

## NOTES

### Who Bears the Cost?: The Public Use Requirement in Failed Economic Development Projects

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#### ABSTRACT

*The Supreme Court's expansion of the public use doctrine authorizes takings for economic development and permits the transfer of private property from individuals to private developers. Because the judiciary defers to the legislature on determinations of public use, courts fail to intervene even when individuals are displaced to enable highly speculative or infeasible urban development projects. To prevent the needless displacement of individuals, courts should employ a four-factor feasibility assessment before permitting the use of eminent domain for economic development projects, and the legislature should grant a right of first refusal to prior owners and require community approval prior to permitting local governments to exercise eminent domain.*

*This Note explores the significant harm that results from failed urban development projects and suggests three key responses for the judiciary and the legislature. First, the Note provides a brief overview of the expansion of the public use requirement of the Takings Clause of the Fifth Amendment. Second, the Note presents case studies of 12 cases across ten states that demonstrate the pervasiveness and severity of the problem and provides an in-depth examination of two communities, New London and Poletown. Finally, the Note examines potential accountability mechanisms the legal system should leverage to shift the burden of failed urban development projects from individuals and communities to developers.*

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### I. INTRODUCTION

Picture this—a community faces economic decline. The local government is desperate to bring jobs to the area. A developer comes to the city council with a seemingly perfect proposal. The proposed project will create office space for a national company's headquarters, provide temporary construction jobs, and draw other businesses to the area. There is just one catch: the project requires demolishing the homes of hundreds of community members. The developer purchases some homes from willing owners, but a group of homeowners refuses to sell. A judge permits the city to seize the remaining private homes and transfer ownership to the developer. Elderly homeowners whose only wish was to die in the homes where they raised their children are forced to move. Parents who bought their homes to raise their children in the neighborhood are forced to uproot from their homes and school districts.

The developer razes the homes in preparation for construction to begin. Then, the national company decides not to relocate their headquarters. The developer had not signed a contract with the company, so there is no legal recourse, and the developer fails to find another company willing to locate their operations in the town. Instead of office space, the community now has vacant land. The land may remain vacant for a decade (or longer). Those elderly people who could have lived out the remainder of their lives in their homes were forced to move, and children who were babies at the time of displacement could have spent their entire childhood and adolescent life in their homes and neighborhoods. Families were uprooted for a vacant lot, exacerbating the town's declining economy. The community bears the costs of the developer pulling out of the deal because courts have chosen not to distribute any of the burden of failure to developers in the law of eminent domain or to require accountability mechanisms prior to approving the use of eminent domain.

This Note will analyze the impact and prevalence of the threat and exercise of eminent domain to facilitate the acquisition of land for failed economic development projects. The use of eminent domain for speculative development projects

frequently displaces individuals and communities in needless and unjustifiable ways. Further, the impact of these failed projects is primarily borne by families from marginalized communities. Courts should apply a different set of legal standards and legislatures should employ risk-shifting mechanisms to reallocate the burden of failed projects from individuals and communities to wealthy developers responsible for designing and executing the projects. Courts should play an active role in the process, granting local governments conditional permission, not unfettered discretion, to seize homes.

The first section of this Note presents a brief overview of the expansion of the public use requirement of the Takings Clause of the Fifth Amendment. The expansion of the public use doctrine to include economic development takings enables local governments to condemn private property and transfer ownership to private developers for use in economic development projects—endeavors aimed at spurring commercial activity and increasing employment opportunities. Economic development projects require use of this legal mechanism because, otherwise, projects would not be able to proceed if community members chose not to sell their land.

The second section of the Note discusses the scope of the use of eminent domain authority to acquire private property for use in economic development projects that ultimately fail. The Note presents 12 case studies across ten states that demonstrate the pervasiveness and severity of the problem. The Note provides an in-depth examination of two communities, New London and Poletown, to highlight two categories of failures that most frequently arise: projects remaining vacant and projects failing to meet promised public outcomes. These case studies underscore the need for accountability mechanisms in economic development takings and illustrate how failed projects harm displaced individuals and communities.

The final section of this Note examines potential accountability mechanisms the legal system should leverage to analyze feasibility and hold developers accountable for failed projects. Rather than exercise broad legislative deference, courts should implement a four-factor feasibility assessment—evaluating projects on necessity, vagueness, market conditions, and accountability. The feasibility test shifts the burden from community members to developers. The first three factors would filter out risky projects that are unlikely to succeed, while allowing the many projects that are likely to succeed to continue. The fourth factor shifts the risk to developers to bear the burden of unforeseen circumstances that may derail a previously feasible project. Additionally, the legislature should grant a right of first refusal to prior owners to mitigate the negative impact on communities when land remains vacant after a development project fails. Lastly, the legislature should require community approval prior to permitting local governments to exercise eminent domain, requiring developers to listen to community voices and to incorporate community members' ideas into economic development plans. Because of the prevalence of failure in economic development takings projects, the legal system must condition permission to seize homes upon meeting feasibility and accountability requirements.

## II. BACKGROUND

The process of seizing and demolishing private property for the purpose of economic development, often referred to as “urban renewal,” first gained widespread popularity in the United States in the 1950s.<sup>1</sup> Since then, economic development projects have led to the demolition of as many as “2,500 neighborhoods and 400,000 residential units.”<sup>2</sup> And much of the resulting displacement occurs in “low-income and predominantly racial- and ethnic-minority neighborhoods because such residents frequently lack the resources to contest the condemnations politically or in court.”<sup>3</sup> Many of these economic development projects are successful, but some projects continue to fail across decades and communities, harming many individuals and families. When projects fail, who should bear the cost: project developers or individuals and communities?

Under the Takings Clause, private property shall not be taken for public use without just compensation.<sup>4</sup> Eminent domain is the inherent power of the government to take private property for public use.<sup>5</sup> And governments exercise their eminent domain power by condemning private property—declaring the property for public use.<sup>6</sup> The judiciary, however, generally defers to the legislature on determinations of public use.<sup>7</sup> In 2005, the Supreme Court expanded public use to include economic development takings, which allow for the transfer of private property from individuals to private developers.<sup>8</sup> By giving full discretion to local governments, courts fail to prevent the displacement of individuals for potentially infeasible projects, to respect the needs and voices of community members who directly bear the burden of such projects, and to redress harm when land remains vacant.

