s and 60s, under the mantle of "urban renewal" countless low-income neighborhoods were razed to make way for new middle-class housing and commercial centers, a process made possible through the powers of eminent domain and federal funds administered through Title I of the 1949 Housing Act. Eminent domain is a measure reserved under the Fifth Amendment that gives the government the power to purchase – at fair market value – private property for "public use" (US Const. amend. V.). Traditionally, the term "public use" included projects such as new roads, utility infrastructure, and schools. However, in 1949

with the passing of the Housing Act, federal funds were made available for the removal of blighted areas in cities in an effort to address economic and social concerns of low-income neighborhoods. In other words, if a property met the federal definition of blight, it was permissible for cities to condemn the property and sell it to a third party for redevelopment with the belief that the larger public would benefit from the redevelopment of the land. The Act displaced thousands of mostly low-income residents and destroyed multiple low-income neighborhoods across the country. Today, the Act is criticized for its radical and invasive approach to urban redevelopment and infringement on personal property rights.

The 1949 Housing Act initially garnered strong legislative support as a result of its broad political appeal as a mechanism to improve poor urban living conditions and declining economic environments in cities (Goodman, 1971). However, in practice, the Act failed to help those it was supposed to and instead became an avenue for politicians to carry out economic development plans for their respective cities using tax dollars to condemn land and then grant title of the newly acquired land to those with political connections. An example of this practice was when the Boston Herald was looking for a new place to build their headquarters. The paper reached a deal with the City of Boston that the city would condemn a low income, mixed race section of the city's South End called the New York Streets using the federal funds from the Housing Act (O'Connor, 1993). The project not only displaced 800 residents, it failed to provide any housing including housing for those who were displaced. The use of federal funds

to benefit politically connected developers and organizations left many to question its constitutionality and support for the act dwindled. After two decades the funding was discontinued (Anderson, 1964).

However, despite the ending of the Act, the injustices of eminent domain for urban renewal purposes continued. One of the best known examples of this abuse of power occurred in Poletown, Michigan where the City of Detroit condemned several hundred acres of land and granted title to General Motors for a new manufacturing plant, citing the important role that General Motors played in the state's economy (Poletown v. The City of Detroit, 1981). The city argued that the public would significantly benefit from the opening of the plant as jobs would be created and tax revenues increased. When affected citizens challenged the case, the City of Detroit prevailed in court, the land was taken and the plant constructed. Eminent domain has faced multiple legal challenges over the decades, but in almost every instance, the courts have upheld the practice, effectively expanding the definition of what qualifies as a public use. In explaining their decision, the courts have repeatedly argued that it is not within the judicial branch's domain to determine what constitutes public use, but rather that the legislative branch has authority to make this determination (Kelo v. The City of New London, 2005).

As the concept of urban renewal gained steam, many government officials, planners and other advocates championed urban renewal legislation as a way to address the nation's poverty problems. At the time, sociologists and planners cited environmental determinism as the primary cause of poverty, suggesting that



physical surroundings of blighted areas were limiting the potential prosperity for residents in those areas (Abramson, 2012). They believed that by removing the structural neighborhood, urban renewal was to be a solution to overcoming the poverty that had previously been hard to escape. In many cases, urban renewal was presented as an attempt to eliminate poverty by clearing slums and creating new and improved urban environments that would replace them.

However, an examination of the implementation of urban renewal demonstrates that many politicians and planners – particularly those at the local level – were not motivated by a desire to uplift the poor, but rather wanted to use available federal funds to redevelop economically depressed neighborhoods of their cities (O’Connor, 1993). Urban renewal created strong financial incentives for cities, allowing them to improve the physical appearance of blighted areas at almost no cost to the local governments. In addition, this redevelopment created an opportunity to improve a city’s tax base. Land situated near urban cores that was occupied by poor residents served as prime targets for redevelopment.

#### *Theoretical foundations of Planning 1900 -1950*

In order to understand how urban renewal and eminent domain evolved into a tool used by planners and politicians to reshape cities, it is necessary to understand the history of planning and associated policies that influenced the urban landscape. Planning theory in America during the first part of the 20th century played an integral role in shaping the ideas that were implemented through urban renewal policies.

Early planning theory can be grouped into three periods. The first period is the rationalizing of order and form. During this period, planners pushed to formalize and systematically organize the built environment. The second period, institutionalization, recognized the study of planning with the issuance of collegiate degrees in the field. The acknowledgement of formal study solidified planning as an established profession that could offer expert advice on the right and wrong approach to the built environments. This would be instrumental during the urban renewal era. The third period used standardization through scientific research to validate decision-making. Data collection was used to back government intervention and new policies, and provided planners with the information needed to diagnose and remedy the country's ailing cities. (Campbell & Fainstein, 1996).

The rationalization period (1880 – 1910) was formative for the field of planning. Early pioneers believed that the rationalization of order and form could be achieved through the decentralization of cities. Decentralization was a mechanism to address the challenges of industrial pollution and the lack of order from centuries of unplanned growth (Campbell & Fainstein, 1996). Two notable champions of this period were Daniel Burnham and Le Corbusier. They were best known for their emphases on light and air quality in cities and efficient transportation networks to hubs outside of the urban cores.

Burnham's 1909 plan for Chicago demonstrates a new approach to planning: the Beaux-Arts style of the City Beautiful movement on the one hand, spurred by the White City – Chicago's 1893 Exhibition – and the large-scale,

long-term comprehensive plan on the other, tackling simultaneously several interrelated components of a metropolis – commercial and industrial development, port and lakefront facilities, railroad and freight transportation, a hierarchy of boulevards and streets, city parks and a regional park system, and the grouping of important civic buildings at the center. His plan emphasized the importance of civic centers and coordinated public and private improvements that provided an opportunity for unity and order that decades of haphazard development could not produce. He also stressed the importance of varying height limitations and uniformity, which were consistent with the idea that rationalization and prioritization should be an integrated part of land-use planning. The inefficiencies of urban development caused by the dominance of factories and associated housing were to blame for the decline of cities (Campbell & Fainstein, 1996). Burnham's vision was instrumental in raising the importance of civic awareness and the role it played in city planning particularly in the 1950s and 60s when urban renewal funds were used to build new city halls. Boston's famous City Hall is a modern version of the City Beautiful's emphasis on civic centers.

Le Corbusier's approach to creating a modern city, in the decades after World War I, was to take the seeming disorder of old European cities, particularly their overcrowded working class quarters, and replace it with physical neatness. A new environment had the potential to alter social behavior and alleviate the oppression that poor physical conditions created (Fishman, 1996). He used the introduction of the automobile as an opportunity develop new city forms of high-

rise buildings in green parks with parking underground connected by freeways and open space. Replacing the density created by low-rise buildings with tall sleek structures would offer the opportunity for parks and light. His visions of decentralization became pillars of the urban renewal era. The concept of “towers in the park” was born from the idea that they could eradicate nineteenth century tenement districts with this new forward-thinking design.

Burnham and Le Corbusier’s contributions to the City Beautiful and Modern Movements were the foundations for future planning theories that used the rebuilding of urban areas as the solution to dirty and polluted cities of the nineteenth century. Burnham and Le Corbusier inspired future generations of planners to think about the massing of buildings around civic centers and the incorporation of mass transit as the ways to design the next generation of cities. These concepts were eventually dismissed by some as elitist approaches that advocated for the beautification of urban form and ignored the realities of other causes of poverty and inequality in cities (Wilson, 1996).

The Institutionalization Period (1910 -1940) recognized the field of planning as a trained profession that, as Burnham’s 1909 plan had demonstrated, went beyond just the architecture and construction of individual buildings. It was a way of thinking and designing comprehensively that could be applied to an entire neighborhood. Through the formal course study universities granted degrees making planner’s experts qualified to advise elected officials and others on the current state and future needs of America’s urban cores. The academic nature of this period contributed to the idea that there was a right and a wrong

way to develop a city. By virtue of their expertise and experience, planners knew the correct path, and could exercise unbiased judgment. Government officials trusted that planners would effectively determine what was best for the public interest and used them to help shape their political agendas (Goodman, 1971).

The post war era (1940 – 60) of standardization used research and data collection to gather information on an array of topics. The data collected included such items as the numbers of cars on highways, income levels of neighborhoods, amount of open space, and even rodent infestation in cities (Abramson, 2012). Data could be used to garner federal support for new policies having to do with neighborhood improvements and the intervention of associated social and health issues. A prime example of this was New York's Committee on the Hygiene of Housing. A 1950s publication by the organization called "An Appraisal Method for Measuring the Quality of Housing: A Yard-stick for Health Officers, Housing Official and Planners" provided an objective, standardized method for evaluating housing conditions to be used by health officers. Designed for the progressive health officer, as well as the city planner and the housing official, the appraisal method outlined in the manual could be used by these professionals to make recommendations on policies.

If the use of data, rationalization, and academic degrees defined the field of planning during the first half of the century, the opposite occurred in the second half. Notable planners and self-declared advocates for the built environment started to speak out against the standardization of planning and associated government collaboration. This next era of planners championed the

rediscovery of the principles of classic urbanism: walkable streets, human-scaled buildings, mixed-income neighborhoods, and an active public realm. One of the most vocal critics of previous planning approached was Jane Jacobs, who in her influential 1961 book *The Death and Life of Great American Cities* suggested that the formalization of the planning field had removed planners from the understanding of how cities operate (Jacobs, 1961). Jacobs argued that government officials and planners are largely out of touch, and objects to big government planning due to its insensitive approach to urban renewal, focus on solving the “car problem,” and lack of understanding of the intricacies of urban economic and social workings. Jacobs wrote several books on urban renewal, in which she was highly critical of planners’ inability to think about the needs of individuals and the inner workings of their neighborhoods. She believed that the reliance on zoning and focus on the built form as a way to fix community social issues was the incorrect path to revitalizing American cities (Jacobs, 1961).

Jacobs was not alone. Robert Goodman (1971) argues that planners failed to consider the role of community participation and advocacy planning during the years of urban renewal. A decade later, William Whyte (1988) championed the important role that individuals played in the life of an urban neighborhood; he believed they had become overshadowed in a policy system that was entirely driven by data and numbers.

There were others who were specifically critical of urban renewal in Boston. Herbert J. Gans (1982), a resident of Boston’s West End prior to its demolition, wrote extensively about the social impacts and the identity crises that

were created by large-scale relocation of the tight knit community. He talks about how the policies that were developed with the goal of helping the poor, did little to advance the existing social problems, and instead destroyed a diverse, strong community. Thomas O'Connor (1993) also wrote about the West End redevelopment and was critical of Boston politics leading to the urban renewal policies that spanned two decades in the city from 1950 to 1970.

