NOTES

EMINENT DOMAIN CONVERSION OF VACANT LUXURY CONDOMINIUMS INTO LOW-INCOME HOUSING

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I. INTRODUCTION

Within the proliferation of scholarship in the wake of *Kelo v. City of New London*, one law student's note provided this straightforward assessment: "Doctrinally, the [United States Supreme] Court's decision in *Kelo* was unsurprising . . . ."[1] In *Kelo*, the Court predictably affirmed economic development as a public purpose for which land can be condemned.[2] The Court's language regarding incidental private benefit echoed the eminent domain precedent established in *Hawaii Housing Authority v. Midkiff*.[3] When the Court recognized in *Kelo* that "the government's pursuit of a public purpose will often benefit

[1] Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-*Kelo *State Legislation*, 82 N.Y.U. L. Rev. 177, 193 (2007).

[2] Kelo v. City of New London, 545 U.S. 469, 483-84 (2005) ("The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. . . . Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment."). One response to this ruling was a campaign to take a Justice's farmhouse for a luxury hotel development. This campaign provided good publicity, but without the context of a comprehensive plan, such a taking would likely not be permitted under *Kelo*. It would look like spot condemnation for a private rather than a public purpose. Debra Pogrund Stark, *How Do You Solve a Problem Like in* Kelo?, 40 J. MARSHALL L. REV. 609, 613-14 (2007).

[3] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241-43 (1984).

individual private parties,"[4] it underlined its earlier determination in *Midkiff* that "transfer[ence] in the first instance to private beneficiaries does not condemn that taking as having only a private purpose."[5] But public opposition to *Kelo* has continued to find strength in the unraveling of New London's revitalization attempt over the half a decade since the decision.[6] The designated redeveloper has lost it designation for lack of financing, and all that New London can show for its approved revitalization plan is a barren lot.[7] The city is on hold for "the promised building boom . . . [and] up to 3,169 new jobs and $1.2 million a year in tax revenues."[8]

Petitioner Susette Kelo has continued to campaign against expansive eminent domain power: "though we ultimately didn't win for ourselves . . . if [the advocacy] can make it better for some other people so they don't lose their homes to a Dunkin' Donuts or a Wal-Mart, I think we did some good."[9] At first glance, she appears to be fighting the good fight because the story of a homeowner standing up to corporate giants is compelling. But her state-by-state victories are pyrrhic. State legislatures have felt pressure to limit economic takings, and forty-one states have enacted legislation to protect private property from *Kelo*.[10] But the legislation may not be doing much to shore up individual property rights.[11] Law professor Ilya Somin believes that post-*Kelo* reform likely will not curb expansive eminent domain if there is "widespread political ignorance that enables state and federal legislators to pass off primarily cosmetic laws as meaningful reforms."[12]

President George W. Bush ostensibly honored Susette Kelo's campaign in

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[4] *Kelo*, 545 U.S. at 485-86.

[5] Midkiff, 467 U.S. at 241-43 ("The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. . . . Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power.").

[6] *See* Katie Nelson, *Conn. Land Taken from Homeowners Still Undeveloped*, BREITBART (Sept. 25, 2009, 4:46 AM), http://www.breitbart.com/article.php?id=D9AU92VG0&show_article=1.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Edward J. López, R. Todd Jewell & Noel D. Campbell, *Pass a Law, Any Law, Fast! State Legislative Responses to the* Kelo *Backlash*, 5 REV. LAW & ECON. 101, 102 (2009).

[11] *Id.* at 102, 130 ("According to our qualitative analysis, 14 of the 37 new laws are largely symbolic—favoring loopholes, exemptions, and vague definitions of public use and blight, over meaningful restrictions . . . . [I]nterests have long ago formed around the political benefits imparted by development takings. Many state legislatures confront strong incentives toward status quo politics, leaving the powers of eminent domain largely intact while voicing reassurances to an agitated populace.").

[12] Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2104 (2009).

2006 with Executive Order No. 13,406, *Protecting the Property Rights of the American People*.[13] But he only reiterated the standard of requiring a general public benefit behind every taking.[14] President Bush did not challenge the Court's deferential rationale for economic development takings that met that standard.[15]

The *Kelo* decision was "unsurprising" in light of both prior jurisprudence and the historical lineage of property acquisition. Law professor Joseph Singer described that history:

> Some critics suggested that never before in U.S. history did the government take property from some to transfer it to others simply because the government thought those others could use the property better than the original owners. It would be good to remember that this is exactly what happened when tribal lands were taken for transfer to non-Indians. And those lands taken from Indian nations amount to 98 percent of the land in the United States. Americans may be outraged by the *Kelo* decision but almost all of them are living on land taken from one owner and given to their predecessors in interest. The uncomfortable truth is that the history of the entire country is founded on this precise injustice.[16]

The injustice of displacement has deep roots. Concern regarding further abuse through exercises like New London's revitalization attempt may be appropriate, but Singer hinted at a response that differs from legislative bans on eminent domain. He explained that "using democratic means to limit or reallocate property rights . . . to promote social relations compatible with a free and democratic society is not only not a violation of property rights but [it is] compelled by the very reasons we created property rights in the first place."[17] New London may have experienced a city planning failure. Nonetheless, the "democratic means" that authorized the redevelopment—including neighborhood meetings and city council approval[18]—present an opportunity to "reallocate property rights" toward progressive, social justice ends.

This note considers an innovative proposal by the New York City chapter of the Right to the City Alliance (RTTC-NYC), which surveyed a citywide housing imbalance:

> In New York City today, there are almost 40,000 individuals in homeless shelters, including up to 10,000 whole families and children; over 500,000 households are paying more than 50% of their incomes just for

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[13] Exec. Order No. 13,406, 71 Fed. Reg. 36,973 (June 23, 2006).

[14] Somin, *supra* note 12, at 2153-54.

[15] *Id.*

[16] Joseph William Singer, *Original Acquisition of Property: From Conquests & Possession to Democracy & Equal Opportunity* 10 (Harvard Pub. Law Working Paper No. 10-28, 2010).

[17] *Id.* at 16.

[18] Kelo v. City of New London, 545 U.S. 469, 473-74 (2005).

> housing . . . . [T]here are thousands of units of housing which have been kept off the market in excess of six months. There are stalled developments in various stages of completion. In both cases, owners and developers are speculating on the eventual profitability of these empty units . . . . The units we describe in this report must be made available as affordable housing. Such action requires significant government involvement.[19]

RTTC-NYC is driving a campaign "to use eminent domain to benefit low-income communities by seizing vacant residential buildings and converting them into low-income housing."[20] Eminent domain conversion of entirely vacant luxury condominium buildings into low-income housing is constitutionally permitted under the public purpose rationales in *Midkiff* and *Kelo*.[21] Part II.A. of this note explains how the Takings Clause in the Fifth Amendment is applied in these two eminent domain precedents, noting the shift from a unanimous decision in *Midkiff* to a 5-4 split in *Kelo*.[22] Part II.B. explains the particular housing imbalance in New York City in the wake of overdriven gentrification. Part III.A. explains the RTTC-NYC findings and proposal. Part III.B. seats the proposal in the context of the Court's public purpose rationales, emphasizing that privatized low-income housing is valid public purpose. This note concludes that property seizure can be used to stabilize community residents where speculative development is displacing them. This strategy counter-intuitively illustrates that community activism is wise to harness expansive eminent domain that probably is not going away, especially if the alternative is to be steamrolled by it.