## III. THE STATE OF THE PUBLIC USE REQUIREMENT IN ECONOMIC DEVELOPMENT TAKINGS

Broadly interpreting public use, the Supreme Court determined the Takings Clause of the Fifth Amendment provides a legal mechanism (through the power of eminent domain) by which local governments can seize property for use in economic development projects. States also possess eminent domain powers limited by the Takings Clause, as incorporated against the states through the Fourteenth Amendment.<sup>9</sup> Because the Takings Clause does not explicitly define

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1. CARL GRODACH & RENIA EHRENFUCHT, URBAN REVITALIZATION: REMAKING CITIES IN A CHANGING WORLD 34–36 (2016).

2. *Id.* at 36.

3. U.S. COMM’N ON C.R., THE CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN ABUSE 7 (2014), [https://www.usccr.gov/files/pubs/docs/FINAL\\_FY14\\_Eminent-Domain-Report.pdf](https://www.usccr.gov/files/pubs/docs/FINAL_FY14_Eminent-Domain-Report.pdf).

4. U.S. CONST. amend. V.

5. *Eminent Domain*, BLACK’S LAW DICTIONARY (11th ed. 2019).

6. *Condemnation*, BLACK’S LAW DICTIONARY (11th ed. 2019).

7. *See Kelo v. City of New London*, 545 U.S. 469, 480 (2005); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984).

8. *See Kelo*, 545 U.S. 469, 484–88 (2005).

9. Thomas J. Posey, *This Land is My Land: The Need for a Feasibility Test in Evaluation of Takings for Public Necessity*, 78 CHI.-KENT L. REV. 1403, 1406 (2003).

public use, courts must determine what uses the term encompasses, and the Court's interpretation of permissible uses has changed over time.<sup>10</sup>

Traditionally, eminent domain was limited to purely public uses accessible to all community members such as roads, parks, and airports.<sup>11</sup> In 1984, however, the Supreme Court broadened the definition of public use to include any use that provides a public benefit and determined that the judiciary should defer to the legislature on the question of public use unless the use seems patently unreasonable.<sup>12</sup> This public benefit interpretation was the first major step in the expansion of public use in eminent domain. The second step occurred in 2005 when the Court interpreted economic development as a permissible public use within the scope of the Takings Clause in *Kelo v. City of New London*.<sup>13</sup> This holding "solidified a broad reading of the Public Use Clause," requiring only that the exercise of eminent domain be reasonably related to a public purpose.<sup>14</sup>

This broadened public use standard permits more takings and magnifies the potential for abuse. Currently, courts give nearly full discretion to local governments to exercise eminent domain for any purported public use. Accordingly, local governments may utilize economic development takings to transfer private property to a private developer for a public benefit, including tax revenue, jobs, and blight removal.<sup>15</sup> Economic development takings are ripe for abuse because the broad public use interpretation affords nearly full deference<sup>16</sup> to the legislature without examining the feasibility of the project or implementing public accountability mechanisms. Additionally, there is little legal recourse for private homeowners whose land remains undeveloped after an economic development project fails.<sup>17</sup>

#### IV. THE SCOPE OF EMINENT DOMAIN IN FAILED ECONOMIC DEVELOPMENT PROJECTS

Local governments may exercise eminent domain to acquire property for economic development projects. These projects sometimes fail to meet promised public outcomes, or in some cases, to provide any development at all. Yet, individuals are still displaced from their homes and communities. Although many economic

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10. *Id.* at 1407.

11. *Id.*

12. *Midkiff*, 467 U.S. at 241.

13. *Kelo*, 545 U.S. at 484–85.

14. John T. Goodwin, Note, *Justice and the Just Compensation Clause: A New Approach to Economic Development Takings*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 219, 219 (2011).

15. *Id.* at 220–21. The term blight most commonly refers "to neighborhoods experiencing systemic vacancy," but for decades, the term has been used to describe entire neighborhoods to justify "strip[ping] low-income Black and Brown residents of businesses, intergenerational wealth, and community[,] all in the name of urban renewal, blight elimination, and blight eradication." *The Problem with Calling Neighborhoods with Vacant Properties "Blighted,"* CTR. FOR CMTY. PROGRESS: BLOG (Mar. 30, 2023), <https://communityprogress.org/blog/what-is-blight/>.

16. *See Kelo*, 545 U.S. at 484–85.

17. *See* discussion *infra* Part IV.A.

development projects succeed, case studies of 12 projects across ten states illustrate the severe consequences such projects create when they fail. These examples, however, merely exemplify the pervasiveness of eminent domain abuse for economic development and are not a comprehensive collection of all instances of economic development failure under the authority of eminent domain.

In 1960, the Community Redevelopment Agency of Los Angeles, California—an independent agency dedicated to revitalizing economically depressed areas of Los Angeles—exercised eminent domain with the promise of economic development by eradicating blight through the Bunker Hill Urban Renewal Project.<sup>18</sup> The 136-acre project destroyed 7,677 bedrooms and displaced 6,000 residents, predominately poor families and elderly individuals eligible for public housing.<sup>19</sup> While the city built some new infrastructure, nearly two-thirds of the land remained vacant for 15 years.<sup>20</sup>

In the early 1960s, the City of Cleveland, Ohio used eminent domain to acquire and raze 200 acres of its downtown area with the aim of removing blight as part of the Erieview urban renewal project.<sup>21</sup> While the neighborhood had some dilapidated apartments and shops, much of the area was composed of homes of working-class families, small factories, office buildings, and open space.<sup>22</sup> The centerpiece Erieview Tower was built in the mid-1960s, and eight office buildings and hotels slowly opened over the next 20 years.<sup>23</sup> But for years, the surrounding area, Erieview Plaza, was primarily composed of parking lots, and in 2010—50 years after the project commenced—the area remained nearly one-third vacant.<sup>24</sup>

The City of Chicago, Illinois exercised eminent domain to clear Block 37, the stretch of State and Dearborn streets from Randolph to Washington, for the creation of a \$350 million office-retail complex, destroying 16 buildings and displacing their residents.<sup>25</sup> The properties were condemned in 1979 but stood vacant for ten years prior to being demolished.<sup>26</sup> The city spent nearly \$40 million to acquire

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18. GRODACH & EHRENFUCHT, *supra* note 1, at 37.

