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UNDERSTANDING URBAN RENEWAL: HISTORY FORGOTTEN

Daniel R. Mandelker*

ABSTRACT

Urban renewal is an important feature of urban life, but judicial, statutory, and constitutional backlash followed a U.S. Supreme Court decision that held constitutional the use of eminent domain to acquire land for redevelopment in an urban renewal project. Urban renewal got its start in the federal urban renewal program, which influenced state legislation but had a weak planning requirement and did not include blight as a requirement for urban renewal. This weakness was a factor in the problems that occurred in urban renewal and that created the backlash to the Supreme Court decision.

No U.S, Supreme Court case has created more backlash than *Kelo v. City of New London.*[1] The Court held that the constitutional requirement that property can be taken by eminent domain only for a public use authorized the taking of land for redevelopment in an urban renewal project. Commentators criticized this case,[2] while constitutions were amended and state legislatures acted to prohibit or restrict the use of eminent domain for redevelopment. Lost is an historical appreciation of the origins of urban renewal in a federal program that authorized urban renewal subsidies, and how genetic weakness in that program created abuse that provoked opposition to the *Kelo* decision. This article reviews the origins of the federal urban renewal program, and how decisions about that program created a weak state statutory structure for urban renewal that did not provide effective control over urban renewal decisions.

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

[2] *E.g.*, Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201 (2006). The urban renewal project in the *Kelo* case consisted of moderately-priced home in good condition, which contributed to the outrage about the project. The plaintiff in the case had a pink house, and the Little Pink House became a symbol of the resistance.

The federal urban renewal program began shortly after the Second World War with a federal statute[3] that authorized a subsidy for local urban renewal projects. A national debate that shaped the statute was carried out in Congress, in published articles, and at national conferences. Understanding the issues in this debate, how Congress decided them when it adopted the statute, and how the responsible federal agency applied the statute, is critical to understanding the federal program, its influence on state legislation, and on local urban renewal programs.

Two major issues shaped the federal urban renewal legislation and how it was applied: the role of planning as a basis for urban renewal, and the role of blight as a basis for approving urban renewal projects. The author of this article was an attorney in the U.S. Housing and Home Finance Agency (the "Urban Renewal Agency"), which was the predecessor to the U.S. Department of Housing and Urban Development, when the urban renewal program took shape, and where decisions that shaped the future of the program were made. This experience, and research for an article on the role of the planning in urban renewal,[4] are the basis for this article.

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

Congressional action to establish an urban renewal program was necessary because American cities at the time were home to massive, blighted, inner-city slums. In St. Louis alone, Mill Creek valley was an extensive urban slum located close to downtown. Because the cost of acquiring blighted land for redevelopment was prohibitive, a federal subsidy to subsidize land acquisition was needed to make urban renewal practicable financially. In the law as finally enacted, the federal subsidy was limited to two-thirds of the acquisition cost of property in urban renewal areas, but the Urban Renewal Agency usually accepted the one-third local share in the form of "in-

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

[4] Daniel R. Mandelker, *The Comprehensive Plan in Urban Renewal*, 116 U. PA. L. REV. 25 (1967). Statements made here on issues considered when urban renewal was first adopted and how they were resolved are based on sources in this article and personal interviews in March 1966 in Madison, Wisconsin with the late Coleman Woodbury as part of the research for that article. He was an important figure in urban renewal debates in the period during and after the Second World War, served in national housing agencies and as chair of a committee created by President Roosevelt during the war to study and recommend a national urban renewal program. The author of this article also reviewed Prof. Woodbury's personal documents relating to the Roosevelt committee. He was also privileged to hear William Wheaton, one of the founders of urban renewal, speak about it at the Salzburg Urban Seminar in February 1977. At twilight, in the library with the fire burning, Bill gave an unforgettable account.

kind" contributions that did not require a cash outlay. Land acquired by the public agency in urban renewal projects was conveyed to private developers for development, often at a discount.

The federal legislation had a decisive effect on the way in which urban renewal was implemented. It detailed the requirements that local urban renewal projects had to meet in order to receive a federal subsidy, and required a fine balance between federal directives necessary to carry out national policy and the flexibility needed for local project management. State legislation also was necessary because it had to incorporate federal requirements into state law that was needed to authorize local urban renewal projects. As a guide for state legislatures, the Urban Renewal Agency drafted a model urban renewal law[5] that complied with federal requirements and that many states adopted. The model law had an important influence on the urban renewal concept as it was applied at the local level.

