

# Inclusionary Eminent Domain

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*This Article proposes a paradigm shift in takings law, namely “inclusionary eminent domain.” This new normative concept serves as a framework that molds eminent domain takings and economic redevelopment into an inclusionary land assembly model that is equipped with multiple tools to help guide municipalities, private developers and communities construct or preserve affordable housing developments. The tools to achieve this include Community Benefits Agreements (“CBAs”), Land Assembly Districts (“LADs”), Community Development Corporations (“CDCs”), Land Banks (“LABs”), Community Land Trusts (CLTs) and Neighborhood Improvement Districts (“NIDs”).*

*The origins of the concept derive from the zoning law context, where exclusionary zoning in the suburbs excluded affordable housing for low-income residents. Courts intervened, applying exclusionary zoning doctrines, which led to the enactment of inclusionary zoning programs to achieve a fair share of housing. Exclusionary eminent domain in urban areas, similarly, has displaced and decreased the stock of or denied access to affordable housing through the power of takings. Under an exclusionary eminent domain doctrine, courts would apply heightened review to condemnations in a locality that has less than its fair share of affordable housing. But in a post-Kelo era of takings, doctrinal solutions may not be enough.*

*Analogous to inclusionary zoning, inclusionary eminent domain helps us rethink how to fix these ubiquitous land problems. Indeed, this Article moves us beyond the doctrinal muddle and instead incorporates both the intellectual musings of takings and zoning law with an assessment of how*

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*innovative tools can be practically applied to construct and preserve affordable housing in eminent domain takings for economic redevelopment.*

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## INTRODUCTION

Inclusionary eminent domain is a new normative concept—paradoxical in nature—that rethinks eminent domain takings as an inclusionary land assembly process structured through a framework that is equipped with multiple tools to help guide municipalities, private

developers and communities<sup>1</sup> construct or preserve affordable housing within economic redevelopment projects. This idea is particularly important where condemnation threatens the loss of affordable housing and displacement of low-income residents. This new paradigm is *ex ante* and *ex post*; that is, the exercise of inclusionary eminent domain would assemble land or negotiate the use of land—prior to, during or after condemnation proceedings—to accommodate affordable housing developments within economic redevelopment projects.

The tools to achieve this include Community Benefits Agreements (“CBAs”), Land Assembly Districts (“LADs”), Community Development Corporations (“CDCs”), Community Land Trusts (“CLTs”), Land Banks (“LABs”) and Neighborhood Improvement Districts (“NIDs”). Here, the tools are adjusted from their traditional purpose to fit within this new eminent domain paradigm. This new framework gives private developers, municipalities and communities a more transparent set of tools that guide the development process to reduce the phenomena of displacing residents and decreasing the supply of affordable housing. Indeed, this Article calls for developers, municipalities and communities to rethink how to plan for inclusion.

Part I draws parallels between exclusionary zoning and exclusionary eminent domain by revisiting the purpose, use and abuse of local zoning powers and takings in the United States. In particular, this Part discusses briefly how exclusionary zoning actively excluded affordable housing by artificially raising the property values and the price of rent beyond the income levels of low-income families, thereby denying them access to residential property in affluent neighborhoods.<sup>2</sup> The practice

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1. The term “community” is used interchangeably in this Article with “property owners,” “residents” or “low-income families.”

2. For a comprehensive discussion of exclusionary zoning, see Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1968) (applying the equal protection doctrine to exclusionary zoning situations). See generally RICHARD BABCOCK & FRED BOSSELMAN, *EXCLUSIONARY ZONING* (1973) (discussing how land use controls have resulted in the exclusion of those with low or moderate incomes); Frank A. Aloï, Arthur Abba Goldberg & James M. White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1 U. TOL. L. REV. 65 (1969) (discussing a constitutional economic right to suburban housing); William Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317 (2004) (outlining the history of zoning and proposing home-equity insurance to reduce the demand for exclusionary zoning); Harold A. McDougall, *The Judicial Struggle Against Exclusionary Zoning: The New Jersey Paradigm*, 14 HARV. C.R.-C.L. L. REV. 625 (1979) (examining the New Jersey Supreme Court’s actions involving exclusionary zoning); John R. Nolon, *A Comparative Analysis of New Jersey’s Mount Laurel Cases with the Berenson Cases in New York*, 4 PACE ENVTL. L. REV. 3 (1986) (comparing two state court decisions regarding exclusionary zoning that led to vastly different results); John M. Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803 (1976) (exploring the defects of the doctrinal approach to

forced courts to look narrowly at a zoning code's intended purposes, called exclusionary zoning doctrine, which essentially provided that a local municipality's fair share obligation is presumptive and if low-income families make a prima facie case of exclusion, then the burden shifts to the municipality to prove otherwise. Part I then links the effects of zoning with eminent domain by revisiting the purpose, use and abuse of eminent domain for the public purpose of urban renewal and economic redevelopment in urban areas. Specifically, these sections of Part I show how, similar to exclusionary zoning, the trajectory of the phenomenon of "exclusionary eminent domain"—from *Berman*<sup>3</sup> to the modern day takings doctrine applied in *Kelo*<sup>4</sup>—has displaced poor communities, upended middle-income homes and generally decreased the stock of or denied access to affordable housing for primarily low-income residents.<sup>5</sup>

Coined by David Dana at Northwestern University School of Law, "exclusionary eminent domain doctrine" is a proposal analogous to the exclusionary zoning doctrine.<sup>6</sup> Under Dana's proposal, courts would apply heightened review to takings challenges, invalidating a

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exclusionary zoning being employed in New Jersey); John M. Payne, *Title VIII and Mount Laurel: Is Affordable Housing Fair Housing?*, 6 YALE L. & POL'Y REV. 361 (1988) (discussing the affordable housing movement as a secondary effect of Title VIII of the 1968 Civil Rights Act); Jerome G. Rose, *New Additions to the Lexicon of Exclusionary Zoning Litigation*, 14 SETON HALL L. REV. 851 (1984) (discussing new legal concepts related to exclusionary zoning created by the New Jersey Supreme Court in *Mt. Laurel II*); Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289 (2002) (discussing how the courts have taken the initiative to reach the goal of residential diversity); Norman Williams, Jr. & Thomas Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971) (analyzing the use of exclusionary land use controls in the outer suburban ring in northeastern New Jersey); Norman Williams, Jr. & Edward Wacks, *Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited*, 1969 WIS. L. REV. 827, 838-39 (1969) (discussing the discriminatory effect of minimum building size requirements).

3. *Berman v. Parker*, 348 U.S. 26, 34 (1954) (holding that maintaining community health was a legitimate public purpose, regardless of private or public transfer thus enforcing the government's power of eminent domain).

4. *Kelo v. City of New London*, 545 U.S. 469, 484 (2005) (holding that city's exercise of eminent domain power in furtherance of economic development plan satisfied constitutional "public use" requirement).

5. See David A. Dana, *Exclusionary Eminent Domain*, 17 SUP. CT. ECON. REV. 7, 20-23 (2009) (discussing the effects of post-*Kelo* reforms).

6. *Id.* at 13. Exclusionary zoning doctrine was born primarily from the *Mt. Laurel* cases in New Jersey, where the courts looked closely at local zoning ordinances and provided that a local municipality's fair share obligation to construct affordable housing for low- to moderate-income families within its zoning code is presumptive. If the plaintiffs (usually low-income households) make a prima facie case of exclusion, then the burden shifts to the municipality to prove otherwise. Exclusionary zoning thus imposes an obligation on the municipality to plan for the inclusion of low- to moderate-income rental units in cooperation with private developers based on the regional needs for such housing.

government taking if there is a loss of a fair share percentage of affordable housing from the development project.<sup>7</sup> The developer can avoid the doctrinal limitation by substituting the anticipated loss of affordable housing with the construction of new housing units at below-market rates within the locality.<sup>8</sup>

Dana's proposal eloquently tells us *what* is wrong with exclusionary eminent domain and tells us *why* heightened judicial review in takings cases is important to protect property owners and residents from displacement and from the loss of affordable housing. However, his doctrinal proposal does not show us *how* to construct or preserve affordable housing in cooperation with those most affected by condemnation—low-income communities and residents—who are increasingly at risk in the post-*Kelo* era. This Article flips the eminent domain paradigm and addresses a link that Dana does not discuss in his proposal; that is, the parallels between inclusionary zoning and inclusionary eminent domain. Here, this Article offers a variety of alternative methods to fix the exclusionary eminent domain phenomenon where courts are reluctant to decide takings challenges based on the amount of affordable housing lost from condemnation. By reframing the eminent domain conversation from a normative doctrinal analysis to a normative conceptual analysis, the role of affordable housing becomes a centerpiece rather than an afterthought in economic redevelopment projects.

Part II conceptualizes the eminent domain paradigm proposed in this Article by analogizing inclusionary zoning to inclusionary eminent domain. This Part first revisits the history, usefulness and limitations of inclusionary zoning as a court-ordered remedy to halt exclusionary zoning, which originated from the *Mt. Laurel* saga in New Jersey.<sup>9</sup> New Jersey courts found that municipalities had violated state constitutional law by setting zoning requirements in areas to levels that excluded and segregated low-income affordable housing in remote and inopportune areas only accessible to the poor. In response to the phenomenon of exclusionary zoning, affordable housing became a centerpiece of zoning laws. Courts mandated that municipalities provide a realistic opportunity for a fair share of affordable housing for low- and moderate-income residents that would be needed immediately and in the future. In further response to the mandates, inclusionary zoning programs were enacted by state legislatures to fix the

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7. *Id.* at 28–30.

8. *Id.* at 52.

9. *See infra* note 39 and accompanying text.

exclusionary zoning problem by employing land use control tools such as builder's remedies, set-aside programs, density bonuses and in-lieu fees to achieve a fair share construction of affordable housing for low- and moderate-income households.<sup>10</sup>

Analogous to inclusionary zoning, inclusionary eminent domain is a framework to think about *how* to fix the exclusionary eminent domain phenomenon and remedy condemnations that threaten the loss of affordable housing. This section of Part II unpacks this new eminent domain paradigm by explicating elements that embody the concept— inclusionary housing, meaningful engagement, community participation, collective action and public approval—and then explaining why each element helps redefine the meaning of “public use” as that which is deeply ingrained in the community. While the tools of inclusionary zoning sought to remedy the exclusion and segregation of low- to moderate-income residents by exclusionary zoning policies, the tools of inclusionary eminent domain seek to remedy low-income and middle-income residents affected by exclusionary eminent domain. This inclusionary model is equipped with a toolkit that conceptually and practically embodies each element.

Part III explains in detail the kit of land assembly and land negotiation tools that give effect to the concept of inclusionary eminent domain. In other words, this toolkit of CBAs, LADs, CDCs, CLTs, LABs and NIDs guides municipalities, private developers and communities on *how* to engage in inclusionary, not exclusionary, land assembly using eminent domain. Indeed, the “bundle of tools” proposed here mitigates and tempers some of the exclusionary effects caused by the proverbial “bundle of sticks.” The purpose of the tools is to reach the goals set forth in an economic redevelopment project without completely compromising the interests of one, or a few, stakeholders. Here, the tools are slightly adjusted from their original purposes to adequately draw a parallel with the purpose of the land use control tools of inclusionary zoning; that is, to construct or preserve affordable housing. This Article calls for developers, municipalities and communities to rethink how to plan for inclusion.

#### I. LAND USE CONTROLS, LAND ASSEMBLY & EXCLUSION

Part I draws parallels between exclusionary zoning and exclusionary eminent domain by analogizing the exclusionary effects created by local zoning powers and government takings powers in the United States.

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10. See *infra* Part II.A (discussing the inclusionary zoning methods employed by state legislatures).

Eminent domain and zoning have overlapped as legal issues in what courts call regulatory takings<sup>11</sup> when the exercise of zoning as a police power rises to the level that is deemed near the equivalent of physically divesting a person of his or her property.<sup>12</sup> In *Pennsylvania Coal Co. v.*

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11. This refers to the Fifth Amendment prohibition that “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. For a discussion on alternative perspectives of the Takings Clause, regulatory takings and just compensation, see Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 64 (1964) (arguing that compensation can prevent government takings from leading to discriminatory outcomes); see also BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977) (examining takings and compensation through various philosophical and legal perspectives); FRED BOSSELMAN ET AL., *THE TAKING ISSUE* 238 (1973) (recognizing that regulations have an economic impact on people that need to be addressed); ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 149 (2005) (discussing compensation as an internalization of regulatory costs); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (examining the Takings Clause in light of the relationship between the individual and the state); WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995) (seeking a middle ground between deferring to unfair regulations that burden property owners and imposing compensation for every infringement); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1256 (1996) (highlighting legislation that requires payment of compensation to landowners when the government reduces the market value of property by more than 20% by restricting the use of land); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967) (recognizing that the attempt to formulate rules of decision for just compensation has yielded unsatisfying results); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (arguing for a new theory of the Takings Clause under which compensation is only required in cases where there has been singling out or where there has been discrimination against discrete and insular minorities).

12. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005) (holding that a plaintiff cannot show a regulation is a taking by arguing that the regulation does not substantially advance a government interest); *Palazzolo v. Rhode Island*, 533 U.S. 606, 632 (2001) (finding that a regulation prohibiting the construction of a beach club development on an owner’s land did not constitute a total taking because the land retained significant worth for the construction of a residence); *Dolan v. City of Tigard*, 512 U.S. 374, 394–96 (1994) (concluding that requiring a petitioner to dedicate part of her land for city use in order to expand her store was an uncompensated taking); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992) (holding that barring a landowner from constructing habitable structures on his land after he purchased it can constitute a taking because it denies the landowner access to an economically viable use of his land); *First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 321 (1987) (holding that when a government’s actions constitute a temporary taking, the government must provide compensation for the period in which the taking was effective); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (finding that conditioning a permit to expand property on the landowner allowing a public easement on that property is a taking if the land-use regulation does not serve public purposes related to the permit requirement); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding that a statute allowing a cable company to place permanent cable facilities on a landowner’s property is a taking because it constitutes a permanent physical occupation); *Agins v. City of Tiburon*, 447 U.S. 255, 261–62 (1980) (finding that placing landowners’ property in a zone that forbids multiple family dwellings is not a taking because it substantially advances a legitimate government goal, does not prevent the best use of the landowners’ land and does not extinguish a fundamental attribute of ownership); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136–37 (1978) (holding that designating landowners’ train station a historical landmark is not a taking because it does not interfere with

*Mahon*, Justice Holmes noted this issue stating, the “general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>13</sup> *Mahon* has garnered significant controversy over whether the Court’s decision is a proper foundation for modern day regulatory takings.<sup>14</sup> Courts today require an “essential nexus”<sup>15</sup> and “rough proportionality” when the state approves a development based on its dedication for the public purpose (or public use).<sup>16</sup> These are long-standing judicial positions on regulatory takings that view the use or abuse of a taking as exclusionary by definition. Indeed, one viable claim against eminent domain takings for private development is under the Equal Protection Clause, however it is rarely applied and poses historical and theoretical problems.<sup>17</sup> Regardless, the operation of regulatory takings excludes owners of property—rightfully or not—and this fact is nothing new to the regulatory takings debate. However, eminent domain and zoning have rarely, if ever, been analogized in the context of affordable housing.

Scholars have argued at length the usefulness and limitations of inclusionary housing programs to remedy exclusionary zoning.<sup>18</sup> In

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the land’s present use nor does it prevent the landowner from realizing a reasonable return on investment); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (holding that determining whether a regulation constitutes a taking is a question of degree); *Hadacheck v. Sebastian*, 239 U.S. 394, 409–10 (1915) (concluding that forbidding a landowner from making bricks on his property does not constitute a taking).

13. *Mahon*, 260 U.S. at 415; see also *id.* at 413 (“When [regulation] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain.”). The *Mahon* opinion, however, explains that a regulation is a taking when it denies the landowner the ability to pursue all economically viable, beneficial, productive or feasible uses of his or her land. *Id.* at 415–16. The regulation must also have significant impact on the landowner’s investment-backed expectations and must substantially advance legitimate state interests. *Id.*

14. See Robert Brauneis, “*The Foundation of Our ‘Regulatory Takings’ Jurisprudence*”: *The Myth and Meaning of Justice Holmes’s Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 702 (1996) (arguing that *Mahon* has left courts with very little framework for deciding constitutional property rights cases); see also Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1625 (1988) (arguing some takings cases “are a manifestation of the difficulties faced by the Court in trying to keep faith with American constitutionalism’s aspiration to reconcile private property (or, more generally, limited government) with democracy”); William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 861 (1998) (analyzing how *Mahon* became central to takings law).

15. *Nollan*, 483 U.S. at 837.

16. *Dolan*, 512 U.S. at 391.

17. Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 5 (2008) (arguing Takings Clause emphasis on protecting property rights does not make it a remedy for finding discriminatory use).

18. For a comprehensive discussion of inclusionary zoning, see ANTHONY DOWNS, OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA 219 (1973) (showing how the unjust aspects of urban development can be remedied); Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 186 (1991) (examining whether the *Mount Laurel* decisions are examples of judicial overreach attempting to end



contrast to the heated debate over zoning, the argument for inclusionary housing schemes to remedy exclusion and displacement by eminent domain has rarely been suggested in academic literature, contemplated by the courts or considered by municipalities or state legislatures. Likewise, courts have rarely been pushed to consider the effects of eminent domain on the loss of affordable housing when deciding whether to grant municipalities the power and private developers the benefit of eminent domain. In fact, the historic framework of eminent domain analysis by the courts has rarely, if ever, suggested normative content to the public use takings doctrine. The Supreme Court, and many federal and state courts, have repeatedly followed the modern day takings doctrine laid by *Berman* and continued by *Kelo*, electing to defer takings challenges to the legislative process.

A consideration of the history, usefulness and limitations of exclusionary zoning will help begin unpacking this new paradigm.

### A. Exclusionary Zoning

#### 1. Urban Sprawl and Exclusion

In the 1950s, urban sprawl created low-density and land-consuming developments on the fringe of the inner cities and pushed land use outward into rural and undeveloped areas that were in relatively close proximity to a deteriorating inner city.<sup>19</sup> The phenomenon left behind

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economic segregation in housing); Paul Davidoff & Linda Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971) (arguing that the standard governing zoning and land use control should be one of inclusion); Charles E. Daye, *Whither "Fair" Housing: Meditations on Wrong Paradigms, Ambivalent Answers, and a Legislative Proposal*, 3 WASH. U. J.L. & POL'Y 241 (2000) (identifying how to legislatively correct the inadequacies of suburban exclusion and inclusion policies); Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981) (arguing that inclusionary zoning programs actually often increase general housing prices); Robert A. Johnston et al., *Selling Zoning: Do Density Bonus Incentives for Moderate-Cost Housing Work?*, 36 WASH. U. J. URB. & CONTEMP. L. 45 (1989) (analyzing the effectiveness of density bonuses and equivalent financial incentives to projects that provide affordable housing); David S. King, *Inclusionary Zoning: Unfair Response to the Need for Low Cost Housing*, 4 W. NEW ENG. L. REV. 597 (1982) (reviewing the judicial and legislative approaches to resolving the affordable housing problem); Thomas Kleven, *Inclusionary Ordinances: Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 UCLA L. REV. 1432 (1974) (examining the impact of inclusionary ordinances on meeting housing needs); Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 HOFSTRA L. REV. 539 (1995) (concluding that most inclusionary housing programs are viable and legally valid); Benjamin Powell & Edward Stringham, *"The Economics of Inclusionary Zoning Reclaimed": How Effective Are Price Controls?*, 33 FLA. ST. U. L. REV. 471 (2005) (determining that the economic defense of inclusionary zoning is flawed).

19. Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 U. PA. L. REV. 873, 874 (2000).

abandoned or underutilized property, contributing to the decline of many American inner cities.<sup>20</sup> The scattering of suburban-bound middle-class families also required significant development of new real estate and services, which helped perpetuate white flight.<sup>21</sup> The outward migration caused an inner-city exodus of working class families to the suburbs, seeking refuge from the deteriorating “ghetto underclass” conditions.<sup>22</sup>

In response to the migration of low-income inner-city populations to the suburbs, zoning laws were manipulated by local governments to segregate and concentrate people within a locality—a practice called exclusionary zoning.<sup>23</sup> As land was acquired and redeveloped in the suburbs, local officials and zoning boards made decisions to regulate and control the land density in accordance with desired local health, safety and welfare standards.<sup>24</sup> The discriminatory nature of local zoning codes veiled by these standards was difficult to detect in constitutional challenges to a municipality’s zoning code.

In *Ambler Realty Co. v. Village of Euclid*, the district court found such land divisions, under the veil of comprehensive zoning, unconstitutional because the land divisions classified and segregated the population based on income.<sup>25</sup> The land divisions in *Village of Euclid* became better known as Euclidean zoning.<sup>26</sup> The Euclidian technique divided land into separate zones, essentially segregating the land by use and building type.<sup>27</sup> The land could be zoned for purposes of single-family or multi-family residential housing, commercial property or light

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20. Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENVTL. L. 89, 101 (1998).

21. *Id.* at 91.

22. See generally WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS AND PUBLIC POLICY* (1987) (analyzing the effects of the exodus of working class families from the inner city and the causes of social dislocation).

23. See Seitles, *supra* note 20, at 95–97.

24. *Id.* at 96.

25. *Ambler Realty Co. v. Vill. of Euclid*, 297 F.307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926). Judge Westenhaver peeled away the discriminatory veil, exposing the unfair exclusionary nature of zoning saying:

The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. . . . [T]he result to be accomplished is to classify the population and segregate them according to their income or situation in life.