Another wave of writing about property rights and the Fifth Amendment came after the *Kelo v The City of New London* decision in 2005. In his book, Tim Sandefur (2006) discusses the philosophy of private property rights and the founding father's original intentions in the Fifth Amendment. He discusses at length the challenges in America as it relates to property rights and the different roles the three branches play in shaping and defining the term "public use." In his analysis, Sandefur identified not only the major Supreme Court cases that have charted the use of eminent domain but highlighted lesser known examples of the abuse of eminent domain, demonstrating its pervasive use as a way for politicians and planners to advance economic and political agendas.

#### *Legislative Movement and Policy Creation From 1900-1950*

In an effort to lift America out of the great depression, improve the country's competitive position, and advance the general welfare of citizens, the legislative branch created laws aimed at improving the nation's infrastructure and housing stock. These laws would be instrumental in permanently transforming the country's physical landscape.

Prior to zoning laws in America, land-use planning was regulated by common law. It did not categorize or organize land by use or hierarchy; rather it simply forbade the unreasonable use of one's property in a manner that seriously interfered with another's interest in the use or enjoyment of his or her property (Butler). Then, in 1924 and 1928, zoning enabling acts were passed. The U.S. Department of Commerce authored legislation that solidified government's role in land use regulation. The purpose of these enabling Acts was to create a mechanism for protecting private investment by separating incompatible land uses and guaranteeing the availability of light and air circulation through height and massing controls (Stiener and Butler, 2007). The concept of zoning was initially challenged. In the Supreme Court case *Village of Euclid, Ohio v Ambler Realty Co.* (1926), the Court supported the idea that government should play a role in land use regulation in order to foster the general welfare of the public (Forest, 1984).

A decade later, the National Housing Act of 1934 was passed in an effort to address unemployment and stimulate the release of private credit in the hands of banks and other financial institutions for home repairs and construction. This Act created the Federal Housing Administration that would be responsible for administering long-term, low-equity mortgages on new homes (U.S. Dept. of Housing and Urban Development, 2007). The program's regulations included specific recommendations that discouraged financing to neighborhoods on the basis of the race, social characteristics and incomes of its occupants. These regulations effectively served as a subsidy for more affluent citizens (Goodman,



1971). While these early measures represented the government's effort to stimulate the overall housing market, they did little to help lower income families. The law prohibited lending to residents in areas that the Home Owner's Loan Coalition (HOLC) had identified as declining or sparsely populated. In practice, this prevented most low-income and non-white families from receiving mortgages, as most of them lived in neighborhoods that were identified as "declining" (Fair Housing Center of Greater Boston, 2013).

Three years later, the 1937 Housing Act – also known as the Wagner-Steagall Act – was established. The Act provided federal funding for the development of public housing and required that for each new public housing unit created, a unit of substandard quality must be removed (Fair Housing Center of Greater Boston, 2013). In order to facilitate this one-for-one policy, the legislation authorized local housing authorities to purchase land using eminent domain to make way for the new housing. The Act also established the definition of a slum that was identified as "any area where dwellings predominate which by reason of dilapidation, over-crowding, faulty arrangement and design, lack of ventilation, light or sanitary facilities, or any combination of these factors, are detrimental to safety, health, or morals" (O'Connor, 1993. Page 66). The Act was administered by local authorities who were allowed to set low maximum income requirements which ultimately led to racially segregated housing projects and even higher concentration of poverty in public housing (Fair Housing Center of Greater Boston, 2013).

In 1944, the Servicemen's Readjustment Act, also known as the G.I. Bill, was passed. Among other benefits, this Act provided veterans with low-cost mortgages and guaranteed single-family and mobile home loans to veterans. The Act grew the number of potential homebuyers and grew the market for extensive new construction in suburban areas.

The Housing Act passed in 1949 was the impetus for the demolition and reconstruction of a significant part of America's cities in the 1950s and 60s. Title I of the Act allocated \$500 million in federal funds to local public agencies called redevelopment authorities for the purpose of removing blight and improving the health and welfare of residents (O'Connor, 1993). These grants provided local redevelopment authorities funding for initial project costs such as planning, acquisition, demolition and the process of selling reclaimed land to third party developers (Forest, 1985). The Act also required that projects be constructed according to specific redevelopment agencies' comprehensive master plans, which were usually created, at least in part, by third party planners. This meant that in order for a municipality to comply with the Act, they had to strategically restructure their own planning process, streamlining approval and oversight processes for redevelopment (Forest, 1985).

The Housing Act was later amended in 1954 to provide funding in a new way, reflecting a shift from clearance to rehabilitation: the wholesale demolition of "blighted areas", including buildings in good condition within them, was replaced by the requirement to demolish only structures beyond repair and to rehabilitate the others. Plans submitted by redevelopment authorities showing

“blighted areas” qualifying for federal funds, had to show rehabilitation as well as new construction. The most notable changes were the substitution of the term “urban renewal” for “urban redevelopment” and the allowance of up to thirty percent federal funding for nonresidential projects, provided that they were consistent with a “workable program” that laid out land-use plans, zoning specifications, relocation of displaced residents, building codes, and citizen participation (O’Connor, 1993). The 1954 amendment upheld the use of eminent domain as a mechanism for large-scale urban redevelopment.

The 1949 Housing Act and its 1954 Amendment referred together as Urban Renewal, are some of the most impactful and reflected upon pieces of federal housing legislation ever created. Once believed to be the answer to decaying urban cores, Urban Renewal in practice displaced a significant portion of poor urban populations, exacerbated social inequity, and allowed for the construction of what would later become highly criticized urban design. Over time, these pieces of legislation were met with resistance and deemed a failed approach to urban redevelopment. After significant backlash against the practice of urban renewal and the infringement on individual property rights, a more sensitive approach to redevelopment was demanded.

### **Chapter Three: Case Studies of Large Scale Uses of Eminent Domain**

This thesis examines two instances where eminent domain was used to redevelop a portion of a city as part of a larger economic agenda. By examining these two cases, and their associated political, legal and policy decisions, as well as the public outcry and frustration they generated, it becomes clear that what is today labeled as economic development, looks incredibly similar to urban renewal of the previous generation. However, instead of being rooted in concerns about health, safety and opportunity for residents, today's redevelopment appears to be focused almost entirely on economic growth for the city. These two cases provide a sound lens for viewing urban renewal and economic development because despite nearly 60 years separating the two projects, they both used the government's power of eminent domain. The projects also contrast each other in that redevelopment was motivated by different legislative acts, showing that today, governments have a wide range of leeway in determining what is in the public's best interest when it comes to property rights (Abramson 2012).

The use of eminent domain in the West End was increased due to the availability of federal funds – most notably the 1949 Housing Act – intended to address the ailing cities around the country. Rooted in concerns about health, safety, and increasing the tax base that was being lost to the competing suburbs, cities were incentivized to create new large-scale plans to fix the grime and congestion resulting from years of industrialization and unplanned growth. The hope was that in addition to improving living conditions for residents in these

areas, development would create an economic stimulus needed to propel the city forward (Goodman, 1971).

The Fort Trumbull development in New London, CT parallels the West End project in many ways. Like the West End, New London was economically depressed. Years of unplanned growth had resulted haphazard development of coastal land that – in the eyes of the planners and government officials – was not being developed to its full, revenue generating potential. In this case, decision makers saw eminent domain as a tool that could create a “blank slate” for developers and stimulate the city’s economy. This plan, similar to the West End, did not include replacement housing for the existing residents or include their existing houses as part of the development plan. Rather, they chose to build new high-end condominiums and other associated profit-maximizing developments. In both cases, eminent domain was a tool available to planners, elected officials, and developers to remove inefficient, obsolete neighborhoods and replace them with new state-of-the-art, planned communities.

### *Boston’s West End - Case Study One*

#### *Introduction*

In the late 1950’s the majority of Boston’s West End was condemned using federal grant money provided under Title I of the 1949 Housing Act. Today, the demolition and redevelopment of the multi-generation immigrant working-class neighborhood is seen as one of the most egregious abuses of eminent domain during the urban renewal era. The City of Boston, like many other cities across the country at the time, was suffering from economic decline evident by its

deteriorating tax base, corrupt political environment, and a continued exodus of middle class families and businesses out of the city. (O'Connor, 1993). Boston's downtown shopping district was losing business to newly built shopping malls in the suburbs; while other downtown businesses battled inconsistent tax structures, rising labor costs, and declining working conditions (O'Connor, 1993). Areas of Boston's upper class were also showing signs of economic trouble. Many of the once stately single-family homes were being converted into rooming houses for immigrants and college students. The economic and physical conditions in Boston were in decline despite increasing demands by neighborhoods for better housing, lighting, water, sewers, and services such as fire and police protection (O'Connor, 1993).

*Historic Boston - A New Plan for the Twentieth Century*

As early as 1907, the Boston Society of Architects (BSA) lobbied for dramatic changes to Boston's historic downtown. They described the city as "a series of ethnic neighborhoods made up of inflammable and dangerous tenements," and proposed to rescue the city with a series of elaborate plans that included "grand boulevards, new civic centers, a man-made island in the middle of the Charles, and a new City Hall in Beacon Hill" (O'Connor, 1993). The hope was if the city implemented these physical improvements, it would relieve the congested business district, improve the aesthetics of the City and prevent the prosperous and educated class from fleeing to the suburbs (O'Connor, 1993). For the next decade, various groups made up of businessmen, civic leaders, and academics pushed for organized plans to improve the city. One of the more

notable groups was called the Boston 1915 Movement. Conceptualized by Edward Filene and other likeminded influential business men, the group set out to create a forward looking plan that would take into consideration the changing needs of the new automobile age in Boston (Heath, 1998). Like other cities that may have had similar aspirations during the City Beautiful movement, such as Chicago and Philadelphia, the Depression and both World Wars redirected resources to larger concerns of the country, putting off any plans for large-scale change.

However, despite the city's inability to act on any of the grand visions of from the first part of the century, Boston had made some efforts to improve the city, creating the first official planning arm of the city - the Boston Planning Board. The planning board, created in 1913 would spend the next several decades overseeing incremental, but critical improvements to the city, making changes to zoning and building codes, improving transportation and enhancing parks (O'Connor, 1993). Yet, despite these incremental improvements to Boston, by the 1940s and 1950s most of the city had fallen into further disrepair.