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[19] N.Y.C. CHAPTER OF THE RIGHT TO THE CITY ALLIANCE (RTTC-NYC), PEOPLE WITHOUT HOMES & HOMES WITHOUT PEOPLE: A COUNT OF VACANT CONDOS IN SELECT NYC NEIGHBORHOODS ii (2010), http://urbanjustice.org/pdf/publications/People_Without_Homes_and_Homes_Without_People.pdf [hereinafter HOMES WITHOUT PEOPLE]. "Right to the City is a national alliance of membership-based organizations and allies organizing to build a united response to gentrification and displacement in our cities. Our goal is to build a national urban movement for housing, education, health, racial justice and democracy." *What We Do*, Right to the City, http://www.righttothecity.org/what-we-do.html (last visited March 1, 2011). Right to the City articulates a list of normative values for which the organization stands, including "Land for People vs. Land for Speculation: The right to land and housing that is free from market speculation and that serves the interests of community building, sustainable economies, and cultural and political space." *Id.*

[20] HOMES WITHOUT PEOPLE, *supra* note 19 at 51 ("RTTC-NYC is calling on New York State to stop using eminent domain as an agent of gentrification in low-income communities; instead, the State must use this process for the public benefit of these communities as originally intended.").

[21] *See infra* Part III.B.

[22] Somin, *supra* note 12, at 2107-08.

II. BACKGROUND

A. *Takings Clause in the Fifth Amendment as applied in Midkiff and Kelo*

Application of the Takings Clause of the Fifth Amendment—the constitutional basis for eminent domain—requires a court to interpret both "public use" and "just compensation."[23] Just compensation is typically in the range of the fair market value of the seized property.[24] This requirement likely induces cities to take cheaper land in low-income areas.[25] But political will can overcome funding hurdles for ambitious and expensive projects. New London sold enough bonds to give $5.35 million to the New London Development Corporation for planning as well as to reserve an additional $10 million to create Fort Trumbull State Park.[26] Susette Kelo was paid $442,000 for her waterfront property.[27]

Money and motive are separate analyses. In *Midkiff*, the Court reasoned that "local legislators are "the main guardian[s] of the public needs to be served by social legislation."[28] Once the public purpose to be served is clear, they gauge how to roll out a social program.[29] That public purpose is unquestioned as long as it is not manifestly unreasonable.[30] Satisfying the public use requirement, then, is a matter of ends rather than means. Even if the legislation does not accomplish what the legislators intended, experimentation is consistent with good governance, and the Constitution only requires a rational basis for legislative confidence in the legislation's efficacy.[31] The effort does not have to bear fruit as long as it is sincere.

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[23] *Id.*

[24] Goodin, *supra* note 1, at 183; *see generally* Yun-chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City, 1990–2002*, 39 J. LEGAL STUD. 201, 204 (2010) (Just compensation is not an exact science: "[F]rom 1990 to 2002, New York City paid $17,311,176 in eminent domain settlements to 89 condemnees owning residential properties, whereas the sum of estimated fair market values of these 89 properties was $21,173,198, which is 23 percent higher than the settlement payment. Forty-seven (53 percent) of the 89 condemnees were compensated with less than fair market value, 36 condemnees (40 percent) received more than fair market value, and six condemnees (7 percent) got roughly fair market value. . . . [Thirty-six] condemnees (40 percent) received extreme compensation payments—that is, compensations that are higher than 150 percent or lower than 50 percent of fair market value.").

[25] *See* Goodin, *supra* note 1, at 201.

[26] Kelo v. City of New London, 545 U.S. 469, 473 (2005).

[27] Nelson, *supra* note 7.

[28] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239 (1984) (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)).

[29] *Id.* at 240 (quoting *Berman*, 348 U.S. at 33).

[30] *Id.* at 241 (quoting United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 680 (1896)).

[31] *Id.* at 242 (quoting W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-72 (1981)).

In *Kelo*, the Court painted the public interest broadly, remarking that "[t]he values [the public interest] represents are spiritual as well as physical, aesthetic as well as monetary."[32] With the same deference shown in *Midkiff*, the Court took the legislature at its word that the area it was taking was in economic decline to the point of needing institutional intervention on behalf of the community.[33] In his concurrence, Justice Kennedy directly called this deference "a rational-basis standard of review."[34] The Court described the narrow "use by the public" test—which limits takings to parks, roadways, and other publicly accessible projects—as an anachronistic interpretation that does not meet the needs of a dynamic society.[35] Instead, the Court "embraced the broader and more natural interpretation of public use as 'public purpose.'"[36] Public use, thus construed, did not block past government conveyance of land to a private party for redevelopment that included low-income housing development or mandatory title transfers from landlords to tenants, even with the result of those tenants suddenly becoming owners when they had no prospect of accomplishing the same previously.[37]

An important shift from *Midkiff* to *Kelo* was in the unity of the judgment—from unanimous to 5-4—but this split does not necessarily present a shift in the "judicial landscape on public use."[38] The issue in *Kelo* was new to the Court, which had not yet ruled on the constitutionality of economic development as a public purpose for takings.[39] The earlier-decided *Midkiff* considered the entirely separate issue of breaking up concentrated land ownership as a public purpose.[40] On that issue, Justice O'Connor agreed with the legislative presumption that "when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices the land market is malfunction-

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[32] Kelo v. City of New London, 545 U.S. 469, 481 (2005) (quoting *Berman*, 348 U.S. at 33).

[33] *Id.* at 483.

[34] *Id.* at 490 (Kennedy, J., concurring).

[35] *Id.* at 479 (majority opinion).

[36] *Id.* at 480.

[37] *Id.* at 480, 485 (referencing *Berman*, 348 U.S. 26 and Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984)).

[38] *Contra* Somin, *supra* note 12, at 2107-08 ("[T]he fact that four Justices not only dissented but actually concluded that the economic development rationale should be categorically forbidden shows that *the judicial landscape on public use has changed.* A fifth . . . signed on to the majority opinion, but also wrote a concurrence emphasizing that heightened scrutiny of eminent domain decisions should be applied in cases where there is evidence that a condemnation was undertaken as a result of 'impermissible favoritism' toward a private party. The fact that four (and possibly five) Justices had serious misgivings about the Court's ultra-deferential approach to public use issues is a major change from the unanimous endorsement of that very position in *Midkiff*.") (emphasis added).