19. Lisa Napoli, *Urban Travesty or Renaissance? 50 Years of High-Rise Living on Bunker Hill*, CURBED L.A. (Nov. 28, 2018, 12:20 PM), <https://la.curbed.com/2018/11/28/18115002/bunker-hill-towers-redevelopment-history>.

20. GRODACH & EHRENFUCHT, *supra* note 1, at 37.

21. Steven Litt, *Enduring Flaws of Erieview District Show Why Downtown Needs New Zoning*, CLEVELAND.COM, (Jan. 11, 2019, 8:11 PM), [https://www.cleveland.com/architecture/2016/03/new\\_downtown\\_zoning\\_should\\_avo.html](https://www.cleveland.com/architecture/2016/03/new_downtown_zoning_should_avo.html).

22. PHILIP W. PORTER, CLEVELAND: CONFUSED CITY ON A SEESAW 181 (2010).

23. J. Mark Souther, *Erieview*, CLEVELAND HIST. (July 15, 2020), <https://clevelandhistorical.org/items/show/909>.

24. *Id.*

25. See Cheryl Kent, *What's the Deal?*, CHI. TRIB. (Apr. 28, 1996, 1:00 AM), <https://www.chicagotribune.com/news/ct-xpm-1996-04-28-9604280016-story.html>; Ross Miller, *Progress Brings Us Back to the Prairie*, CHI. TRIB. (July 16, 1993) [hereinafter Miller, *Progress Brings Us Back to the Prairie*], <https://www.proquest.com/docview/283535516?pq-origsite=primo/ip>; David Matthews, *Old Main Post Office and Eminent Domain: What Could Go Wrong?*, DNAInfo (Mar. 3, 2016, 10:22 PM), <https://www.dnainfo.com/chicago/20160229/downtown/old-main-post-office-eminent-domain-what-could-go-wrong/>.

26. Ross Miller, *Block 37*, ENCYC. OF CHI. (last visited Feb. 17, 2024), <http://www.encyclopedia.chicagohistory.org/pages/146.html>; Miller, *Progress Brings Us Back to the Prairie*, *supra* note 25.

the property from its lawful owners, but after delays, it sold the property to developers for only \$12.5 million.<sup>27</sup> Beginning in the early 1990s, the block served as a temporary skating rink in the winter and art gallery in the summer, and in 2009, 30 years after the initial condemnations, a mall opened on the property and additional development has since followed.<sup>28</sup>

In 1998, the City of Cincinnati, Ohio decided to use eminent domain to permit the development of a Nordstrom on the site of an existing Walgreens.<sup>29</sup> In an effort to relocate the Walgreens to another plot, the city condemned the private property of several small businesses, including a family shoe repair store that had been in operation for 95 years.<sup>30</sup> The shoe repair store does not appear to have ever reopened.<sup>31</sup> After the city spent millions of dollars on the project, the Nordstrom deal fell through, and the new Walgreens site was paved over and became a municipal parking lot.<sup>32</sup> As of 2019, the property remained a parking lot.<sup>33</sup>

In 1989, the City of Las Vegas, Nevada exercised eminent domain to condemn multiple small businesses so that the land could be passed to developers to build a business tower.<sup>34</sup> The development plan relied on a predicted future market increase spurring demand for office space in the area.<sup>35</sup> The city spent nearly \$2 million preparing the site and believed the addition of businesses would increase tax revenue and bring jobs to the community.<sup>36</sup> Instead, the site remained vacant for eight years until the city decided to build a courthouse on the land.<sup>37</sup>

Throughout the 1990s, the City of Indio, California used eminent domain to acquire the property of individual homeowners in a historic Black neighborhood—Nobles Ranch—which it largely razed to expand a fashion mall.<sup>38</sup> The expansion plan included at least one specific retailer, JC Penney.<sup>39</sup> After three churches and

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27. *Id.*

28. Blair Kamin, *Block 37 Represents a Painful Missed Opportunity*, CHI. TRIB. (June 11, 2016, 6:52 AM), <https://www.chicagotribune.com/columns/ct-block-37-architecture-kamin-met-0612-20160610-column.html>.

29. Dale Orthner, *Toward a More “Just” Compensation in Eminent Domain*, 38 MCGEORGE L. REV. 430, 437 (2006).

30. *Id.*

31. *See Dream Scheme*, CINCINNATI MAG., Oct. 2001, at 145. A Google search for the store, Kathman’s, in 2024, turned up no results.

32. Orthner, *supra* note 29, at 438.

33. WALTER E. BLOCK, *PROPERTY RIGHTS: THE ARGUMENT FOR PRIVATIZATION* 220 (2019).

34. *Minami Cleanup Vote Paves Way for Courthouse*, LAS VEGAS SUN (Feb. 25, 1997, 11:59 AM), <https://lasvegassun.com/news/1997/feb/25/minami-cleanup-vote-paves-way-for-courthouse/>.

35. Vicki M. Bertolino, *All Systems Go for the Minami Tower Project*, 4 NEV. BUS. J. 28, 29 (1989).

36. *Minami Cleanup Paves Way for Courthouse*, *supra* note 34.

37. *Id.*

38. David Olson & Sandra Baltazar-Martinez, *Indio: Resentment Lingers Over Razed Homes*, THE PRESS-ENTERPRISE (May 15, 2005).