The city's inability to make improvements at the municipal level was evidenced by the condition of individual properties and buildings throughout the city's boundaries. Years of deferred maintenance and dilapidated buildings led to public health concerns and sparked discussions about the obsolescence of existing neighborhoods throughout the city (Abramson, 2012). By the late 1940s conditions reached a point where banks classified many of the city's neighborhoods, including South Boston, Dorchester, Charlestown, and the West

End as “depressed” or “blighted” areas, and refused to lend money in those communities (O’Connor, 1992). The citywide need for better housing, utility upgrades, new businesses and tax growth made the opportunity to access federal funding an attractive option for John Hynes, Boston’s pro-growth mayor at the time. In an effort to meet the criteria for the federal funds, the City Planning Board targeted blighted areas that were immediately abutting downtown Boston that might qualify for redevelopment funds made available through the 1949 Housing Act. Through this process it became clear that most of Boston, including the South, West and North Ends were obvious candidates for slum clearance and urban renewal projects (Gans, 1962)

One of the first projects undertaken by the Hynes Administration was an area in the South End known as the “New York Streets.” The City first condemned the low-income residential area then handed the land over to the Boston Herald on which they would construct a new headquarters. In a speech at Boston College Citizen Seminar in 1954, Mayor Hynes stated that the project would “create new jobs, make more productive use of the land, and provide the city with additional tax revenues” (O’Connor, 1993). However, the land was not used to alleviate housing concerns in the City; instead his administration saw the Housing Act as an opportunity to transform this area of the city and use it as a driver for economic redevelopment (Gans, 1962). After receiving federal funding for the relatively small project in the South End, the City shifted its focus to the West End, which was a much larger project, and promised much more in federal funding.



### *Brief History of Boston's West End*

The West End is one of the oldest neighborhoods in Boston; its history dates to colonial times. In Boston's early years, the West End was primarily used for farming and light industry, as it was located not far from the city's primary residential area near Washington Street (Swift, 1992). During the late seventeenth hundreds and early eighteenth hundreds the West End grew to become a more desirable residential location, as traditional residential areas near Boston's wharves became more crowded. Landowners in the West End, who had been leasing the land for various commercial uses, began to capitalize on the outward growth by selling off single family housing plots to upper class merchants (Swift, 1992). Most of the existing residents relocated to the established elite neighborhood of Beacon Hill and the emerging fashionable Back Bay, filled and built between 1857 and 1882. By the late eighteenth hundreds, the West End's population density was the second highest in the city, after that of the North End.

As the industrial revolution transformed American business, it also changed Boston's economy. Many of the City's traditional residential neighborhoods once again evolved as factories expanded, and the number of workers needed to operate those factories grew. Owners of single-family homes in the West End were financially incentivized to lease rooms to factory workers – who had migrated from more rural areas – and the growing immigrant population (Swift, 1992).

At the same time that immigrants and rural workers were arriving in the City, Boston's small African American community was also rapidly growing. In

the 50 years between 1840 and 1890, Boston's African-American community grew from 2,427 to 8,125, remaining below 2% of the city's population that was growing much faster (Petronella, 2004). By 1860, approximately two-thirds of the city's African American population settled on the north slope of Beacon Hill first, where they worked as maids and servants to Beacon Hill families and in the West End (Swift, 1992). The cheaper housing, along with cultural anchors like the African Meeting House, the Smith school (segregated until 1855), and New England Anti-slavery Society all served to draw African Americans to the neighborhood (Swift, 1992). With immigrants from across the globe, the growing African American population, and many rural poor now residing in the West End, it had become a truly multi-cultural neighborhood. By the end of the 19th century the West End had been transformed into a diverse place that included African Americans, Irish, Italian, Polish, Russian, Ukrainian, Albanian, and Lithuanians immigrants seeking work, mostly as unskilled industry and servant workers.

In order to accommodate – and profit from – this growth, the owners of once single-family homes subdivided their houses into apartments or sold their property to new owners who built blocks of cold-water flats; all landlords squeezed as many units into their buildings as possible (Swift, 1992). The rapid physical growth of the neighborhood made it denser, limited air circulation, compromised the infrastructure of buildings, and worsened sanitary conditions.

After this influx of residents occurred in the late eighteen hundreds, there was little transformation for the next forty-years. Instead, the population stabilized and the neighborhood became less transient. Eventually, it became home to

multiple generations of close-knit working class families. By the nineteen fifties the majority of the West End's residents were American born, and had established businesses, were members of religious institutions, social clubs, and schools (Gans, 1992).

### *Urban Renewal in the West End*

For years, politicians, architects, planners and social agencies had viewed the West End not as a close-knit community, but rather as an obsolete and unsanitary tenement-housing neighborhood (O'Connor, 1992). Following the end of WWII, with the creation of the Federal government's urban renewal grant program, there was now a vehicle to replace the neighborhood's blight with a more futuristic vision. In 1950, the City of Boston created a "General Plan" that not only included redeveloping the city's waterfront and improving rail terminals, but also included cleaning up "unsightly pockets of blight" in both the South and West Ends (O'Connor, 1992). The first image shows existing conditions of the West End prior to urban renewal. The city viewed the narrow streets and high building density as an obsolete neighborhood. The second image below illustrates an early vision for the West End that incorporates many of the themes embedded in the ideas of Le Corbusier.

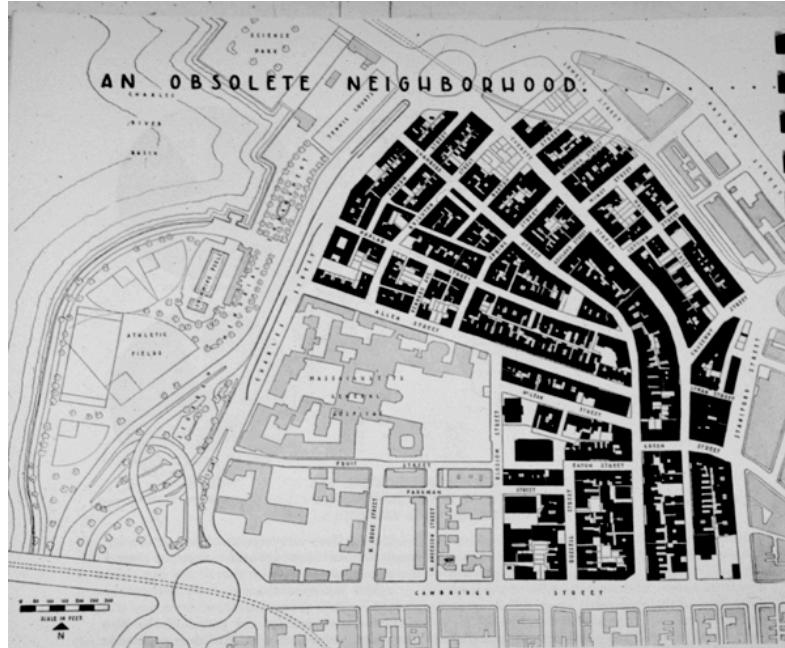


Figure 1: The Boston City Planning Board published this image in December 1950 stating in the “General Plan for Boston” that the West End was “An Obsolete Neighborhood.” Reprinted from *The Urban Renewal Chronicle: The Politics of Urban Renewal in Boston*, by T.H. O’Connor in *The Last Tenement: Confronting Community and Urban Renewal in Boston’s West End*, (p. 64), edited by S.M. Fischer and C. Hughes, 1992, Boston, MA: The Bostonian Society.

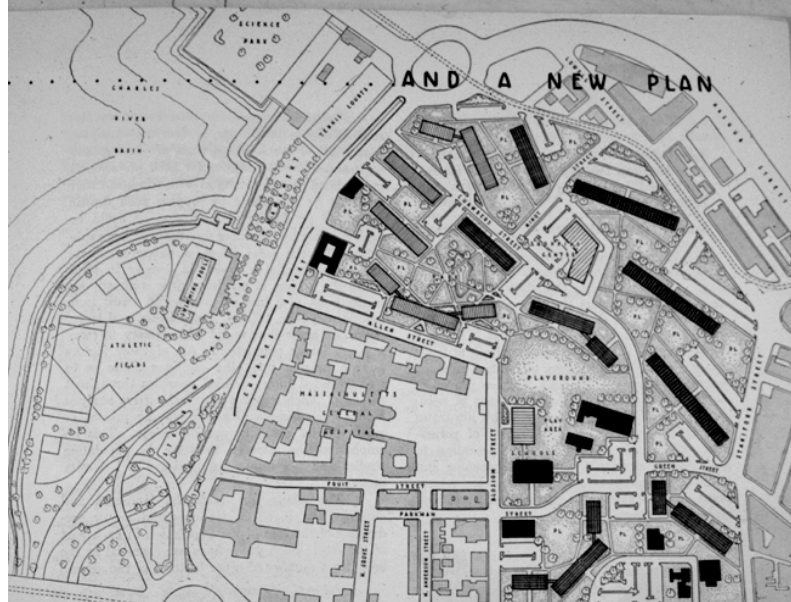


Figure 2: This image shows in the same “General Plan for Boston” the vision for “A New Plan” for the West End overlaid the existing street pattern. Reprinted from *The Urban Renewal Chronicle: The Politics of Urban Renewal in Boston*, by T.H. O’Connor in *The Last Tenement: Confronting Community and Urban Renewal in Boston’s West End*, (p. 65), edited by S.M. Fischer and C. Hughes, 1992, Boston, MA: The Bostonian Society.



Figure 3: Written on the back of this aerial photograph taken for the Boston Housing Authority is the comment 'overcrowding.' For many urban planners, the narrow street pattern and high building density indicated less than desirable urban living conditions. Reprinted from *The Urban Renewal Chronicle: The Politics of Urban Renewal in Boston*, by T.H. O'Connor in *The Last Tenement: Confronting Community and Urban Renewal in Boston's West End*, (p. 66), edited by S.M. Fischer and C. Hughes, 1992, Boston, MA: The Bostonian Society.

In 1950, just a year after the Housing Act was passed, the Boston Housing Authority applied to the Federal government for money to preliminarily support a redevelopment plan for the West End. A year later, the BHA began a formal study of the area with those funds. It was two years after that, in 1953 when Mayor Hynes formally announced the West End Project. According to his announcement, the plan included low-rent housing for 1,175 families, 200 middle-income apartments, and 640 high-rent apartments. The project would take three years and 2,248 families would be 'displaced' (O'Connor, 1993).

If the West End suffered from a lack of investment over the previous decades, the city's 1954 letter to residents and landlords, announcing the city's intent to condemn the area and advising them not to invest any more money into their homes, only made the environment worse. Many West End tenants voluntarily cleared out immediately following the announcement and landlords were forced to backfill worker housing with whomever they could, including gypsies and other transient people (Gans, 1992). The following year, trash pickup and other municipal services halted. As a result of these post announcement developments, the West End reputation as a slum area amplified, only strengthening the case for redevelopment. Those outside the West End community saw pictures of a declining neighborhood and politicians were able to drum up further political and outside resident support (O'Connor, 1993).