The Role of Planning

Deciding on the role of comprehensive planning in urban renewal programs was one of the critical issues that shaped the federal legislation.[6] Planning produces a comprehensive plan that can include a policy for urban renewal projects, and that can justify the taking of private property for redevelopment.[7] Each individual taking of property is based on a comprehensive plan that has a consensus on community objectives. It overcomes the objection that property is taken by a public agency from one landowner in an urban renewal project only for the purpose of conveying it to another landowner so she can develop it.

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

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

[7] *See* American Planning Association, Policy Guide on Public Redevelopment (2004) ("APA and its Chapters support the adoption of state legislation requiring that a redevelopment area may be established only if the local government agency performing redevelopment has adopted a local comprehensive plan and the redevelopment area plan conforms to the comprehensive plan"), *available at* http://www.planning.org/policy/guides/adopted/redevelopment.htm.

The comprehensive plan is a locally adopted policy document that guides land use decisions under zoning and other land use ordinances and that can provide guidance for public projects, such as urban renewal projects. Consistency of land use regulations and public projects with the comprehensive plan should be required to make the plan binding.[8] State statutes did not explicitly require zoning decisions to be consistent with a comprehensive plan when Congress considered an urban renewal program after the Second World War, although a weak statement in state legislation might have mandated this requirement.[9] Neither was comprehensive planning well established at the local level, and many advocates of urban renewal saw this program as a way to strengthen local planning.

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

Two model urban renewal acts that addressed the planning function were available in the period before the adoption of federal legislation. One model, drafted by Bettman for the American Society of Planning Officials, now the American Planning Association, required compliance with a general plan and the preparation of community and detailed project plans as a condition to the approval of urban renewal projects.[11] It delegated the authority to acquire blighted land for redevelopment to local governments.

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[8] Daniel R. Mandelker *The Role of the Local Comprehensive Plan in Land Use Regulation*, 76 MICH. L. REV. 899 (1976).

[9] Most state zoning legislation is based on a model act proposed by the U.S. Department of Commerce, STANDARD STATE ZONING ENABLING ACT (1926), available at StndZoningEnablingAct1926.pdf (cpb-us-w2.wpmucdn.com). This act required that zoning regulations be made "in accordance with a comprehensive plan." *Id.,* § 3. Courts had not yet interpreted this provision at the time Congress considered federal urban renewal legislation.

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

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

Some state legislation in this period adopted the Bettman planning requirements and made them a condition to a federal subsidy for urban renewal.

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

Proposals for federal urban renewal legislation put forward earlier by a wartime housing agency adopted much of the second approach. They placed the planning function in a public agency that would not be responsible for urban renewal projects, and emphasized the adequacy of the local planning process rather than the substantive content of comprehensive plans. Federal urban renewal legislation was influenced by this model,[13] and stripped the detailed planning language from the Bettman model act that was in an earlier bill.

As enacted, the federal law required only a local legislative finding that an urban renewal project plan "conforms to a general plan for the development of the locality as a whole."[14] State legislation copied this requirement.[15] Federal agency regulations further weakened the statutory planning requirement, and this weakness affected how local urban renewal projects were done. The author's study of urban renewal in St. Louis and Nashville, for example, found that the statutory planning requirement was inadequate to

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

[13] The federal urban renewal statute included the "indicate" language from that model. 42 U.S.C. § 1460(b) (1964).

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

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

guide the urban renewal process. Major changes occurred in project development that distorted original plans.[16]

Weakness in the federal planning created resistance to the urban renewal concept. Property owners could argue that the weak federal planning requirement allowed local urban renewal agencies to select projects that benefited the interests of private redevelopers rather than community policy. In *Kelo*, Justice Stevens emphasized the role of planning in the urban renewal project that he approved,[17] but he did not explicitly require planning as a condition to the use of eminent domain. Planning in that case had been at the project, not the community, level.