[39] Kelo v. City of New London, 545 U.S. 469, 498 (2005) (O'Connor, J., dissenting).

[40] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984).

ing."[41] The Court accepted that the tying up of a real estate market is a public harm to be averted.[42] Thus, the Court visited different issues with these two seizure cases.

The concentrated land ownership at issue in *Midkiff* may not have been harming the public. Bishop Estate was the largest landowner in Hawaii before the seizure accomplished by the Hawaii Land Reform Act of 1967.[43] Bishop Estate was a charity that held the land in trust to generate funds for the education of indigenous Hawaiian children.[44] Tenants established long-term leases with the charity, and the charity held its tenants to below-market rate lease terms to make sure it did not abuse its landholding in the name of education.[45] This arrangement fell apart after the Court cleared the seizure of the land. The former tenants received land that was much more valuable than had been reflected in the rent they paid. In one description of the free market frenzy, tenants "gained a windfall and became instant millionaires as they sold their aging bungalows to Japanese buyers and rushed out to buy grander replacement homes for themselves."[46] Was it a public harm for tenants to be unable to flip the properties they lived in? Paying for the education of indigenous Hawaiian children through landholdings apparently constituted "artificial deterrents to the normal functioning of the State's residential land market."[47] From a free market perspective, the pent up value of the land was released—which is to say, the Hawaii Land Reform Act of 1967 actually freed the land rather than the tenants.

Under the Act, condominiums were exempt from the redistribution scheme because of the added complication of common areas.[48] Judicial approval of the Act, however, led to Honolulu's City Ordinance 91-95, which sought to seize and redistribute condominiums.[49] The mandatory conversion of condominium leaseholds into fee simple was enacted in 1991 over Honolulu Mayor Frank Fasi's withheld signature and the disapproval of four of nine City Council members.[50] The Supreme Court approved the law in 1998.[51] But condomini-

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[41] *Id.* at 242.

[42] *See id.*

[43] Eric Young & Kery Kamita, Comment, *Extending Land Reform to Leasehold Condominiums in Hawai'i*, 14 U. HAW. L. REV. 681, 682 (1992); HAW. REV. STAT. § 516 (1967).

[44] Gideon Kanner, Kelo v. New London*: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 212 (2006).

[45] *Id.*

[46] *Id.* at 214.

[47] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984).

[48] George Stott, *Leasehold Ownership of Condos*, OAHU UPDATE (The Stott Team, Kailua, Haw.) January-March 2008, *available at* http://stott.com/wp-content/uploads/2009/09/Q1_2008_Newsletter.pdf (last visited Nov. 24, 2010).

[49] *Id.*; REV. ORDINANCES HONOLULU § 38 (1991) (repealed 2004).

[50] Young & Kamita, *supra* note 43, at 681 n.4.

[51] Stott, *supra* note 48.

um seizure did not take on a popular meaning of releasing investment property.[52] Instead, it interfered with families' homes.[53] Hawaiian real estate lawyer George Stott explained:

> With houses, large estates such as Bishop Estate and Campbell Estate owned most of the underlying land. With condos, many were relatively small buildings owned by Hawaiian families. The underlying land often had been in the family for years. *Its potential loss created a huge emotional issue* . . . .
>
> When a flaw was discovered in the condo law making it non-applicable to most leasehold condos, the City facing ongoing pressure from the Hawaiian community . . . decided to negate City Ordinance 91-95.[54]

Thus, the interruption of generational residential stability that might have resulted from redistributed condominiums stirred lasting opposition in the community, but the interruption of educational security of Hawaiian children that resulted from the earlier Act did not.

Perhaps the apparent residential acceptance of the 1967 redistribution spoke more to the contours of political power than to the lack of an emotional issue at that time. For example, one state Senator opposed the first redistribution by claiming that the Bishop Estate land belonged to indigenous Hawaiians because the rental income was invested into the education of Hawaiian children.[55] The senator warned, unsuccessfully, that "[i]t would be a shame and disgrace for us here, who are really foreigners in Hawaii, to take from the Hawaiians what is justly theirs."[56] In the end, educational funding through Bishop Estate leaseholds fell to free market principles to benefit the public, while generational family homes on inherited plots were preserved to protect the public. This community-defined limit on market priming presaged the rift among the Justices in *Kelo* following *Midkiff*.

The basic *Midkiff* free-the-land rationale emerged from the *Kelo* dissent largely unopposed.[57] The *Kelo* dissent rested on a similar sentiment as Honolulu's reaction to condominium seizure—specifically, the importance of protecting property owners with a home rather than a loosely held investment.[58] Additionally, the dissent addressed the danger and reality of targeting poor

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[52] *Id.*

[53] *Id.*

[54] *Id.* (emphasis added).

[55] Debra Pogrund Stark, *How Do You Solve a Problem Like in* Kelo*?*, 40 J. MARSHALL L. REV. 609, 625 (2007).

[56] *Id.* (quoting DAN BOYLAN & MICHAEL T. HOLMES, JOHN A. BURNS: THE MAN AND HIS TIMES 201 (2000)).

[57] Kelo v. City of New London, 545 U.S. 469, 494-523 (2005) (O'Connor, J. and Thomas, J., dissenting).

[58] Ngai Pindell, *Fear and Loathing: Combating Speculation in Local Communities*, 39 U. MICH. J.L. REF. 543, 560 (2006).

populations to bear displacement.[59] It is misleading to say that "[i]n a stroke of poetic justice, Justice O'Connor had to eat [her] words in *Kelo*."[60] Rather than turn around her rationale, she differentiated *Midkiff* from *Kelo* by affirming her former "endorse[ment of] government intervention when private property use had veered to such an extreme that the public was suffering as a consequence."[61] Justice O'Connor had no quarrel with takings that sought to eliminate property uses that caused harm, but she disagreed with the condemnation in *Kelo* because it disrupted homes that had been a source of stability and not "the source of any social harm."[62] For example, Susette Kelo's co-petitioner sought to remain in a house that her family had lived in for more than one hundred years.[63] Those years included important family milestones such as her at-home birth in 1918 and her fresh start as a newlywed in 1946.[64] This generational element compares to the emotional issue of the Hawaiian condominium conversion because of the family's long tenure and the petitioner's gifting of the neighboring house to her son for his fresh start as a newlywed.[65] Justice O'Connor seems to have felt that protection of the real estate market was implicated in *Midkiff* while protection of homes was implicated here.