By 1956 the BHA had secured all federal and state approvals to move forward with the plan, and the Boston City Council and Mayor Hynes signed off on the project. However, not all were pleased with the BHA's handling of the project up to that point, and as a result, oversight of the redevelopment project was transferred to the newly created Boston Redevelopment Authority (BRA) the following year (O'Connor, 1992). Before demolition, the BRA held an informal public meeting in the West End. Despite testimonial from residents about challenges of the West End, they did not want to see their homes removed by the redevelopment project (Gans, 1992). While taking the community's pushback into consideration, the BRA ultimately concluded that the process had progressed too far to change direction, and that it was too late to stop the project (O'Connor,

1992). The BRA was also confident that demolition was the appropriate solution for the West End, citing public health statistics that were developed by the American Public Health Association. At the time, Boston's city inspector reported that 80% of the structures in the West End were substandard or marginal. Over 60% of the structures were infested with rats; 75% contained other types of vermin; 80% had no rear stairways; 80% lacked any type of outside fire escapes. They also reported data that welfare, crime and disease rates were higher than other parts of the city (O'Connor, 1992). Whether or not these statistics were true, they provided enough evidence for the planners to resist resident pushback, and move the redevelopment forward.

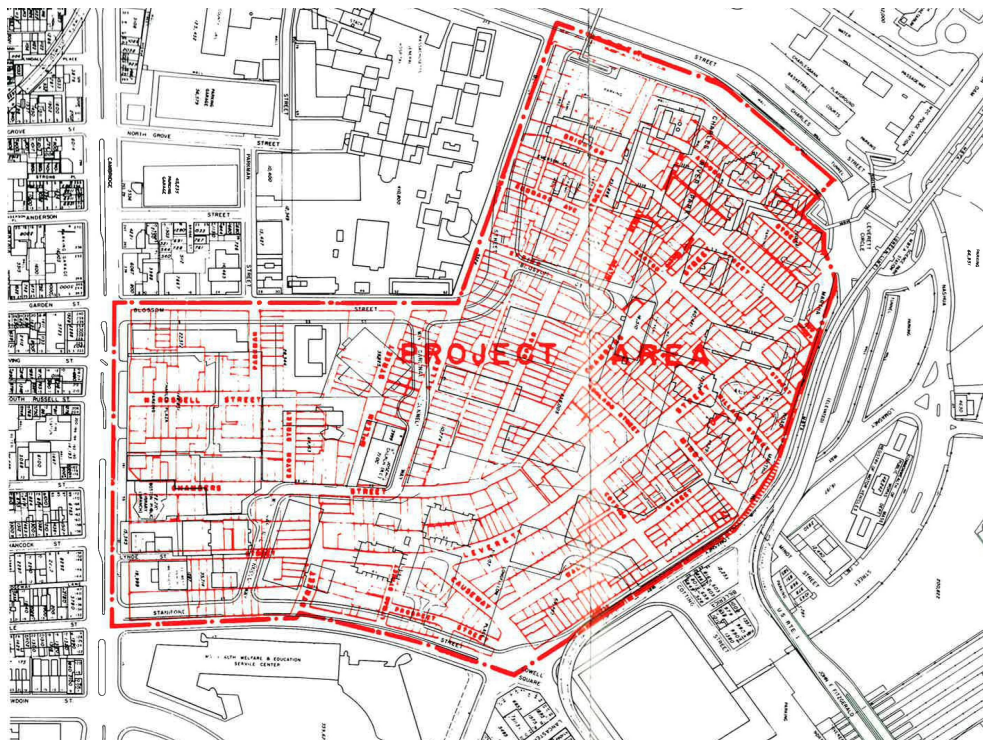


Figure 4: This Map showing the over thirty-five streets that ran through the West End prior to 1958 is superimposed onto the current street pattern. Outlined in black is the West End redevelopment project area as proposed by the Boston Housing Authority in 1953. Today, approximately twelve buildings from the old West End remain. Reprinted from *The Last Tenement: Confronting Community and Urban Renewal in Boston's West End*, (p. 9), edited by S.M. Fischer and C. Hughes, 1992, Boston, MA: The Bostonian Society.

### *The Plan of the Future*

After the plans had been set in motion, many people questioned whether redevelopment was actually driven by concern for the health and safety of the resident's, or by an opportunity for politicians to create revenue. In 1958, the BRA delivered a letter to West End residents and landlords stating that their properties had been taken by eminent domain for the purpose of "eliminating a 'substandard' and 'decadent' area and that demolition would begin immediately" (O'Connor, 1992). Mayor Hynes was quoted in the Boston Globe that same year saying that the project would "bring back hundreds of families who left the city because of lack of suitable and attractive urban living conditions" (O'Connor, 1992. Page 67). The mayor's emphasis on those who had left the city, further suggests that the project was partially motivated by an effort to replace low income residents with higher earning, tax revenue generating residents.

When the city and federal authorities put the project out to bid in 1958, the high bidder was Charles River Park Corporation, a three-person group consisting of a local investor, Theodore J. Shoolman; a New York financier, Seon Pierre Bonan; and a politically influential Boston lawyer named Jerome L Rappaport who had been an assistant to Mayor Hynes (O'Connor, 1992). The speculation was that Mayor Hynes has awarded the deal to his former aide as a political kick back for his work (O'Connor, 1992). Rappaport hired New York architect Victor Guen who called for most of the interior streets to be eliminated in order to accommodate five residential complexes that would consist of approximately 500



apartments each. Each room in these apartments would rent for \$45 per room, which was consistent with many luxury apartment buildings in the area at the time (O'Connor, 1992). The emphasis had shifted from a redevelopment plan that would address the health and well being of West End residents to a plan that would show case the current administration progress in revitalizing the City. Instrumental to the plan was a project that would bring middle-class families back into the City. The Chamber of Commerce and other influential parties such as the head of Filene's and Jordan Marsh saw the plan as a strategy for bring back "quality shoppers" and supported the development (O'Connor, 1992. Page 67). The image below is a pamphlet of marketing the newly design Charles River Park.



Figure 5: Pamphlet (Detail). Charles River Park: The wonderful experience of spacious, in-town living, 1960s. Urban high-rise apartments and open park-like spaces were intended to attract middle- and upper-middle-class families back to the city from the suburbs. Reprinted from *The Urban Renewal Chronicle: The Politics of Urban Renewal in Boston*, by T.H. O'Connor in *The Last Tenement: Confronting Community and Urban Renewal in Boston's West End*, (p. 67), edited by S.M. Fischer and C. Hughes, 1992, Boston, MA: The Bostonian Society.

### *The Aftermath*

Government officials and planners championed the West End's urban renewal project as a solution to the city's substandard housing conditions, but the true focus appeared to have evolved towards a revenue and redevelopment plan that would address the city's declining tax problems and attract middle income families back into the city. In the end, the project displaced over 8,000 residents

and demolished over 2,800 houses, apartments, schools, and community centers (O'Connor, 1993). Although demolition of the West End was fairly quick, it took nearly a decade until construction of the first new building was completed. Prior to construction, most of the West End was leased as parking lots. The running joke about the old West End was that it was the “the biggest parking lot in Boston” (O'Connor, 1993).



Figure 6: Parking lot on what was once home to people on North Russell and Chambers Street, 1961. Left Center, the iron fence that once separated the Blackstone School schoolyard from Eaton Street. Reprinted from *The Urban Renewal Chronicle: The Politics of Urban Renewal in Boston*, by T.H. O'Connor in *The Last Tenement: Confronting Community and Urban Renewal in Boston's West End*, (p. 69), edited by S.M. Fischer and C. Hughes, 1992, Boston, MA: The Bostonian Society.

There was much debate in the years to follow on whether the approach, process and execution were done in an equitable or even necessary manner. But as the process of urban renewal continued in the City of Boston and elsewhere

throughout the country, the West End was often mentioned as a point of comparison (O'Connor, 1993).

The Hynes administration's mark on the City of Boston extended beyond the redevelopment of the West End. The administration was responsible for the physical transformation of other parts of Boston. Although the Hynes' administration will always be remembered for its role during urban renewal, it was also responsible for several other projects, including the Prudential Center in the Back Bay and a new parking garage under the Boston Common (Whitehill & Kennedy, 2000).

### *New London's Fort Trumbull Area - Case Study Two*

#### *Introduction*

New London, CT, like many other coastal cities, saw a decline in manufacturing and industry throughout the twentieth century as manufacturing expanded over seas and the US transitioned to a service based and research dependent economy. The city was also suffering from the down sizing and eventual closure of a military base in the Fort Trumbull section of the city. By the mid-1990s the city looked to the state for help in reversing their multi-century economic decline. The state recognized the challenges in New London and took action to designate it as a "distressed municipality" (Rutkow, 2006). As a result of this designation, the state committed funds to help New London recover from its depressed state.

In collaboration with the state, the City of New London created an economic redevelopment plan to stimulate the economy. The proposed

redevelopment plan set out to create an agenda that would help attract new businesses to the area. The proposed plan was completed and approved by the City Council and the state's Economic Development Department in 2000 (Plattus, Harwell, Ponto & Estes, 2011).

As with many redevelopment projects over the previous decades, this plan rested on the redevelopment authority's ability to use eminent domain in order to take land needed for the project. Around the time that the City of New London started working with the state, the city also struck a deal with the pharmaceutical company, Pfizer. The agreement stated that Pfizer would build its world research and development headquarters in New London, so long as the city granted them ten years of tax abatements and made infrastructure improvements in Fort Trumbull (Edwards, 2009). In addition to Pfizer's new development, the proposed plan envisioned the transformation of the Fort Trumbull peninsula into an "urban village" that would host a hotel, high-end housing, a public park and other commercial properties. (Sanderfur, 2006).

While the proposed plan painted a pretty image for the city, the process to develop the land proved incredibly challenging. Public backlash mounted when the city announced it would use eminent domain to condemn property within the Fort Trumbull area as part of the larger redevelopment plan. After years of law suits, the backlash reached a pinnacle in 2005 when the U.S. Supreme Court ruled in favor of the City of New London when local residents challenged the city's reason for taking the land by eminent domain (*Kelo v. City of New London*, 2005). The case became one of the best-known eminent domain cases to reach the

Supreme Court. The Institute for Justice represented several land owners who sued on the premise that economic development was in violation of the fifth amendment's public use clause.

### *Brief History of New London*

Founded in 1649, New London, CT has a rich maritime and military history. Located at the mouth of the Thames River near Long Island Sound the city's deep-water port has always played a role in Connecticut and New England's economy. In the early years, the city was the second largest whaling port after New Bedford, MA bringing early wealth to the region (Connecticut Humanities, n.d.). Later, the port town became instrumental to both global and regional trade, particularly in the West Indies. Expanding on its reputation as a sea faring town, New London became known for its shipbuilding in the middle of the 18th century. With the introduction of the railroad in the 1850's and the deep port, the City of New London became a necessary stop, to transition cargo from land to sea, or vice versa (Connecticut Humanities, n.d.).