*Id.*

26. See *Vill. of Euclid v. Ambler Realty Co. (Euclid II)*, 272 U.S. at 387–89 (overturning the district court decision, finding that nothing in the zoning code was arbitrary or capricious).

27. See Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 4 (2004) (discussing how Euclidean zoning reflects the preference for single-use zones).

industrial.<sup>28</sup> The local government's exclusionary zoning code raised the price and sale of residential property in a particular area to levels that ensured that access to such property was denied to members along social, economic and racial lines.<sup>29</sup>

The Pennsylvania Supreme Court was the other court to hear the early exclusionary zoning challenges. In *National Land and Investment Co. v. Easttown Township*, the court found that zoning ordinances that were designed purposely to exclude were unacceptable and in violation of the state constitution.<sup>30</sup> The court, only five years later, again took up the same issue. In *In re Concord Township*, the court held that minimum lot sizes of two acres and three acres in the interior of a proposed 140-acre development were unnecessarily large, particularly for the construction of a house.<sup>31</sup> Thus, public regulation of the lot sizes was found both unnecessary and “completely unreasonable.”<sup>32</sup> Once other courts began deciding cases on exclusionary zoning, such practices became all but facially discriminatory.<sup>33</sup>

Indeed, the expansive land reach of zoning in suburbs ultimately inflated the price of housing and segregated low-income residents—

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28. *Id.* at 22. See generally *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 541 (2005) (holding a *Euclid* zoning ordinance will “survive a substantive due process challenge so long as it was not ‘clearly arbitrary and unreasonable, having no *substantial relation to the public health, safety, morals, or general welfare*’” (emphasis in original) (citation omitted)).

29. See Sager, *supra* note 2, at 767 (discussing how exclusionary zoning results in the denial of residential access to members of low-income groups). See generally STEPHEN R. SEIDEL, HOUSING COSTS & GOVERNMENT 159–86 (1978) (discussing the history, goals and impacts of zoning); David E. Dowall, *The Effect of Land Use and Environmental Regulations on Housing Costs*, 8 POL’Y STUD. J. 277 (1979) (analyzing the effects of land use and environmental regulations on housing costs).

30. *Nat’l Land & Inv. Co. v. Bd. of Adjustment of Easttown Twp.*, 215 A.2d 597, 612–13 (Pa. 1965). The court went on to hold that “[z]oning provisions may not be used, however, to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.” *Id.* at 610.

31. *In re Concord Twp.*, 268 A.2d 765, 767 (Pa. 1970).

32. *Id.* at 767.

33. See, e.g., *United States v. City of Black Jack*, 508 F.2d 1179, 1186 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (finding that a city ordinance prohibiting the construction of any new multiple family housing was a prima facie violation of the Fair Housing Act of 1968 because of its racial implications); *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250, 254 (9th Cir. 1974) (recognizing that a large-lot zoning ordinance prevented Mexican-American appellants from living in the town because of their poverty); *Oakwood at Madison, Inc. v. Twp. of Madison*, 371 A.2d 1192, 1208 (N.J. 1977) (holding that zoning ordinances under which persons in the bottom third of the population had no access to housing are impermissible); *Surrick v. Zoning Hearing Bd.*, 476 382 A.2d 105, 111–12 (Pa. 1977) (finding that a zoning ordinance allowing only 1.14% of land for the development of multi-family dwellings was impermissible); *In re Girsh*, 263 A.2d 395, 400 (Pa. 1970) (holding that a zoning ordinance, although it did not prohibit all apartments, was not permissible because it set aside too small of an area for apartments for the size of the population).

many of whom were people of color—by socio-economic characteristics.<sup>34</sup> The resulting property tax rates differed between wealthier and poorer residential areas because the zoning codes tied multi-family housing prices to single-family housing prices,<sup>35</sup> therefore implicitly segregating the tax base of the municipality into separated parcels of land. Redlining was already one form of segregation that prevented certain groups from migrating and living in predominantly white neighborhoods.<sup>36</sup> Euclidian zoning would later help perpetuate suburban sprawl and exacerbate segregation in America.

## 2. Exclusionary Zoning Doctrine

However, unlike Pennsylvania, some state courts, such as those in New Jersey, took a more progressive approach to zoning standards that veiled discriminatory actions. The result was an increase in constitutional challenges to exclusionary zoning under the Equal Protection Clause, and not the Takings Clause, that forced courts to look narrowly at a zoning code's intended purposes, an approach called exclusionary zoning doctrine. In the 1970s several courts in New Jersey found that "practically any significant kind of zoning" had inherent socio-economic characteristics.<sup>37</sup> The *Mt. Laurel* saga<sup>38</sup> unveiled

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34. See ROBERT ELLICKSON & A. TARLOCK, *LAND-USE CONTROLS* 795–859 (1981).

35. *Multifamily Housing Finance and Production: Hearings Before the Subcomm. on Hous. & Cmty. Dev. of the H. Comm. on Banking, Fin. & Urban Affairs*, 102d Cong. 36 (1992) (statement of William C. Perkins, Board of Directors, Federal Housing Finance Board) (noting that affordable housing stock declined from 8.6 million units in 1974 to six million units in 1989).

36. See DOUGLASS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 10 (1993). Massey and Denton challenge William Julius Wilson's "black-out migration theory" by positing the theory of "hypersegregation," the "well-defined institutional practices, private behaviors, and public policies by which whites sought to contain growing urban black populations," including redlining, among other tactics, that perpetuated the concentration of poor blacks in the inner city. *Id.* For later studies on this topic, see XAVIER DE SOUZA BRIGGS, *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* (2005); see also KARYN R. LACY, *BLUE CHIP BLACK: RACE, CLASS AND STATUS IN THE NEW BLACK MIDDLE CLASS* (2007) (focusing on the impact of differences in residential location on the construction of identity for middle-class African-Americans). See generally ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 20–30 (2012) (theorizing that there is a social component to enduring neighborhood inequality in that people react to neighborhood difference).

37. *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mt. Laurel II)*, 456 A.2d 390, 449 (N.J. 1983) (hearing and deciding six cases together concerning towns' obligations under the *Mount Laurel* doctrine).

38. The term "saga" is used to illuminate the length and importance of the case. This is simply an author preference, which I have used elsewhere in other scholarship. See Gerald S. Dickinson, *Blue Moonlight Rising: Evictions, Alternative Accommodation and a Comparative Perspective on Affordable Housing Solutions in Johannesburg*, 27 S. AFR. J. ON HUM. RTS. 466, 473 (2011) [hereinafter Dickinson, *Blue Moonlight Rising*]; Gerald S. Dickinson, *The Blue Moonlight Remedy: Formulating the Voucher Scheme into a New Emergency Housing Remedy in*

exclusionary zoning codes that discriminated based on opaque and vague standards such as codes that sought to achieve the health, safety, morals or general welfare of the residents and were all held unconstitutional on equal protection grounds.<sup>39</sup>

Exclusionary zoning doctrine, originating from the *Mt. Laurel* Doctrine,<sup>40</sup> essentially provided that a local municipality's fair share obligation is presumptive. If the plaintiffs (usually low-income households) make a prima facie case of exclusion, the burden then shifts to the municipality to prove otherwise.<sup>41</sup> The *Mt. Laurel* Doctrine also imposes an obligation on the municipality to plan for the inclusion of low-income rental units in cooperation with private developers.

Similar constitutional challenges were employed, with less success, in other notable cases such as *Berenson v. Town of New Castle*<sup>42</sup> and *Village of Belle Terre v. Boraas*.<sup>43</sup> And finally, the U.S. Supreme Court met its Euclidian match in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>44</sup> But in one of the lesser-quoted excerpts from the *Mt. Laurel* saga, the court, in one line, captured the essence of where affordable housing policy was heading, stating that "Courts do not build housing nor do municipalities."<sup>45</sup> Indeed, in an increasingly deregulated housing market in the aftermath of the public housing demise, states were seeking ways to build housing through the private

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*South Africa*, 130 S. AFR. L.J. 554, 561 (2013) [hereinafter Dickinson, *The Blue Moonlight Remedy*].

39. See *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mt. Laurel I)*, 336 A.2d 713, 727–28 (N.J. 1975).

40. John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665 (1995).

41. See *Mt. Laurel I*, 336 A.2d at 728 (stating that if "a facial showing of violation of substantive due process or equal protection under the state constitution has been made out [] the burden" then "shifts to the municipality to establish a valid basis for its action or non-action").

42. *Berenson v. Town of New Castle*, 341 N.E.2d 236, 241 (N.Y. 1975) (finding that the exclusion of multifamily housing under New Castle's zoning law was unconstitutional and holding "[t]he primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community"). The town was required to change its zoning laws to provide a fair share of various housing types that were marked at affordable market rates. *Id.* at 243.

43. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 2–3, 9 (1974) (approving town zoning ordinance barring all uses other than owner-occupied single family residences within the municipal borders).

44. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). The challenge sought to halt the effects of decreased access to low- and moderate-income affordable housing. See *id.* at 270–71 n.21. But, lacking sufficient proof of intent to discriminate in the city's refusal to rezone for purposes of constructing more affordable housing, the Court denied the challenge to overturn the exclusionary ordinance. *Id.* at 270. The Court also reviewed the racial discrimination claim, affirming that a showing of disproportionate impacts on particular groups was insufficient to prove an equal protection violation. *Id.* at 265–68.

45. See *Mt. Laurel I*, 336 A.2d at 734.

market, particularly in response to exclusionary zoning.

However, the abovementioned cases do not invoke the Holmesian idea that regulations, particularly zoning codes, that go too far must involve the exercise of eminent domain. The loss of affordable housing—or exclusion of low-income housing in wealthier parts of a locality—was confined mostly to the exercise of zoning that violated the Equal Protection Clause. Eminent domain, like zoning, does have the power to exclude under the veil of health, safety and morals, but exercised under the Fifth Amendment Takings Clause. In fact, the history of takings has resulted in a similar ubiquitous land use problem. Nevertheless, the practice of exclusion in the eminent domain context is, primarily, exercised by forcefully taking and assembling the land, not opaquely regulating and controlling the land.

### *B. Exclusionary Eminent Domain*

The phenomenon of “exclusionary eminent domain,” coined by David Dana, occurs when a taking leads to the loss of affordable housing and the displacement of residents from one neighborhood to another.<sup>46</sup> More than just this, though, it is analogous to exclusionary zoning in that the condemnation that results excludes low-income households from an otherwise predominantly or entirely middle-class or wealthy neighborhood or locality.<sup>47</sup> Dana notes that poor residents are doubly excluded in eminent domain proceedings:

Exercises of what I am calling “exclusionary eminent domain” are doubly exclusive because the displaced residents are unable to afford new housing in the same neighborhood or locality as their now-condemned, former homes. In exclusionary eminent domain, low-incomes households are excluded not only from their homes but also from their home neighborhood or locality.<sup>48</sup>

Exclusionary eminent domain occurs in two distinct contexts—suburban and urban.<sup>49</sup> In the suburban context, dwellings or structures occupied by low-income families may be condemned by the municipality for purposes of attracting new development, drawing in

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46. See Dana, *supra* note 5, at 8.

47. See *id.*; see also Matthew J. Parlow, *Unintended Consequences: Eminent Domain and Affordable Housing*, 46 SANTA CLARA L. REV. 841, 856–57 (2006) (“[N]ot only do cities fail to use their eminent domain power to build more affordable housing units, but they often use their power to raze them . . . . By taking such affordable housing units off the market by their exercise of eminent domain power, cities reduce the available housing stock for low-income residents as such units are usually replaced by new high-end commercial, residential, and mixed-use projects.”).

48. Dana, *supra* note 5, at 8.

49. *Id.* at 8–9.

residential and commercial property for the wealthy.<sup>50</sup> In the urban context, a municipality of a large city condemns property in a gentrified area.<sup>51</sup> The consequence in either context is displacement. Low-income residents are forced to relocate to poorer areas of the city (in the urban context) or to remote suburbs.<sup>52</sup>

As a result of this exclusionary practice, residents (also known as the renters or condemnees in eminent domain proceedings) do not receive compensation for a peculiar, but not less important, loss under the law.<sup>53</sup> In other words, the loss is the inability to remain in the neighborhood the condemnee was displaced from.<sup>54</sup> Takings doctrine, according to Dana, underprices low-income housing and produces an inefficiently high level of condemnations of low-income households.<sup>55</sup> The condemnee, as a result, bears the social costs of displacement. Although Dana's definition of the exclusionary eminent domain phenomenon is narrowed to the effects in gentrifying urban areas where low-income owners and low-income tenants reside in relatively wealthy to middle-class areas, the forthcoming discussion conceptualizes the phenomenon, historically and more broadly, to include any form of condemnation and eviction—whether for purposes of economic redevelopment, urban renewal, urban regeneration, etc.—that decreases the stock of and access to affordable housing in slums and other forms of concentrated poverty-stricken neighborhoods.

### 1. Urban Redevelopment and Displacement

The municipal power to exercise eminent domain has a history of displacing disproportionately poor populations.<sup>56</sup> The exclusionary

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50. *Id.* at 8.

51. *See id.* at 8–9.

52. *Id.* at 9. In some jurisdictions, however, tenants do receive just compensation when the landowner's property is condemned. Indeed, the tenant (also known as the lessee), not just the landowner (or lessor), in such jurisdictions receives compensation based on the rental value over the rent that is reserved. In other words, the tenant's projected loss from condemnation depends on whether the rental value of the leasehold exceeds that of the rent reserved through the lease term. Thus, Dana's analysis that "renters . . . have no meaningful property rights within our legal framework" is loose and tenuous. *Id.* at 43.

53. *Id.* at 11.

54. *Id.*

55. *Id.*

56. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003). Wendell Pritchett describes the exclusionary effects of eminent domain through urban renewal saying,

[B]light was often used to describe the negative impact of certain residents on city neighborhoods . . . [and] used to justify the removal of blacks and other minorities from certain parts of the city. By selecting racially changing neighborhoods as blighted areas and designating them for redevelopment, the urban renewal program

effects of eminent domain were perhaps most glaring in New York City. The “power broker” behind many of the urban renewal projects was Robert Moses, who singlehandedly dispossessed tens of thousands of poor people from their homes and businesses to make way for his grand visions of a renewed urban environment.<sup>57</sup> Thus, Moses was able to build silos for the poor and residential housing for the wealthy.<sup>58</sup>

Indeed, slums and blighted areas were the havens for most of the poor who were removed. Ironically, Moses was creating “new slums as fast as [he was] clearing the old” contributing “to the ghettoization of the city, dividing up the city by color and income.”<sup>59</sup> The new, substitute housing was usually not on the site where the urban renewal project was taking place, but rather in remote locations on the outskirts of the city.<sup>60</sup> The housing was bleak and sterile, expressing “patronizing condescension.”<sup>61</sup> The courts would later learn that the meaning and interpretation behind condemnation—or appropriation—could be used to satisfy the means to destructive ends.<sup>62</sup>

The Supreme Court, and subsequently other state and federal courts,

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enabled institutional and political elites to relocate minority populations and entrench racial segregation.

*Id.* at 6.

57. ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 19–20 (Alfred A. Knopf ed., 1974) (unpacking the magnitude of the effects of eminent domain on displacing thousands of people).

58. *Id.* at 20.

59. *Id.*

60. *Id.* (“[T]here are available no accurate figures on the total number of people evicted from their homes for all Robert Moses public works, but the figure is almost certainly close to half a million . . . . The dispossessed, barred from many areas of the city by their color and their poverty, had no place to go but into the already overcrowded slums . . .”).

61. *Id.*

62. In the 1920s, the New York State legislature understood “appropriation” to mean the allocation of funds by the Legislature. See *id.* at 174 (referring to Chapter 122 of the Laws of 1924). However, Moses had read a very different, hidden meaning of “appropriation” in the legislation. Significantly, in the context of land acquisition, the traditional use of the state’s authority to “appropriate” land was only for vast forest lands. *Id.* The power of condemnation by “appropriation” of land had not, however, been used in urban or suburban contexts. Moses discovered and re-interpreted an obscure law enacted by the New York legislature in 1884, transferring the meaning of appropriation from the mountain and forest context to the urban and suburban context. In the act, “appropriation” read as empowering the state to “appropriate” forest lands and defined “appropriation” as a procedure in which a state official could take possession of the land by simply walking on it, leaving the possessor of land with only a glimmer of hope of compensation by applying to the condemnation commission. *Id.* Title I of the United States Housing Act of 1949 amplified the “appropriation” power and gave the state authority to exercise eminent domain by condemning land and giving it to developers to build and construct. Title I therefore allowed for the condemnation of almost any urban land within a city, and its evicted residents became victims of demolished buildings, only for the land to be handed to public and private developers. *Id.* at 777.



finally entered the conversation over the constitutionality of the power of eminent domain for urban renewal projects and economic redevelopment projects where the land was transferred from the state to a private entity and later, from a private entity to a private entity. This issue came to a head in *Berman v. Parker*<sup>63</sup>—the seminal case laying the prevailing foundation of takings doctrine that interprets the words “public use” as coterminous with “public purpose” when exercised for purposes of blight removal or economic redevelopment.<sup>64</sup>

In *Berman*, the District of Columbia Redevelopment Land Agency was given the power to undertake the redevelopment of blighted territory by way of prevention, reduction or elimination of slums or areas that produce slums. Area B, located in southwest Washington, D.C. was a decaying and blighted area of residential housing.<sup>65</sup> But the “mere fact that a community occupied the proposed site for redevelopment was not factored into the eminent domain proceedings.”<sup>66</sup> The community was not a primary factor in choosing a method of renewal, such as whether to physically destroy the area, thereby dispersing the community, or rehabilitating and restoring the area.<sup>67</sup> By displacing the residents in the slums, the eminent domain proceedings offered few alternative accommodations for the—albeit inferior—existing affordable housing.<sup>68</sup>

Section 6(b) of the District of Columbia Redevelopment Act of 1945 (“DCRA”) required a redevelopment project (granted through the use of eminent domain and approved by the municipality commissioner) to have a provision that considered “the amount or character or class of any low-rent housing.”<sup>69</sup> The Court focused on section 2 of the DCRA.<sup>70</sup> But, the municipality’s plans for economic redevelopment

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63. See *Berman v. Parker*, 348 U.S. 26, 34 (1954) (examining redevelopment for public purposes).

64. See *id.* (stating that if a community is to be healthy, it cannot revert to being a blighted area).

65. *Id.* at 30.

66. Keasha Broussard, *Social Consequences of Eminent Domain: Urban Revitalization Against the Backdrop of the Takings Clause*, 24 LAW & PSYCHOL. REV. 99, 105 (2000).

67. Denis J. Brion, *The Meaning of the City: Urban Redevelopment and the Loss of the Community*, 25 IND. L. REV. 685, 702 (1991).

68. However, to convince the Court that the taking was justified for economic redevelopment purposes, the municipality proposed construction of affordable housing for the poor. See *Berman*, 348 U.S. at 30–31 (noting “[t]he plan for Area B . . . makes detailed provisions for types of dwelling units and provides that at least one-third of them are to be low-rent housing with a maximum rental of \$17 per room per month”).

69. District of Columbia Redevelopment Act of 1945, ch. 736, § 6(b), 60 Stat. 790, 794 (1946).

70. See *Berman*, 348 U.S. at 28 (focusing on the statutory language stating that “the

fell short of its original intent to substitute the existing blighted housing with new affordable housing developments.<sup>71</sup> Instead, the development plans for Area B changed after the Supreme Court granted the municipality the authority to condemn and the planned affordable housing developments were never fully realized.<sup>72</sup> *Berman* set the stage for nearly sixty years of takings doctrine precedent.

*Poletown Neighborhood Council v. Detroit*, *Hawaii Housing Authority v. Midkiff*, and *Kelo v. City of New London* followed *Berman*'s public use definition as taking anything that is "broad and inclusive," including any "object . . . within the authority of Congress."<sup>73</sup> The growing eminent domain jurisprudence essentially washed away the meaning of the public use limitation in the Constitution. *Kelo* then sparked a lengthy debate amongst the public, jurists, policymakers and academics over what was meant by rendering economic redevelopment takings for public use.<sup>74</sup>

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conditions . . . are injurious to the public health, safety, morals, and welfare; and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by *employing all means necessary and appropriate for the purpose*" (emphasis added) (internal citation omitted). The Court further noted section 3(r)'s definition of substandard housing conditions: "*dwelling . . . or housing accommodation for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is in the opinion of Commissioners detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia.*" *Id.* at 28 n.1 (emphasis added). The Court acknowledged that many residents would be affected by the redevelopment project. *See id.* at 30 ("The population of Area B amounted to 5,012 persons, of whom 97.5% were Negroes.").

71. Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 50 (2006) ("The *Berman* [C]ourt's approval of the exercise of police power thus implicitly rested on the plan's provision for socio-economic variety and inclusion, most importantly of the poor. Ironically, the implementation of the urban renewal program did not look anything like what was presented to the Court.").

72. *Id.* at 51.

73. *Berman*, 348 U.S. at 33; *see Kelo v. City of New London*, 545 U.S. 469, 483 (2005) (stating that the Court's "public use jurisprudence has wisely eschewed rigid formulas and intensive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power"); *see also* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240–41 (1984) (holding that economic development qualified as public use under the federal and state constitutions and holding that courts will not stop a taking as long as the use of eminent domain is rationally related to some conceivable public purpose); *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 459 (Mich. 1981) (determining that redevelopment was for economic development purposes—the public benefit—and valid as public use even if the only claimed public benefit was a bolstered economy).