In his complementary *Kelo* dissent, Justice Thomas took issue with disrupted homes as well when he argued that "no [just] compensation is possible for the subjective value of [seized] lands to the individuals displaced and the indignity inflicted . . . ."[66] He argued to subordinate "even public necessity to the sacred and inviolable rights of private property."[67] He cautioned against the distinct social harm of expansive eminent domain as a tool for developers and employ-

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[59] *Id.*

[60] Gideon Kanner, Kelo v. New London: *Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 214 n.60 (2006). Kanner is "co-author of the amicus curiae brief filed in the U.S. Supreme Court in *Kelo v. New London* in support of petitioners Suzette [sic] Kelo et al., on behalf of the American Farm Bureau Federation." *Id.* at 201. When Justice O'Connor, who authored the *Midkiff* opinion, revised her dicta regarding the police powers and public use to cancel their equation, she wrote that such language was peripheral to the holding anyway. Kelo v. City of New London, 545 U.S. 469, 501 (2005) (O'Connor, J., dissenting).

[61] *Kelo*, 545 U.S. at 504.

[62] *Id.* at 500-01.

[63] *Id.* at 494.

[64] *Id.*

[65] *Id.* at 494-95.

[66] *Id.* at 521. Constitutionally speaking, the fair market value of the property is accepted as just compensation without reference to subjective value. Chang, *supra* note 24, at 212. The implication of Justice Thomas's statement, though, is that the subjective value of a home is presumably much greater than the subjective value of property intended to be flipped for profit, such that the loss of a home is a more profound loss than that of a loosely held investment.

[67] *Id.* at 505 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 135 (Univ. of Chicago Press, 1979) (1765)).

ers against weak populations.[68] He did not dissect *Midkiff* in his argument, but rather focused on "the text, history, and structure" of the Public Use Clause standing alone.[69] Thus, the free-the-land rationale inherited from *Midkiff* was not directly questioned.

The Court is concerned with both robust real estate markets and the sanctity of private homes. The RTTC-NYC report clarifies the current New York City situation of an overdriven, seemingly robust real estate market, which interferes with the sanctity of private homes and creates social harm for weak players.[70] In such a case, the free market interacts with individual property rights at cross-purposes. Eminent domain conversion of entirely vacant luxury condominium buildings into low-income housing is one way to balance those interests. This proposal constitutes a novel analysis that the Court has yet to address.

B. *Housing imbalance in New York City in the wake of overdriven gentrification*

Gentrification is "the restoration and upgrading of a deteriorated or aging urban neighborhood by middle-class or affluent persons, resulting in increased property values and often in displacement of lower-income residents."[71] Revitalization is an upgrade that is intended to benefit the actual community residents rather than a new set of community residents moving in to take their place.[72] But as Susette Kelo experienced when her well-maintained house was swept up in a ninety-acre land grab intended to create jobs and revenue, revitalization can result in displacement just like gentrification.[73] Gentrification is distinct from Susette Kelo's experience in that it links the displacement to low-

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[68] *Id.* at 522 (Thomas, J., dissenting) ("It encourages 'those citizens with disproportionate influence and power in the political process, including large corporations and development firms" to victimize the weak.") (quoting *Id.* at 505 (O'Connor, J., dissenting))).

[69] *Id.* at 523 (Thomas, J., dissenting).

[70] *See infra* text accompanying note 88.

[71] Isis Fernandez, Note, *Let's Stop Cheering and Let's Get Practical: Reaching a Balanced Gentrification Agenda*, 12 GEO. J. ON POVERTY L. & POL'Y 409, 412 (2005) (quoting BLACK'S LAW DICTIONARY 695 (7th ed. 1999)).

[72] *See id.* at 415 ("Revitalization can be defined as 'the process of enhancing the physical, commercial and social components of neighborhoods and the future prospects of its residents through private sector and/or public sector efforts,' with the implication that the social services resulting from the revitalization are shared by the original residents. However, their displacement (and the magnitude of it) calls into question whether gentrification is in fact synonymous with revitalization.") (quoting MAUREEN KENNEDY & PAUL LEONARD, THE BROOKINGS INST. CTR. ON URB. & METRO. POL'Y, DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES 6 (2001), *available at* http://www.brookings.edu/~/media/Files/rc/reports/2001/04metropolitanpolicy_maureen%20kennedy%20and%20paul%20leonard/gentrification.pdf) (last visited Oct. 1, 2011)).

[73] *See* Kelo v. City of New London, 545 U.S. 469, 474-75 (2005).

income housing loss throughout the neighborhood.[74] The original residents of a gentrifying neighborhood lose available housing to new higher-income residents who are able to pay more for housing than the original residents.[75] Then the cost of services and supplies in the neighborhood increases incrementally as local businesses respond to the greater purchasing power of the new residents.[76]

Proponents of gentrification point to higher property values increasing the tax base, which improves the funding of services and the infrastructure.[77] Critics point to the breakdown in social networks and the neighborhood's changed character from the displacement of original residents, such that these residents do not experience the benefits of the improvement even though they bear its burdens.[78] When the supply of luxury housing outpaces the demand of higher-income residents moving into a gentrified area, displaced residents leave behind a surplus of unaffordable housing. Housing developers cause this surplus by responding not only to housing demand but also to the gentrification process itself, with "a greater number of optimistic, bullish speculators enter[ing] the market putting upward pressure on asset prices."[79] Developers may inefficiently press a neighborhood for more housing dollars than the neighborhood is able to give them. In other words, speculation has the potential to create an investor frenzy, where developers place too much confidence in competitors who are directing money to a particular real estate market.[80] The developer thinks, inaccurately, that the glut of luxury housing is in demand at premium prices.[81] A developer's ability to rely on the market for production and pricing breaks down as "upward price pressure departs from the average price expectation of the market, which may be a more accurate reflection of true asset value than speculative expectations."[82] When developers are tied up with housing that is too expensive to sell and affordable housing for the neighborhood disappears, gentrification has run its course and has ended with a socially harmful housing imbalance.

Gentrification picks up speed along a continuum, from incidental to official policy to, finally, overdrive. Overdriven gentrification may be more apparent

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[74] *See* Fernandez, *supra* note 71, at 416-17. This discussion of gentrification and revitalization is not intended to discredit them completely since, as a practical matter, they will continue to be overlapping policies pursued by municipalities. The question is whether the externalities constitute a social harm that can trigger institutional intervention on behalf of the gentrified or revitalized community to remedy that harm.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 414.

[78] *Id.* at 415.

[79] Pindell, *supra* note 58, at 557.

[80] *See id.* at 555.

[81] *See id.* at 556.