39. *Renovation Set for Indio Mall*, L.A. TIMES ARCHIVES (Feb. 5, 1989), <https://www.latimes.com/archives/la-xpm-1989-02-05-re-2171-story.html>.

eighty-seven homes belonging to 500 people were demolished to prepare for the expansion, the development deal fell through.<sup>40</sup>

The City of Mesa, Arizona condemned sixty-three homes<sup>41</sup> in a predominately single-family, Hispanic neighborhood in the 1980s to develop an entertainment district.<sup>42</sup> Promising new jobs, the project cost the city \$6 million and aimed to build a resort, conference center, and waterpark on the site.<sup>43</sup> The development plan failed, as did many subsequent development proposals, and the land remains vacant four decades later.<sup>44</sup>

When MGM Grand announced plans to build a casino in Atlantic City, New Jersey, the city displaced residents in 147 homes under the threat of eminent domain.<sup>45</sup> MGM eventually decided not to develop the property, instead opting to use property at another site which had already been condemned on behalf of Mirage Resorts.<sup>46</sup>

New York City cleared land for the development of a new trading complex for the New York Stock Exchange.<sup>47</sup> Hundreds of tenants occupying 435 apartments were displaced.<sup>48</sup> The project collapsed after the September 11 terrorist attacks, and the apartment building at 45 Wall Street was given back to its owner after the city spent months and \$6 million relocating the building's tenants.<sup>49</sup> The city projected the failure would cost the city about \$109 million.<sup>50</sup>

In Brooklyn, New York, developers promised New York City more than 14,000 construction jobs and approximately 7,400 permanent jobs through the Atlantic Yards project.<sup>51</sup> Developers planned for the Barclays Center to anchor a mixed-use project, which would also include residential and retail space.<sup>52</sup> The city displaced more than 1,000 individuals under the threat of eminent domain; yet, after the market crash in 2008, the project stalled.<sup>53</sup> The city spent over \$200

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40. Kimberly Trone, *Indio Residents Work Together to Put Mall Misstep Behind Them*, THE DESERT SUN (July 22, 2000).

41. Tom Scanlon, *New Plans Pitched for Tortured Downtown Site*, MESA TRIB. (Oct. 29, 2023), [https://www.themesatribune.com/news/new-plans-pitched-for-tortured-downtown-site/article\\_6298d0b0-7514-11ee-bc30-1bdf9effebd1.html](https://www.themesatribune.com/news/new-plans-pitched-for-tortured-downtown-site/article_6298d0b0-7514-11ee-bc30-1bdf9effebd1.html).

42. Tom Scanlon, *Hope Again for Long-Dormant Downtown Parcel*, E. VALLEY TRIB. (Apr. 19, 2021), [https://www.eastvalleytribune.com/news/hope-again-for-long-dormant-downtown-parcel/article\\_d95871ec-9efc-11eb-b202-fb6aecfd928e.html](https://www.eastvalleytribune.com/news/hope-again-for-long-dormant-downtown-parcel/article_d95871ec-9efc-11eb-b202-fb6aecfd928e.html).

43. Scanlon, *New Plans Pitched*, *supra* note 41.

44. *Id.*

45. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 136 (2003), [https://ij.org/wp-content/uploads/2015/03/ED\\_report.pdf](https://ij.org/wp-content/uploads/2015/03/ED_report.pdf).

46. *Id.* at 137.

47. See Charles V. Bagli, *45 Wall St. Is Renting Again Where Tower Deal Failed*, N.Y. TIMES (Feb. 8, 2003), <https://www.nytimes.com/2003/02/08/nyregion/45-wall-st-is-renting-again-where-tower-deal-failed.html>.

48. *See id.*

49. *Id.*

50. *Id.*

51. BATTLE FOR BROOKLYN (RumuR Inc. 2011).

52. *Id.*

53. *Id.*



million on the project.<sup>54</sup> The Barclays Center opened in 2012.<sup>55</sup> However, as of 2023—20 years after the project was unveiled—the area remained largely undeveloped, lacking open space development and falling nearly 40% short of affordable housing unit projections.<sup>56</sup>

Failed economic development projects in New London, Connecticut and Detroit, Michigan are discussed in detail below. In total, these 12 cases represent the total displacement of over 12,000 individuals, more than 10,000 homes and apartments, and at least 215 businesses, disproportionately harming working-class neighborhoods and people from marginalized communities. The failed projects cost cities and taxpayers at least \$643 million in total. Most projects that went completely undeveloped were vacant for at least 15 years, and several remain vacant today. The case studies demonstrate the severity of harm caused using eminent domain for failed economic development projects. Two categories of problems emerge from the cases: land remaining partially or entirely vacant and projects failing to meet promised public outcomes. The New London and Detroit case studies examined below highlight the negative impacts of each category.

#### A. Vacancy Case Study: New London

In 2001, the City of New London, Connecticut was facing economic decline and high unemployment rates, more than double the unemployment rate of the state.<sup>57</sup> The city was comprised of mainly working-class neighborhoods and approximately 24,000 total residents.<sup>58</sup> When Pfizer announced it would build a \$300 million research facility in New London, the city seized the opportunity to use the facility as the anchor for a larger urban renewal project, hoping the facility would draw other new businesses to the area.<sup>59</sup>

New London established the New London Development Corporation (NLDC) to assist the city with economic development.<sup>60</sup> NLDC created an integrated development plan for ninety acres of the Fort Trumbull area, including 115 privately-owned homes and two dozen businesses clustered on about ten acres of the site, and divided the land into seven distinct parcels, each with a different intended use.<sup>61</sup> Parcel 1 would include a waterfront conference hotel with

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54. Ariella Cohen, *Atlantic Yards Cost Skyrockets; Opponents Scream as Bloomy Quietly Doubles Taxpayer Subsidy*, BROOKLYN PAPER (Feb. 3, 2007), <https://www.brooklynpaper.com/atlantic-yards-cost-skyrockets-opponents-scream-as-bloomy-quietly-doubles-taxpayer-subsidy/>.

55. *Id.*

56. Rebecca Greenberg, *Atlantic Yards Project Continues to Face Delays 20 Years Later*, SPECTRUM NEWS (Dec. 13, 2023), <https://ny1.com/nyc/all-boroughs/news/2023/12/13/atlantic-yards-project-continues-to-face-delays-20-years-later>.

57. *Kelo v. City of New London*, 545 U.S. 469, 473 (2005).

58. Tom Condon, *New Movie Will Revive Painful Lesson in How Not to Redevelop a City*, CT MIRROR (Apr. 2, 2018), <https://ctmirror.org/2018/04/02/new-movie-will-revive-painful-lesson-not-redevelop-city/>; *Kelo*, 545 U.S. at 473.