74. *See, e.g.*, ROBERT G. DREHER & JOHN D. ECHEVERRIA, *KELO'S UNANSWERED QUESTIONS: THE POLICY DEBATE OVER THE USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT I* (2006) (stating that the use of eminent domain for economic development raises concerns that government power may be used to benefit private interests).

However, noteworthy is *County of Wayne v. Hathcock*, where the Michigan Supreme Court reversed *Poletown*, holding that “generalized economic benefit” is not enough to justify condemnation.<sup>75</sup> *Hathcock* was a reprieve for many still trying, one year later, to wrap their heads around the powerful exercise of state authority that *Kelo* seemed to exhibit. While some argued that there was a legitimate public outcry over *Kelo* because middle-income homes were being displaced, the same reasoning for granting the municipality the power to exercise eminent domain in the District of Columbia sixty years earlier was the controlling doctrine used in *Berman*. The difference, however, was *Kelo* was an attack on America’s middle class while *Berman* had an impact on poor minority communities and thus received far less media attention.

The main thrust of the problem in the abovementioned cases was the extent to which the state could exercise eminent domain for public or private purposes. However, courts have yet to rule on eminent domain challenges based on whether the taking would have an impact on affordable housing. But perhaps the dissents from Justice Thomas and Justice O’Connor laid the groundwork for such reasoning.<sup>76</sup>

Today, the exclusionary effects of eminent domain still resonate in high-density urban environments. The ongoing Atlantic Yards redevelopment saga in Brooklyn, New York is perhaps the most recent example of the phenomenon of exclusionary eminent domain where low-income and middle-income residents are displaced in an increasingly gentrified dense urban area.<sup>77</sup>

The Empire State Development Corporation (“ESDC”), a quasi-governmental organization, sought to condemn property in Prospect Heights, which then allowed New York City to officially condemn the land as blighted and in need of redevelopment. The area was subject to

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75. *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765, 786 (Mich. 2004).

76. Justices Clarence Thomas and Sandra Day O’Connor focused their *Kelo* dissents on the impact that eminent domain has on low-income minority communities. Justice Thomas noted, “[a]llowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities.” See *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting).

77. It worth noting in the discussion of Atlantic Yards, including *Goldstein v. N.Y. State Urban Development Corp. (Goldstein)*, 921 N.E.2d 164 (N.Y. 2009), that Daniel Goldstein was the final landowner to hold out before the eminent domain proceeding commenced and the property was confiscated for redevelopment. Goldstein, however, was a relatively affluent professional who was displaced by the redevelopment project. Thus, exclusionary eminent domain increasingly impacts low-income and middle-class residents.

gentrification for years<sup>78</sup> before the courts of New York confronted the borough's biggest redevelopment project.<sup>79</sup> Low-income tenants argued they were the "hardest hit," losing rent-stabilized apartments and other affordable housing that was not replaced.<sup>80</sup> Furthermore, opponents charged that they would be excluded not only from their homes but also from their home neighborhoods or localities in Brooklyn.<sup>81</sup> Thus, a challenge arose and the courts intervened.<sup>82</sup>

In *Goldstein v. New York State Urban Development Corp.* ("Goldstein"),<sup>83</sup> the Court of Appeals of New York upheld ESDC's use of eminent domain to acquire land for the Atlantic Yards project in Brooklyn. The court deferred the decision-making process of determining blight<sup>84</sup> to ESDC.<sup>85</sup>

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78. Iver Peterson, *Prospect Heights Beginning to Climb to Gentrification*, N.Y. TIMES, Nov. 27, 1988; see also James E. Caldwell, President's Testimony at the New York City Council Economic Development Committee Hearing, Brooklyn United for Innovative Local Development (BUILD) (May 4, 2004). White flight from urban areas in the 40s, 50s and 60s was followed by disinvestment from the inner cities, such as Brooklyn. The disinvestment deprived many in search of economic opportunities of prosperity and imprisoned many in the clutches of working class poverty and underclass entrapment. *Id.*

79. See PRATT INST. CTR. FOR CMTY. & ECON. DEV., SLAM DUNK OR AIRBALL? A PRELIMINARY ANALYSIS OF THE ATLANTIC YARDS PROJECT 1 (Mar. 2005) (explaining that, in 2000, approximately 65% of the households in the area earned more than the median income for Brooklyn, compared to 45% in 1990); see also DEV. DON'T DESTROY BROOKLYN, RESPONSE TO THE ATLANTIC YARDS ARENA AND REDEVELOPMENT PROJECT BLIGHT STUDY CONTAINED WITHIN THE GENERAL PROJECT PLAN 4 (Sept. 26, 2006) (stating Brooklyn's real estate market in 2006 was drastically different than its real estate market in 1968).

80. See generally Brief for Develop Don't Destroy (Brooklyn), Inc. et al. as Amici Curiae Supporting Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108).

81. *Id.*

82. See *Goldstein v. Pataki*, 516 F.3d 50, 53 (2d Cir. 2008) (upholding the district court's dismissal of a complaint lodged by fifteen property owners whose homes and businesses were to be condemned by the Atlantic Yards project and the pending construction of affordable housing). The ESDC's taking for public use was determined valid under the Fifth Amendment. *Id.* at 59. The court said the Atlantic Yards project, which involved the redevelopment of blighted area, the creation of affordable housing, the creation of public open space and other mass-transit improvements, was rationally related to public use and that the ESDC, deputized by the legislature, could determine what was public use based on its study and analysis of the land in Prospect Heights. *Id.* at 58-59; see also *Dev. Don't Destroy (Brooklyn) v. Urban Dev. Corp.*, 59 A.D.3d 312, 333 (N.Y. App. Div. 2009) (ruling in favor of the ESDC's environmental impact statement). The courts were now relying on the environmental impact statements and blight studies to determine whether blight rose to a level that granted the ESDC the power to seize the land, exercise eminent domain and hand over the responsibility of redevelopment to Forest City Ratner Companies LLC ("FCR"), the private development company. See *Dev. Don't Destroy*, 59 A.D.3d at 423 (deferring to the ESDC's blight study to determine there was blight in the takings area).

83. *Goldstein*, 921 N.E.2d 164 (N.Y. 2009).

84. Conditions that rise to the level of blight usually include high crime, high unemployment rates, declining tax bases, dilapidated buildings and infrastructure, buildings that violate building codes and high vacancy rates for commercial, residential or office buildings. These conditions

The language of article 1, section 7 of the New York Constitution is similar to the Fifth Amendment Takings Clause. It requires both public use and just compensation for a state taking of private property.<sup>86</sup> Like *Berman*, a “broad and inclusive” definition of what constitutes permissible public use or public purpose was adopted in New York.<sup>87</sup> Significantly, the taking of land for slum clearance purposes is constitutionally accepted and falls under the public use requirement.<sup>88</sup> Moreover, under article 18, section 6, takings for the purpose of slum clearance and economic redevelopment must provide low-income housing if the project is subsidized or funded in some capacity by the state.<sup>89</sup>

Like *Berman*, the construction of affordable housing was a substantial justification for the Atlantic Yards redevelopment project.<sup>90</sup>

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and definitions vary by state.

85. *Id.* at 171–72 (discussing standard for upholding a public benefit corporation’s finding of blight).

86. N.Y. CONST. ANN. art. I, § 7. The provision was enacted in 1821 and was amended over the years to allow condemnations for private roads (in 1846) and for swamp drainage systems (in 1894). *Id.*

87. *See, e.g.*, *Bd. of Hudson River Regulating Dist. v. Fonda, Johnstown & Gloversville R.R. Co.*, 164 N.E. 541, 543 (N.Y. 1928) (rejecting a claim that a dam, claimed to be needed for flood control purposes, was actually intended to benefit private power producers; even if there was a profit motive, the public use was sufficient); *Holmes Elec. Protective Co. v. Williams*, 127 N.E. 315, 320 (N.Y. 1920) (Andrews, J., concurring) (upholding taking for telegraph company).

88. N.Y. CONST. art. XVIII, § 9. Although the amendment expressly authorized the use of eminent domain for slum clearance purposes, it did not modify article I, section 7, suggesting that slum clearance, in some cases, might still be found to be a private use. *Murray v. La Guardia*, 52 N.E.2d 884, 887–88 (N.Y. 1943) (finding slum clearance a public use).

89. N.Y. CONST. art. XVIII, § 6. The critical state constitutional provision used throughout *Goldstein* was ultimately shelved when the petitioners failed to make a persuasive case under article XVIII, section 6. The New York constitutional provision states that “[t]he occupancy of any such project shall be restricted to persons of low income as defined by law and preference shall be given to persons who live or shall have lived in such area or areas.” *Id.* Under the plain language interpretation any housing built as part of the Atlantic Yards project, which received some state loans or subsidies, would be reserved for low-income tenants. *See id.*

90. *See* Brief for Petitioners-Appellants at 68, *Goldstein*, 921 N.E.2d 164 (N.Y. 2009) (No. 2009-0178) (arguing that applying the plain language of article XVIII, section 6 of the New York State Constitution to the Atlantic Yards project would not produce absurd results, nor would it place unwarranted burdens on the developer); *see also* *Coal. for Responsible Planning v. Koch*, 535 N.Y.S.2d 513, 519 (N.Y. Sup. Ct. 1988) (allowing plans for construction of housing to proceed after applying New York Private Housing Law and determining that “low-income” group is not required to have particular lower monetary income level); *Chelcy v. Buffalo Mun. Hous. Auth.*, 206 N.Y.S.2d 158, 161 (N.Y. Sup. Ct. 1960) (applying article XVIII, section 6 of the New York State Constitution to state-aided public housing development); *Minkin v. City of N.Y.*, 198 N.Y.S.2d 744, 749–50 (N.Y. Sup. Ct. 1960) (denying injunction to prevent taking—although the property to be taken would benefit “middle-income” group—because, pursuant to article XVIII, the legislature adopted a broad standard for income status); *Davidson v. City of Elmira*, 44 N.Y.S.2d 302, 311–12 (N.Y. Sup. Ct. 1943) (dismissing action to enjoin public housing authority from engaging in a housing project). *But see* *Goldstein*, 921 N.E.2d at 184 (determining that the

The petitioners, however, argued that the respondent's proposed affordable housing was not actually "affordable" for low-income persons.<sup>91</sup> Instead "the majority of the housing units in the economic redevelopment project [were] slated to be rented or sold at market rates."<sup>92</sup> The petitioners pointed to article 18, section 6, arguing that although the land use improvement project received state aid earmarked for affordable housing, the project did not comply with the state constitution,<sup>93</sup> and the respondent's Modified General Project Plan suggested that affordable housing could never be constructed at the site.<sup>94</sup>

The court dismissed such claims, stating that the argument "does not capture the provision's [(article 18, section 6)] intendment."<sup>95</sup> The court explained that slum clearance and the construction of affordable housing were "not under the article necessarily, or even ordinarily, to be pursued in tandem."<sup>96</sup> Instead, it held the constitutional provision, approved in the 1930s, was intended to deal with the growth of slums.<sup>97</sup> If a municipality exercised the power to condemn emerging slums, then it was required that affordable housing be constructed.<sup>98</sup> The court concluded, "The sentence in essence assures that *if* housing is created in connection with a slum clearance project, and the project is aided by state loans or subsidies, the new housing will replace the low rent accommodations lost during the clearance."<sup>99</sup> The court's reasoning follows *Berman* and *Kelo*, ensuring that municipalities are not constitutionally obligated to build affordable housing when exercising

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core purpose of the Atlantic Yards project was not to develop affordable housing but rather to rehabilitate substandard land through improvements, including the construction of a sports arena, publicly-accessible open space, and community facilities).

91. Brief for Petitioners-Appellants, *supra* note 90, at 14.

92. *Goldstein*, 921 N.E.2d at 174.

93. Brief for Petitioners-Appellants, *supra* note 90, at 68.

94. See Brief for Respondents-Appellees at 24, *Goldstein*, 921 N.E.2d 164 (No. 2009-0178) (noting the Blight Study documented the presence of conditions that purportedly made it highly unlikely that the blight would be removed without public action).

95. *Goldstein*, 921 N.E.2d at 174. Significantly, the court clarified the language of the constitutional provision, saying the section 6 clause, "assures that if housing is created in connection with a slum clearance project, and the project is aided by state loans or subsidies, the new housing will replace the low rent accommodations lost during the clearance." *Id.* at 175. The court concluded that although building affordable housing to replace lost housing is a worthy objective, it is not constitutionally required under article XVIII, saying that "to hold otherwise would in many cases arbitrarily tether land use improvement to the creation of low rent housing and, in so doing, encumber, in a manner plainly without the framers' contemplation." *Id.*

96. *Id.* at 174.

97. *Id.*

98. *Id.* at 174-75.

99. *Id.* at 175 (emphasis added).

eminent domain. What was left of the Atlantic Yards saga was a lesser publicized component—a history-making community benefits agreement that serves as the seminal tool for how inclusionary eminent domain operates conceptually and practically.<sup>100</sup>

Even amidst longstanding case law and federal legislation,<sup>101</sup> the

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100. See *infra* Parts II.B.1, III.A (discussing how the CBA from the Atlantic Yards project could serve as a model for community leverage under inclusionary eminent domain).

101. Housing Act of 1949, ch. 338, 63 Stat. 413 (codified as amended in scattered sections of 12 and 42 U.S.C.) (relating to the Urban Renewal Fund, which was terminated by 42 U.S.C. § 5316 after Jan. 1 1975). Federal legislation has attempted to combat the displacement of communities from condemnation. *Id.* The Housing Act of 1949 was enacted to provide temporary relocation payments for people displaced by federal urban renewal programs. *Id.* The Fair Compensation Act (“FCA”) was enacted to standardize relocation assistance legislation along with the Housing Act of 1949. SELECT SUBCOMM. ON REAL PROP. ACQUISITION OF THE HOUSE COMM. ON PUB. WORKS, 88TH CONG., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSON AFFECTED BY REAL PROPERTY AND ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAM 145–47 (Comm. Print 1965). The Act sought to afford “persons affected by the acquisition of real property in . . . federally assisted programs . . . fair and equitable treatment on a basis as nearly uniform as practicable.” *Id.* at 147. In particular, two prominent pieces of federal legislation have sought to mitigate the displacement effects on low-income communities when eminent domain and other land use mechanisms are exercised—the Uniform Relocation Assistance Act (“URA”) and the Housing and Urban Development Act (“UDA”). See Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451 (codified as amended in scattered sections of 12 and 42 U.S.C.); Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. No. 91-646, 84 Stat. 1894 (codified as amended at 42 U.S.C. §§ 4601–4655); see also NAT’L. HOUS. & ECON. DEV. LAW PROJECT, *Guide to Federal Housing Redevelopment and Planning Programs*, in HANDBOOK ON HOUSING LAW ch. X, pts. 1–13 (1970) (discussing relocation obligations imposed by URA on federally funded highway projects that cause displacement). The URA specifically incorporated many of the goals of the Housing Act and FCA and was a remedy for the growing social problems in urban areas and to alleviate hardship for the poor. See NAT’L. HOUS. & ECON. DEV. LAW PROJECT, *supra*, ch. X, pts. 1–13 (reporting that URA requires more than the Highway Relocation Assistance Act of 1968 from federally assisted projects in terms of relocation planning for displacees). The URA was meant to ensure adequate replacement housing to individuals displaced by federally funded activities. See 42 U.S.C. § 4621 (2012) (“This subchapter establishes a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance.”). Significantly, the Act targeted low-income communities who were disproportionately affected by displacement and subsequently experience serious affordable housing shortages. See H.R. DOC. NO. 91-34, pt. 2, at 82–83 (1968) (reporting that urban renewal programs between 1949 and 1968 actually resulted in a net deficit between the number of low-income housing units directly destroyed and the number built for the poor); see also 42 U.S.C. § 4625(c) (describing relocation assistance advisory measures, facilities and services). The URA did so by providing moving expenses or fixed moving allowances to those forced to relocate. See 42 U.S.C. § 4622. A relocation program is also available that compensates the cost of displacement with comparable replacement dwelling, but a comprehensive plan for relocation is not required. See Coleman A. Young, *Recent Developments in Urban Development*, 21 URB. L. ANN. 317, 368 (1981) (stating that under the URA any displacing agency must create a relocation assistance advisory program, but such assistance is in the form of assurances and not duties). However, similar to the objective analysis of just compensation used by the Supreme Court in takings cases, the URA provides the displaced person relocation to a dwelling of equivalent fair market rate. See 42 U.S.C. § 4623 (authorizing

problem of displacement prevails. The most recent proposal to treat the takings problem is a doctrinal remedy.

## 2. Exclusionary Eminent Domain Doctrine

Dana proposes a doctrinal remedy known as “exclusionary eminent domain doctrine” to fix the exclusionary phenomenon. To unpack and analogize the doctrine, Dana ties together the similar negative effects that exclusionary zoning and exclusionary eminent domain impose on low-income communities.

The doctrine is twofold. First, it is a judicial evaluation of a municipality’s action in light of the regional need for low-income housing.<sup>102</sup> Second, the doctrine considers the impact the taking has on a fair share obligation of affordable housing with respect to those needs and develops a rebuttable presumption of illegality when a municipality condemns land in an urban setting that decreases the stock of affordable housing below or further below its fair share obligation.<sup>103</sup> The doctrine would not necessarily force the internalization of all real costs of exclusionary condemnations in the community.<sup>104</sup>

The doctrine, like the exclusionary zoning doctrine, would instead apply heightened review to condemnations of low-income housing in a locality or neighborhood that has less than its fair share of affordable housing than a rational basis review would require.<sup>105</sup> The heightened

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payments to displacees for the difference between the acquisition cost and the reasonable cost of a comparable replacement dwelling). The UDA also sought to quell the problem of displacement. *See* 12 U.S.C. § 1715(z) (2012) (authorizing periodic assistance to lower income families for homeownership or membership in cooperative associations); 42 U.S.C. § 1455 (setting forth requirements to ensure displacees are relocated to decent, safe and sanitary dwellings). The UDA was enacted in an effort to provide affordable housing for low-income families. The Senate report emphasized that there ought to be a new strategy for providing housing and giving American families the widest choice in selecting the type of housing in which they desire to live. S. REP. NO. 1123-90, at 4 (1968). Originally, the Act sought to achieve a balance in existing programs, placing emphasis on developing programs that would give lower-income families a better opportunity of becoming homeowners. *Id.* That goal was expanded to affordable housing broadly, not simply homeownership. *Id.* The UDA sought to improve conditions in the inner city areas where private investment is scarce, such as low-income communities. *Id.* at 88. With the increase of economic redevelopment projects throughout the nation, amendments to the Act can potentially redirect funds, at a minimum, to where private investment is already taking place to ensure inclusionary affordable housing because many of the economic redevelopment projects are already heavily funded by the private developer.

102. *See* Dana, *supra* note 5, at 10 (evaluating a locality’s actions in terms of the regional need for low-income housing).

103. *Id.*

104. *Id.* at 11.

105. *Id.* at 10. Dana distinguishes zoning by invoking three principles that have dominated judge-made, non-statutory zoning. These principles have been the overriding guide that cause judges to refrain from imposing limits on exclusionary zoning. *Id.* at 23–25. Dana’s



review standard would operate like a “reasonably-flexible rebuttable presumption that exclusionary government actions are illegal,” rather than like a traditional strict scrutiny standard.<sup>106</sup> The municipality could rebut the presumption by showing an important, local need for the economic redevelopment project.<sup>107</sup> However, the doctrine would not bar the condemnation of low-income housing in a neighborhood totally, but would require an application of heightened review to eminent domain proceedings and condemnations.<sup>108</sup> Municipalities that seek to condemn land and exercise eminent domain would have to provide a more compelling justification for the taking rather than relying on rational review.<sup>109</sup>

However, under this proposal, a court would have to engage in this heightened review in the absence of judicial precedent to guide its reasoning as to whether a fair share of housing is decreased by the taking.<sup>110</sup> The only closely related precedent would be land use controls and exclusionary zoning doctrine. But the practice of exclusionary zoning occurs, for the most part, in low-density suburban localities where neighborhood and locality boundaries are easily drawn, whereas exclusionary eminent domain doctrine would seek to mitigate the effect of displacement in dense urban areas where neighborhood boundaries are more difficult to draw.<sup>111</sup> This makes determining whether the condemnee has actually been displaced from his or her neighborhood difficult for courts. But the adoption of eminent domain doctrine would presumably result in properties not being acquired

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exclusionary eminent domain proposals focus on the third principle which gives local officials the authority to zone on behalf of the local welfare of *only* those living within a municipality. *Id.* at 24. However, courts, particularly in New Jersey, New York and Pennsylvania, have departed from this third principle and require local officials to consider extra-local welfare where the zoning law has exclusionary effects on low-income residents and affordable housing. *Id.* at 26–27.

106. *Id.* at 30–31.

107. *Id.* at 31.

108. *Id.* The *Nollan* and *Dolan* nexus/rough proportionality test for judicial review of land use exactions is a similar heightened review application. See Nicole Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 936–37 (2003) (arguing generally that public use review should be modeled after *Nollan/Dolan* heightened review).

109. See David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1294–97 (1997) (discussing likely responses of regulators and developers to the prospect of nexus/rough proportionality review in the repeat-game context compared to the one-time context).

110. *Id.* In the exclusionary zoning context, courts in New Jersey, New York and Pennsylvania developed heightened review of exclusionary practices. See Dana, *supra* note 5, at 26–27.