[82] *Id.* at 557.

ex ante, but when it does happen, gentrification critics have a strong case for the harm outweighing the benefit. New York City, under Mayor Michael Bloomberg since 2001, moved along this continuum from gentrification as official policy to gentrification in overdrive in an effort to accommodate the flush of wealth from the mortgage bubble.[83] New wealth, and new wealthy residents, attracted a boom in real estate investor confidence that spread from Lower Manhattan to the "formerly fringe working-class neighborhoods [of] Bushwick, Crown Heights, [and] East Harlem."[84] The New York City government accommodated investor speculation by rezoning industrial areas into residential development areas.[85] The rising property values left the poorest two-fifths of the city residents with restricted or nonexistent housing options because close to 60,000 apartments per year jumped out of their price range.[86]

Alyssa Katz is a New York City journalist and community organizer with the Pratt Center for Community Development.[87] She described the speculative blitz of developers, banks, and investors on original residences, which RTTC-NYC documented through its count of vacant luxury condominiums:

> Developers' speculative fever *far outstripped any real demand* for the real estate they were building or acquiring. [RTTC-NYC] . . . counted more than 600 incomplete or largely empty condominium buildings, some with units priced at more than many longtime residents of these communities could hope to earn in a lifetime. In Bushwick, Brooklyn, where over one-quarter of households fall below the poverty line, apartments in one 15-unit building have been on sale for more than a year at over $500,000 each. Only one has found a buyer. In Chinatown, where the median household income is $36,538, all 13 apartments in one condo were on offer for an average $1.3 million. In Harlem, a new building with pads priced at $1.47 million sat vacant.[88]

The housing imbalance stems not from too much housing, but from too much luxury housing at unrealistically high prices. Presumably, developers now know that the New York City real estate market cannot sustain more luxury units. But the stalled real estate market is not giving developers feedback re-

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[83] Alyssa Katz, *Gentrification Hangover*, THE AMERICAN PROSPECT (Jan. 6, 2010), http://prospect.org/article/gentrification-hangover-0 (last visited Oct. 1, 2011).

[84] *Id.*

[85] *Id.*

[86] *Id.* ("The new Housing Asset Renewal Program [that gives developers cash for offering affordable units voluntarily] won't change that trend, because it's aimed at households making up to $126,000 a year. Advocates like Right to the City want to see more housing for those earning less than half of the median household income in the New York area ($70,900 for a family of four), even if that means yielding fewer apartments.").

[87] Alyssa Katz, About the Author, http://alyssakatz.com/about-the-author (last visited Oct. 1, 2011).

[88] Katz, *supra* note 83 (emphasis added).

garding what types of housing the market actually can sustain, and at what selling prices.

This stalled real estate market is in fact a distorted real estate market. The overlay of investor speculation on housing demand can lure developers into overproducing and overpricing luxury housing until deep disruption of neighborhood stability hurts everyone with continuing interests in the real estate:

> New York's post-gentrification cautionary tale . . . [includes] a former mint factory . . . [that] was subsidized housing for artists until a private-equity firm bought the 42-unit building for $6.6 million and went to court to force residents' eviction. Those who held out faced faltering maintenance and security, then open threats of lawsuits. Once the tenants were cleared, the owner flipped the former factory and an adjoining lot to a condo developer for nearly $20 million, with the help of a $9.8 million investment from [American International Group]. In 2008, the Brooklyn apartments went on sale for a high of $1,100 a square foot. A year later, it is a derelict site of torn tarps, rusting scaffolding, and boarded-up windows.[89]

The irony of the latter development is the lack of an improved structure for the developer to hold onto while hoping for a revived market. Brooklyn exchanged functional infrastructure for deserted, devalued, and dangerous infrastructure. The artists who were forced out of their housing with threats of litigation presumably could not relocate into luxury housing vacancies since their original rentals were subsidized. Their displacement may have meant leaving the neighborhood, crowding more individuals into less space, or joining the close to 40,000 individuals in the limbo of homeless shelters.[90] As for many other luxury developments that have not fallen into disrepair like the artists' former housing, they are beautiful ghost towns.[91]

This speculative fallout is amplified by a persistent, nationwide affordable housing shortage, in which the housing market provides only enough affordable, available, and ready-to-move-in rentals for households earning above eighty-nine percent of the area median income.[92] The ratio of such rentals to the total number of households has not changed appreciably in over twenty years.[93] Available affordable housing is a moving target because 2,000 affordable units disappear monthly, according to the Fannie Mae Foundation.[94] This trend actually fuels speculation because forty-five percent of the disappearance

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[89] *Id.*

[90] *See supra* text accompanying note 19.

[91] *See* Katz, *supra* note 83.

[92] David A. Vandenbroucke, *Is There Enough Housing to Go Around?*, 9 CITYSCAPE: J. POL'Y DEV. & RES. 175, 176 (2007).

[93] *Id.*

[94] Matthew J. Parlow, *Unintended Consequences: Eminent Domain and Affordable Housing*, 46 SANTA CLARA L. REV. 841, 848 (2006).

is attributable to units that were formerly insulated from market pressures but have had their titles cleared for market competition.[95] According to polling by the National Association of Realtors (NAR) in 2003, urban residents perceived affordable housing to be the top concern in five of the ten most populous cites in the United States—Boston, Los Angeles, New York, Philadelphia, and Washington, D.C.[96] The national public as a whole ranks the concern for affordable housing equally with health care, and finds affording housing only slightly less disconcerting than unemployment.[97] NAR polling found that more than eighty percent of people surveyed were willing to have more affordable housing available if it "fit with the area and [was] pleasant to look at."[98] More than sixty percent surveyed were willing to have affordable housing next door to their own homes.[99] Almost seventy percent of people surveyed agreed "it would be important to them if a candidate for elected office worked to make area housing more affordable."[100]

The background housing shortage means that residents who are priced out by speculation cannot resettle easily. Bridgette Scott is a New York City Head Start teacher and the vice president of her tenant association.[101] Her frustration is likely shared in urban areas across the United States: "People want decent neighbors and affordable homes to live in . . . . Where are they supposed to go—down South? New Jersey? The Bronx? They're fixing that up, too!"[102] The average price of urban housing is beyond the earning power of many traditional working-class service providers—including schoolteachers, firefighters, police officers, and nurses.[103] Upward pressure on prices makes difficult situations even worse. The long commutes or overcrowded housing that displaced service providers face can lead to them leaving the community.[104] Their necessary roles become harder to fill as the cost of living deters new schoolteachers, firefighters, police officers, and nurses from moving into the area.[105]

The National Low Income Housing Coalition developed an analytical measure called the Housing Wage to understand how much an individual needs to

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[95] *See id.*

[96] Robert E. Lang, Katrin B. Anacker & Steven Hornburg, *The New Politics of Affordable Housing*, 19 HOUS. POL'Y DEBATE 231, 236 (2008), *available* at http://www.tandfonline.com/doi/pdf/10.1080/10511482.2008.9521633.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 238.

[100] *Id.*

[101] Katz, *supra* note 83.

[102] *Id.*

[103] Michael R. Diamond, *The Meaning and Nature of Property: Homeownership and Shared Equity in the Context of Poverty*, 29 ST. LOUIS U. PUB. L. REV. 85, 104 (2009).

[104] Pindell, *supra* note 58, at 549.