New London also benefited from a rich military history. Starting in the Revolutionary war, the city became an important transportation hub. This trend continued through the Civil War when a fort was constructed by the Union Army (Friends of Fort Trumbull, 2010). That same fort became the official home of the Coast Guard Academy in 1915 until it was moved across the city seventeen years later. At nearly the same time, the U.S. Merchant Marine Officer Training School opened on the peninsula (Friends of Fort Trumbull, 2010). However, the most important military contribution was the research conducted at Fort Trumbull

during the Cold War, when the U.S. Navy created the Naval Underwater Sound Laboratory. Starting in World War II and continuing through the Cold War, researchers developed and tested Sound Navigation And Ranging technology, also known as SONAR (Plattus et al., 2011). After the war ended, the Harvard Underwater Sound Laboratory in Cambridge and Columbia University's Division of War Research laboratory in New London merged and joined forces with the Navy, choosing Fort Trumbull as the location for their Navy Underwater Sound Laboratory (NUSL) (Plattus et al., 2011). NUSL research continued exclusively at Fort Trumbull until 1970, when the New London facilities partnered with other undersea research and development government activities in Newport, RI. In 1992, a newly created Naval Undersea Warfare Center (NUWC), headquartered in Newport, Rhode Island, absorbed the Naval Underwater Systems Center. Within five years the majority of the research and operations of the program were run out of the Newport location and the operations in New London was closed. In 1996, the Navy transferred the property to the State (Friends of Fort Trumbull, 2010).

#### *New London's Plan for Economic Development*

Once a busy port city that served as integral part of the region's economy, New London suffered from military disinvestment and increased manufacturing overseas. Macro changes to the regions economy began to take its toll on the city throughout the second half of the twentieth century. The city's troubles were heightened as unemployment rose and population fell. By 1998, the unemployment rate had risen to twice the state's average. As jobs continued to

disappear, the population saw a 30 percent decrease from its high in the 1960s (Rutlow, 2006). One problem for the city led to another; the declining population made it difficult for New London's once busy storefronts to stay open, and with businesses closing and services shrinking, the city became a less desirable place to live. The city was in need of a comprehensive economic plan that would help to get it back on track.

The depletion of industry and strong military presence created tax challenges for the city. Approximately half of the city's land was devoted to tax-exempt uses including: military facilities, courthouses, social services agencies, churches, colleges, and government buildings (Cosgrove, 2002). Compounding the problem, the city owned very little unoccupied land where they could create incentives for developers who may be able to attract companies to expand or relocate their businesses. In order to address these challenges, the city took action and created a plan that centered on attracting tax-paying entities. In order to carry out this plan, the city would have to secure developable land. The military closing and close proximity to the water made the Fort Trumbull peninsula neighborhood an attractive opportunity for the city to carry out this plan (New London Development Corporation, 2005).

In 1997, the governor of Connecticut, John G. Rowland, recognized the need to assist the City of New London in its economic redevelopment plans. Rowland's administration would recommend Claire L Gaudiani, then president of Connecticut College, to lead the initiative between the private sector and public organization that would be tasked with revitalizing the city. Gaudiani would go on



to lead the New London Development Corporation (NLDC) the regulatory agency that was responsible for administrating the Fort Trumbull redevelopment plans. In January 1998, the State provided \$5.38 million in bonds towards the execution of the NLDC development plans that would help turn New London around (Costas, 2005).

#### *The Plan for Transformation – Development Plan*

The hope was that the answer to New London's economic troubles would be the NLDC's Municipal Development Plan for Fort Trumbull. As it was originally envisioned by the NLDC, the Fort Trumbull Municipal Development Plan (MDP) would be one of the largest construction projects in the history of New London (Renaissance City Development Corp., 2013). According to the NLDC website the MDP goals were to build a world class development; create jobs, tax revenue, and spin-off economic activity for the city; maximize public access to the water; and develop a project that would help build momentum for the revitalization of all of New London (Renaissance City Development Corp., 2013). The scope of the project included the refurbishment of the historic Fort Trumbull structure, the creation of a new state park, completing the environmental abatement of an adjacent scrap yard, and upgrading utilities and infrastructure that would help facilitate Pfizer's facility. Public investment in the Fort Trumbull area would exceed \$73 million (Cosgrove, 2002).

Although a good portion of the site had been zoned as commercial/industrial since 1929 and had already been turned over to the city for redevelopment, a portion of the peninsula had been developed into a residential

neighborhood. When the project was initially conceived in the late 90s there were 117 separate parcels of land, some built and some vacant, of which 64 were residential parcels occupying 20 percent of the area, and 53 were non-residential parcels occupying the remaining 80 percent. Following the approval of the development plan in 2000, and with the use of a grant from the state, NLDC was able to negotiate the purchase of 98 of the 117 parcels of land (Costas, 2005).

The major component of the MDP vision was to use third party equity to help carry out the development. Without the private investment it would be difficult to build the “urban village.” The MDP had permitted the following uses in its redevelopment plan: a hotel, residential, office/R&D uses, civic uses, a river walk and associated parking (Costas, 2005). The NLDC solicited private developers to bid on the project and decided to move forward with Corcoran Jennison Co. of Boston as the developers of the project. In 2000, Corcoran Jennison unveiled its plans for \$100 million investment across several parcels of land on the peninsula. They would build a seven-story hotel with 75 rooms and a three-story hotel with 25 rooms. The plans also called for 80 units of housing that would be split between clusters of townhouses and a six-story apartment building with 47 units (Day Staff, 2000).

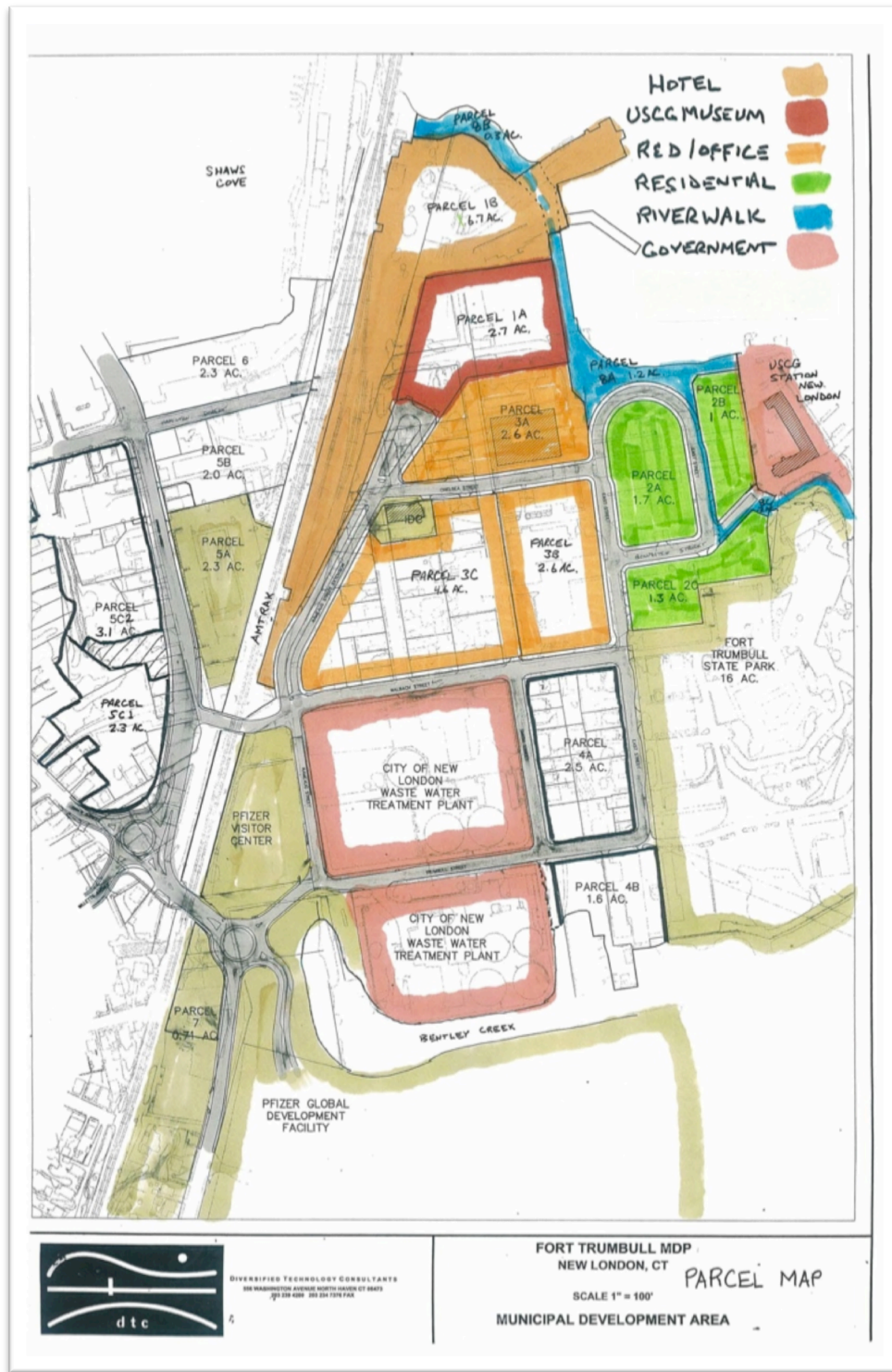


Figure 7: Municipal Development Plan showing the different contemplated uses for the redevelopment of Fort Trumbull area in New London, CT. Reprinted From *Fort Trumbull Vision: New London, CT* (p. 18), by A.J Plattus, , A. Harwell, M. Ponto & C. Estes, 2011, New Haven CT: The Yale Urban Design Workshop/Yale School of Architecture.

Above is a diagram produced by the NLDC that shows the contemplated uses for the MDP. It does not include the reuse of any existing residential houses. However, the individual lot lines remain on the map showing the existing lot lines of the individual parcels. The plaintiffs in the Kelo case were nine homeowners who possessed fifteen properties within the development area. Four of those properties were in parcel 3, which was scheduled for research and office space, and eleven were in parcel 4A, which was designated as “park support” (Rutkow, 2006). Their owners occupied ten of the properties that were to be taken through the condemnation process and five were held as investment properties (Rutkow, 2006).

The NLDC goal was to create a community that would be attractive for major corporations, tourists, and new residents (McGeehan, 2009). The project was also expected to generate between 1,700 and 3,150 jobs and between \$680,544 and \$1,249,843 in annual property tax revenues (Rutkow, 2006). It was this early vision — and a package of financial incentives — that enticed Pfizer to commit to building their headquarters for its research division on a nearby 26-acre site known as the New London Mills site. As part of the deal, Pfizer would receive tax abatement for the first 10 years (Edwards, 2009). Pfizer spent \$294 million on a 750,000-square-foot complex that opened in 2001 (McGeehan, 2009)

In order to understand how the plans to turn around New London ended with one of the most famous cases of eminent domain in history, it is best to walk through the timeline from 2000 through 2005.