111. See *id.* at 29–30 (discussing how exclusionary eminent domain raises the question of how to define an urban neighborhood in a different way than exclusionary zoning).

when, and if, the municipality or private developer is unwilling to pay the full value of the property to the property owners and tenants.<sup>112</sup>

Under exclusionary eminent domain doctrine, if a municipality did not substitute the low-income housing that is condemned for the public purpose of economic redevelopment, then the taking is unlawful and the government may not exercise eminent domain.<sup>113</sup> Municipalities must provide substitute housing to overcome the loss of low-income housing under this doctrine. This type of rebuttable presumption allows courts to decide cases based, in part, on cost-benefit balancing. The courts can weigh the costs of the exclusionary impact versus the benefits associated with the exclusionary practice.<sup>114</sup>

Indeed, Dana is right that there is something problematic with the exclusionary practice of eminent domain and something must be done to avoid displacing low-income residents and decreasing access to affordable housing. Practicing lawyers are also beginning to see the parallels between exclusionary zoning and exclusionary eminent domain.<sup>115</sup> Most important to this Article is that Dana's proposal takes into account the social cost of losing affordable housing:

[T]he possibility that a doctrine of exclusionary eminent domain will raise the effective cost of excluding a low-income household beyond the full social costs of exclusion is mitigated by the fact that the doctrine allows the locality and developer to avoid the doctrinal limits by constructing substitute affordable housing.<sup>116</sup>

Empowering developers to “avoid the doctrinal limits by constructing substitute affordable housing”<sup>117</sup> deserves further exploration in what is, otherwise, a convincingly argued doctrinal proposal. Dana eloquently tells us *what* is wrong (exclusionary eminent domain) and tells us *why* we need a remedy (exclusionary eminent domain doctrine). But how do we do this? To avoid a judicial limitation by substituting more affordable housing where it was lost begs the question of *how* to

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112. See *id.* at 42 (noting that if the municipality or developer values acquisition of the site at less than the owner subjectively does, the owner will not sell and the site will not be acquired).

113. See *id.* at 45 n.87 (noting that under the federal relocation statute displaced tenants and homeowners are entitled to a “comparable replacement dwelling”).

114. See *id.* at 31 (positing that a doctrine limiting exclusionary eminent domain may be efficient, in a cost-internalization sense).

115. Brief of Amicus Curiae Public Advocate of New Jersey at 39, *LBK Assocs., LLC v. Borough of Lodi*, No. A-001829-05T2, 2007 WL 2089275 (N.J. Super. Ct. App. Div. July 24, 2007) (“[I]f this principle, [exclusionary zoning,] prohibits municipalities from using zoning to prevent low- and moderate-income families from locating in their communities, *a fortiori* it forbids the use of eminent domain [(exclusionary eminent domain)] to expel low- and moderate-income families already living within their communities.”).

116. See Dana, *supra* note 5, at 52.

117. *Id.*

constructively substitute the affordable housing while keeping in mind the interests of those most affected by the condemnation—low-income communities.

Exclusionary eminent domain doctrine falls short of showing us how to constructively substitute or construct affordable housing where existing housing is to be lost by condemnation. Moreover, Dana missed an important link that provides a useful analogy to answer the question of how to construct or preserve affordable housing and to fix the exclusionary eminent domain problem.<sup>118</sup> One only has to look at inclusionary zoning—a legislative remedy imposed as a response to exclusionary zoning doctrine—to begin unpacking the answer to these ubiquitous land assembly questions. Analogizing the eminent domain paradigm similarly to the zoning paradigm leads us to a new way of thinking about how to plan for inclusion in economic redevelopment projects.

## II. CONCEPTUALIZING A NEW EMINENT DOMAIN PARADIGM

Part II discusses the policy behind inclusionary zoning that gives effect to the court rulings on exclusionary zoning. Further, the tools used to achieve affordable housing, which include the builder's remedy, set-aside programs, density bonuses and in-lieu fees, are explicated from the policy to show how similar tools in the eminent domain context could be replicated to assist localities construct or preserve low-income affordable housing within dense urban areas where economic redevelopment is flourishing throughout the United States.

### A. Inclusionary Zoning

Inclusionary zoning is broadly defined as any method within the law that creates more affordable housing in a community.<sup>119</sup> This can

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118. Dana seemingly glosses over an important aspect of the Atlantic Yards private development and goes no further than to note that a community benefits agreement was one way to include, or substitute, affordable housing developments. *See id.* at 12 (noting that the Atlantic Yards development “does include a community benefits agreement that provides that some affordable housing will be constructed in or near the redeveloped area as substitutes for lost affordable housing”). However, Dana was far too focused on his doctrinal proposal as a remedy to fix the exclusionary eminent domain phenomenon, saying “the existence of a clearly recognized exclusionary eminent domain doctrine under New York state constitutional law might have resulted in a more generous and definite commitment for the creation of new affordable housing, and would allow for a more effective court enforcement mechanism.” *Id.* at 5. But, as demonstrated above in the *Goldstein* matter, 921 N.E.2d 164, 174–75 (N.Y. 2009), an exclusionary eminent domain doctrinal argument is not persuasive under existing New York state legislation or under the New York Constitution. Indeed, more than a doctrinal proposal is needed.

119. *See* DANIEL R. MANDELKER, LAND USE LAW § 7.26, at 7-23 to -24 (5th ed. 2003)

include high-density apartments and reduced development standards, among other strategies discussed shortly.<sup>120</sup> In *Mt. Laurel II*, the court held that every municipality must provide a realistic opportunity for decent housing for its poor—in other words, provide its fair share, expressed in terms of number of units needed immediately and in the future.<sup>121</sup> Court-mandated inclusionary zoning ordinances<sup>122</sup> were designed, implemented and enforced by the New Jersey legislature, and municipalities were ordered to undertake affirmative measures and assist development by obtaining state and federal aid.<sup>123</sup> New York and Pennsylvania courts departed from the usual deference to local officials to zone on behalf of general welfare and instead deployed a loosely reasoned “fair share” obligation on the municipality to provide affordable housing.<sup>124</sup> The *Mt. Laurel* saga, however, brought a new normative perspective on zoning by requiring municipalities to enforce land use controls on private developers or to induce the developers to

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(discussing zoning revisions necessary to encourage affordable housing development).

120. *Id.*

121. *Mt. Laurel II*, 456 A.2d 390 (N.J. 1983).

122. See Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 70 (2001) (discussing the New Jersey courts’ restraints on economic segregation). Inclusionary zoning ordinances have been implemented in Massachusetts where approximately 1000 affordable units through various kinds of “affordability zoning” have been made mandatory and have increased affordable housing. See Philip B. Herr, *Zoning for Affordability in Massachusetts: An Overview*, in *Inclusionary Zoning: Lessons Learned in Massachusetts*, NHC AFFORDABLE HOUSING POL’Y REV. (Nat’l Hous. Conference, Washington, D.C.), Jan. 2002, at 3–4 (discussing various inclusionary zoning provisions in Massachusetts voluntarily adopted by municipalities). Other communities with inclusionary ordinances include Boulder and Telluride, Colorado, and Fairfax County, Virginia. See, e.g., COLO. REV. STAT. § 9-13-3 (2013), available at <http://www.colocode.com/boulder2/chapter9-13.htm> (requiring that 20% of a project’s units be affordable for all new residential developments (regardless of project size) and that inclusionary units remain affordable in perpetuity).

123. See *Mt. Laurel I*, 336 A.2d 713, 725–28, 745 (N.J. 1975) (“Land use regulation is encompassed within the state’s police power . . . . [I]t is required that, affirmatively, a zoning regulation, like any other police power enactment, must promote public health, safety, morals or the general welfare . . . . [I]t is beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation . . . [and] it has to follow that, broadly speaking, the presumptive obligation arises for each . . . municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for . . . low and moderate cost housing.”).

124. See Dana, *supra* note 5, at 26–27 (comparing New York and Pennsylvania zoning decisions to those in New Jersey). Heightened review in the exclusionary zoning context helped challengers and the courts identify municipalities’ unconstitutional zoning practices. Most states have settled with some form of heightened review of such issues but rarely go as far as to mandate the municipality implement a fair share of affordable housing. That obligation, for the most part, is left for the legislature to enact. It took a bold court and a unique set of facts and history in New Jersey to hand down such a state landmark judgment in *Mt. Laurel*, which is arguably an outlier on exclusionary zoning cases in the United States.

voluntarily increase the stock of affordable housing.<sup>125</sup> The *Mt. Laurel* court, in its rationale for an exclusionary zoning doctrine, may have foreseen that the decision would push local municipalities and state legislatures to enact laws mandating inclusionary housing programs.

In 1985, the New Jersey Legislature passed the Fair Housing Act and created the Council on Affordable Housing (“COAH”), which imposed regulations to provide affordable housing on municipalities. Municipalities were tasked with the obligation of using zoning powers in an affirmative manner to provide a realistic opportunity for the production of affordable housing for low-income families. Since *Mt. Laurel*, there have been two primary routes to achieve this—mandatory and voluntary tools.

## 1. The Tools of Inclusionary Zoning

### a. Builder’s Remedy

The builder’s remedy is a voluntary tool used to affect land use and construct or preserve affordable housing developments. The scheme grants builders the choice to profit from construction in ways that exclusionary zoning otherwise would not allow.<sup>126</sup> Here, the private developer can challenge exclusionary decisions by a local zoning board on behalf of the public interest.<sup>127</sup> In other words, the developer, who has been denied permits or variances to build affordable housing, can appeal the local zoning board’s decision.<sup>128</sup>

This allows the developer to accelerate the process of constructing affordable housing using an administrative procedure instead of litigation. The refusal to hold a hearing in response to the appeal automatically deems the permit granted. However, if the developer

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125. However, few state courts have used state constitutional law to overturn exclusionary zoning laws. Fewer courts have imposed set-aside zoning mandates on the ground that exclusionary zoning is excessive or discriminatory. Truth be told, *Mt. Laurel*, to put it mildly, was a big success ideologically, but its practical effect remains quite limited. Indeed, under current zoning doctrine, municipalities can overcome presumptions by showing local need. In the exclusionary eminent domain context, a developer that avoids the doctrinal limitation operates similarly to the developer operating in the inclusionary zoning builder’s remedy context, where the developer can avoid the zoning law by constructing affordable housing and placing it on the market at or below the marginal cost of the unit.

126. Andrew Dieterich, *An Egalitarian’s Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 28, 47 (1996).

127. *Id.* In Massachusetts, such a scheme was enacted under the Massachusetts Anti-Snob legislation, granting private developers the power to exercise the builder’s remedy. See generally Paul K. Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535 (1992) (discussing the Anti-Snob legislation’s incentives to builders).

128. See generally Stockman, *supra* note 127, at 550 (discussing the appeal process).

loses on appeal, the developer can obtain a review of the decision before a state committee.<sup>129</sup> The committee reviews all aspects of the zoning code, the developer's proposal for affordable housing and the regional needs for such housing.<sup>130</sup> To overcome its burden, the zoning board must show health, safety, environmental, design, open space or other local concerns, all of which must clearly outweigh the regional need for affordable housing.<sup>131</sup> Like with exclusionary zoning, there is a strong presumption against the locality unless it maintains a threshold level of affordable housing.<sup>132</sup>

Underlying the builder's remedy is the idea of filtering low-income housing from the decisions of private developers, not from government regulation or subsidization.<sup>133</sup> The expected result of empowering developers to exercise the builder's remedy is the development of affordable housing that would otherwise not be constructed at the market rate and to then filter down to those who would otherwise lack access.<sup>134</sup> The problem, however, is that private developers may be unaware that constructing affordable housing, in and of itself, may not generate sufficient housing stock in the poorest areas where the income levels fall well below the market rate.<sup>135</sup> Indeed, unless the locality is ready to subsidize low-income residents' purchasing power, the developer may avoid using the builder's remedy *or* the tool may be used only to construct middle-income housing.<sup>136</sup> The latter process may benefit the poor only by filtering, which may be helpful for increasing accessibility to affordable, sometimes inferior, housing, but it is no substitute for the construction of new affordable housing developments.<sup>137</sup>

Here, the geographic location of the housing under the builder's remedy is important. For private developers the location of the housing

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129. *Id.* at 551.

130. *See* Dietderich, *supra* note 126, at 48 (discussing how the committee determines the denial of a variance or permit by looking at the regional housing needs).

131. *Id.*

132. *Id.*

133. *See generally* Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 *GEO. L.J.* 179, 235–58 (1995) (rejecting theory that deregulation would produce sufficient, decent affordable housing and proposing policies that marry market and regulatory strategies to create such housing in settlements along the Mexico-Texas border).

134. *Id.*

135. *See* Dietderich, *supra* note 126, at 45–46 (discussing the expected change in affordable housing stock in low income areas based on whether a municipality implements mandatory or voluntary inclusionary zoning).

136. *Id.* at 49.

137. *Id.*

is of utmost importance in estimating the property's value when and if sold in the future.<sup>138</sup> If this is the case, then the filter effect may result in middle-income families capturing the housing rather than the lowest income brackets.<sup>139</sup> This then begs the question of how affordable housing is defined under the inclusionary zoning laws and who it is intended to benefit. If the filter effect fails, the government will have to intervene to subsidize affordable housing for the poor and the private developer's use of the builder's remedy goes to those who it was not intended to benefit.<sup>140</sup> However, if the developer is willing to construct and place the affordable housing on the market at or below the marginal cost of a unit, then the developer can avoid the zoning law.<sup>141</sup> Further, if the challenge to the zoning code is successful, the court will grant an order permitting the developer to construct the affordable housing development.<sup>142</sup> However, compared to mandatory ordinances, voluntary programs like the builder's remedy may be less likely to produce the same level of affordable units with a much broader and all-inclusive range of household incomes through mandatory ordinances.<sup>143</sup>

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138. *Id.* at 51.

139. See Ellickson, *supra* note 18, at 1186 (discussing the short-term advantages and long-term disadvantages to moderate- and low- income families from the filtering effect).

140. See Dietderich, *supra* note 126, at 49 (noting that the developers will either not use the builder's remedy or the remedy will go to construct middle-income housing).

141. *Id.*

142. Rose, *supra* note 2, at 870–74; see also *Mt. Laurel II*, 456 A.2d 390, 452–53 (N.J. 1983) (noting that the builder's remedy should be conditioned on the fact that the developer constructs sufficient low-income housing). In *Mt. Laurel I* and *II*, critics were skeptical of the builder's remedy as a tool to achieve inclusionary zoning because it was a voluntary scheme that required private developers to act in the public interest. Critics contended that it resulted in little, if any, construction of affordable housing. However, a builder's remedy may also provide builders an avenue to provide affordable units and have the costs offset by the bonus of say, for example, 25% or exemptions from other local ordinances. In *Mt. Laurel I*, the trial court essentially allowed for the private developer to continue with an affordable housing development plan regardless of whether the municipality had granted the development permit, if the municipality failed to uphold its *Mt. Laurel I* doctrine obligations. See Nolon, *supra* note 2, at 25–26 (analyzing the three remedies employed in *Mount Laurel II*). The result of the abovementioned is that the plaintiff-developer is awarded a rezoning for higher density, multi-family developments.

143. See Nicholas J. Brunick, *The Inclusionary Housing Debate: The Effectiveness of Mandatory Programs Over Voluntary Programs*, ZONING PRAC., Sept. 2004, at 2–3 (citing several studies that found mandatory inclusionary housing programs generate a larger supply of affordable housing than voluntary programs); see also Dietderich, *supra* note 126, at 35 (discussing how the Tiebout model disincentivizes affordable housing development by pushing costs onto developers and new residents). Studies in California have found that fifteen of the most productive inclusionary housing programs are mandatory. Some studies have found local ordinances produce a higher rate of affordable housing compared to voluntary inclusionary housing programs. See Cal. Coal. for Rural Hous. & the Non-Profit Hous. Ass'n of N. Cal., *Inclusionary Housing in California: 30 Years of Innovation*, NHC AFFORDABLE HOUSING POL'Y REV. (Nat'l Hous. Conference, Washington, D.C.), Feb. 2004, at 13 (finding mandatory ordinances provide more affordable housing units for absolute numbers and percentage of total

Robert Ellickson contends that inclusionary zoning ordinances tacitly force the supply of affordable housing, resulting in a lack of affordable housing.<sup>144</sup> He argues that ordinances that encourage builder's remedies may slow the construction of affordable housing and increase income and race segregation.<sup>145</sup>

#### b. Set-Aside Program

Dietderich contends, however, that voluntary land use control tools, such as set-aside schemes, “will always increase the stock of affordable housing—measured either in market value or in number of units created.”<sup>146</sup> This tool operates like a “conditional builder's remedy” that takes advantage of the vast demand—assuming the demand is real—for forbidden suburban uses at market prices to finance the sale and resale of low-income housing units that fall below the actual cost to construct the units.<sup>147</sup> Under this tool, the local zoning boards encourage or require the developer to set-aside a certain percentage of the units in a for-profit development for affordable housing.<sup>148</sup>

The set-aside tool is optional and developers can choose to participate. This scheme may increase the developer's profits and the value of undeveloped land.<sup>149</sup> However, if the benefits of constructing below-market units do not outweigh the costs associated with forgoing more profitable development elsewhere, then developers may be more likely to return to following localities' exclusionary practices. But Dietderich contends that the set-aside tool is more profitable for developers than the builder's remedy because the latter *only* grants

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development than voluntary programs). Moreover, the “voluntary programs do not cause market-rate developers to build or facilitate affordable units unless including affordable housing makes an application more competitive in the permit approval process.” *Id.* In 1999, a mandatory inclusionary housing ordinance was adopted in Cambridge, Massachusetts. By 2004, the program had produced 135 affordable homes with fifty-eight more anticipated for development. Brunick, *supra* at 3. In the District of Columbia there were four mandatory county-wide programs to create affordable housing in mixed-income areas, such as Montgomery County, Maryland, where the county has constructed over 13,000 affordable housing units over thirty years. Inclusionary programs have also been implemented in Fairfax County, Virginia, which has produced affordable homes for extremely low-income households by allowing the local housing authority to purchase some of the newly created affordable units. New Jersey has also had success with inclusionary zoning ordinances that encourage the construction of affordable housing. Nico Calavita, *Inclusionary Zoning: The California Experience*, NHC AFFORDABLE HOUSING POL'Y REV. (Nat'l Hous. Conference, Washington, D.C.), Feb. 2004, at 2.

144. Ellickson, *supra* note 18, at 1215.

145. *Id.* at 1170.

146. Dietderich, *supra* note 126, at 45.

147. *Id.* at 49.

148. *Id.*

149. *Id.*



developers relief from local zoning ordinances for proposals to build affordable—in other words, low-rent—housing.<sup>150</sup> The former, on the contrary, provides the developer options, such as a variance, to construct any kind of affordable housing development with little, if any, limitation on profit maximization.<sup>151</sup>

But Ellickson and other scholars contest the underlying assumptions of the set-aside tool. The common argument is that developers may lose out on increased profits by being forced, or tacitly encouraged, to set aside a certain portion of the housing built for poor families under the assumption that the developer can still profit.<sup>152</sup> Municipalities, Ellickson argues, ought to bear the burden by altering local housing policies instead of shifting the burden to the private sector. Those in favor of a land use control tool steered by local agencies may have an inflated view of what can be expected of local regulators.<sup>153</sup> This contention is most visible in mandatory inclusionary zoning tools.

### c. Density Bonus

The density bonus tool compensates for the set-aside scheme. The tool mandates that the developer dedicate certain portions of a new development for affordable housing units that exceed a certain size, height, floor plan or setback. This bonus is meant to compensate the developer for anticipated losses.<sup>154</sup> Simply put, the density bonus is “any increase in the feasible number of units (because of cost savings or otherwise) over the number of units that the jurisdiction [(locality)] would otherwise allow.”<sup>155</sup> The bypass mechanism of the locality’s zoning code allows for the increase in the number of low-income units at rates that the poor—who would otherwise be unable to access—can lease. Similar to the set-aside tool, the density bonus is malleable and is supposed to expand the supply of below-market housing to assure dispersal of affordable housing in developing areas within municipalities.<sup>156</sup>

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150. *Id.* at 49–50.

151. *Id.* at 50.

152. *See id.* at 26 (stating that inclusionary zoning is a revision of residential zoning rules to encourage profitable construction of affordable housing).

153. *See generally* Robert Ellickson, *Three Systems of Land Use-Control*, 13 HARV. J.L. & PUB. POL’Y 67 (1990) (arguing that current zoning practice underestimates the competence of landowners and overestimates the competence of zoning officials).

154. *See* Dieterich, *supra* note 126, at 45 (noting that a mandatory inclusionary program forces developers to dedicate some of its development to low-income housing but that the density bonus compensates for the possible losses).

155. *Id.* at 67.

156. Gregory M. Fox & Barbara R. Davis, *Density Bonus Zoning to Provide Low and*

The idea is that reducing exclusionary zoning requirements—lot-size, square footage, set-back distance, number of bedrooms, housing material, etc.—will result in significant cost savings.<sup>157</sup> The tool requires municipalities to grant financial incentives for private developers to construct a certain percentage of affordable housing units in a locality that is planned to have five or more units, such as a density bonus of 25% or more.<sup>158</sup> The developer is granted the bonus if 10% of the units are set-aside for low- to moderate-income families or 25% for moderate-income families.<sup>159</sup> Density bonuses are also financial and political incentives because the tool requires no subsidies from local government and leaves the developer free work without much regulation or restriction.<sup>160</sup> The outcome: a reasonable percentage of the original targeted housing development is made accessible to those who would otherwise not have the resources to live in the area.