59. *Id.*

60. *Id.*

61. Condon, *supra* note 58; *Kelo*, 545 U.S. at 474.

restaurants, marinas, and retail, and Parcel 2 would include eighty new residential plots and a U.S. Coast Guard museum.<sup>62</sup> Parcel 3 would hold research and development office space.<sup>63</sup> Parcel 4A did not have a solidified use, but NLDC proposed using the land either to support the nearby marina or to support the adjacent state park by providing parking or retail services for visitors.<sup>64</sup> Parcel 4B would hold a marina and river walk, and Parcels 5-7 would be composed of office and retail space, parking, and other water-dependent commercial uses.<sup>65</sup>

There were several foreseeable issues with the feasibility of the redevelopment project. While NLDC designated Parcel 3 for research and development offices, witness testimony and a marketing study at the time of condemnation showed that market conditions were not ripe for the development of office buildings.<sup>66</sup> Additionally, NLDC failed to outline a specific intended use for Parcel 4A. While NLDC stated that the land could be used for park or marina support, no intended use was specified during legal proceedings on the matter.<sup>67</sup> The plan also lacked accountability mechanisms to ensure the project was executed as planned. There was no development agreement, adequate project timeline, or potential penalties for NLDC's failure to execute the plan as required.<sup>68</sup> The written documentation provided by NLDC and the City of New London during the legal proceedings specified only that the land "will be devoted 'principally' to the uses in the plan and 'in accordance' with the plan."<sup>69</sup> For at least two parcels of the property, there were no guarantees that the developers would build anything. And there were no penalties for nonperformance.<sup>70</sup> The petitioners in *Kelo* expressed these concerns during briefing,<sup>71</sup> so these feasibility issues were foreseeable.

The city spent \$90 million preparing the site for development and displaced approximately 115 privately-owned homes and 24 businesses.<sup>72</sup> In New London, the displacement unsurprisingly played out along class lines. While the Italian Dramatic Club successfully leveraged its political power to avoid its facility being demolished, many elderly and low-income residents who lacked both political power and the financial capacity to seek legal recourse lost their homes.<sup>73</sup>

Susette Kelo, one of the seven owners who took their cases to court, worked three jobs to save up enough money to purchase her home in New London.<sup>74</sup> She

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62. *Kelo*, 545 U.S. at 474.

63. *Id.*

64. *Id.*

65. *Id.*

66. Reply Brief for Petitioner at 11, *Kelo v. City of New London*, 545 U.S. 469, 473 (2005) (No. 04-108).

67. *Id.* at 12.

68. *Id.* at 15.

69. *Id.* at 16 n.18.

70. *Id.*

71. *Id.*

72. Condon, *supra* note 58.

73. JEFF BENEDICT, *LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE* 150-64 (2009).

74. Elizabeth Mehren, *Homeowners' World is Not For Sale*, L.A. TIMES (May 29, 2005), <https://www.latimes.com/archives/la-xpm-2005-may-29-na-domain29-story.html>.

adored the home's view of the river.<sup>75</sup> Susette and her five adult sons invested time, sweat, and money to renovate the property and later adapted it to meet the needs of Susette's disabled husband.<sup>76</sup> Wilhelmina Dery had lived her entire 88-year life in her family home in New London and wished to live out her remaining days there.<sup>77</sup> Wilhelmina did get her wish, but only because she died before the legal battle had concluded.<sup>78</sup> Michael Cristofaro's family had lived in Fort Trumbull for three generations, and the property was the second that the family lost to eminent domain.<sup>79</sup> At one point in the proceedings, Cristofaro vowed to retain possession of the home unless the city removed his father from the home "in handcuffs."<sup>80</sup>

Eight years after Pfizer opened its research facility in New London, it announced its plan to leave the city, taking with it 1,400 jobs and leaving the city's largest office complex vacant.<sup>81</sup> As an incentive to locate in New London, NLDC permitted Pfizer to pay only one-fifth of its property taxes for the first ten years of operation.<sup>82</sup> Thus, the city's largest taxpayer exited before the city received its full tax benefits.<sup>83</sup> Additionally, although New London exercised eminent domain to condemn the remaining fifteen unsold properties,<sup>84</sup> the city failed to execute significant portions of the development plan.<sup>85</sup> Nearly 20 years after *Kelo*, the land cleared by eminent domain remained vacant.<sup>86</sup>

In February 2021, the New London City Council approved the development of a \$30 million community recreation center on 6.8 acres of the vacant land.<sup>87</sup>

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75. *Kelo v. City of New London*, 545 U.S. 469, 475 (2005).

76. Mehren, *supra* note 74.

77. Lynne Tuohy, *Fort Trumbull Plaintiff Dies*, HARTFORD COURANT (Mar. 15, 2006, 05:00 AM), <https://www.courant.com/news/connecticut/hc-xpm-2006-03-15-0603150758-story.html>.

78. *Id.*

79. Kathleen Edgecomb, *'It Still Hurts': Fight to Save Home Scars One Fort Trumbull Family*, THE DAY (June 23, 2013, 12:04 AM), <https://www.theday.com/article/20130623/NWS01/306239947>.

80. Avi Salzman, *Only 2 Holdouts Left in Eminent Domain Case*, N.Y. TIMES (June 11, 2006), <https://www.nytimes.com/2006/06/11/nyregion/the-week-only-2-holdouts-left-in-eminent-domain-case.html>.

81. Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES (Nov. 12, 2009), <https://www.nytimes.com/2009/11/13/nyregion/13pfizer.html>.

82. *Id.*

83. *Id.*

84. Thomas A. Garrett & Paul Rothstein, *The Taking of Prosperity? Kelo vs. New London and the Economics of Eminent Domain*, FED. RES. BANK OF ST. LOUIS (Jan. 1, 2007), <https://www.stlouisfed.org/publications/regional-economist/january-2007/the-taking-of-prosperity-emkelo-vs-new-londonem-and-the-economics-of-eminent-domain>.