- In January 2000, the Planning and Zoning Commission, Redevelopment Agency, City Council and NLDC approved the Municipal Development Plan. NLDC and the New London City Council and its boards and commissions held 14 public forums and hearings on the plan before it was approved by the City Council on January 18, 2000 (New London Development Corporation, 2005).
- Later that same year, the NLDC voted to use eminent domain to acquire 22 properties it needed to develop the Fort Trumbull peninsula into a maritime village after NLDC's offer to buy the properties was rejected by the owners. None of the properties was alleged to be blighted or in poor condition (Rutkow, 2006). NLDC offered to buy property from eleven homeowners, including Susette Kelo. Susette Kelo and others elected to reject the offer presented by the NLDC. The Institute for Justice, a non-profit law firm, agreed to represent Susette Kelo and other residents in the neighborhood, in a lawsuit against NLDC and the City of New London. They brought action claiming that the development plan was not for a "public use" under the Fifth Amendment and therefore could not justify the takings (Rutkow, 2006).
- In 2002, Connecticut Superior Judge Thomas J. Corradino ruled in favor of the City of New London and NLDC. Five days after the ruling, the property owners filed an appeal with the Supreme Court

and ignited a national debate about the future of property rights in America (Day Staff Writer, 2005).

- In 2005, *Kelo v. New London* was heard by the Supreme Court and would go on to become one of the most scrutinized property-rights cases in history. In a 5-4 decision, the Court ruled that it was permissible to take private property for economic purposes (McGeehan, 2009).

### *The aftermath of the Kelo Decision*

The Supreme Court's decision generated a profound public backlash sparking the debate around whether or not a municipality should a.) Have the right to use eminent domain; and b.) Under what conditions they should be able to use the power. In his dissent, Justice Clarence Thomas called New London's plan "a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation" (McGeehan, 2009.) His comments brought back to light the scrutinized urban renewal policies of the 60s and 70s associated with political payback and economic agendas. People started to equate the city's agreement with Pfizer to that of GM's manufacturing plant in Poletown, MI and Boston's West End. The debate around Kelo was further analyzed following the turn events in the following years, further sparking the debate about whether or not appointed agencies such as the NLDC hold too much power and are not operating in the best long-term interest of the public.

After Pfizer's R&D facility was completed Boston-based Corcoran Jennison Cos., a seasoned developer, was able to secure exclusive rights to develop nearly half of the Fort Trumbull peninsula. However, with the onset of the economic crisis of 2007-2008 credit to developers across the real estate industry ceased. After repeated efforts they were unable to obtain financing and lost their development rights in June 2008 (Nelson, 2009).

In November 2009, Pfizer announced it would be shutting down its New London plant as a cost-cutting measure, after it completed its \$67 billion acquisition of Wyeth, another large pharmaceutical company. In their decision, Pfizer cited that “[they] had a lot of real estate that [they] had to make strategic decisions about” (McGeehan, 2009). The move would require that within two years they pull all of the 1,400 jobs at the facility out of New London and move them a few miles away to their Groton Campus (McGeehan, 2009). Pfizer was paying property taxes based on 20 percent of the assessed value of its New London property; the state was paying an additional 40 percent of the assessed value. The arrangement Pfizer had with the city was through 2011 and required the company to maintain at least 1,000 jobs at the facility to preserve the tax break. In 2012 Pfizer started to pay the full assessed amount, about \$6.1 million based on the current tax rate (Edwards, 2009).

After a decade of planning and working towards a vision for the redevelopment of Fort Trumbull, economic hardship, years of court battles and the departure of Pfizer left elected officials and residents a dozens of acres that failed to deliver economic revitalization of the area. With out Pfizer or the mixed

use urban neighbor promised by the city the plan was not able to make good on the promised 3,000 jobs or \$1.2 million in tax revenue. Not all was lost, the was able to make good on its plan to deliver a state park, but funding for a maritime museum was halted. The dozen of acres of empty land eventually served as a dumpsite after Hurricane Irene (Nelson, 2009; ricochet.com 2011).

Citizens across the country followed this very public court case. This was probably in part because many people could identify with the plaintiffs, who had lost their property to the government. Furthermore, they learned that eminent domain could be used to acquire private property and deed it to a third party simply because that third party could deploy that land – or promise to deploy that land – in a manner that would bring higher tax revenue. The outcome of the case caused lawmakers across the country to push for and pass statutes to further protect private property rights.

#### *Fort Trumbull Today*

Thirteen years after the passage of the Municipal Development Plan and close to \$100 million in taxpayer money, no new buildings have been built in Fort Trumbull. The city did invest \$25 million to renovate an existing building in the state park (Edgecom, 2013). However, New London's efforts to redevelop Fort Trumbull remain slow and have been encumbered by additional setbacks. The New London Development Corporation, renamed the Renaissance City Development Association (RCDA) is still responsible for administrating the redevelopment of the land and overseas the coordination of land disposition to third party developers (Edgecom, 2013). In 2010 the RCDA and developer



Robert Stillman entered into an agreement for the redevelopment of parcels 2B and 2C. Originally, Stillman's redevelopment plan, The Village Thames, called for 103 condominium units, but was later changed to rental units. The agreement required that Stillman secure financing within approximately 3 years. As of May 2013, Stillman had failed to gain the financing needed for the \$24 million project and the deal with the City was voided (Edgecom, 2013). Despite years of redevelopment efforts, the City of New London has failed to redevelop any meaningful portion of the 90-acre site.

## **Chapter Four: Historical Background and Major Cases Involving Eminent Domain**

### *Early History of Eminent Domain*

Understanding the Kelo decision requires an understanding of the history of eminent domain and previous case law that led to the now famous Kelo decision. This chapter briefly describes the history of eminent domain law from colonial times through to the present day. Particular focus in this chapter is on prominent American case law in the second half of the twentieth century.

The debate about personal property rights in America predates the signing of the US constitution and can be traced back to colonial times and the passing of the Mill Acts. Virginia adopted in 1667, and Massachusetts in 1714, Mill Acts that served as models for the South and New England (Gold, 2007). Mills were an essential part of everyday life and played an important role in a community's economy. Mills, like utilities, were considered "common carriers" critical for individuals and businesses to function. In order for mills to operate efficiently, they often required the flooding of upstream properties (Cohen, 2006). In an effort to prevent lawsuits and injunctions against the mills from abutting property owners, and inhibiting economic growth of these communities, colonial states created legislation to protect mill owners and the larger economic vitality of the community. The Mill Acts allowed mill owners to "take" the land of abutting properties, so long as they paid just compensation for the use of this land. These acts were among the earliest instances of government promoting private enterprise at the expense of other private property owners (Gold, 2007).

The passing of the Mill Acts was the first instances of what would turn out to be an ongoing and complex relationship between the government's role in promoting the larger society's interests and the protection of individual rights. The founding fathers' approach to balancing these at times opposing principles that dealt with personal property rights was the Fifth Amendment. The Fifth Amendment grants both the federal and state governments the right to take property for "public use" so long as it pays just compensation to its owner. This power is known as eminent domain. The authors of the Constitution determined that eminent domain was a necessary right of the government for it to function efficiently (Sandefur, 2006). The process of eminent domain is executed through the condemnation process, also known as a regulatory taking. Much of the debate surrounding eminent domain lies in the definition of what constitutes a "public use," as it was not defined in the Constitution. For a long period of time, the government's use of eminent domain was generally limited to the construction of roads, schools and other public utilities (Sandefur, 2006).

However, the passing of the Fifth Amendment did not guarantee protection to citizens under individual states' laws. This was confirmed in the Supreme Court's ruling in *Barron v Baltimore* (1822), when the Court determined that the Bill of Rights and thus the Fifth Amendment did not apply to individual states (Esptein & Walker, 2004). In this case, John Barron, a wharf owner in Baltimore, MD asked the state to pay for damages caused by the city's reconstruction of streets, which had redirected streams coming into the Baltimore Harbor. The redirection of water created sediment build up near the wharves,

making it too shallow for ships to dock at John Barron's wharf. When John Barron and his partner asked the city to dredge the Harbor, the city refused. They sued the city based on the Fifth Amendment and argued that it should apply to the states. Chief Justice Marshall delivered the opinion for the Court clearly stating their position: "The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states" (Esptein & Walker, 2004).

This was the position until the Supreme Court heard *Chicago, Burlington & Quincy Rail Road v. Chicago* (1897). In this case, the same question about whether the Fifth Amendment applied at the state level was challenged. However, the difference this time around was that ratification of the Fourteenth Amendment, also known as the Incorporate Doctrine, in 1865 had been passed stating that the Bill of Rights also applied to individual states (Sandefur, 2006). The *Chicago, Burlington & Quincy Railroad* challenged the Fifth Amendment when the City of Chicago did not fairly compensate them for the taking of their land to accommodate the outward growth of the city resulting from the industrial revolution (Esptein & Walker, 2004). The Court ruled in favor of *Chicago, Burlington & Quincy Railroad* and solidified that just compensation must be paid at the state level. However, despite the Court's ruling, they still did not define what qualified as a "public use" under eminent domain, but rather that just compensation must be paid. Writing for the majority opinion of the Court was Justice Harlan who stated "In determining what is due process of law regard must be had to substance, not to form.... If compensation for private property taken for

public use is an essential element of the due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court... is to be decreed the act of the State within the meaning of that Amendment” (Epstein & Walker, 2004).

Over a hundred years later, the courts have yet to define what qualifies as a public use, rather they continue to defer to state legislators to define and enforce the term “public use” and the context in which eminent domain can be exercised. Justice O’Connor said in the Hawaii *Housing Authority v Midkiff* (1984) decision that the Court should not “substitute its judgment for a legislature’s judgment as to what constitutes a public use unless the ‘use be palpably without reasonable foundation’” (Hawaii Housing Authority v. Midkiff, 1984). Generally, the notion is that land use laws should be regulated at the local and state level. As a result, eminent domain law differs – sometimes significantly – between states.

#### *The Definition of Public Use*

The inconsistent definition among municipalities of what constitutes a “public use” has been a question in several legal challenges to the use of eminent domain over the past several decades. Its foundations have always been rooted in the economic and social betterment of society, first used as a mechanism for the government to take land for roads, utilities and canals. But today, the question resulting from the Kelo decision is whether or not the courts have gone too far in giving the states the power of legislative deference to determine what is a “public use.” This question has become even more relevant since the beginning of the

urban renewal era, when the use of eminent domain became more widespread, through its more recent use for economic development purposes.

Although there have been multiple challenges to the test the limits of eminent domain as its use continued to increase throughout the later parts of the nineteenth century and early parts of the twentieth century, there are three cases leading up to the *Kelo* decision that outline the courts' position on the power of eminent domain and defend the courts' position on legislative deference: they are, *Berman v Parker*, 75 S.Ct. 98 (1954), *Poletown v The City of Detroit*, 410 Mich. 616 (1981), and *Hawaii Housing Authority v Midkiff*, 104 S.Ct. 2321 (1984).