The density bonus tool also helps combat fixed pricing by forcing the supply of affordable housing to low-income residents who migrated from the inner city to the suburbs, where it is needed. This is, in part, due to the economic nature of inclusionary zoning; that is, private developers desire to construct residential developments in strong housing markets and exact contributions from the development industry to produce affordable housing.<sup>161</sup> While useful with regard to achieving a fair share of affordable housing, these mandatory programs may impose certain requirements that the developers would otherwise not freely choose themselves.<sup>162</sup> Inclusionary zoning also helps preserve affordable housing and redevelop depreciating inner-city housing markets.<sup>163</sup> This approach also concedes that inclusionary zoning ordinances work to construct affordable housing in strong housing

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*Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1016 (1976).

157. See Dieterich, *supra* note 126, at 67 (noting that retracting some exclusionary zoning requirements can reduce costs).

158. Robert A. Johnston et al., *Selling Zoning: Do Density Bonus Incentives for Moderate-Cost Housing Work?*, 36 WASH. U. J. URB. & CONTEMP. L. 45, 48 (1989).

159. “Low-income” often means 80% or less of the county or city median income level, while “moderate-income” often means 80% to 120% of the county or city median income level. *Id.*

160. See Johnston, *supra* note 158, at 49. Some density bonus programs, particularly in Montgomery County, Maryland, allow one bonus unit for every two affordable units. See Fox, *supra* note 156, at 1046–48. The result is affordable units that constitute only 5% of the 25,000 residential units built over several years. *Id.* at 1047. The developer, operating under the density bonus scheme, is compensated for the decreased revenues from the below-market units. *Id.*

161. Douglas R. Porter, *The Promise and Practice of Inclusionary Zoning*, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? 214, 214 (Anthony Downs ed., 2004).

162. *Id.*

163. *Id.*

markets that can absorb the costs involved with the regulations. But higher costs always threaten to decrease the amount of development.<sup>164</sup>

This means that local zoning boards control the resale price for many years after the properties have been built in order to encourage and sustain mixed-income housing that is inclusionary for moderate-income and low-income families. Perhaps most fulfilling—for local officials and the taxpayers—is that the creation of affordable housing under inclusionary zoning ordinances, such as density bonuses, cuts costs on the public treasury. Instead, private developers may bear the burden of forced subsidized housing for the poor themselves, undercutting their profit.

Indeed, agency regulated zoning schemes are apt to stumble, according to some scholars, causing an inefficient misallocation of land, increased transaction costs as a result of undue administrative costs<sup>165</sup> and wasteful and arbitrary rent seeking.<sup>166</sup> Ellickson argues that “[t]he irony of inclusionary zoning is . . . that, in the places where it has proven most likely to be adopted, its net effects are apt to be the opposite of the ones advertised,” causing a clogged housing market, higher rent prices, decreased property values and decreased supply of affordable housing, while failing to assist those who the scheme was intended to assist.<sup>167</sup>

Ellickson, again, contends that municipalities should increase the production of housing priced beyond the reach of the poor in a filtering or a trickle-down scheme.<sup>168</sup> Here, the assumption is that a housing

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164. In essence, both forms of housing—rental or homes—are sold below the market rate to accommodate and include those who otherwise would not have access to such property in an effort to achieve a fair share of affordable housing. Controlling the resale of the rental property and homes in places where inclusionary ordinances are in place is similar to the local municipality’s authority to regulate and control land use.

165. See generally Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (discussing the problems presented by externalities).

166. See Ellickson, *supra* note 18, at 1175.

167. See *id.* at 1216.

168. *Id.* at 1185; see WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 327–29 (1985) (noting inclusionary zoning as a tool of wealthy suburban communities who want to halt growth); WILLIAM TUCKER, *ZONING, RENT CONTROL AND AFFORDABLE HOUSING* 11–14 (1991) (discussing inclusionary zoning and noting that it may lead to housing shortages and homelessness); Quintin Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 N.Y.L. SCH. L. REV. 373, 392 (1994) (noting that inclusionary zoning may restrict supply of affordable homes); Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179, 181 (1995) (noting that inclusionary zoning regulations inhibit the construction of affordable housing); Carol M. Rose, *Property Rights, Regulatory Regimes and the New Taking Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 588 n.49 (1990) (noting that inclusionary zoning risks increasing the price of housing).

unit may filter downward in relative quality as its components depreciate, and therefore “the filter down process provides higher quality housing for the poor than can be provided by construction of new houses for them.”<sup>169</sup>

Dietderich, on the contrary, takes the position that market forces operating under inclusionary zoning ordinances create more affordable housing than if the market forces are left to act alone.<sup>170</sup> Inclusionary zoning ordinances, Dietderich argues, are likely to “expand the aggregate supply of housing available across income strata” and leave regional housing markets no less efficient.<sup>171</sup> Therefore, the choice between the voluntary and mandatory inclusionary zoning tools, such as builder’s remedies, set-aside schemes or density bonuses, is dependent on how many affordable housing units a residential area needs. Further, it depends on whether those who otherwise would not have afforded the units before the inclusionary scheme was in place, can actually afford to lease the higher-priced units and allow private developers to internalize subsidies for lower-priced units.<sup>172</sup>

#### d. In-Lieu Fee

In-lieu fees enable developers to opt-out of the obligation to construct affordable housing units by paying a fee in-lieu of building more and allocating the units for low-income renters. The revenue from the fees is transferred to a government operated fund earmarked to finance inclusionary housing in the same neighborhood as the development or developments elsewhere in accordance with regional needs.<sup>173</sup> In other cases, the fee revenues are allocated to a local housing authority to be used to provide affordable housing in the development.<sup>174</sup> The developer can also opt not to pay the fee *and* avoid on-site inclusionary units if the developer provides an equivalent number of affordable housing units off-site.<sup>175</sup>

In an era of post-*Kelo* takings, why restrict the use of a land assembly tool that holds the power to exercise a positive social function for affected communities with yet another doctrinal proposal that

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169. E. MILLS, URBAN ECONOMIC 123 (2d ed. 1980); *see also* JOHN WEICHER, HOUSING: FEDERAL POLICIES AND PROGRAMS 25–26 (1980) (finding “less low-quality housing in areas where there is a high rate of private new housing construction”).

170. *See* Dietderich, *supra* note 126, at 28–29 (disagreeing with Ellickson).

171. *Id.* at 28.

172. *See id.* at 103 (concluding that where “a [great] transfer of neighborhood wealth is necessary to promote affordable housing, zoning rules should be mandatory”).

173. *See* Ellickson, *supra* note 18, at 1183.

174. *Id.*

175. *Id.*

encourages more litigation and court intervention, when there may be an alternative framework, similar to the tools encouraged in inclusionary zoning? Eminent domain has nothing in the way of court precedent to halt the loss of affordable housing and displacement from condemnation for economic redevelopment purposes. Therefore, a new conceptual framework is necessary—namely “inclusionary eminent domain.” Inclusionary eminent domain shows us how to fix the exclusionary eminent domain problem, just as inclusionary zoning sought to fix the exclusionary zoning phenomenon.

### B. Inclusionary Eminent Domain

#### 1. The Concept

In the inclusionary zoning context, the developer’s incentives include tax breaks, abatements, fee waivers and the ability to build more units, which help offset some of the losses the developer may incur from the inclusionary rules. However, in the inclusionary eminent domain context—given the difference between regulating land versus assembling land—the incentive for developers, primarily, is public support and community cooperation, which sometimes is the key to a lucrative return on the condemnation of the land anticipated for development. The *Goldstein* saga, and the subsequent agreement on affordable housing in the Atlantic Yards project through a CBA, is one example of motivating developers to engage in inclusionary eminent domain. Further, in the zoning context, legislation—enacted in response to exclusionary zoning doctrine—was the remedy for excluding others from affordable housing options. In the eminent domain context, legislation was also enacted in response to the modern day takings doctrine, which an appalled legislature found to be an expansion of municipal authority to condemn land.

But, Dana’s doctrinal proposal seeks to reinvent the exclusionary zoning doctrine in the eminent domain context. Although thoughtful, such proposals do not move us further through the takings muddle. We need something more. The practice of inclusionary eminent domain, in the absence of an exclusionary eminent domain doctrine, may “[result] in a more generous and definite commitment for the creation of new affordable housing” than Dana’s doctrinal remedy.<sup>176</sup> The post-*Kelo*

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176. See Dana, *supra* note 5, at 12; see also DOUGLAS S. MASSEY ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB 184–96 (2013) (showing the positive efficacy of affordable housing developments, such as the Ethel Lawrence Homes, an inclusionary affordable housing development constructed in response to Mt. Laurel’s exclusionary zoning code). The scholar’s empirical findings validate the

takings doctrine,<sup>177</sup> Dana's new proposal, the current state legislative framework<sup>178</sup> and the federal efforts in response to *Kelo*<sup>179</sup> are all unlikely to fix the exclusionary problem.<sup>180</sup> This new normative concept gives us a model to work from to help fix it.

Inclusionary eminent domain is paradoxical in nature and is akin to inclusionary zoning. In an effort to minimize the false positive effects of exclusionary eminent domain, inclusionary eminent domain plans for inclusion by constructing or preserving affordable housing where it is anticipated to be lost to condemnation. The difference between inclusionary zoning and inclusionary eminent domain, therefore, is that the latter is not a result of heightened judicial review mandating affirmative legislative obligations on municipalities. Nor is it a direct legislative proposal in the post-*Kelo* era, which restricts or bars municipalities' power to condemn. Instead, inclusionary eminent

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use of affordable housing projects as a tool to address exclusionary problems such as housing scarcity, poverty alleviation and residential segregation. *Id.*

177. However, the groundwork for a *Kelo* reversal was laid in the *Hathcock* ruling, which held that the government may not use eminent domain to take private property for more profitable purposes, such as economic redevelopment. *Wayne Cnty. v. Hathcock*, 684 N.W.2d 765, 786–87 (Mich. 2004).

178. NEV. CONST. art. I, § 22, cl. 1 (forbidding transfer of any interest in property taken in condemnation proceeding from one private party to another private entity); ALASKA STAT. § 09.55.240 (2013) (exempting preexisting public uses declared in state law from a ban on takings for economic redevelopment); COLO. REV. STAT. § 31-25-103(2) (2013) (defining blight); *Id.* § 38-1-101 (allowing takings for eradication of blight); FLA. STAT. § 73.014 (2013) (banning blight condemnations and economic development takings, without mentioning that the state has substantially used the law for blight condemnations); KAN. STAT. ANN. § 26-501b (2013) (limiting blight condemnations to instances where property is “unsafe for occupation by humans under the building codes”); MO. REV. STAT. § 523.271 (2013) (exempting blight takings from the ban on economic development takings); NEB. REV. STAT. §§ 18-2103, 18-2123, 76-710.04 (2013) (exempting “blight” condemnations from the ban on economic redevelopment takings); N.C. GEN. STAT. § 160A-503 (2013) (exempting blight condemnations from restrictions on takings for public purpose of economic redevelopment); OHIO REV. CODE ANN. § 163.021 (West 2013) (allowing eminent domain of blighted areas for public uses if certain conditions are met); TEX. CODE ANN. § 2206.001 (2013) (exempting “blight” condemnations from the ban on economic development takings); UTAH CODE ANN. § 17C-1-202 (West 2013) (revising the code to omit the power given in a previous version of the code to use eminent domain for blight alleviation or redevelopment); VT. STAT. ANN. tit. 12, § 1040 (2013) (prohibiting eminent domain except when it is for the purpose of “urban renewal”); W. VA. CODE § 16-18-3 (2013) (exempting blight condemnation from the ban on economic development takings and defining blight to include an area that “retards the provision of housing accommodations or constitutes an economic or social liability”). Further, eleven state supreme courts have banned takings for the public purpose of economic redevelopment under state constitutions—Arkansas, Florida, Illinois, Kentucky, Maine, Michigan, Montana, Ohio, Oklahoma, South Carolina and Washington.

179. H.R. 1433, 112th Cong. (2012).

180. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2120–30 (2009) (arguing that laws permitting blight condemnation after *Kelo* made banning or restricting condemnation for economic redevelopment nearly irrelevant).

domain is conceptualized as operating as an organic ex ante and ex post remedy with little, if any, imposition of the courts or legislation,<sup>181</sup> thereby—similar to Dana’s proposal—leaving the *Kelo* decision and the government’s power of eminent domain for economic redevelopment purposes intact.<sup>182</sup>

This new model encourages a constructive, three-way engagement process and partnership among the community, private developer and municipality where condemnation is already, or anticipated, to be granted by the courts. Inclusionary eminent domain shows us *how* private developers and municipalities can reconcile a development project in accordance with the needs and wants of the affected community.<sup>183</sup> Eminent domain takings should temper and enable the human elements of economic redevelopment to flourish. The following sections unpack the concept of inclusionary eminent domain.

## 2. The Elements

The elements that help fully conceptualize the meaning of inclusionary eminent domain include: inclusionary housing, meaningful engagement, community participation, collective action and public

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181. This Article does not go so far as to directly make a legislative analogy, such as imposing mandatory inclusionary eminent domain (like mandatory inclusionary zoning) as part of the land use approval process or a requirement before condemnation is granted by the courts. That is part of this evolving new paradigm in takings law that will likely become a reality. Given the barrage of post-*Kelo* legislation restricting or barring eminent domain at the state level, and even at the federal level, one could imagine a city council or state legislature experimenting with a proposal by amending local ordinances or state enabling laws to encourage or require “inclusionary eminent domain” provisions enabling agencies, governing bodies and land use approval boards to oversee the “meaningful engagement” process between the city, private developers and communities to determine which, if any, of the tools (CBAs, CDCs, LADs, CLTs, LABs and NIDs) would be utilized throughout the condemnation proceedings or during the redevelopment project for purposes of constructing or preserving affordable housing. Indeed, some housing activists and grassroots organizations would find the proposal intriguing, although developers may find it unappealing.

182. See Ilya Somin, *Introduction to Symposium on Post-Kelo Reform*, 17 SUP. CT. ECON. REV. 1, 4 (2009) (stating that Dana’s exclusionary eminent domain proposal does not seek to curb takings for economic redevelopment, but to curb “specific abuses arising from the exercise of eminent domain”).

183. Although the concept of inclusionary eminent domain is presented in this Article as a functional guide for municipalities, private developers and communities, it is conceivable to expand its practical utility to broader partnerships and coalitions, such as federal and state governments in cooperation with local businesses, industries, labor organizations, along with private developers and affected communities. Furthermore, the concept applies to development projects where middle-class and working class homeowners or renters prefer to move into other high-end neighborhoods or localities, but the property values stagnate or freeze at levels unattainable to those groups. Indeed, many localities can benefit from middle-income and working-class populations migrating (or simply remaining situated) in the locality for, among other things, long-term growth, sustainability and development.

approval. Each element is an important part of the practical and conceptual operation of the tools of inclusionary eminent domain. A broader and perhaps more common theme that these elements embody, and that inclusionary eminent domain seeks to espouse, is the valuing of self-governance of common-pool resources (such as affordable housing) and the enabling of low-income communities to work effectively in cooperation with private developers and municipalities to manage the construction or preservation of housing while at the same time overcoming collective action problems.<sup>184</sup>

*Inclusionary housing:* Affordable housing is the crux of the exclusionary eminent domain phenomenon. Inclusionary housing seeks to ensure that a fair share percentage of affordable units are set aside and constructed within economic redevelopment projects where existing housing is planned to be condemned and razed for purposes of a larger project. In the zoning context, inclusionary housing programs were imposed by state legislatures that required a fair share percentage of units to be developed in a building that was within a specific zoning area in order to meet the regional needs of affordable housing. This ensures that affordable housing is dispersed within the economic redevelopment project and areas outlying the project area where those who must be displaced may move. By constructing inclusionary housing in an economic redevelopment project, the effects of exclusionary eminent domain are mitigated and offset.

*Meaningful engagement:* Elsewhere in the world, courts have looked to an evolving process known as meaningful engagement to resolve property and land use disputes where affordable housing and shelter is threatened.<sup>185</sup> This process has not been widely published on or discussed in the American legal lexicon.<sup>186</sup> The practice of inclusionary eminent domain must be linked to the idea of meaningful engagement where municipalities and private developers can reconcile their interests in order to encourage a process that prevents the exclusion of poor and low-income communities.<sup>187</sup>

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184. See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 742–49 (1986) (describing the historic development of managed commons).

185. See generally Stuart Wilson, *Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential of "Meaningful Engagement"*, 22 URB. F. 265 (2011) (discussing South African law, which forbids evictions which lead to homelessness).

186. *Id.* at 267.

187. See *id.* at 272–74 (discussing the duty of municipalities in South Africa to engage with the property owners they seek to evict). This idea of “meaningful engagement” derives from the South Africa urban regeneration context, where courts are continuously holding municipalities affirmatively responsible to uphold constitutional obligations to provide shelter for unlawful



Land use planning by municipalities and private developers in America has not been primarily focused on the social costs of utilizing land assembly tools, such as eminent domain, to achieve economic redevelopment or urban renewal. Urban planning has, for the most part, followed a procedural process of adopting and complying with land use and land assembly regulations, building regulations and nuisance issues. Few state legislatures or courts—the outlier being New Jersey—have deigned to consider imposing affirmative duties on the municipality to take into consideration the social and human consequences of land use and land assembly. Like Dana’s proposal,<sup>188</sup> inclusionary eminent domain would encourage municipalities and private developers to internalize some of the social costs involved in the taking of land without the imposition of affirmative obligations from the courts or the legislature.

Meaningful engagement in the American property and land use context would entail municipalities and private developers—in undertaking economic redevelopment—considering the potential consequences of the takings for the affected community and the measures that could be implemented before, during or after proceedings to alleviate those consequences. Courts do not have the authority to deny a taking for economic redevelopment on the grounds of a loss of affordable housing, but they can ask the municipality and the private developer to engage with the community through various tools.<sup>189</sup> The municipality and private developer ought to show that they made reasonable efforts<sup>190</sup> to engage with the affected community on the proposed economic redevelopment project at various points throughout the economic redevelopment process.<sup>191</sup> This may require courts in the

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occupiers evicted from private or public property where the eviction leads to homelessness and to engage in a process of meaningful engagement to lead the relocation process. *See* Dickinson, *Blue Moonlight Rising*, *supra* note 38, at 470–73 (discussing the South African Constitutional foundations for meaningful engagement); *see also* Dickinson, *The Blue Moonlight Remedy*, *supra* note 38, at 566–72 (highlighting the housing problems caused by large-scale urban regeneration in Johannesburg and the impact that dramatic transformations in property rights, such as protections from eviction for those evicted from private property, may have on developers, municipalities and affected communities).

188. *See supra* Part I.B.2 (discussing Dana’s proposal).

189. *See infra* Part III (discussing the tools of inclusionary eminent domain).

190. There are a variety of terms that have been used to establish a standard, including “reasonable efforts,” “reasonable best efforts,” “commercially reasonable efforts,” “diligent effort,” “every effort” and “good faith efforts.” The standard used should be determined through the meaningful engagement process. Indeed, certain terms will impose different levels of obligations that will either benefit the community or benefit the developer. The meaningful engagement process amongst the parties, not the courts or the legislature, should decide that standard at the initial stages.

191. This element of inclusionary eminent domain derives from the legal context in South

eminent domain context, like the zoning context in *Mt. Laurel*, to order that parties report back with detailed information prior to, during or after eminent domain proceedings about reasonable efforts to alleviate the problem of exclusionary eminent domain. Meaningful engagement would evolve from another element of inclusionary eminent domain—community participation.

*Community participation*: The element of community participation focuses more narrowly on aspects of meaningful engagement. It is commonly understood that limited-access and common-resource pools, such as affordable housing, flourish with strong mechanisms of self-government that enable communities affected or threatened by condemnation to overcome collective action problems.<sup>192</sup> Here, community participation is a layered approach for determining who represents the community in land assembly matters and how the community goes about organizing itself to prepare for negotiations with a private developer and municipality. As William Fischel contends, having “voice” is the general ability to participate in and influence political processes—one that has certain protections from excessive regulation.<sup>193</sup> Community participation and its subsequent voice is important because underlying much of the needs and wants of the community in eminent domain proceedings is who is speaking on behalf of the concerns and how the concerns are being conveyed, not only to the private developer and the municipality, but to the broader public as well.

Community participation entails the affected community following a decision-making process that considers the viewpoints of all members and not a select few. What is missing from Dana’s proposal is a discussion of the affected community’s interaction with the private developer and municipality to address the affordable housing problem. His proposal merely places the burden on the private developer to

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Africa discussed *supra* note 187. However, the element of meaningful engagement in the inclusionary eminent domain context does not push for such affirmative duties because the American property law structure does not lend to imposing positive obligations on the state. In some states, such as New York, courts have ignored the United States Supreme Court dogma that does not recognize a right to housing or other affirmative obligations and instead have allowed for loose language placing some affirmative obligations on the state to provide accommodation. See N.Y. CONST. art. XVIII, § 1 (“[T]he legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing . . . accommodations for persons of low income as defined by law . . .”).