85. McGeehan, *supra* note 81 (noting the failure to develop a promised hotel, stores, and condominiums).

86. Johana Vazquez, *New London to Sell Remainder of Fort Trumbull properties*, THE DAY (Jan. 19, 2023), <https://www.theday.com/local-news/20230119/new-london-to-sell-remainder-of-fort-trumbull-properties/>.

87. Greg Smith, *New London Approves \$30 Million Community Recreation Center*, THE DAY (Feb. 2, 2021, 11:30 PM), <https://www.theday.com/article/20210201/NWS01/210209913>.

And in July 2023, crews broke ground, beginning construction for the center.<sup>88</sup> Some community members expressed support for the project, while others conveyed their disdain, wishing the city would reserve the land for a taxpaying entity.<sup>89</sup> A city official expressed his expectation that the facility will “reinvigorate interest” in the vacant land and have a positive effect on businesses in the area.<sup>90</sup> In August 2023, a developer pitched the development of 500 new apartments and a six-story parking garage.<sup>91</sup> While the future of development in Fort Trumbull remains somewhat uncertain, the families who were displaced for the project could have spent many additional years in their homes. Instead, the land has largely remained vacant.<sup>92</sup>

*B. Failure to Meet Promised Outcomes Case Study: Poletown*

In 1980, General Motors announced plans to close its Cadillac and Fisher Body plants located in Detroit, Michigan.<sup>93</sup> Detroit, already facing a 13% unemployment rate,<sup>94</sup> was poised to lose 6,000 more jobs.<sup>95</sup> General Motors informed the City of Detroit that it would build a new assembly plant within the city if there was a site that complied with General Motors’ development specifications.<sup>96</sup> The site required 450-500 acres, a rectangular plot, and access to both a railroad line and the freeway.<sup>97</sup> While nine sites were evaluated, only one was found to be feasible: a 465-acre plot in Poletown.<sup>98</sup> The city developed a plan to acquire the site using eminent domain.<sup>99</sup>

The proposed General Motors auto-assembly plant would encompass 4.1 million square feet of floor space surrounded by surface parking and landscaping.<sup>100</sup> General Motors shared job projections, financing plans, and construction timelines.<sup>101</sup> The company projected the plant would create 6,150 jobs.<sup>102</sup> In addition

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88. John Penney, *New London Community Center Site an Opportunity for Budding Builders*, THE DAY (Aug. 24, 2023, 4:31 PM), <https://www.theday.com/local-news/20230824/new-london-community-center-site-an-opportunity-for-budding-builders/>.

89. Smith, *supra* note 87.

90. *Id.*

91. John Penney, *Developer Looks to Build 500 Apartments, Six-Story Garage at Fort Trumbull*, THE DAY (Sept. 11, 2023, 4:47 PM), <https://www.theday.com/local-news/20230911/developer-looks-to-build-500-apartments-six-story-garage-at-fort-trumbull/>.

92. Vazquez, *supra* note 86.

93. *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 636 (1981) (Fitzgerald, J., dissenting).

94. *Unemployment Rate in Michigan (MIUR)*, FED. RES. BANK OF ST. LOUIS (last updated Jan. 25, 2024), <https://fred.stlouisfed.org/graph/?g=Mb5#>.

95. *See Poletown Neighborhood Council*, 410 Mich. at 651 (Ryan, J., dissenting).

96. *Id.* at 636 (Fitzgerald, J., dissenting).

97. *Id.*

98. *Id.* at 637.

99. *Id.*

100. Amy Crawford, *Can Poletown Come Back After a General Motors Shutdown?*, BLOOMBERG CITYLAB (Dec. 10, 2018, 3:57 PM), <https://www.bloomberg.com/news/articles/2018-12-10/the-history-of-gm-poletown-and-its-impact-on-detroit>.

101. *Poletown Neighborhood Council*, 410 Mich. at 637 (Fitzgerald, J., dissenting).

102. Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1023 (2004).

to exercising eminent domain to clear the property for development, the city agreed to upgrade the perimeter roads, modify access ramps, install lighting along the perimeter roads, and absorb the penalty for the use of underground utility services.<sup>103</sup> The city development corporation also agreed to dispose of any waste materials found on the site.<sup>104</sup>

There were several foreseeable issues, however, with the redevelopment project. The development plan lacked both job guarantees from General Motors and public accountability measures.<sup>105</sup> Even if the job projections were made in good faith, General Motors entirely lacked accountability after the land was acquired.<sup>106</sup> General Motors is a public corporation, and thus, the company is primarily motivated by delivering profits to its shareholders rather than accomplishing promised public benefits.<sup>107</sup> The management would determine employment “with reference, not to the rate of regional unemployment, but to profit.”<sup>108</sup>

Additionally, the plan lacked community support and approval. The Poletown neighborhood was declining, but it was densely populated and exceptionally diverse for Detroit at the time.<sup>109</sup> The neighborhood was comprised of approximately half Black residents and half white residents with a large first-generation immigrant community, including Poles, Albanians, Yugoslavians, and Yemenis.<sup>110</sup> Members of the Poletown community responded to the news with outrage, including emotional protests.<sup>111</sup> Many elderly residents fought hard to save their homes.<sup>112</sup> Many of them were first or second-generation Polish-Americans who had “raised their families there, worshipped in the Catholic churches there and wanted to die in their homes there.”<sup>113</sup> Residents who chose not to take the buyout formed the Poletown Neighborhood Council to fight the exercise of eminent domain to raze their neighborhood.<sup>114</sup> One protest involved a twenty-nine day sit-in at the Immaculate Conception Church, which was to be razed in the development.<sup>115</sup> Eventually, the police showed up and

103. *Poletown Neighborhood Council*, 410 Mich. at 655–56 (Fitzgerald, J., dissenting).

104. *Id.* at 656.

105. *Id.* at 679.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Before GM’s Detroit-Hamtramck Plant, There Was the Poletown Neighborhood*, NPR (Nov. 27, 2018, 4:40 PM), <https://www.npr.org/2018/11/27/671285209/before-gms-detroit-hamtramck-plant-there-was-the-poletown-neighborhood>.

110. *Id.*

111. *Id.*

112. James Risen, *Poletown Becomes Just a Memory: GM Plant Opens, Replacing Old Detroit Neighborhood*, L.A. TIMES (Sept. 18, 1985, 12AM), <https://www.latimes.com/archives/la-xpm-1985-09-18-fi-6228-story.html>.