*Berman v Parker (1954)*

*Berman v Parker* 75 S.Ct. 98 (1954) was a landmark case decided unanimously by the U.S. Supreme Court which set the precedent to allow eminent domain to be used in private developments as long as it had a "public purpose" (see discussion below regarding *Hawaii Housing Authority v Midkiff*, 1984). Through the District of Columbia Redevelopment Act, the District of Columbia Redevelopment Land Agency was formed and granted the power of eminent domain. Its job was to redevelop any areas that were considered "blighting factors or cause of blight" (see *Hawaii Housing Authority v Midkiff*, 1984). The agency considered an area blighted if buildings within in lacked indoor plumbing, heating and electricity and could be "deemed beyond repair" (see discussion below regarding *Kelo et al. v City of New London*, 2005). In the case that was brought to the Supreme Court, the redevelopment agency identified 90 acres of land in a section of Washington D.C. that it believed fell within the definition of "blight,"

and according to the act could be considered “injurious to the public health, safety, morals, and welfare” Berman, 75 S.Ct. at 100. The 90-acre redevelopment plan was approved, triggering condemnation proceedings, which is the process one must follow when taking land through eminent domain.

Within the identified 90-acre area was a self-sustaining department store that did not meet the development agency’s defined criteria of “blight.” When the agency tried to initiate the condemnation process on the department store, the owner filed suit on the grounds that the acquisition and redevelopment of his property was not a public use because his property was not blighted. The Court ruled against the storeowner on the premise that the problem of large-scale blight needed to be addressed through an integrated redevelopment plan, including parcels that may not be considered blighted. Justice Douglas delivered the opinion of the Court, where he said, "If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly" (*Hawaii Housing Authority v. Midkiff*, 1984). This landmark case set precedent allowing eminent domain to be used in private developments as long as they have a public purpose, even if all of the parcels within the development area are not by definition blighted.

*Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981)

Unlike in Berman, where the definition of blight – as it relates to an integrated redevelopment – was challenged, *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981) challenged the constitutionality of using the

power of eminent domain to condemn one's property to convey it to another private person in order to bolster the economy. The case started in the 1970s when the City of Detroit and the State of Michigan were both experiencing exceptionally high unemployment at 18 percent and 14.2 percent respectively, The auto industry was an integral component of the state's economy and was facing growing foreign competition. If General Motor's was to keep up, it was going to have to close existing plants and build a new state-of-the-art facility (Sandefur, 2006).

Enticed by the promise of a new, \$500 million plant and fearing the loss of thousands of jobs if it was not built, the City of Detroit offered to help identify potential locations for a new plant based on General Motor's specifications for a site "450 to 500 acres in size with access to long-haul railroads lines and a freeway system with railroad yards within the plant site" 410 Mich. at 652. The hope was that the new plant would generate 6,000 jobs, as promised by General Motors, and help alleviate some of the unemployment caused by a severe recession. In order to facilitate the development, Detroit officials condemned 465 acres of a mainly first-generation Polish neighborhood that included 1,300 houses, 140 businesses, and six churches. The neighborhood sued not to dispute the City's power of eminent domain, but rather that the condemnation of their land was for a private use not a public purpose, as General Motors as the recipient of the property was a private entity (Sanderfur, 2006).

The Michigan Supreme Court heard the case in March of 1981. At the core of the case was whether or not eminent domain was used for public or



private use. The Poletown residents argued that General Motors would benefit the most from the taking, not the public. The Court determined that the legislative branch had the authority to determine what is a public use, and that under the Economic Development Corporations Act which authorizes “municipalities to acquire property by condemnation in order to provide industrial and commercial sites and the means of transfer from the municipality to private uses,” (Sandefur, 2006) the transfer of the property was within the limits of the state’s Constitution.

Within a year, General Motors completed the plan and was granted approval to move forward. In the end, General Motors would fall short on its 6,000 promised jobs. After a series of layoffs, the end result was only 2,500 jobs (Sandefur, 2006).

*Hawaii Housing Authority v Midkiff, 104 S.Ct. 2321 (1984)*

In an effort to address the public and social concerns of land oligopoly in Hawaii, a Hawaiian statute was enacted in 1967 allowing for the transfer of fee titles to be taken from the lessors and transferred to lessees in an effort to reduce the concentration of land ownership. The controversy in this case lies in the decision to take private property from one person and transfer it to a new property owner for their private use and benefit. The circumstances led the Hawaiian legislature to believe that the concentration of land ownership was “skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare,” and, therefore, enacted a condemnation process to transfer the titles *Hawaii Housing*, 104 S.Ct. at 2325.

The Supreme Court agreed that private property could be taken from person A and transferred to a new owner B, even if that new owner is not a public entity, on the grounds that it is the “taking purpose, not its mechanics” that determine the characteristics of public use. In other words, “the mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose” (Hawaii Housing Authority v. Midkiff, 1984).

The Court’s rulings on what qualifies as a “public use” in both Berman and Midkiff laid significant foundations for the Kelo ruling. These two cases set precedents that would allow for the City of New London to take 15 parcels of land under the Takings Clause of the Fifth Amendment even though they were not considered blighted, simply because they were integrated into a larger development master plan (as in the Berman case). In addition, private property could also be transferred from one private owner to another as long as the reason for the transfer served a public purpose (as in the Midkiff case).

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

In Kelo v City of New London, the U.S. Supreme Court ruled on whether a city’s sole reason for taking private property for the purpose of economic development qualifies under the “public use” requirement of the Fifth Amendment. Kelo, similar to Berman, involved approximately 90 acres of privately owned land. The City of New London, CT wanted to redevelop Fort Trumbull in order to address the declining economic state of the city. The plan envisioned a building boom that would produce over 3,000 new jobs and \$1.2

million a year in tax revenues through the development of a new “small urban village” (Nelson, 2009). The master plan called for a new waterfront conference hotel, restaurants and shopping; new residences; and, a commercial facility for research and development (McGeehan, 2009). The city had successfully purchased a significant portion of the land, but failed to acquire several parcels of privately-owned land. The failure to secure these parcels forced the City to initiate the condemnation proceedings against the property owners. The owners sued on the basis of the Fifth Amendment, claiming that the government failed to meet the criteria of “public use.” When the case was heard before the Supreme Court, the Court ruled in favor of the City of New London, allowing the land to be taken for private development on the basis that the development met the public use criteria because of the perceived economic gains for the community.

The Kelo decision certified that property transferred through eminent domain solely for the purpose of economic development qualifies as a public use. Writing for the majority was Justice Stevens, who said, “There is no allegation that that any of these properties [are] blighted or otherwise in poor condition, rather they were condemned only because they happen to be located in the development area”, Kelo, 125 S.Ct. at 2660. His statement puts forth that there is no longer the need to show that an area be declared “blighted” as long as it can be shown that it is incorporated into a larger economic development plan, and that that economic development plan can be parlayed into a “public use.” As seen in Berman, “public use” and “public purpose” are now interchangeable by the Court’s definition. Justice Stevens further goes on to say that “Given the

comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment” *Kelo*, 125 S.Ct. at 2665. Furthermore, the Court reaffirmed that states have the latitude to decide the boundaries of using condemnation for purposes of economic development and have the leeway for setting restrictions on its use.

#### *Elected Officials and the Evolution of Eminent Domain*

These cases outline the progression of eminent domain since the passing of the 1949 Housing Act. The Act accelerated the use of eminent domain by elected officials via redevelopment authorities to remove blight and redevelop America’s urban cores. After widespread consensus that urban renewal was an invasive and unjust approach to improving American cities, and did little to actually improve the housing conditions for the poor, support for the act ended. However, even after funding for urban renewal stopped the use of eminent domain did not. In the nineteen seventies, multiple economic development acts were passed that transferred the power of eminent domain to be administered by local development authorities (as in the case of Poletown and in New London). Rather than the removal of blight as the primary reason for invoking a takings process, there was a new focus on economic development.

As the court cases above demonstrate, the judicial branch defers to legislative preference to determine what is in the best interest of the general public. In the case of eminent domain, it is the legislative branch's job to determine what constitutes a public use. This creates a difficult moral question for both planners and elected officials to do what is in the best interest of the larger population. Particularly, as the courts continue to rule that elected officials have the power via the US Constitution to pass laws and create agencies that are allowed to evoke the law of eminent domain to take land for a purpose they determine is in the best interest of the public. Further more, since the mechanism for doing this requires the adoption of law, it is difficult to over rule or amend an existing law. Again, looking back at New London, the NLDC was created in the 1970's as an economic development agency. Despite little activity and lack of funding for decades, the law was passed granting the powers to the NLDC, so when the City of New London needed an avenue to redevelop Fort Trumbull conveniently it did not have to pass a law to create a new agency.

The most important take away from the Kelo ruling, was that economic development is considered a permissible public use under the assumption that the redevelopment project will eventually produce additional jobs and higher tax revenues. This ruling creates challenges for planners and governments, as it is difficult to quantify the eventual economic and social benefits from a given development as well as the time frame from which others will benefit. However, the law does not require that urban planners, developers or elected officials tract

the progress after projects have been delivered. Meanwhile, the property rights of people and businesses displaced by redevelopment have been compromised.

Although the courts have ruled that the use of eminent domain is permissible for economic gains, the long-term impacts on neighborhoods are hard to quantify and justify under the original intentions of the Fifth Amendment. Eminent domain is an example of how the judicial branch's interpretation of the US Constitution is a powerful component of the checks and balances of the democratic system in America, but does not always produce the most equitable outcome. Eminent domain law also provides an example of how private sector interests and the government work together with mixed results and that there are instances where those who administer the law, such as redevelopment agencies do not always do so in a fair and just manner.

### *The Future Roles of Planners*

Knowing that it is difficult to achieve an outcome that is fair to all parties involved, the role of planner becomes even more important in situations where property rights are at stake. A planner should have a fiduciary responsibility to the public to ensure were in instances of competing interests they facilitate conversation and plans that balance the needs of the general public, developers, elected officials and property owners. Redevelopment of urban areas should happen as markets demand and may not always benefit with substantial government assistance. Particularly when government assistance allows for the use of eminent domain that is administered by agencies created by elected officials who may more concerned with re-election and pay back than the general

well being of the public. The Fifth Amendment has been a fundamental right to American's for over 200 years. Many people have been able to achieve the American dream based on the right to own land and benefit from that ownership. If the government has the ability to easily take land, particularly in cases of economic development, there is concern for the larger checks and balances of policy creation and administration in America.