192. See Rose, *supra* note 184, at 749 (invoking the concept of self-management by orderly and civilized people).

193. William A. Fischel, *Lead Us Not into Penn Station: Takings, Historic Preservation, and Rent Control*, 6 FORDHAM ENVTL. L. REV. 749, 751 (1995).

construct substitute housing without any concrete suggestions as to how to construct the housing in accordance with the needs and wants of the community. In contrast, community participation encourages civil society organizations to help organize communities in developing a list of desired resources, particularly affordable housing, and a plan of action when facing condemnation and displacement.<sup>194</sup>

*Collective action:* As Garret Hardin wrote in *The Tragedy of the Commons*, community participation helps to solve some of the collective action problems that arise in, for example, land assembly conflicts.<sup>195</sup> Collective action in the eminent domain context arises where the possibility of losing affordable housing looms. In other words, the disintegration of ownership or the prospect of losing ownership gives rise to multiple collective action problems, such as holdouts, free-riders and evasion.<sup>196</sup> However, the community participation element assists in devising a structure to ensure members of the community have some power to accept or decline a proposed economic redevelopment project where eminent domain is exercised. From an ex ante perspective, structured participatory mechanisms, such as voting policies and community leadership positions, allow stakeholders to eliminate the abuse of eminent domain and surmount the community's collective opposition against the project. The elements of collective action and community participation play significant roles in how CBAs, CDCs, LADs and NIDs operate.

*Public approval:* Perhaps one of the most important elements of inclusionary eminent domain—particularly in the aftermath of *Kelo*—is public approval of proposed condemnation for purposes of economic redevelopment.<sup>197</sup> The public is less than enthused by the idea that the state has the power to take private property and transfer the property to another private entity in the name of “public use.” When Pfizer folded its plan to relocate to New London after the *Kelo* decision, the public's distaste for the use of eminent domain for public use soured even further. The words “condemnation” and “eminent domain” arguably have negative connotations for both public officials and voters.

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194. Lawyers, as part of civil society organizations, can play a role in this as well. See generally Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999 (2007) (discussing the West Harlem Environmental Action campaign in West Harlem, New York and the decentralization of power in urban redevelopment and lawyers' role in the process).

195. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

196. See Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1472–82 (2008) (discussing the problems of land assembly districts and eminent domain).

197. Patrick McGeehan, *Pfizer To Leave City That Won Land-Use Case*, N.Y. TIMES, Nov. 13, 2009, at A1.

The practice of inclusionary eminent domain seeks to rethink the negative connotations and instead invoke an inviting terminology of “inclusion” that public officials, residents and developers can utilize in the planning process. Elected officials obtain a better understanding of their constituencies’ desires by adhering to the public interest where eminent domain is proposed for development purposes.

These abovementioned elements are found intertwined and interwoven within the social, economic and political fabric of the tools of inclusionary eminent domain. The tools are the most important part of the successful practice and operation of this new land assembly model.

### III. THE TOOLS OF INCLUSIONARY EMINENT DOMAIN

This Part offers a variety of land assembly tools that have been used in urban redevelopment projects and urban planning schemes throughout the United States. The tools have historically been used for a variety of purposes, such as infrastructure, residential and commercial development and other land assemblage. However, here the discussion and analysis of the tools are adjusted in accordance with the inclusionary eminent domain framework; that which is modeled for purposes of constructing or preserving affordable housing developments on land condemned for economic redevelopment. Legislation in most states *enables* to some degree—but does not *require* or *mandate*—communities, municipalities and private developers to utilize the following tools for economic redevelopment purposes. While each tool, in and of itself, is capable of achieving the construction or preservation of affordable housing within economic redevelopment projects, the tools are also interrelated and overlap in operation.

#### A. *Community Benefits Agreement*

CBAs are private, legally binding contracts between private developers, municipalities and various community representatives setting forth a range of benefits to be included in a development project, which are the result of substantial community involvement.<sup>198</sup> CBAs should promote the core values of inclusiveness and accountability.<sup>199</sup> They also help obtain the cooperation and participation of community organizations that might otherwise object to and stall the development project. Community opposition, therefore, also has a causal effect on

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198. Julian Gross, *Community Benefit Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 36, 37 (2007).

199. *Id.* at 37–39.

whether an economic redevelopment project receives regulatory approval through the land use approval process or public subsidies.<sup>200</sup> Further, opposition to a CBA poses a threat to the entire development project and securing other forms of funding.<sup>201</sup> For developers, a promise of support is important because it helps the developer negotiate state subsidies and maintain good public relations.<sup>202</sup>

For purposes of this Article, a CBA also concerns a single economic redevelopment project where eminent domain proceedings have commenced and the land has been condemned to begin construction.<sup>203</sup> Inclusiveness entails having a broad range of community concerns heard and addressed prior to a development project's approval.<sup>204</sup> To achieve inclusiveness, the CBA must have a broad coalition of organizations with demands that bring some weight to the negotiation table with municipalities and private developers.<sup>205</sup> This aspect of meaningful engagement involves a community coalition with the strength to persuade a private developer to negotiate in the interests of the community.<sup>206</sup> The prospect of a CBA also helps leverage demands at the negotiating table. Private developers or municipalities may also propose a CBA.<sup>207</sup>

Community coalitions hold the power to publicly support or oppose an economic redevelopment project.<sup>208</sup> If support is given only upon conditions that are beneficial to the community, such as the developer agreeing to set aside a fair share of affordable housing in the economic redevelopment project, then a legally enforceable mechanism such as a

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200. Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 7 (2010).

201. *Id.*

202. JULIAN GROSS, GREG LEROY & MADELINE JANIS-APARICIO, COMMUNITY BENEFIT AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 9–10 (2002).

203. Julian Gross's CBA definition excludes policies and documents setting forth required conditions for a range of projects, such as redevelopment plans, general plans, specific plans, zoning laws and other land use documents. Moreover, Gross excludes benefits, such as "inclusionary housing policies" and ordinances or resolutions, that make procedural improvements in the approval processes. Therefore, while Gross contends that zoning laws, ordinances and "inclusionary housing policies" should not be part of the CBA definition, I contend—for conceptualization purposes—that they ought to be a part of the CBA process. See Gross, *supra* note 198, at 39 (noting that a CBA concerns a *single* development project, thereby excluding policies and documents outlining the requirements for groups of projects).

204. *Id.* at 37–38.

205. *Id.* at 38.

206. *Id.*

207. Been, *supra* note 200, at 7–8.

208. See *id.* at 15–18 (explaining the ways in which a communities may assist the development process).

CBA may be the way to attain that support.<sup>209</sup>

The CBA, under the inclusionary eminent domain framework, operates in a similar manner to the builder's remedy by allowing the developer and the community to accelerate the process of constructing affordable housing using administrative procedures and legally binding negotiations instead of litigation. Accountability, therefore, is also important in the CBA process. Indeed, promises made by the redevelopment agency, the municipality and the private developer with regard to the community benefits should be a legally binding process and enforced against the parties.<sup>210</sup> The CBA has been utilized to construct or preserve affordable housing in economic redevelopment projects successfully on the West Coast and has increasingly, albeit with less success, become an important tool for land assembly and affordable housing on the East Coast.<sup>211</sup>

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209. See Gross, *supra* note 198, at 38–39 (explaining that CBAs advance accountability).

210. *Id.*

211. CBAs first appeared on the West Coast, with California having the first in 1998. The agreement was struck with the development of the Hollywood and Highland Center. The development project included 4000 theater seats, several parking lots and hotels, 1.2 million square feet of retail space and was projected to cost \$388 million. The benefits package for the development project also included living wages and job training provisions along with affordable housing. Shortly after the success of the Hollywood project came another CBA success with the construction of the Staples Center in Los Angeles. See Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 113, 116 (2008). At the start of the Staples Center development project, the community residents were led astray after the developer failed to provide the promised benefits when the first phase of the project had been completed. The negotiations involved the developer and the Figueroa Corridor Coalition for Economic Justice ("FCCEJ"). The FCCEJ represented more than thirty community organizations. Part of the planned project was to provide permanent affordable housing. See STAPLES CENTER COMMUNITY BENEFITS AGREEMENT A-9 to -10 (June 20, 2011), available at <http://www.scribd.com/doc/58303580/Staples-Center-Community-Benefits-Agreement-CBA>. To ensure some oversight and enforcement, the CBA established a committee to monitor the agreement and to maintain dialogue between the developer and the coalition. In fact, shortly thereafter the developer issued the funds for the construction of affordable housing. See Salkin & Lavine, *supra*, at 117. In San Diego, a strong coalition of twenty-seven housing, labor and environmental groups coalesced to create a CBA with the developer JMI/Lennar in the development of Ballpark Village. Significantly, the CBA forced changes to the original project's affordable housing plans, which had initially not included housing on site. The CBA forced the developer to make the housing inclusionary. See generally *Ballpark Village Project CBA*, CENTER ON POL'Y INITIATIVES, <http://onlinecpi.org/campaigns/ballpark-village-cba/> (last visited Dec. 28, 2013) (noting that the community coalition pressured the developer to include more than the usual amount of affordable housing). In Oakland, the Oak of 9th project had a CBA attached to it in 2006. The project planned to construct 3000 residential units and a retail complex. E. BAY ALLIANCE FOR A SUSTAINABLE ECON., BUILDING A BETTER BAY AREA: COMMUNITY BENEFIT TOOLS AND CASE STUDIES TO ACHIEVE RESPONSIBLE DEVELOPMENT 39–41 (2008); see also COOPERATION AGREEMENT (OAK TO NINTH PROJECT), available at <http://urbanstrategies.org/programs/econopp/documents/FinalOaktoNinthCooperationAgreement>

The Atlantic Yards redevelopment project in Brooklyn, New York is separate and distinct from other CBAs and development projects across the United States. Recall *Goldstein* where the municipality exercised eminent domain to take property for the public purpose of economic redevelopment and struck a CBA with the community to ensure that the project plan had inclusionary housing.<sup>212</sup> The Atlantic Yards CBA modeled the Staples Center CBA, which progressively negotiated a CBA that emphasized enforceability, accountability, transparency and

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withCoalitionfinalexecution.pdf (providing the terms of the 2006 CBA); OAK TO 9TH CMTY. BENEFITS COAL., MAKING A NEIGHBORHOOD FOR ALL OF OAKLAND: A COMMUNITY PROPOSAL FOR AFFORDABLE HOUSING AND JOBS IN THE OAK TO 9th DEVELOPMENT SITE 4 (2005), available at <http://urbanstrategies.org/programs/econopp/documents/Oakto9thCommunityBenefitsCoalitionReport-July2005.pdf> (introducing the Oak to 9th Development Project); Salkin & Lavine, *supra*, at 120 (providing a summary of the Oak to 9th CBA). The agreement was entered into by a coalition of community members and the redevelopment agency and primarily focused on affordable housing. Significantly, it authorized injunctive relief to be awarded to the community for noncompliance. CBAs have also succeeded in the Midwest. In 2005, Milwaukee's Park East Redevelopment had a CBA attached to it. One aspect of the CBA required the county to provide affordable housing. See Salkin & Lavine, *supra*, at 126. In New York, CBAs have faced considerable opposition and arguably less success than those on the West Coast. In *Kaur v. New York State Urban Development Corp.* a victory for Columbia University seemed all but certain until the appellate court overturned the lower court's ruling that had previously banned the state from exercising the power of eminent domain to take private property for the non-profit institution's seventeen-acre expansion project in West Harlem and Manhattanville without the property owner's consent. *In re Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010), *rev'g* 892 N.Y.S.2d 8 (App. Div. 2009). The court held that the judiciary must defer to the state to determine whether a location is "blighted" and that condemnation on behalf of a university served a public purpose. *Id.* at 733-35. The provision of affordable housing was proposed by the University in a Memorandum of Understanding. The University proposed a \$20 million fund to develop or preserve affordable housing. COLUMBIA UNIV., UNIV. SENATE, MANHATTANVILLE AND ACADEMIC AND PHYSICAL PLANNING AT COLUMBIA UNIVERSITY (2010). The affordable housing was recognized in the Final Environmental Impact Statement ("FEIS") to minimize the "significant adverse indirect residential displacement impacts" due to a projected "upward pressure on market-rate rents." See N.Y.C. DEP'T OF CITY PLANNING, MANHATTANVILLE: FINAL ENVIRONMENTAL IMPACT STATEMENT 4-4, 25-1 (2007), available at [http://www.nyc.gov/html/dcp/html/env\\_review/manhattanville.shtml](http://www.nyc.gov/html/dcp/html/env_review/manhattanville.shtml) (follow the hyperlinks for the relevant chapters). The applicants argued that the provision of affordable housing, among other provisions, cannot be considered "civic purposes" or "public purposes of the project." Columbia agreed to provide an affordable housing and legal services fund, subsidize the West Harlem Piers Park, fund the I.S. 195 playground, extend Columbia's small business retail strategy, commit between 4 and 18% of retail space in the project site to local entrepreneurs, enact construction safety mitigation procedures, provide construction jobs for minorities, provide meeting space and offices for Community Board 9 and provide unspecified community access to Columbia's proposed facilities. The City 269 Planning Commission's recommendation also refers to Columbia's commitment to develop a mind, brain and behavior public outreach center. See Brief for Petitioner at 52-53, *In re Tuck-It-Away v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8 (App. Div. 2009) (No. 778), 2009 WL 7446916 (arguing that the Columbia project is not a civic project).

212. *Goldstein*, 13 N.Y.3d 511 (2009); see *supra* notes 82-101.

inclusiveness.<sup>213</sup>

After the *Goldstein* decision, the State of New York had its first CBA in its history. The agreement was the legally-binding force behind ensuring that low-income families and community members had a direct voice in the decision-making process and planning of affordable housing<sup>214</sup> in the Atlantic Yards project.<sup>215</sup> Prior CBAs around the United States were part of a larger development, but in those examples the municipality did not exercise eminent domain. In contrast, the Atlantic Yards CBA was drafted in response to condemnation proceedings, thus making it a strong conceptual and practical example of inclusionary eminent domain.

Forest City Ratner, the developer, promised to construct affordable housing within the Atlantic Yards redevelopment project to replace the housing stock projected to be lost from condemnation.<sup>216</sup> The CBA was drafted with the support of eight community organizations and the developer. The agreement was considered an “historic commitment to affordable housing.”<sup>217</sup> The CBA also had the support from over 200 community leaders. The actual percentage has varied over the years. A fair share percentage was proposed at 50% at the beginning stages of the project, but then decreased to 30% affordable housing. The CBA relied upon “governmental contributions for site development and affordable housing subsidies.”<sup>218</sup> The initial goal was for the ACORN/Atlantic Yards 50/50 Program to use the existing Housing Development Corporation’s bond program and the Department of

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213. See Salkin & Lavine, *supra* note 211, at 121–22 (analyzing the Atlantic Yards case study). See generally *Community Benefits Agreements*, COMMUNITY BENEFITS L. CENTER, <http://www.forworkingfamilies.org/cblc/cba> (last visited Dec. 28, 2013).

214. The CBA also included educational initiatives, jobs for minorities and women, as well as pre- and post-construction job training. It contained environmental assurances and a commitment to develop community facilities, such as child-care and youth and senior centers, and it ensured community access to the arena for local events such as high school and college graduations and for religious congregations. COMMUNITY BENEFITS AGREEMENT 11–13, 26–35 (2005), available at <http://www.buildbrooklyn.org/pr/cba.pdf>.

215. *Id.* at 22.

216. See Press Release, Mayor Michael R. Bloomberg, Forest City Ratner CEO and President Bruce Ratner and Civic Leaders Sign Community Benefits Agreement (June 27, 2005), available at <http://www.nyc.gov/html/hpd/html/pr2005/mayors-release248-05-pr.shtml>.

217. Michael Freedman-Schnapp, *A New Dynamic: Atlantic Yards Challenges Brooklyn Progressive Politics*, NEXT AM. CITY, Jan. 1, 2006, at 11. The signatories of the agreement included Faith in Action, the Association of Community Organizations for Reform Now (“ACORN”), Brooklyn United for Innovative Local Development (“BUILD”), Brooklyn Voices for Children, the Downtown Brooklyn Neighborhood Alliance (“DBNA”), the Brooklyn Endeavor Experience (“BEE”), the New York State Association of Minority Contractors (“NYSAMC”) and the Public Housing Communities (“PHC”). *Id.*

218. See COMMUNITY BENEFITS AGREEMENT, *supra* note 214, at 23, exhibit D, annex A.



Housing Preservation and Development programs to construct the housing.<sup>219</sup> However, a battle has endured over the “promise” of affordable housing.<sup>220</sup>

While fair share affordable housing—which the petitioners in *Goldstein* argued the state constitution required—failed on its merits, the private developer and the community agreed to construct a certain percentage of affordable units to replace lost affordable housing without the constraints of heightened judicial review which, under an exclusionary eminent domain doctrine, would have *forced* developers to substitute the lost affordable housing with new affordable housing. Instead, the CBA—without the imposition of courts or the legislature—was the controlling factor that led to the agreement to construct affordable housing.

However, accountability has been a problem. One of the primary justifications for the taking of blighted property in Atlantic Yards—affordable housing—has been scrutinized even though “it was reasonable to expect the benefits from the Community Benefits Agreement when it was signed.”<sup>221</sup> The slow economy may have become an impediment, but it has been reported that FCR had indicated that plans for affordable housing appear to have been indefinitely delayed.<sup>222</sup> It was well documented in the CBA that there was not a minimum threshold for affordable housing.<sup>223</sup>

The definition of “affordable” in the CBA has been a highly

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219. See Been, *supra* note 200, at 26 n.97 (noting that the Atlantic Yards CBA promises to provide affordable housing but foresees that the housing will use various public subsidy programs); see also COMMUNITY BENEFITS AGREEMENT, *supra* note 214, at 23, exhibit D, annex A (stating that “the program may also utilize existing Housing Finance Agency (HFA), Affordable Housing Corporation (AHC) or Housing and Urban Development (HUD) programs, with necessary modifications”).

220. See generally Bloomberg, *supra* note 216 (noting the challenges overcome in order to implement the CBA).

221. Norman Oder, *A (Somewhat Speculative) FAQ on the Atlantic Yards News*, ATLANTIC YARDS REP. (Mar. 22, 2008), <http://atlanticyardsreport.blogspot.com/2008/03/speculative-faq-on-atlantic-yards-news.html>. See generally MEMORANDUM OF UNDERSTANDING 1–6 (2005). A fifty-fifty affordable housing deal was made in a Memorandum of Understanding (“MOU”) between FCR and the ACORN and was then attached to the CBA, presumably providing some enforceability of affordable housing. See Norman Oder, *CBA “Watchdog” Sought to Ensure “History Making” Benefits “for Local Community,”* ATLANTIC YARDS REP. (Mar. 19, 2007), <http://atlanticyardsreport.blogspot.com/2007/03/cba-watchdog-sought-to-ensure-history.html> (scrutinizing the Atlantic Yards CBA).

222. Charles V. Bagli, *Slow Economy Likely to Stall Atlantic Yards*, N.Y. TIMES, Mar. 21, 2008, <http://www.nytimes.com/2008/03/21/nyregion/21yards.html>.

223. See COMMUNITY BENEFITS AGREEMENT, *supra* note 214, at 22–26 (providing the requirements for housing); see also MEMORANDUM OF UNDERSTANDING, *supra* note 221, at 4 (providing that 50% of the housing units on the project site constitute affordable housing).

contested aspect of the project. The Atlantic Yards project used area median income (“AMI”) for the New York City metropolitan area to determine market-rate rental prices, rather than AMI in Brooklyn.<sup>224</sup> This calculation can conflate the definition of “affordable” housing with the threshold for what qualifies as “low income” in Brooklyn, particularly those whose annual incomes fall below the AMI.<sup>225</sup> Therefore, the housing stock produced may become above-market rate housing for the area, which would be far beyond the annual household income for many residents in Brooklyn.

According to the EIS study, the “socioeconomic characteristics of the new population (e.g., in household income and household size) would not be markedly different from the characteristics of the population living in the broader ¾-mile study area.”<sup>226</sup> With figures like these using AMI calculations, it is possible that the existing Brooklyn low-income population may be priced out of newly developed units because the scale for affordability is higher than annual household incomes.<sup>227</sup> Some argue that even if 35% of the housing development is affordable, the overall increase in affordable housing would likely be less than a fair proportion of substitute housing.<sup>228</sup>

Municipalities may need to require that the terms of the CBA be made part of the redevelopment project between the quasi-state entity and developer.<sup>229</sup> However, CBAs are not authorized in all states and some states do not authorize municipalities to enter into the negotiations or agreements.<sup>230</sup> In such cases the CBAs are only enforceable by the contracting community groups.<sup>231</sup> This issue of state-by-state

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224. EMPIRE STATE DEV., ATLANTIC YARDS FINAL ENVIRONMENTAL IMPACT STATEMENT S-5 (2006) [hereinafter FEIS], available at [http://www.esd.ny.gov/Subsidiaries\\_Projects/AYP/AtlanticYards/AdditionalResources/AYFEIS/00\\_Executive\\_Summary.pdf](http://www.esd.ny.gov/Subsidiaries_Projects/AYP/AtlanticYards/AdditionalResources/AYFEIS/00_Executive_Summary.pdf); *id.* at 4-50, available at [http://www.esd.ny.gov/Subsidiaries\\_Projects/AYP/AtlanticYards/AdditionalResources/AYFEIS/04\\_Socio.pdf](http://www.esd.ny.gov/Subsidiaries_Projects/AYP/AtlanticYards/AdditionalResources/AYFEIS/04_Socio.pdf).

225. Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn’s Atlantic Yards Project*, 42 URB. LAW. 287, 320 (2010) (discussing the differences in AMI between Brooklyn and the metropolitan area).