113. *Id.*

114. *Poletown*, DETROIT HIST. SOC’Y (2021), <https://detroithistorical.org/learn/encyclopedia-of-detroit/poletown>.

115. *Id.*

took the protestors to jail.<sup>116</sup> In the meantime, the bulldozers arrived and demolished the church.<sup>117</sup>

Ultimately, the Detroit-Hamtramck Plant was developed in Poletown, displacing approximately 4,200 individuals, 1,500 homes, 144 businesses, 16 churches, and one hospital.<sup>118</sup> The City of Detroit spent over \$200 million preparing the land for General Motors,<sup>119</sup> and the company received \$100 million in tax breaks.<sup>120</sup> At its peak, the plant employed 3,600 workers,<sup>121</sup> only 58.5% of the projected employment rate. General Motors nearly closed the plant in 2019 but ultimately repurposed the facility to manufacture electric and autonomous vehicles.<sup>122</sup> The plant, rebranded as Factory ZERO, currently employs 1,180 total workers.<sup>123</sup> More than 35 years after the exercise of eminent domain, the plant's employment level is less than 20% of the employment projections.

The facility also spurred further decline of the Poletown neighborhood.<sup>124</sup> The remaining neighborhood is very poor, and streets once filled with businesses are now some of "the most devastated and depopulated" in Detroit.<sup>125</sup> Chene Street, for example, was once home to hundreds of businesses, many immigrant- and Black-owned.<sup>126</sup> It was a vibrant centerpiece to the community, but today, the street is largely vacant.<sup>127</sup> The forced move of Willy and Ethel Feagen's auto business brought them to "the brink of financial collapse" as they lost their old customers in the move.<sup>128</sup> Many elderly residents who were forced to relocate battled with depression from the loss of their homes and tight-knit community.<sup>129</sup> George Crosby was disoriented after the move and regularly requested to be taken home, failing to realize his home had been demolished.<sup>130</sup> Poletown's residents were displaced throughout Detroit and its suburbs, longing for a community that no longer existed.

116. *Before GM's Detroit-Hamtramck Plant*, *supra* note 109.

117. *Id.*

118. Breana Noble, *General Motor's Unclear Future Could Impact Jewish Cemetery*, AP NEWS (Apr. 29, 2019), <https://apnews.com/article/dbcab2e8d205423e9e6eaf7c5c3411b2>.

119. Somin, *supra* note 102, at 1018.

120. *See* Crawford, *supra* note 100.

121. Somin, *supra* note 102, at 1013.

122. Andrew J. Hawkins, *GM Rebrands Its Detroit-Hamtramck Plant as 'Factory Zero' for Electric and Autonomous Vehicles*, THE VERGE (Oct. 16, 2020 11:14AM), <https://www.theverge.com/2020/10/16/21519358/gm-factory-zero-detroit-hamtramck-electric-autonomous-vehicles>.

123. *Factory ZERO, Detroit-Hamtramck Assembly Center*, GEN. MOTORS (Dec. 11, 2023), [https://plants.gm.com/media/us/en/gm/company\\_info/facilities/assembly/dham.html](https://plants.gm.com/media/us/en/gm/company_info/facilities/assembly/dham.html).

124. *Before GM's Detroit-Hamtramck Plant*, *supra* note 109.

125. *Welcome, Chene Street History Project*, UNIV. OF MICH. COLL. OF LITERATURE, SCI., AND THE ARTS, <https://sites.lsa.umich.edu/detroitchenestreet/>.

126. *Id.*

127. *Id.*

128. Risen, *supra* note 112.

129. BRIANNE TURCZYNSKI, *DETROIT'S LOST POLETOWN: THE LITTLE NEIGHBORHOOD THAT TOUCHED A NATION* 128 (2021).

130. *Id.*

## V. PROPOSED ACCOUNTABILITY MECHANISMS

Currently, people and communities bear the costs of failed economic development projects while developers largely avoid accountability. The lack of accountability is problematic, especially considering the wealth gap between developers and the primarily poor, marginalized communities harmed by condemnation for economic development.<sup>131</sup> Given the pervasive use of such projects to address blight removal, low-income areas are more likely to be deemed in need of economic development than their middle- or upper-class counterparts.<sup>132</sup> Low-income communities should not shoulder the cost of failed projects, increasing the wealth gap as residents must deal with the costs of relocation and displacement. There are three accountability mechanisms that the legal system should leverage to shift the financial burden of economic development failures back to wealthy developers: implement feasibility assessments, grant a right of first refusal to repurchase condemned property to prior property owners, and require community approval of economic development projects.

### A. Burden Shifting Feasibility Assessment

Rather than exercising broad legislative deference, courts should assess the feasibility of an economic development project prior to permitting local governments to exercise eminent domain. Implementing a feasibility assessment will enable projects with high likelihoods of success to proceed, while blocking risky projects. Because strong, well-planned projects will continue, the assessment is unlikely to significantly deter developers from pursuing economic development projects altogether.

The four-factor test should evaluate the project based on necessity, vagueness, market conditions, and accountability. The first three factors serve as procedural safeguards to filter out risky projects that are unlikely to succeed. The fourth factor shifts the risk to developers to bear the costs of unforeseen circumstances that may derail a previously feasible project, holding developers accountable if a project fails to deliver the promised public benefits. The feasibility test would require private developers to demonstrate the development project could reasonably be completed before seizing private property.<sup>133</sup>

The first factor courts should consider is the necessity of eminent domain to serve the public purpose. As evidenced in New London, where there were already 80 acres of vacant land that could have been used for development without condemning any homes,<sup>134</sup> often there are alternative development options that

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131. See GRODACH & EHRENFUCHT, *supra* note 1.

132. See Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 35 (2006); A. Mechele Dickerson, *Revitalizing Urban Cities: Linking the Past to the Present*, 46 UNIV. MEMPHIS L. REV. 973, 978 (2016).

133. See Posey, *supra* note 9, at 1403.

134. Condon, *supra* note 58.

could adequately accomplish a similar public purpose with little or no use of condemnation.