[105] *Id.*

earn to actually afford affordable housing.[106] The Housing Wage is a measure of what an individual would have to earn hourly, through a full-time, year-round job, to cover the U.S. Department of Housing and Urban Development (HUD) estimate for the Fair Market Rent (FMR) of an apartment without losing more than thirty percent of those earnings to housing costs.[107] For 2010, an individual could secure a two-bedroom rental unit for a national average FMR of $959 a month, setting the Housing Wage at $18.44, or $38,360 over the year.[108] In twenty-eight states, achieving the Housing Wage would require an individual to work "more than two full-time minimum wage jobs . . . ."[109] As the cost of housing outpaces the income of area residents, the strain of affording it increases, and the available units become increasingly mismatched with the neighborhood.

Manhattan's Lower East Side is said to have "resembled the 'Wild Wild West' [before] . . . the gentrifiers made positive contributions by helping to clean it up."[110] It is among the seven neighborhoods that RTTC-NYC surveyed for vacant luxury condominiums.[111] Ironically, it is an example of overdriven gentrification today while also being home to First Houses, which is the first public housing development in the United States.[112] Demand was high at its opening in 1935, with 3,300 applications submitted to the New York City Housing Authority for only 122 units.[113] Working-class service providers were early occupants of the housing.[114] Sixty years later in 1995, the 184,000 public housing units across New York City carried a waitlist of 150,000 families.[115] The president of the First Houses tenants association could still point to high demand—she had waited sixteen years to get into First Houses.[116] Families

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[106] Nat'l Low Income Hous. Coal., *Out of Reach 2010: Renters in the Great Recession, the Crisis Continues*, 5-6 (2010), http://www.nlihc.org/oor/oor2010/oor2010pub.pdf.

[107] *Id.* at 6.

[108] *Id.*

[109] *Id.* at 7 ("Box 3: State-Level Findings").

[110] Fernandez, *supra* note 71, at 415.

[111] HOMES WITHOUT PEOPLE, *supra* note 19, at III. The six surveyed neighborhoods are Downtown Brooklyn; the Lower East Side; Harlem; Bushwick, Brooklyn; the South Bronx; the West Village; and Chelsea.

[112] *See* Christopher Gray, *Streetscapes/Public Housing; In the Beginning, New York Created First Houses*, N.Y.TIMES, Sept. 24, 1995, http://www.nytimes.com/1995/09/24/real estate/streetscapes-public-housing-in-the-beginning-new-york-created-first-houses.html?pagewanted=all. First Houses opened with its own biases: "Interviewers carefully screened out those families who they felt were too poor, too rich, too big, too small, too lazy and too dirty. May Lumsden, who was in charge of the screening, wrote in the magazine Survey Graphic in 1936 that she got only 'the very finest types' for tenants." *Id.*

[113] *Id.*

[114] *Id.* (identifying barbers, taxi drivers, and garment workers as tenants).

[115] *Id.*

[116] *Id.*

waiting on the extensive waitlists for public housing are not filling the waitlist-free luxury developments.

New York City used eminent domain to establish First Houses, resulting in a New York State precedent of allowing seizure for the public use of low-income housing.[117] In *New York City Housing Authority v. Muller*, the New York State Court of Appeals indicated bias against the poor in its description of low-income housing: "the essential purpose . . . [was] to protect and safeguard the entire public from the menace of the slums."[118] Bias aside, the court incorporated sound legislative findings of fact in its decision to allow municipal intervention through eminent domain: "improper planning . . . [and lack of] an adequate supply of decent, safe, and sanitary dwelling accommodations for persons of low income . . . [which] *impair economic values . . . [and] cannot be remedied by the ordinary operation of private enterprise*."[119] Overdriven gentrification today has worsened the problems of inadequate low-income housing and real estate market distortion.

III. ARGUMENT

A. *RTTC-NYC findings and proposal*

Local governments do not want to chill investment under their watch. Investor speculation in housing is subject to limited legal restraint through the tax code, which taxes real estate sales differentially depending on how long the real estate was held by the seller and whether it was a primary home or an additional investment holding.[120] Municipalities typically do not want to restrain speculation further because they want the benefits of employment and capital from investment.[121] According to property and local government law professor Ngai Pindell, local legislators resisting restraint of speculation may be guarding against: 1) litigation tying up innovation; 2) political backlash for stampeding individual property rights; 3) disruption of outside investment to raise property values and, in turn, property taxes; and 4) overly broad legislation that interferes with healthy investment, which might be hard to sort from speculation since housing prices can rise for various reasons aside from speculation.[122] Without government intervention, investment chills when speculation has run its course and developers are overstocked with luxury housing that will not sell at the expected premium prices.[123] Three important groups would benefit from government intervention if speculation has run its course: 1) residents seeking to remain in, or move into, affordable housing; 2) developers seeking to clear

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[117] N. Y. City Hous. Auth. v. Muller, 1 N.E.2d 153 (N.Y. 1936).

[118] *Id.* at 156.

[119] *Id.* at 154 (emphasis added).

[120] Pindell, *supra* note 58, at 549.

[121] *See supra* text accompanying note 77.

[122] Pindell, *supra* note 58, at 545-546.

[123] *See supra* text accompanying note 88.

the liabilities of outdated investments to reinvest more accurately; and 3) local governments protecting affordable housing and community investment.

In the New York City context, the RTTC-NYC proposal seeks "to simultaneously increase the amount of affordable housing available to low-income families as well as combat the negative impacts of Mayor Bloomberg's economic development policies, such as the proliferation of [too much] luxury development . . . ."[124] The proposal incorporates data about luxury condominium vacancies and stalled developments collected by members of the affected neighborhoods.[125] John Tyus, a neighborhood surveyor for RTTC-NYC, partnered with Families United for Racial and Economic Equality.[126] He questioned whether investor speculation produced the housing that New York City needs: "39,000 people living in homeless shelters . . . doesn't make sense. The boom is over."[127] RTTC-NYC wants to address the socially harmful housing imbalance in these neighborhoods: "in times of economic prosperity, luxury housing gentrifies neighborhoods and displaces families; in times of economic turmoil, these same buildings are unable to sell their units, creating ghost towns in communities with clear housing needs."[128] RTTC-NYC's solution is for New York City to use eminent domain to convert entirely vacant luxury condominium buildings into low-income housing.[129]

RTTC-NYC found extensive vacancies in new luxury developments, which did not match the financial capacities of neighborhood residents.[130] Neighborhood surveyors found 4,092 vacant units in 264 residential buildings that are ready for residents but unable to attract them.[131] RTTC-NYC identified $1,894,201 as the average price for a local luxury condominium, $3,798 as the average monthly rent for the same, and only $35,744 as the average annual income for the families in the low-income neighborhoods where the speculation occurred.[132] These figures show that the new luxury developments are beyond the reach of neighborhood residents who are in need of housing. As a result, the units drop out of the real estate market when developers unsurprisingly cannot find buyers at inflated offering prices. For example, when the proposal

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[124] HOMES WITHOUT PEOPLE, *supra* note 19, at 1.