226. FEIS, *supra* note 224, at 4-57. The study further said that the “shifts in the distribution of households across income brackets would be small and would not substantially affect the overall socioeconomic character of the study area.” *Id.*

227. See Lavine & Oder, *supra* note 225, at 320.

228. See *id.* at 318-20 (explaining that the actual amount of affordable housing offered was about 35% of the project and that the use of a citywide AMI would actually result in the “affordable” housing being priced beyond what most current residents could afford).

229. Been, *supra* note 200, at 34.

230. See generally Michael H. Crew, *Development Agreements after Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), 22 URB. LAW. 23, 27-31 (1990) (explaining development agreements and challenges that developers face in some states).

231. See Gross, *supra* note 198, at 49-51 (discussing ways that public CBAs can be made

authorization creates murky waters for states like New York that have many large, ongoing economic redevelopment projects but do not have any statutory oversight to ensure the CBAs are successfully executed—the only legally binding aspect of the CBA is the primary enforcement mechanism. However, CBAs are only successful when they are enforceable.<sup>232</sup>

It is important to note that municipalities in New York do not have authorization to enter into redevelopment agreements as part of a land development approval process.<sup>233</sup> Some of the underlying issues that the Atlantic Yards CBA has experienced may in fact be linked to the fact that there is no statutory or legislative authority overseeing the CBA at the federal, state or local level. Therefore, while the goal is for the CBA, along with the other tools, to operate as an organic remedy to construct or preserve inclusionary housing, there is also the case to be made that tools such as the CBA may need legislative or judicial oversight.<sup>234</sup> Nonetheless, the CBA is a warranted addition to the inclusionary eminent domain toolbox.

### B. Land Assembly District

LADs are another innovative local tool that fall under the framework of inclusionary eminent domain. The purpose and function of LADs “is to unify property interests without expropriating property owners.”<sup>235</sup> In the midst of the eminent domain muddle and the courts’ slow response to untangling the complexities of takings for the public purpose of economic redevelopment, LADs have been proposed as an inclusive and community-driven tool to assemble land.<sup>236</sup> The model

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enforceable through the use of community groups).

232. See Salkin & Lavine, *supra* note 211, at 115 (“This reality[—that many CBAs are enforceable only by the contracting community groups—]raises a number of as yet untested legal issues, including who will have standing to challenge and enforce privately negotiated CBAs, and whether these voluntary agreements, regardless of their terms, will be enforceable in a court of law.”). See generally Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 *UCLA J. ENVTL. L. & POL’Y* 291, 324–28 (2008) (addressing some of the legal issues related to enforcing CBAs).

233. Salkin & Lavine, *supra* note 211, at 120–21.

234. Lavine & Oder, *supra* note 225, at 289–90 (“The planning process, or lack thereof, raises serious concerns about the transparency . . . . It is likely that a good deal of the conflict could have been reduced had FCR and ESDC pursued a more open and inclusive process from the outset, and had they been willing to fairly consider and incorporate public input in the development of the project’s plans.”).

235. See Heller & Hills, *supra* note 196, at 1468.

236. See *id.* at 1469–70 (rejecting the tragedy of the anticommons solution, that is, a call for the Leviathan where disinterested experts are employed by a larger-scale government who figure out what the parties would have done were they capable of contracting or self-government).

arises out of frustration with the two traditional methods of assembling land in the United States—voluntary assembly and eminent domain. Voluntary assembly leads to a holdout problem, resulting in underassembly, while eminent domain leads to a “fair market value” problem resulting in capricious redistribution with little regard for the subjective or emotional valuation of the property.<sup>237</sup> Thus, LADs main purpose is “to overcome the landowners’ collective action problems that prevent them from selling their land for an efficient assembly.”<sup>238</sup>

Heller and Hills propose giving back what they see as the communities’ share in the benefits of condemnation, not the burdens associated with the taking.<sup>239</sup> LADs seek to solve some of the distributive injustice on low-income communities and property owners in general.<sup>240</sup> As discussed earlier in this Article, assembling public land, particularly when it involves condemning and razing property for economic redevelopment, encounters hostility by low-income and even middle-class residents and homeowners.

Thus, LADs give neighbors the freedom to decide, collectively, what for and how their land will be assembled when a municipality proposes the exercise of eminent domain. This land assembly design, retrofitted for purposes of eminent domain, would give neighbors veto power to reject economic redevelopment projects that are not worth the time and costs.<sup>241</sup> The LAD proposal also seeks to redesign property rights in a way that enhances both welfare and fairness in the wake of what Heller and Hills see as eminent domain’s unjust redistribution of land at the expense of landowners and residents.<sup>242</sup>

The process of meaningful engagement under this regime requires that if the municipality or the private developer offers an unsatisfactory price for compensation to the LAD’s constituents, the assemblage of land would not move forward.<sup>243</sup> Thus, meaningfully engaging and discussing plans with the affected community is essential. Here, the controlling factor is the affected community’s response to the private developer’s intentions to develop. This is in contrast to relying on heightened judicial review to solve the affordable housing problem, where the controlling factor is the private developer’s response to doctrinal limitations.

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237. *Id.* at 1468.

238. *Id.* at 1503.

239. *Id.* at 1467–68.

240. *Id.* at 1469–72.

241. *Id.* at 1469–70.

242. *Id.*

243. *Id.*

Furthermore, affordable housing could be used as a negotiation tool for the LAD's constituents; that is, where the municipality or private developer fails to offer a reasonable plan to construct a fair share of affordable housing on the parcel of land at issue, the project cannot move forward—not because the judiciary said so, but because the community said so. This puts the bargaining power in the hands of the LAD constituents, making the inclusionary element of the project a powerful land assembly tool.

LADs also focus on whether to expand the parcel of land for the proposed development purposes. In particular, this focus is on the construction of affordable housing at affordable rent prices, where historically it has never been realized in large-scale development projects. LADs also seek to utilize the benefits of condominium developments.<sup>244</sup>

Much of this proposal rests on transparency. *Poletown*<sup>245</sup>—along with *Berman* and *Kelo*—is one of many eminent domain cases that illustrates the transparency problem with land assembly for the affected communities and is precisely why some argue local reform may need to be achieved through legislation.<sup>246</sup> Under the LAD model, states authorize neighborhoods, similar to NID legislation, to create LADs that are governed through an elected board to negotiate the price of sale of the neighborhood or the compensation for condemnation.

The holdout problems are presumably mitigated through a collective voting procedure.<sup>247</sup> Here, community participation is at work. The residents and community who have a share of the LAD have the voting power to cause a stalemate and stop the redevelopment project from moving forward.<sup>248</sup> The blight problem would be mitigated because, with LADs, the taking cannot be justified for economic redevelopment purposes unless blight is defined “narrowly to include only

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244. *Id.* at 1469.

[P]roperty law can retrofit a community with a condominium-like structure tailored to solve the problem of land assembly. To allow people to overcome collective action barriers that might otherwise prevent them from selling their neighborhood, the LAD places them in a special district with the power, by a majority vote, to approve or disapprove the sale of the neighborhood to a developer or municipality seeking to consolidate the land into a single parcel.

*Id.*

245. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by* *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

246. *See Heller & Hills*, *supra* note 196, at 1469 (noting Detroit never explained why the neighborhood's interests were sacrificed for the common good).

247. *Id.* at 1469–70.

248. *Id.* at 1470.

neighborhoods that impose extraordinary external costs on outsiders.”<sup>249</sup>

It seems plausible that a fragmentation of income status between landowners who share the collective voting procedure could become unbalanced or suspect to traditional political power struggles.<sup>250</sup> Atlantic Yards was a social and economic faction of different communities—a *Berman-Kelo* hybrid of middle class and low-income residents in Prospect Heights. Heller and Hills argue that LADs overcome the just compensation question because neighbors bargain effectively for a share of the neighborhood’s “assembly value” and not simply the value of each lot.<sup>251</sup> They go on to say that LADs can be designed so each individual is as well off as under current law and most are substantially better off.<sup>252</sup> It is also conceivable that LADs could negotiate the sale of a few, or many, parcels within a neighborhood to a developer and, at the same time, publicly support the condemnation of other parcels in the neighborhood that are, say, blighted and place external costs on others within the locality. Here, the LAD, on behalf of those in need of affordable housing, could then negotiate the construction of affordable housing with the developer on the parcels of land condemned using any number of tools discussed herein, including a CBA. Indeed, LADs may be of increased interest for municipalities, private developers and communities looking to construct or preserve affordable housing where economic redevelopment projects are proposed.

### C. Community Development Corporation

CDCs are nonprofit entities that seek to improve economically depressed inner-city neighborhoods with, among other things, affordable housing to recreate the social fabric of distressed areas.<sup>253</sup> CDCs combine several sources of equity and debt to construct economic development projects. Funding usually comes from the Urban and Rural Economic Development Program of the U.S. Department of Health and Human Services Office of Community

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249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. See Herbert J. Rubin, *Renewing Hope in the Inner City: Conversations with Community-Based Development Practitioners*, 27 ADMIN. & SOC’Y 127, 137 (1995) (discussing business activities of CDCs that subsidize affordable housing and other community programs). See generally WILSON, *supra* note 22 (analyzing how the shift from the urban manufacturing sector to the decentralized service sector has caused a substantial increase in urban poverty).

Services (“OCS”), the Economic Development Administration (“EDA”), the Small Business Administration (“SBA”) and the U.S. Department of Housing and Urban Development (“HUD”).<sup>254</sup> The construction and preservation of affordable housing is one of the main priorities of CDCs before the organization moves towards broader economic development projects.<sup>255</sup>

CDCs allow local residents to elect local CDC boards and empower the boards’ members to represent the interests of those living in a particular locality.<sup>256</sup> The board then lobbies the municipality for services, such as affordable housing, through a meaningful engagement process along with the private developers, particularly if the condemnation threatens to raze affordable housing.<sup>257</sup> Significantly, the production of affordable housing under the CDC has resulted in positive outcomes.<sup>258</sup> Some studies have found that when a CDC is employed in a neighborhood, the quality of affordable housing is above average. Increasingly, CDCs have grown to go beyond affordable housing advocacy and, today, work alongside other forms of social services providers to help protect assets for families living within the locality where the CDC is located.<sup>259</sup>

CDCs can purchase buildings from the existing landowners that are subject to condemnation and propose to refurbish the buildings as leverage to stop an incoming private developer from demolishing the structures. However, some CDCs are unwilling to risk the investment or unable to improve the property through capital investments for fear that the property is targeted for condemnation. The CDCs could buy the existing blighted property from the landowners before condemnation and then convey the property back to the private developer on the

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254. Michael H. Schill, *Assessing the Role of Community Development Corporations in Inner City Economic Development*, 255 N.Y.U. REV. L. & SOC. CHANGE 753, 769 (1996).

255. See AVIS C. VIDAL, *REBUILDING COMMUNITIES: A NATIONAL STUDY OF URBAN COMMUNITY DEVELOPMENT CORPORATIONS* 76 (1992) (noting that CDCs typically begin their economic development activities with housing).

256. See Paul S. Grogan, *Proof Positive: A Community-Based Solution to America’s Affordable Housing Crisis*, 7 STAN. L. & POL’Y REV. 159, 159 (1996) (noting that community residents govern CDCs).

257. *But see* Ram A. Cnaan, *Neighborhood-Representing Organizations: How Democratic Are They?*, 65 SOC. SERVICE REV. 614, 621 (1991) (“[P]rofessionalization and detachment from residents is more the norm than the exception.”); Randy Stoecker, *The CDC Model of Urban Redevelopment: A Critique and an Alternative*, 19 J. URB. AFF. 1, 8–10 (1997) (arguing that communities do not actually control CDCs).

258. See VIDAL, *supra* note 255, at 78 (finding housing development was the least risky activity of CDCs, with failure rates ranging from 17% to 38%).

259. William M. Rohe, *Do Community Development Corporations Live up to Their Billing? A Review and Critique of the Research Findings*, in *SHELTER & SOCIETY: THEORY, RESEARCH, AND POLICY FOR NONPROFIT HOUSING* 177, 182–83 (C. Theodore Koebel ed., 1998).

condition that the property be refurbished and rented at below-market rates for the affected community. In return, the CDC promises to publicly support the developer. This may require a small-scale CBA to strengthen the promise and the subsequent construction of affordable housing.

The CDC could also negotiate with the developer to purchase the land with strings attached. This would entail persuading the developer to purchase the land adjacent or adjoining the property where the condemnation is to take place and use the land to construct new affordable housing units. This would involve a costly, but worthwhile, relocation if the relocation is negotiated *within* the economic redevelopment project and mitigates the effects of exclusionary eminent domain.

CDCs also hold the power to persuade developers to acquire the land and quickly resell the properties to the community at a discount or to buy the land and immediately sell it to the CDC so it can construct affordable housing with its investments. Furthermore, the developer can negotiate a long-term lease to build new affordable housing structures with the affected community. The CDC, on behalf of the affected community, would pay the developer the property rent. The rent, therefore, would be put towards development and maintenance of affordable housing in lieu of a bank loan. A thirty-year lease, for example, would finance the leasehold to make available the profits necessary for development and maintenance of the affordable housing for the affected community who otherwise may be displaced.

The CDC could also negotiate with a private developer to acquire the blighted property threatened by condemnation on the condition that the private developer convert the property into affordable housing units. In exchange, the CDC would approve of the condemnation and economic redevelopment project. This may ensure the existing blighted property is not demolished and sold or rented at the market rate. This would work like a CBA, but with fewer stakeholders involved. Since the CDC is controlled by the community, the CDC can refuse to raise rents in a newly constructed economic redevelopment project in an effort to preserve the existing affordable housing for community members, thereby thwarting the loss of affordable housing.

CDCs may play an *ex ante* role that is at the heart of the inclusionary eminent domain framework because their purpose is to enter into distressed neighborhoods that may be vulnerable to condemnation. By employing a CDC in low-income neighborhoods and establishing procedural steps to take if and when a municipality begins eminent domain proceedings, the community would have a plan in place to



thwart displacement, not the entire redevelopment project. This would position the CDC to negotiate the relocation process within the proposed economic redevelopment project. Again, inclusionary eminent domain seeks to constructively facilitate, not halt, redevelopment.

In some states CDCs have been granted the power of eminent domain.<sup>260</sup> However, CDCs are not designed, specifically, for the purpose of exercising or opposing eminent domain. In contrast, LADs are designed to focus the community on eminent domain and subsequent sale of the neighborhood—an issue no resident can or wants to ignore.<sup>261</sup> Indeed, CDCs could serve as a mechanism to organize the initial stages of the formation of an LAD that is dedicated to creating inclusionary affordable housing for low-income families.<sup>262</sup> The CDC, however, would not receive shares of the revenue after the land was condemned and would not have a majority veto over the decision to condemn.<sup>263</sup> The LAD would, presumably, authorize both of those things. Nonetheless, the imposition of CDCs under an inclusionary eminent domain framework ought to be strongly considered by communities.

#### D. Community Land Trust

CLTs are modeled on a landowner and property ownership scheme. The title to the land that sits underneath the property is held by the CLT, while the title to the property, such as an affordable housing development, is held by the community. The CLT is the ground lessor and the individual is the ground lessee in the ownership of fee interest of the land. The house, however, cannot be sold beyond a set resale price, usually set at the maximum. In CLT programs, the municipality or the CLT usually has the right of first refusal, particularly with regard to the purchase of affordable housing units. This scheme ensures that the CLT can preserve affordable housing permanently.

CLTs have been enacted under section 213 of the Housing and Community Development Act of 1992.<sup>264</sup> The basic benefits of the CLT give the community the ability to repurchase residential structures

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260. See Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit and Charitable Corporations*, 56 AM. U. L. REV. 455, 492–97 (2007) (describing the private nondelegation doctrine within the context of eminent domain).

261. See *Heller & Hills*, *supra* note 196, at 1518.

262. See *id.*

263. *Id.* at 518–19.

264. Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 213, 106 Stat. 3672, 3757 (codified as amended at 42 U.S.C. § 12773).

located on the CLT's land in the event ownership is sold. Doing so allows for future investment, such as below-market renters or buyers, and the opportunity to gain access to affordable housing.<sup>265</sup> Under inclusionary eminent domain, CLTs would operate within the physical boundaries of, say, a proposed economic redevelopment project where eminent domain is being exercised or proposed. CLT members would live within the boundaries of the CLT and have certain voting powers.<sup>266</sup> The area that the CLT covers is broader than a neighborhood locality and could include an entire town, city or county. Residents essentially control the process by sitting on the CLT's board of directors, serving as the drivers of meaningful engagement with the private developer and the municipality. Members either reside on the land of the CLT, in the properties of the CLT or within the locality of the CLT.

Although a CLT may acquire and also expand its land holdings to increase the supply of affordable housing, it may also acquire a single parcel of land to develop affordable housing.<sup>267</sup> The CLT could also impose its power to negotiate the sale of a parcel of land within an economic redevelopment project on the condition that the private developer construct affordable housing, particularly if a substantial portion of the existing affordable housing would be lost from the condemnation. In the event land is acquired through eminent domain and transferred from one private owner to another, the CLT may have the power to concentrate its land holding within a small area of land to ensure affordable housing is either preserved or constructed.<sup>268</sup> In other words, once the boundaries for an economic redevelopment project are finalized, the community (represented by the CLT), the private developer and the municipality can negotiate goals for affordable housing through the conveyance of concentrated or scattered sites for

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265. See Stacey Janeda Pastel, *Community Land Trusts: A Promising Alternative for Affordable Housing*, 6 J. LAND USE & ENVTL. L. 293, 301–12 (1991) (discussing whether a CLT's option to repurchase is an invalid restraint on alienation).

266. *Id.* at 315.

267. See generally Christopher A. Seeger, *The Fixed-Price Preemptive Right in the Community Land Trust Lease: A Valid Response to the Housing Crisis or an Invalid Restraint on Alienation?*, 11 CARDOZO L. REV. 471 (1989) (noting that CLTs remove land from the speculative market and create affordable housing for low income individuals).

268. *Id.* CLTs expanded in the 1980s, particularly in urban neighborhoods, in an effort to thwart condemnation of land for development purposes. Julie Farrell Curtin & Lance Bocarsly, *CLTs: A Growing Trend in Affordable Home Ownership*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 367, 371 (2008). In 1981, Cincinnati laid claim to the first CLT in the United States, named the Community Land Cooperative of Cincinnati. *Id.* The cooperative was an association of churches organized to stop the condemnation of land and the displacement of low-income people, predominantly African-American neighborhoods. *Id.*

sale or rental units at affordable rates within the locality.

In 1989, a well-known CLT worked in collaboration with the City of Boston. The City-CLT partnership was formed when the Dudley Street Neighborhood Initiative (“DSNI”), the CLT, was permitted to exercise eminent domain to redevelop and revitalize the Dudley Street neighborhood, a blighted, dilapidated inner-city area in Boston with widespread property abandonment.<sup>269</sup> However, many landowners held out, refusing to sell. In response to the City’s plan to condemn areas of land within the Dudley neighborhood, the DSNI demanded to take control of the area of land planned for condemnation.<sup>270</sup> The DSNI’s strategy was to consolidate the vacant and dilapidated properties as a foundation for economic redevelopment that suited the wants and needs of the community—rather than simply doing what the City of Boston had envisioned.<sup>271</sup> Understandably, given the divisiveness inherent in municipal takings of property, the City of Boston was first reluctant, but then agreed, to give the community the power to condemn the land and exercise eminent domain.

After some negotiations, the City authorized the DSNI to use eminent domain to acquire the land for economic redevelopment, thereby avoiding the lengthy process of acquiring tax-delinquent and abandoned properties.<sup>272</sup> In creating a CLT, the DSNI assembled 132 parcels of land between 1991 and 1994.<sup>273</sup> During that time period, nearly 400 single-family, duplex and triplex affordable housing units were built in the locality. The DSNI preserved 740 houses by using its funds to refurbish existing structures that needed repairs.

### *E. Land Bank*

LABs are inventories of surplus land that are primarily established by redevelopment authorities or municipalities to manage undeveloped land until the market spurs potential buyers to develop it. Over the last forty years, local governments have designed this new land assembly tool to revitalize blighted, vacant and abandoned property that threatens to decrease the value of the land. LABs focus on vacant, abandoned

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269. See PETER MEDOFF & HOLLY SKLAR, *STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD* 43 (1994) (noting that 30% of the Dudley neighborhood is vacant; the remaining population is characterized by low income, low education levels and high unemployment).

270. *Id.* at 126.

271. *Id.* at 120.

272. *Id.* at 119 (noting that DSNI was the first community group in the nation to win the right of eminent domain).

273. DOUGLAS R. PORTER, *URBAN LAND INST., EMINENT DOMAIN: AN IMPORTANT TOOL FOR COMMUNITY REVITALIZATION* 24 (2007).

and tax-delinquent parcels of land in urban areas, and the general goal is to reinvigorate these properties and cultivate them as assets for community development and redevelopment.<sup>274</sup> Land Banks function best in situations where the needs and concerns of the community are not being met; they respond to those needs by converting vacant and abandoned land into assets that contribute to the health and vitality of the community.<sup>275</sup>

Vacant, blighted and abandoned property is, invariably, affordable for those who may have no other means to afford shelter, despite the fact that such practices may be considered a form of squatting or illegal occupancy. The property is usually inferior and becomes a target for condemnation. But municipalities, for many different reasons, have neglected to invest resources into the properties, fearing that the costs put towards revitalizing the areas will not lure private developers to make future investments in the property. The properties are also subject to illegal occupancy and under-maintenance from slumlords who thrive on dilapidated buildings to provide a source of affordable housing for the poor in the inner-cities—many times in relative proximity to jobs and transportation—where it would otherwise not be available due to other factors, such as gentrification of other areas within the city.