## **Chapter Five: The Response to Kelo**

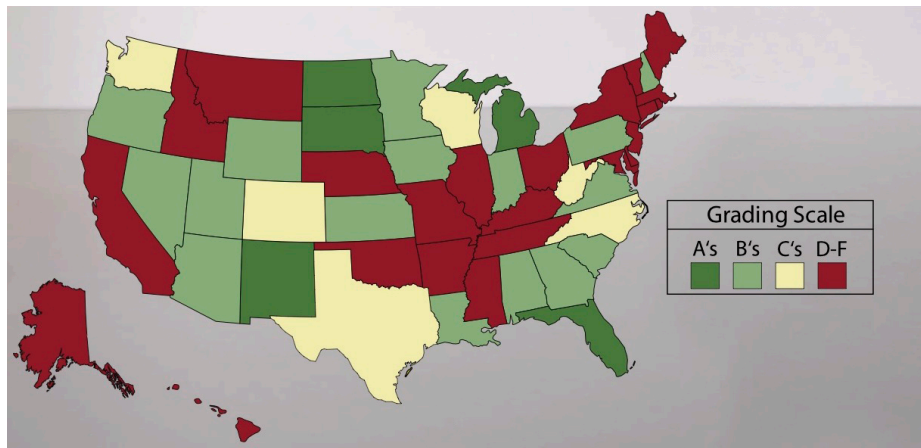
Typically, when the U.S. Supreme Court decides a constitutional ruling, state courts follow the precedent that has been set, interpreting state constitutional provisions in a similar manner. For example, when the Court decided *Berman v. Parker* (1954), which upheld the use of eminent domain for urban renewal projects, 34 state supreme courts followed suit (Institute for Justice, 2010). After Kelo, state courts have gone on to do the opposite. Within two years of the Kelo decision, 43 states and the U.S. Congress had already passed some measure of eminent domain reform which limited its use as a tool for economic development. Three state supreme courts – Ohio, Oklahoma, and South Dakota – flat out rejected the Kelo decision (Institute for Justice, 2010). The rush – by states and the federal government’s legislative branch – to limit the powers of eminent domain following the Kelo decision shows the value that Americans place on personal property rights. In a poll following Kelo, 80% of the public opposed the Supreme Court’s take on the use of eminent domain for economic gain (Institute for Justice, 2010).

In order to understand just how far reaching the Kelo decision was, it is helpful to take a closer look at some of the state-by-state reforms that have occurred since. The Castle Coalition (2013), a property watchdog organization, rated each of the states’ legislation reform. The report assigns a grade, on a scale of A to F, to legislation passed by individual states. The purpose of the report was to let “legislators know what is left to do and so that citizens can find out if they are really protected from eminent domain abuse” (Castle Coalition, 2013). The



question that guided the analysis of each state was, “How hard is it now for the government to take a person’s home or business and give it to someone else for private gain?” (Castle Coalition, 2013). In other words if a state offered adequate protections for property owners, making a taking more difficult for a state to take their property in circumstances that involved economic gains or blight, the state would receive a high grade. States that passed weaker legislation as more of a symbolic gesture received a low grade. States that made no change received a failing grade of F.

Of the fifty states that were graded, approximately half received a C or better and the remaining states received a D or lower. Below is a map of the states and their associated grades.



Imagine 8: A map depicting the grades received from the Castle Coalition as it relates to the reform states embarked on following the 2005 Kelo decision. Reprinted from 50 State Report Card: tracking eminent domain reform legislation since Kelo, continuously updated, by Castle Coalition, Arlington, VA: Castle Coalition.

In order to provide context for the Castle Coalition’s report, it is helpful to evaluate the ratings of two states that were rated very differently. The state of Florida received an A. The Castle Coalition (2013) report states “[Florida] set an

example by restoring eminent domain authority to its original and limited purpose by removing the blight exception and closing the book on its long history of property rights abuse.” In 2006, Florida passed House Bill 1567, sponsored by State Representative Marco Rubio with an overwhelming majority. The new law requires municipalities to wait 10 years before transferring land taken by eminent domain from one owner to another. The purpose of this waiting period was to minimize the use of eminent domain for private commercial development because it would be unfeasible for a developer to accurately respond to the market (i.e. hit the market and make a profit) with a decade of waiting time. HB 1567 also forbids states from using eminent domain to remove blight and instead requires municipalities to use their police powers to address individual properties that may present a risk to public health and safety (Castle Coalition, 2013). Furthermore, Florida took the additional step to assure that this bill could not be easily amended and citizens of the state voted to adopt a constitutional amendment that would require that a three-fifths majority in both legislative houses was needed to grant exceptions to the state’s prohibition against using eminent domain for private use (Castle Coalition, 2013).

To contrast the laws passed in Florida, it is helpful to review a state that did make changes to their eminent domain laws but received a low grade by the Castle Coalition. The state of Connecticut that was at the center of the eminent domain debate, received a D for their eminent domain reform. In 2007, Senate Bill 167, sponsored by the State Senate Judiciary Committee was passed. The Castle Coalition (2013) criticized the law stating that it “does not add any

meaningful protection for property owners from eminent domain abuse.” SB 167 was almost unanimously agreed to but offers little by way of substantial protection for property owners. The bill purports to stop condemnations “primarily” for increased tax revenue and requires municipalities to pass approval by a “super-majority.” The criticism of the bill is that it is easy for a local redevelopment authority that has been granted the powers of eminent domain to find an alternative “primary purpose” (Castle Coalition, 2013).

It is important to clarify that the Kelo decision only addressed a “taking” for economic development purposes, and not a “taking” in instances of blight. Although the widespread use of eminent domain for slum and blight removal dwindled when support for urban renewal ended, there has been very little legislative action to limit the use of eminent domain to address blight since the Berman ruling in 1954 (Institute for Justice, 2010). The Kelo decision also failed to address at the federal level the definition of “public use,” rather it affirms the Court’s position that it is the legislative branch’s role to determine what constitutes a public use.

#### *Eminent Domain – What’s Next?*

The debate over what constitutes a “taking” under the Fifth Amendment continues. In recent years, two additional cases of eminent domain have received national attention. The first case is *Arkansas Game and Fish Commission v United States*, 133 S.Ct. 511 (2012). The second case is *Koontz v St. John Water Management*, 133 S.Ct. 2586 (2013). In the first case, the Arkansas Game Fish Commission argued that a temporary taking that permanently impacts one’s land

requires just compensation under the Fifth Amendment. Here, the U.S Army Corps of Engineers (Corps) from 1993 through 2000, authorized flooding that extended into the peak timber-growing season for timber that was owned and managed by petitioner, Arkansas Game and Fish Commission. The increased flooding over a 7-year period caused irreversible damage to the land. The Supreme Court ruled in favor of Arkansas Game and Fish Commission. Justice Ginsburg delivered the opinion of the court. In her opinion she stated, “government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable”. *Arkansas*, 133 S.Ct. at 519. The significance of this case is that a temporary taking constitutes a taking under the Fifth Amendment and just compensation must be paid.

The second case, *Koontz v St John Water Management*, 133 S.Ct. 2586 (2013), questions whether the denial of a permit to use one’s land constitutes a taking under the Fifth Amendment. The plaintiff, Coy Koontz, a landowner in Florida who owns fifteen acres of land – the majority of which falling within a riparian habitat-protection zone in the Econlockhatchee River hydrological basin and containing protected wetlands. The development of the land is under the jurisdiction of the St. Johns River Water Management District. When the St. Johns River Water Management District denied Koontz the permits required for him to build a 3.7-acre shopping center, he appealed to the state of Florida. The State decided to approve the permit as long as he agreed to a mitigation package.

He was not willing to meet the terms of the mitigation package and the state denied him his permit (Weiss, Serota, Helfman, Pastoriza, Cole & Boniske, 2012). Koontz sued on the basis that his rights under the Fifth Amendment had been violated and he was owed compensation by the State. The district court agreed and awarded him compensation for the denial of the permit. The State Supreme Court disagreed and reversed the decision based on the grounds that no transfer of title had occurred. On October 5, 2012 the United States Supreme Court granted a petition for certiorari filed on behalf of the plaintiff in *Koontz v St. Johns Water Management District* and in reversing the Florida Supreme Court, held that conditioning approval of a land use permit on the payment of monetary exactions required a finding that the exactions were related to and proportional with, the impacts from the proposed development.

#### *Tying the Use of Eminent Domain Back to Urban Renewal*

There are clear ties between the use of eminent domain for large-scale economic development projects and similar scale projects associated with urban renewal decades earlier. The call for reform resulting from the Kelo decision in New London – when eminent domain was used for economic gains – is similar to the call for reform when eminent domain was used in the West End for slum clearance. Chester Hartman (1992) wrote that “The controversy over and triggered by the West End project, both in the planning ligatures and in more general policy circles, as well as in public debate, marked a significant change in attitudes toward urban renewal. The boosterism aura that surrounded ‘urban renewal’ began to clash severely with a comprehension of the costs being paid for

such progress and the disparity between who the beneficiaries were and who the victims were (Hartman, 1992. Page 72).”

If West End was the rallying call to end eminent domain abuse for urban renewal projects, Kelo was the rallying call to end eminent domain abuse for economic gains. To demonstrate the impact that the demolition of the West End had on other Boston neighborhoods, the North End, a similar working class neighborhood near the West End, was also slated for urban renewal. However, once people saw the destruction of the West End, and its inability to live up to the promise of forward movement and a fresh start for the city, significant public opposition was launched and plans for the redevelopment were shelved indefinitely (O’Connor, 1993) Going forward, these two cases will resonate in policy and planning circles as a reminder of the potential danger of placing too much power in the hands of a few people, when it comes to large scale planning initiatives.

### *Conclusion*

In conclusion, this thesis documents the evolution of the use of eminent domain over the past half century, particularly as the field of planning expanded and global economic competition increased. Planners, politicians and developers will likely continue to be tempted – just as they were sixty years ago – to use eminent domain to carry out plans that promise (at least on paper) economic growth. On the one hand, it is the role of planners and elected officials to make sure their cities grow and develop to avoid obsolescence and stay globally competitive. Some will claim that without the power of eminent domain,

municipalities and state governments would be operating without an essential tool needed to develop sites, attract new industry, and restore tax bases that continue to erode.

However, looking retrospectively at the West End, others may argue that the City's "Plan of the Future" did little to move the city forward and that those neighborhoods that did not undergo urban renewal, fared better in the long run. For instance, the North End, the adjacent residential area that narrowly escaped demolition, is one of the most vibrant and diverse neighborhoods in the city today. Several decades later when the Fifth Amendment was used for economic purposes to support development around land adjacent to Pfizer in New London and take land for the General Motor manufacturing plant in Poletown, both companies fell short in their (and government officials) promises to bring economic prosperity and jobs to the economically challenged cities. In both instances, the cities granted substantial tax incentives to the companies and used eminent domain to carry out redevelopment, but within a few decades, both companies announced their plans to close. Looking at the collective body of redevelopment projects analyzed in this thesis that have used eminent domain to carry out the vision of planners and redevelopment agencies, it becomes clear that in most cases, neighborhoods would have been better off without such destructive intervention.

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## Appendix I

The Fifth Amendment of the U.S. Constitution provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."