[125] *Id.*

[126] Katz, *supra* note 83.

[127] *Id.*

[128] HOMES WITHOUT PEOPLE, *supra* note 19, at 45.

[129] *See supra* text accompanying note 20.

[130] HOMES WITHOUT PEOPLE, *supra* note 19, at 1.

[131] *Id.*, at 5. Recognizing the value of this information for policy makers, City Council Member Melissa Mark Viverito introduced a Housing Not Warehousing bill "to create an annual, city-run count of all vacant properties and lots in New York City." *Id.* at 55. RTTC-NYC supports this effort as well as additional legislation establishing a mandatory registry for owners of vacant units and lots, with a registration fee raise funds for cost associated with takings for low-income housing (presumably including just compensation). *Id.*

[132] HOMES WITHOUT PEOPLE, *supra* note 19, at 6.

was published in 2010, ninety-four vacant or partially vacant residential buildings featured condominiums without buyers after an average of 418 days of online advertising.[133] At the same time, the real estate market was still struggling to incorporate this information to decrease production, with 186 additional elite residential buildings under construction, contemplating at least 3,267 new units for phantom wealthy people.[134] While the New York State Court of Appeals cited impaired economic values due to slum conditions when it approved the creation of First Houses, current speculation has resulted in impaired economic values in the opposite direction.[135] Enabling the construction of First Houses was an appropriate government intervention when the market impairment "[could] not be remedied by the ordinary operation of private enterprise."[136] The speculation causing market impairment here is even less likely to be remediated by the free market since the free market continues to drive it.

Holding speculative investors in housing accountable when they have pressed the real estate market too hard can improve the risk assessment involved in their investment decisions.[137] If certain investors rely on certain neighborhoods for a return on their investment, then those neighborhoods should be able to rely on those investors as partners in the upkeep of an accurately functioning real estate market. Clean up of speculative fallout can be characterized as part of the cost of business. This feedback can contribute to "correcting the market distortions associated with speculative investment on supply and demand signals in the housing market."[138] Eminent domain loss of housing product in exchange for just compensation is simply a sale at an accurate price, instead of an inflated premium price based on market distortion. Developers would have to sell at negotiated prices that reflect the area median income of the neighborhood, immediately injecting a meaningful price corrective into the real estate market such that future developments will feature units at prices that the market can bear. Essentially, forced sales enlist overproducers of luxury developments in the rehabilitative community service of affordable housing provision.

The problem of housing imbalance will continue to harm the public as long as it is left to solve itself. For example, 138 of the vacant or partially vacant elite residential buildings have not paid property, water or sewer taxes for over a year, which means that New York City is weathering a recession with $3,797,690 in unpaid taxes from developers who are using the city as a creditor.[139] New York City is unable to access these funds for residents who cannot

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[133] *Id.* at 7.

[134] *Id.*

[135] *See supra* text accompanying note 119.

[136] *Id.*

[137] *See generally* Pindell, *supra* note 58, at 555-56 ("Speculation may not be an efficient market phenomenon.").

[138] *Id.* at 555.

[139] HOMES WITHOUT PEOPLE, *supra* note 19, at 8. Beyond the scope of this paper,

afford the inflated housing prices caused by overdriven gentrification. The unpaid taxes are equivalent to the cost of subsidizing 845 families in public housing or, alternatively, the cost of subsidizing 450 families with vouchers in private housing.[140] As aforementioned, New York City homeless shelters accommodate almost 40,000 individuals, of which 10,000 are families and children.[141] More than 500,000 New York City households pay over half of their income in housing costs, which means that these individuals and families are housed but their housing stability is tenuous.[142] Neighborhood residents shoulder development risk that they did not choose to take on while investors receive no corrective feedback to make better investment decisions. Developers that hold onto vacant luxury developments compound externalized harm and reap no present benefit. Taking vacant luxury developments to benefit neighborhoods would counteract the externalized harm of irresponsible speculation.

B. *Privatized low-income housing is valid public purpose*

Two aspects of the RTTC-NYC proposal are particularly relevant for establishing the constitutional public purpose of seizure. First, the proposal specifies that every converted unit should become low-income housing, with each household paying twenty-five percent of its income or less and half of the units set aside for extremely low-income households on public assistance or making under $22,000 per year.[143] If all of the converted units were to be devoted to low-income housing, then a public purpose would be established according to *Kelo*, which listed low-income housing among approved public purposes.[144] Conversion would produce the benefit of affordable housing and would remove the harmful use of mismatched housing at the same time. The Court gave deference to legislative determinations of distressed areas that would be amenable to eminent domain.[145] That deference would be applicable even if the area were counter-intuitively a luxury development. The legislature only has to have a rational basis for believing that conversion would address public welfare concerns, such as low-income affordable housing disappearance and resident displacement due to overdriven gentrification.[146] Just compensation could be determined by a corrective, affordable fair market value rather than by the inflated premium price, which disabled the market's ability to clear the units.[147]

RTTC-NYC recognizes tax foreclosure as another avenue for city action in parallel with eminent domain. *Id.* at 50.

[140] *Id.* at 8.

[141] *Id.* at ii.

[142] *Id.*

[143] HOMES WITHOUT PEOPLE, *supra* note 19, at 47.

[144] See *supra* text accompanying note 37.

[145] See *supra* text accompanying note 28.

[146] See *supra* text accompanying note 31.

[147] *See supra* text accompanying notes 137-138.

Second, the proposal specifies that the converted units must remain permanently affordable and insulated from speculative pressures.[148] The objective is to establish stable housing stock that would not be vulnerable to price runs in a future speculative wave, preferably through a nonprofit community land trust (CLT).[149] Then investment speculation in housing would have a counterbalance to inform the market about realistic offering prices that the market can bear. Additionally, a network of nonvolatile real estate would promote neighborhood stability by preserving housing options for displaced residents. If low-income housing is owned or managed privately rather than publicly, the housing could still qualify as serving a public purpose since any private benefit would be incidental to the public benefit.[150]

A CLT would ensure that the public benefit from the RTTC-NYC proposal would remain even after vacancies are filled. The basic function of a CLT is to control equity windfalls for owners by controlling the terms of sale—either by buying back the unit when the owner sells or by requiring that the buyer's income be below a specified threshold.[151] A CLT is based on shared equity, where the appreciation of the real estate remains with the CLT to be shared by current and future owners while they are part of the CLT.[152] The public buys the residential building when it pays just compensation, and though the CLT is a private entity receiving the residential building, the public retains the benefits of shared equity and housing availability because low-income residents will always have that building as a stable community resource.[153] When a CLT owner sells, a non-windfall portion of equity specified in the original purchase agreement is that owner's portion.[154] The next owner agrees to the same shared equity terms.[155] The effect of this arrangement is that while no purchaser would want to buy into a CLT for real estate investment, many would want to buy into a CLT for housing stability. The families moving into the converted units would forgo the private benefit of building investment equity to gain protection from overdriven gentrification.