LABs were initially proposed as a substantial land-use planning tool when authorized at the state and local levels of government.<sup>276</sup> More accurately, the LAB was created for land use control purposes so that “land inventory could be used to impact the costs of land for private and public development.”<sup>277</sup> Indeed, the LAB was developed to deal with a range of social and cultural problems; it “was limited only by the creative imagination of social and urban planners.”<sup>278</sup>

Charles Haar envisioned public authorities that—by the acquisition of parceled land and undeveloped land—employ LABs to directly impact the fluctuation of land values and allow local governments to undertake land use control.<sup>279</sup> In the face of nuisance laws, exclusionary zoning

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274. See generally Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 140 (2004) (discussing how LABs can operate as a local governmental authority to turn liabilities into assets).

275. *Id.* at 141.

276. *Id.*

277. *Id.* at 143.

278. *Id.*

279. See *Wanted: Two Federal Levers for Urban Land Use—Land Banks and Urbank: Paper submitted to Subcomm. on Hous. Panels of H. Comm. on Banking and Currency*, 92d Cong. 927–940 (1971) (statement of Charles M. Haar, Professor of Law, Harvard Law School), cited in CTR. FOR URBAN POLICY RESEARCH, *LAND USE CONTROLS: PRESENT PROBLEMS AND FUTURE REFORM* 365–79 (David Listokin ed., 1974). The first LAB was established in the 1970s in St.

and urban renewal, LABs served as a new tool for dealing with the inefficient use of land.<sup>280</sup>

However, redevelopment authorities—faced with the rapid decline of some inner-city parcels of land—did not reclaim or redevelop the areas.<sup>281</sup> Nor were private developers convinced by market forces to invest in the areas. Therefore, as a governmental entity, LABs assemble and bank land to be converted into productive, short-term and long-term uses.<sup>282</sup> Indeed, the tool expedites the urban redevelopment process in declining areas and puts the land to use for other purposes or in conjunction with other land assembly tools, such as CDCs or CLTs. As a matter of fee simple ownership, the blighted property that sits on the land is reserved by its owners, but stands idle with no apparent productive use.<sup>283</sup>

Since LABs are flexible in form and function, they can be adjusted to various land assembly purposes.<sup>284</sup> Here, in the face of condemnation that threatens the loss of affordable housing, LABs can construct or preserve affordable housing where it already exists, albeit in a physically inadequate form.<sup>285</sup> If used to control urban sprawl caused, in part, by exclusionary zoning, LABs could be adjusted to fix the exclusionary eminent domain problem by serving as an inclusionary housing development tool by banking, and then earmarking, the land for affordable housing so it may be targeted for economic redevelopment.<sup>286</sup>

LABs, like CDCs, can acquire land for purposes of developing

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Louis, Missouri by the St. Louis Revitalization Authority. Redevelopment authorities historically have held the power to issue tax-exempt financing and exercise the power of eminent domain to revitalize dilapidated and blighted land. See generally Kenneth R. Langsdorf, *Urban Decay, Property Tax Delinquency: A Solution in St. Louis*, 5 URB. LAW. 729 (1973) (discussing the tax breaks and power of eminent domain that statutory redevelopment corporations in Missouri enjoy).

280. Haar, *supra* note 279, at 933.

281. See Alexander, *supra* note 274, at 142 (noting the forces that inhibited public development authorities in efforts to reclaim and redevelop blighted and tax-delinquent properties).

282. *Id.*

283. See *id.* (noting that LABs are comprised of both privately and publicly owned “stagnant” homes).

284. See *id.* at 142, 147 (noting that there “is no single form or function to land banks” and that this “variation . . . is essential” for LABs to function).

285. See generally Patricia A. Hemann, *Land Banking Tax Delinquent Property: Reform and Revitalization*, 27 CLEV. ST. L. REV. 517 (1978) (discussing the use of LABs to revitalize urban areas which have become blighted and filled with abandoned properties).

286. See generally HARVEY L. FLECHNER, *LAND BANKING IN THE CONTROL OF URBAN DEVELOPMENT* (1974) (providing an overview of land bank programs including their functions and role in urban redevelopment).

affordable housing. LABs and CDCs operate similarly in that both advance acquisition of parcels of land for future purposes of affordable housing development.<sup>287</sup> The meaningful engagement process takes place largely between the municipality, public authority or state agency banking the land.

The LAB combines elements of long-term proposals and project-specific approaches to banking land.<sup>288</sup> Thus, in the face of the threat of exclusionary eminent domain, CDCs can bank land for future purposes by acquiring, holding and designating sites for affordable housing development for low-income and moderate-income families who may be displaced by condemnation elsewhere.

The LAB can also be designed for a single public purpose, such as economic redevelopment.<sup>289</sup> The land banking process focuses on a single geographic area for the purpose of acquiring and assembling land for, say, affordable housing development.<sup>290</sup> Since land assemblage in targeted, single parcels of land is unavailable or difficult to obtain by way of open-market acquisitions, the exercise of eminent domain can be delegated to or exercised on behalf of the LAB.<sup>291</sup> In the event a private developer requests that a municipality condemn land for economic redevelopment purposes, land banking can also induce the development of affordable housing by providing the public financial subsidies in the form of tax-exempt financing, low-interest loans or tax abatements for the private developer in exchange for the affordable housing development on the land targeted for condemnation.<sup>292</sup> Indeed, the key components of the LAB scheme are: (1) “public acquisition and holding of land as a form of land use . . . control” and (2) “the public acquisition of land for transfer to private third parties for use and development.”<sup>293</sup> In the context of inclusionary eminent domain, LABs can play a significant role in staving off the exclusionary effects of condemnation because the municipality—already holding property for future investment—can spur private developers to utilize the existing property for affordable housing.

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287. See Alexander, *supra* note 274, at 145 (contrasting the acquisition of property by nonprofit housing development corporations to that of LABs).

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* See generally Langsdorf, *supra* note 279 (discussing the use of public financial subsidies and eminent domain to encourage private redevelopment by third parties).

293. Alexander, *supra* note 274, at 145; see also Richard P. Fishman & Robert D. Gross, *Public Land Banking: A New Praxis for Urban Growth*, 23 CASE W. RES. L. REV. 897, 899 (1972) (discussing the modern goals and purposes of land banking).

In fact, some of the earliest proposals for LABs sought to assemble large amounts of land as a form of local land use planning, while other proposals dabbled with the idea of giving the redevelopment authority the power of eminent domain.<sup>294</sup> But, for constitutional reasons, many LABs are not designed with the authority to condemn land—that power still remains with the municipality. And, although the exercise of eminent domain is sometimes suggested for LABs, municipalities rarely grant it.<sup>295</sup>

However, the LAB does have the authority to acquire properties from municipalities, such as foreclosed or surplus properties or as a result of voluntary donations and transfers from private owners.<sup>296</sup> Communities subject to threats of losing affordable housing to condemnation may, therefore, have the ability to acquire ownership over a parcel of land that has been banked by the municipality and use the land as leverage in negotiations with private developers. The purchase or lease of property on the open market would allow the LAB to negotiate the purchase of neglected property from a private owner.<sup>297</sup> Communities are not the only stakeholders that could acquire the banked land from the municipality; private developers could also acquire the properties.

The holding of land by the municipality could lure the private developer to enter into negotiations to complete the project with the affordable housing interests of the affected community. The LAB also focuses on transfers of property at nominal prices to facilitate the construction or preservation of affordable housing where it is threatened by condemnation.<sup>298</sup> A LAB often transfers property “in anticipation that the transferee will undertake certain commitments concerning development and future use of the property.”<sup>299</sup> An offer made by the municipality to a private developer to acquire the banked land prior to commencing eminent domain proceedings could ensure that affordable housing is refurbished and has significant positive impacts on the affordable housing market within an economic redevelopment project.

The potential for an inclusionary relationship between LABs and other land assembly tools proposed in this Article is significant, in part, due to the fact that corporations or individuals can apply to purchase property from the LAB.<sup>300</sup> Some land banks may give preference to

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294. See Alexander, *supra* note 274, at 143.

295. *Id.* at 150, 156.

296. *Id.* at 150–51.

297. *Id.* at 152.

298. *Id.* at 154.

299. *Id.* at 163.

300. *Id.* at 160.

non-profit corporations that plan to use the property to create affordable housing, while others make the property available to private corporations.<sup>301</sup> Thus, LABs that operate within an area targeted for condemnation have the authority to transfer the property to a private developer who plans for economic redevelopment of the land. The process of banking, then transferring, the land establishes a sales price for the land sold to a private developer to use for constructing affordable housing at a reasonable percentage of the standard price.<sup>302</sup> And since the LAB is primarily concerned with transferring land to transferees whose primary goal is to hold ownership of the land for future resale, the sale of the properties to a private developer benefitting from the exercise of eminent domain may allow the developer—incentivized by tax-exemptions and other conditions—to sell or rent the property to the affected community at below-market rates to ensure the community is not displaced by exclusionary eminent domain.

#### F. Neighborhood Improvement District

NIDs<sup>303</sup> are one of many variations of improvement districts that exist throughout the United States, including Business Improvement Districts (“BIDs”),<sup>304</sup> Block-Level Improvement Districts (“BLIDs”),<sup>305</sup> and Private Neighborhood Associations (“PNAs”).<sup>306</sup> Local

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301. *Id.*

302. The St. Louis Land Bank sells the land to non-profit entities who will utilize the property for a “strong public purpose” at 50% of the standard price. *Id.*

303. This section focuses on the NID Act under Pennsylvania law. See Neighborhood Improvement District Act, 73 PA. CONS. STAT. §§ 831–40 (2013). This is primarily to simplify the conversation and for convenience since I am acquainted with the NID legislation in Pennsylvania.

304. For a comprehensive discussion of BIDs, see ROBERT ELLICKSON & VICKI BEEN, LAND USE CONTROLS 619–34 (2005) (discussing the concepts and practical utility of special assessments and BIDs); Wayne Batchis, *Privatized Government in a Diverse Urban Neighborhood: Mt. Airy Business Improvement District*, 3 DREXEL L. REV. 109 (2010); Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 366–74 (1999) [hereinafter Briffault, *Urban Governance*]; Richard Briffault, *The Business Improvement District Comes of Age*, 3 DREXEL L. REV. 19 (2010); Gerald E. Frug, *The Seductions of Form*, 3 DREXEL L. REV. 11, 17 (2010); Robert Stokes, *The Challenges of Using BIDs in Lower-Income Areas: The Case of Germantown, Philadelphia*, 3 DREXEL L. REV. 325 (2010); Thomas J. Vicino, *New Boundaries of Urban Governance: An Analysis of Philadelphia’s University City Improvement District*, 3 DREXEL L. REV. 339 (2010).

305. BLIDs are residential communities similar to BIDs that enable residents to acquire resources such as local public goods. Within inclusionary eminent domain, BLIDs are perhaps yet another tool to place more pressure on private developers to include services to the displaced communities where eminent domain is used. Importantly, a BLID would focus its attention towards protecting the rights of dissenting landowners and displaced communities. Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 97–98 (1998).

306. PNAs may serve as another alternative tool for inclusionary eminent domain. PNAs function as condominium-like communities. PNAs are made up of concurrent supermajorities of



governance models, such as NIDS, are enabled by state regulations and designed as group property institutions that can be retrofitted to an existing community where eminent domain is considered for economic redevelopment. However, this Article focuses on the NID due to its extremely local design and its focus on improvements for residential property owners and renters within a designated area. The designated NID area could potentially be drawn for purposes of alleviating the exclusionary impact of eminent domain in high-density areas of cities.

NIDs are geographic areas within a municipality where a special assessment is levied on all designated property, other than tax-exempt property, for the purpose of promoting the economic and general welfare of the district and the municipality. The NID funds are utilized to supplement city services, such as streetlights, managing parking lots and other security measures.<sup>307</sup> Here, the NID assessment may finance the provision of positive externalities that generally benefit the assessed area or construction of an improvement, such as affordable housing, that would generate economic activity, increase property values or generally create an inclusive environment.<sup>308</sup> Unlike BIDs, NIDs are primarily created to improve residential, not commercial or business, areas within a locality. NIDs seek to fix some of the collective action problems found in areas that are both commercial and residential and are thus composed of different-sized structures that serve different functions.<sup>309</sup>

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existing owners and renters of residential and commercial properties. The Association would enable members to coerce individual owners to join. The board would have the power to sell changes in use, such as selling the community as a whole for redevelopment. Nelson notes that the creation of such associations in already established neighborhoods is very difficult because “the transaction costs of assembling unanimous neighborhood consents voluntarily would be prohibitive.” Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 833–34 (1999).

307. Briffault, *Urban Governance*, *supra* note 304, at 368–69.

308. See generally Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939 (2013). Stahl elaborates on the concerns of authors such as Ellickson and Liebmann, arguing that because a “neighborhood has unfettered ability to control its own land use,” use of neighborhood controlled zoning results in “not in my backyard” (“NIMBY”) impulses and exclusionary practices that deny in-demand resources, such as low-income housing developments. *Id.* at 995.

309. Heller and Hills focus their LAD proposal on the intra-group exploitation problem that NIDs seek to overcome. Heller & Hills, *supra* note 196, at 1521.

[T]he opportunities for intra-group exploitation are high in a neighborhood composed of different-sized structures serving different functions. The possibility that residential owners would burden commercial structures with onerous restrictions is matched only by the possibility that commercial owners would burden residential owners with noxious uses. Even among residential owners, the owners of large and small buildings would have persistently different interests that would invite intra-neighborhood squabbling.

Further, blight removal is not a prerequisite for establishing a NID. The decision-making body is also representative of the residents within the NID.

The municipal corporation—a body or board authorized to enact ordinances or resolutions, such as a City Council—has the power to establish an authority to administer the NID improvements.<sup>310</sup> The municipal corporation can also choose an existing CDC located within the NID designated area to administer the funds for improvements. A governing body is created by group representatives from the community—called the neighborhood improvement district management association (“NIDMA”)—that levies assessments and makes other decisions concerning the improvements of the neighborhood when there is not a local CDC.

The revenue generated is funneled back into the NID fund and dispersed for neighborhood improvements.<sup>311</sup> Although NIDs are primarily designed to upgrade and maintain residential areas, some NID legislation allows for commercial property within or abutting the NID area, and thus local business owners are sometimes members of the NIDMA.<sup>312</sup> However, the purpose of the NID, in contrast to the BID, is to ensure that improvements districts do not center primarily on business development, but on residential neighborhood development.

In low-income neighborhoods, some states allow the NIDMA to exempt residential property owners from any special assessment fee levied and instead levy a higher assessment on participating businesses within the NID. Other states require residents to pay a nominal amount, such as \$1, to prevent burdening an already low-income community. Residents and business owners can petition the City Council to designate the NID where the municipality has not taken such action, but

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*Id.*

310. *See* Neighborhood Improvement District Act, 73 PA. CONS. STAT. § 834(1) (2013) (“Every municipal corporation shall have the power . . . [t]o establish within the municipality an area or areas designated as an NID.”).

311. *See id.* § 837(b)(1).

The NIDMA shall, upon approval by the governing body of the municipality, have the power to assess property owners within the NID a special assessment fee. Revenues from the fee shall be accounted for and used by the NIDMA to make improvements and provide programs and services within the NID as authorized by this act. Where the district established is a BID, the NIDMA shall have the authority to exempt residential property owners from any special assessment fees levied.

*Id.*

312. *See id.* § 834(10) (explaining that the municipal corporation has the power “[t]o levy an assessment fee on property owners located within an NID needed to finance additional supplemental programs, services and improvements to be provided or made by the NIDMA”).

the ultimate decision to establish a NID rests with the municipal corporation. The responsibility for drawing boundaries rests with the entity that proposes the NID, which many times includes a variety of local neighborhood stakeholders and residents.<sup>313</sup>

The initial NID proposal to the municipal corporation must include proposed revenue sources for financing the proposed improvements within its boundaries. Revenue for the NID is primarily generated from the assessments, but some states have enacted NID legislation to allow the municipal corporation to issue and generate bonds, notes or guarantees to finance improvements within the NID.<sup>314</sup> The bonds may be retired by a further assessment on the property owners on an equitable basis. The municipal corporation also has the power to advance some of the funds to the NIDMA, or to the local CDC, to carry out the purposes and goals of the NID.

These provisions within NID legislation are what make NIDs more powerful than other small-scale neighborhood improvement areas with minimal streams of revenue. The issuance of bonds and other forms of monies, including the authority to “[a]ppropriate and expend NID funds which would include any Federal, State or municipal funds received by the NIDMA” from the City Council is a useful, and perhaps attractive, tool for private developers seeking to invest in affordable housing developments in the community.<sup>315</sup> Those funds can be “expend[ed] in accordance with the specific provisions of the municipal enabling ordinance” establishing the NID.<sup>316</sup>

Given the close proximity and interaction with the municipal authority and private developers under the NID scheme, NIDs have a strong incentive to eliminate abandoned and blighted buildings using their partial authority to condemn property through eminent domain.<sup>317</sup> Under state or local legislation, a NID has the authority to identify deteriorating buildings, outline a detailed proposal for rehabilitation of the buildings within a locality and condemn land to acquire and then refurbish or construct new affordable housing.<sup>318</sup>

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313. *See id.* § 835(c)(1) (stating the plan must include “[a] map indicating the boundaries, by street, of the proposed NID; however, a designated property may not be included in more than one NID”); *see also id.* § 835(a)(1) (providing that “[t]he governing body of the municipality or any municipal businesses or residents or combination thereof may initiate action to establish an NID or NIDs”).

314. *Id.* § 834(7).

315. *Id.* § 837(a)(8).

316. *Id.* § 834(3) (internal punctuation omitted).

317. *See id.* § 834(6) (stating the municipal corporation has the power to acquire property through eminent domain in order to “mak[e] physical improvements within the NID”).

318. *See generally id.* § 834 (outlining the powers municipal corporations may bestow on

The initial stages of the NID proposal would need to explicitly state that one of the primary improvements the NID seeks is a fair share percentage of affordable housing to be constructed or preserved on the site condemned for development. Private developers will likely be open to the fair share option because most states have NIDs with alternative revenue streams that would assist in the financing of the inclusionary housing.

From an *ex ante* perspective, the proposed use of eminent domain proceedings by a municipality should spur the affected community to consider the designation of a NID within the economic redevelopment project area. Then, from an *ex post* position, the local CDC, in collaboration with the city council and private developer, would meaningfully engage. This would entail meeting to map out and draw what portion of the redevelopment project would be designated as a NID and what portion of revenue from the special assessment and other local, state and federal funds would go towards substituting the anticipated loss of housing with new affordable developments.

Most NID legislation also requires a comprehensive plan that draws “[a] map indicating the boundaries, by street, of the proposed NID.”<sup>319</sup> Here, the private developer and municipality can offer numerous ways to assist the NID area with development of affordable housing in that area. The funds accessible through the NID from local and state taxes would assist in the maintenance and repair of the areas surrounding the affordable housing, such as street cleaning, light maintenance and other local amenities, thus working to mitigate blight and decay over time.

Similar to the CBA, the creation of a NID can be used as a public approval mechanism: We will support the taking of property for economic redevelopment purposes in exchange for the creation of a NID and designation of its powers, under applicable NID legislation, to a local CDC to improve the area, including the oversight of development of affordable housing units with the private developer. While CBAs bind the parties through a number of promises, including housing, on a contractual document, the NID places a structural organization within the economic redevelopment project area that helps maintain—at least to a certain extent—the integrity of the neighborhood. Indeed, the prospect of righting the wrongs of the past by giving back a certain degree of community empowerment through meaningful engagement, participation and public approval within an economic redevelopment project is an exciting, but still evolving,

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NIDs).

319. *See id.* § 835(c)(1).

phenomenon under an inclusionary eminent domain model. Overlaying a NID boundary within an economic redevelopment project is increasingly becoming an important tool in the post-*Kelo* era for constructing and preserving affordable housing.

#### CONCLUSION

This Article calls for developers, municipalities and communities to rethink how to plan for inclusion. Inclusionary eminent domain is a new normative concept to help us rethink *how* to fix the exclusionary eminent domain phenomenon and remedy condemnations that threaten the loss of affordable housing and displacement of low-income communities. Heightened judicial review, as proposed by Dana, in and of itself, may not solve the ubiquitous problems of inefficient land assembly and shortage of affordable housing. Post-*Kelo* legislation barring condemnations for economic redevelopment is not likely to adequately solve the exclusionary phenomenon. Indeed, this Article makes a normative case by proposing CBAs, LADs, CDCs, CLTs, LABs and NIDs as crucial tools that are part of this broader framework of inclusion to guide municipalities, private developers and communities on *how* to assemble land taken through eminent domain. However, the question that remains is whether the legal doctrine framing takings law can embody the norms proposed in this Article.

The model proposed here is just one of many steps in what is an organic and evolving paradigm in takings law and economic redevelopment. The next phase of this paradigm very well may lead to state legislatures considering how to structure statutes that require the practices advocated here, city councils amending ordinances to mandate the implementation of the tools or courts who may want to uphold the inclusionary practices by ordering the municipalities to utilize some of the tools as a matter of state constitutional law or zoning enabling law. This, of course, would require a comprehensive assessment of the constitutionality of legislatively enforced and judicially mandated inclusionary eminent domain, which would also substantiate the normative position set forth in this Article.

This Article, though, seeks to start that conversation and to acknowledge the realization that public use, in the most local community sense, is an integral part of the exercise of takings for economic redevelopment. Inclusionary eminent domain is a framework to nurture and facilitate the process.