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

The statutory definition of blight is critical, and physical blight is the traditional blight requirement. The physical blight finding determines the area that qualifies for urban renewal, and is usually the basis for approving an urban renewal project under state law.[18] The federal urban renewal law did not require blight,[19] but a blight requirement was one of the requirements included in the model state urban renewal law drafted by the federal Urban Renewal Agency that was widely adopted.[20] It addressed the slum clearance problem that was the major issue at the time by authorizing projects for the removal of physical blight, but extended the definition of blight by authorizing urban renewal projects if they were socially and economically blighted. State legislation included this extended definition of blight.[21]

The addition of social and economic blight as a basis for urban renewal weakened its public image because it could allow projects based on problems such as low property

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

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

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

[19] 42 U.S.C. § 1460(c)(1)(i) (Supp. I 1966).

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

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

tax collection, title deficiencies, and business vacancies that did not fit the traditional urban renewal image. Courts upheld this extension of urban renewal authority. A New Jersey case, for example, upheld the condemnation of vacant land for a shopping center under a statute that defined blight as "a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare" that was "caused by the condition of the title, diverse ownership of the real property therein and other conditions."[22]

Statutory authority was not enough, however, as urban renewal faced a major constitutional challenge in the constitutional requirement that property can be taken by eminent domain only for a public use. The argument was that using eminent domain for urban renewal was not a public use because it authorized an urban renewal agency to acquire private property and transfer it another private property owner for private redevelopment.

State court decisions on the public use question in urban renewal had largely been favorable at the time the federal urban renewal program began,[23] and courts found ways to avoid or eliminate the private transfer of property problem. But the Urban Renewal Agency was concerned that urban renewal programs would be seriously damaged if a public use case was lost in federal court. As the author recalls, the Agency faced a major problem deciding how it should support the public use requirement in court. One alternative would have based the public use defense on the statutory requirement that redevelopment projects must conform to a comprehensive plan. The argument would have been that compliance with redevelopment policies in a plan provides the public use that defeats an argument that urban renewal is just an excuse to transfer property from one private owner to another private property owner

Another alternative based the public use defense on the requirement that urban renewal can be approved only for blighted areas under state law. This argument claimed

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

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

that the removal of blighted slum areas is enough of a public use to defeat the private transfer of property argument. The Urban Renewal Agency chose the second alternative, with important consequences for the future of urban renewal. Courts were not given an opportunity to make compliance with a comprehensive plan a necessary element in the public use requirement.

The public use issue came to a head in *Berman v. Parker*.[24] Justice William Douglas held that the District of Columbia urban renewal legislation, which had been used to redevelop a seriously blighted slum, satisfied the public use requirement. Justice Douglas eliminated any opportunity for judicial review of urban renewal that could discipline the program. He deferred instead to the legislative decision on when eminent domain could be used for urban renewal. In a now-famous statement, he held that "[w]e do not sit to determine whether a particular housing project is or is not desirable."[25] This statement means that courts should not be concerned with how urban renewal legislation defines urban renewal projects. His only reference to blight was a statement that "[m]iserable and disreputable housing conditions" could be a "blight on the community."[26]

Douglas also eliminated constitutional review of the property transfer issue. He held that authorizing a property transfer from one property owner was a question only of means that was for the legislature to decide:

> Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.[27]

The Douglas opinion left no real constitutional barriers to the use of eminent domain for redevelopment. Statutory compliance is all that is needed, and has not been a

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[24] 348 U.S. 26 (1954).

[25] *Id.* at 33. His reference to a housing project rather than an urban renewal project was a mistake, but the meaning is clear.

[26] *Id.* at 32.

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

difficult problem in most cases in state courts. State urban renewal statutes based on the federal model ease the finding of blight for most projects, although the definition of blight has been reformed in some states. Planning was not an issue in *Berman*.

Conclusion

The use of eminent domain to acquire land for urban renewal raises critical legal questions, both statutory and constitutional. The Supreme Court's *Kelo* decision confirmed that the eminent domain power can constitutionally be used for redevelopment, but state constitutional and legislative change diminished this decision. Practically forgotten in the midst of change and protest are the legislative origins of the federal urban renewal program and the weakness it created. The role of planning, which could have disciplined urban renewal programs, was diluted. The blight requirement that is needed to approve an urban renewal project was weakened by statute and court decision and became practically meaningless.

Both requirements should be part of the constitutional public use equation. History should teach that a strong statutory planning function must be an element of urban renewal legislation in order to satisfy the public use requirement. So must a tightly defined definition of blight for the selection of urban renewal areas. Well-defined statutory planning and blight requirements would then provide an appropriate basis for urban renewal.