In *Midkiff*, Justice O'Connor approved the public purpose of jumpstarting a stalled real estate market, explaining: "when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices the land market is malfunctioning."[156] A robust real estate market is such an important end that the Court allowed forced transfers of titles from landlords to tenants

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[148] HOMES WITHOUT PEOPLE, *supra* note 19, at 47.

[149] *Id.* at 47, 53.

[150] *See supra* text accompanying notes 4-5.

[151] *See* HOMES WITHOUT PEOPLE, *supra* note 19, at 53.

[152] Diamond, *supra* note 103, at 102.

[153] *See generally id.*, at 102-03.

[154] *Id.*

[155] *Id.*

[156] *See supra* text accompanying note 41.

without any resale restrictions.[157] Equity became available to these tenants as a windfall.[158] Market distortion from uncontrolled speculation in New York City has interrupted market functionality. Eminent domain of surplus luxury housing for a CLT can clear the market by getting people into empty housing and fairly compensating holdout developers. Removal of barriers to participation in the market can also restore market function. Justice Stevens explained in *Kelo* that the Court previously "accepted Congress' [public] purpose of eliminating a 'significant barrier to entry in the pesticide market.'"[159] Low-income housing is similarly an entry in the real estate market. Loss of low-income housing restricts market participation for displaced residents, individuals and families in homeless shelters, and any household attempting to meet basic housing needs at an affordable price.

In his *Kelo* dissent, Justice Thomas was concerned with eminent domain abuse that causes displacement from homes and victimizes poor populations.[160] RTTC-NYC actually proposes use of eminent domain to curb real estate investment abuse that causes displacement from homes and victimizes poor populations.[161] Competition as a free market principle is as much about the extent of a household's tenure stability in a neighborhood as it is about the extent of and investor's return from a development. These diverse interests coexist in a robust real estate market, whether symbiotically or in tension. Professor Pindell described the tenure competition that is particularly prevalent in cities:

> The city is a place in which diverse groups, distinguished by income, race, or other characteristics, engage in a competition for space. For some, efforts within the competition are focused on *excluding* certain populations. Suburban communities incorporate to separate themselves from cities; some individuals live within the protections of gated communities, and some localities engage in zoning practices designed to limit housing opportunities for low-income individuals. For others, the struggle centers on gaining *inclusion* to areas and amenities previously unobtainable. Within this latter group, these residents of the city seek to reclaim vacant houses in decaying neighborhoods. They seek affordable rental and ownership opportunities in communities, or resist displacement in gentrifying neighborhoods. . . . They seek creative ways to occupy the city . . . .[162]

In the competitive exchange over what characteristics will define a neighborhood and how inclusive the neighborhood will be, low-income earners have

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[157] *See supra* text accompanying note 46.

[158] *See id.*

[159] Kelo, v. City of New London 545 U.S. 469, 485 (2005) (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984)).

[160] *See supra* text accompanying note 68.

[161] *See supra* text accompanying notes 19-20 and 88-89.

[162] Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and in the United States*, 39 VAND. J. TRANSNAT'L L. 435, 438 (2006).

claims to the city and its real estate along with capital-enriched investors. Providing low-income housing would soften the blow of gentrification and give low-income earners a place to call home.

There is no constitutional requirement to follow up on a taking to see if it accomplished what it intended to accomplish.[163] The New London taking failed to produce "3,169 new jobs and $1.2 million a year in tax revenues."[164] But the effort was hurt by the changed circumstance of the redeveloper's lack of financing.[165] Reducing the time between taking the real estate and the completing the plan can guard the plan against changed circumstances. For example, in 1952 Los Angeles seized and leveled Chavez Ravine with the promise of building affordable housing in its place for the displaced residents.[166] Then a new mayor was elected in 1953.[167] The new mayor promised the Brooklyn Dodgers a new stadium if they moved to Los Angeles.[168] The stadium was built right where the affordable housing was intended to stand, and Los Angeles abandoned the original purpose for which Chavez Ravine was seized.[169] The RTTC-NYC proposal, unlike the original Chavez Ravine promise, would efficiently match low-income earners in need of housing with ready-to-move-in or soon-to-be-ready units.[170] A quick turnaround would increase the likeliness that eminent domain for low-income housing would result in low-income housing. And low-income residents would have an improved ability to participate with investors and developers in the determination of neighborhood character.

IV. CONCLUSION

Despite popular opposition to expansive eminent domain since *Kelo*, there has not been an appreciable decrease in that sovereign power. RTTC-NYC wants to harness eminent domain for neighborhood stabilization when overdriven gentrification has caused neighborhood disruption. Correcting real estate market distortion from overdriven gentrification and providing low-income housing for displaced residents are both valid public purposes. The financial interests of investors and developers can be tied to the stability interests of neighborhood residents if municipalities introduce forced sales of persistently vacant luxury housing at fair prices that correct market distortion. Whether eminent domain conversion of vacant luxury condominiums into low-income

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[163] *See supra* text accompanying notes 31.

[164] *See supra* text accompanying note 8.

[165] *See supra* text accompanying note 7.

[166] Matthew J. Parlow, *Unintended Consequences: Eminent Domain and Affordable Housing*, 46 SANTA CLARA L. REV. 841, 844 (2006).

[167] *Id.*

[168] *Id.*

[169] *Id.* at 844-45.

[170] *See supra* text accompanying note 19.

housing is politically feasible is beyond the scope of this note.[171] But this note demonstrates that the RTTC-NYC proposal is legally feasible. Implementing the proposal would mitigate speculative bubbles and encourage sustainable housing development.

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[171] *See generally* Robert E. Lang, Katrin B. Anacker & Steven Hornburg, *The New Politics of Affordable Housing*, 19 HOUS. POL'Y DEBATE 231, 242-43 (2008) ("[M]ost housing news is . . . the standard 'poor people cannot find housing' stories. To those concerned with housing, such stories are compelling and represent a national shame . . . [but] these stories fail to gain political traction unless they are truly extreme. . . . [A]dvocates need to find creative ways to piggyback their concerns onto sellable and vivid accounts of how people who are relatively well off are struggling to afford housing . . . ."). A municipality can connect affordable, family-friendly housing to the image it wants to project. *See* Parlow, *supra* note 166, at 855 (quoting Matthew J. Parlow, *Publicly Financed Sports Facilities: Are They Economically Justifiable?*, 10 U. MIAMI BUS. L. REV. 483, 489-90 (2002)) ("To the degree that [some] cities are not so financially constrained and can use their land use and eminent domain powers for purposes other than tax revenue generation, they often use such powers to raise their profile or reputation. Such [cities] improve their image and visibility by, for example, drawing a major employer to the area or by building a new sports facility to garner the image or label of a 'major league city.'").