Courts should evaluate the necessity of using condemnation by requiring developers to demonstrate the proposed public purpose could not reasonably be accomplished without the exercise of eminent domain.<sup>135</sup> The necessity determination would ensure that eminent domain is only being exercised where there are no adequate alternative options to achieve the promised public benefit. The necessity factor—together with the community approval requirement outlined below—would maximize reform impact by ensuring that any community-developed plans which lessen the need for condemnation are prioritized over developer plans if they can provide the same benefit. The focus of the inquiry should be on minimizing displacement while providing the maximum public benefit rather than blindly deferring to the legislature's plan without investigating the relative public costs and benefits.

Vagueness is the second factor courts should examine. Before the exercise of eminent domain, specific intended uses for the condemned property should be stated and accompanied by project timelines, specified funding, and signed contracts. Rather than approving a vague public purpose for development, leaving the details to be filled in later, courts should require developers to present thorough plans detailing the specific use for every piece of land accompanied by signed documentation demonstrating plan feasibility. In New London, for example, developers were able to exercise eminent domain without stating a specific intended use for one parcel of land.<sup>136</sup> If courts examined project timelines, funding plans, and contracts, developers would be required to provide detailed, finalized plans before taking land for development, minimizing the risk that land will remain vacant.

The relationship between the intended uses stated in redevelopment plans and current market conditions is the third factor of the proposed feasibility assessment. Intended uses should be based on market conditions at the time of the proposed taking rather than speculative future market conditions. The Bunker Hill Redevelopment Plan, for example, included 20,000 parking spaces to facilitate access to the redeveloped area for middle- and upper-class suburbanites.<sup>137</sup> However, at the time of condemnation, the neighborhood was widely regarded as full of crime and was not remotely considered a destination for suburban residents.<sup>138</sup> Similarly, the New London development plan included lots of office and research space even though there was not any demand for such space

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135. See Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENV'T L. 1, 46 (1980).

136. Reply Brief for Petitioner, *supra* note 66, at 12.

137. Stephen Jones, *The Bunker Hill Story: Welfare, Redevelopment, and Housing Crisis in Postwar Los Angeles*, 44 (2017) (M.A. Thesis, City University of New York) (CUNY Academic Works).

138. Napoli, *supra* note 19.



in the current market.<sup>139</sup> In both cases, the land remained fully or largely vacant for at least 15 years.<sup>140</sup> Courts should examine evidence such as market studies and leasing commitment letters to ensure the relationship is not over-attenuated, and thus, increase the feasibility of economic development projects.<sup>141</sup>

Public accountability mechanisms are the final factor courts should consider when evaluating the feasibility of economic development projects. In Poletown, General Motors promised 6,150 jobs in exchange for the displacement of 4,200 residents and the destruction of an entire neighborhood.<sup>142</sup> The Atlantic Yards Project in Brooklyn, New York promised over 14,000 construction jobs and as many as 7,400 permanent jobs for the displacement of over 1,000 residents.<sup>143</sup> However, in neither city were the jobs provided close to the projections.<sup>144</sup> Courts should examine plans to ensure they include job guarantees where relevant, which should include both binding agreements and penalties.<sup>145</sup> Additionally, companies should have to commit to contracting with local employees for a minimum duration of time after the project commences and such contracts should demonstrate that employees have a local address. Binding agreements and corresponding penalties should be required in all situations where private land is seized for economic redevelopment, shifting the risk of project failure from communities back to developers to meet their promised outcomes, even in the event of unforeseen economic circumstances.

### B. Right of First Refusal

Legislatures should also play a role in establishing accountability mechanisms for urban development projects when the public use is later abandoned. Specifically, legislatures should grant a right of first refusal to repurchase condemned property to prior property owners. A right of first refusal is an agreement between a property owner and an individual wishing to purchase the property.<sup>146</sup> The owner grants the prospective buyer an opportunity to purchase the property in the event they eventually wish to sell.<sup>147</sup> The common law historically vests all rights to the land in the condemner upon condemnation, and the condemnee's right to the land is terminated, even in the event that the land is not utilized for the intended public use.<sup>148</sup> A right of first refusal could be useful in the eminent

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139. Reply Brief for Petitioner, *supra* note 66, at 11.

140. GRODACH & EHRENFEUCHT, *supra* note 1, at 37; Vazquez, *supra* note 86.

141. See Leonard A. Zax & Rebecca L. Malcolm, *Economic Development, Eminent Domain and the Property Rights Movement*, REAL EST. FIN. J. 1, 4 (2005).

142. Somin, *supra* note 102, at 1023, 1037.

143. BATTLE FOR BROOKLYN, *supra* note 51.

144. See *id.*; Somin, *supra* note 102, at 1013.

145. See Martin E. Gold, *The Use and Abuse of Blight in Eminent Domain*, 38 FORDHAM URB. L.J. 1119, 1139 (2011).

146. Casey Bond & Rachel Witkowski, *What is a Right of First Refusal in Housing?*, FORBES (Oct. 29, 2021, 12:01PM), <https://www.forbes.com/advisor/mortgages/what-is-right-of-first-refusal/>.

147. *Id.*

148. Lynda J. Oswald, *Can a Condemnee Regain Its Property if the Condemnor Abandons the Public Use?*, 39 THE URB. LAW. 671, 672 (2007).

domain context when more land is taken than ultimately required for the project or when the project is never executed.<sup>149</sup>

The legislature should enact statutory protections permitting condemnees to “repurchase the property at the original condemnation price.”<sup>150</sup> While this accountability mechanism is limited to cases where the land remains vacant, it provides a remedy for the harm individuals suffer when being forced to give up their homes and would deter condemners by preventing them from profiting from the sale of undeveloped condemned property.<sup>151</sup> Private owners also will not receive an economic benefit as they would still have to repurchase the property. However, this allows individuals to regain their cherished property and rejoin their prior community. Many states have passed legislation providing for the reconveyance of condemned property to the prior owner upon the abandonment of the public use.<sup>152</sup> State legislatures should continue to expand and enact rights of first refusal, permitting prior owners to repurchase condemned property when the public use is abandoned.

Sometimes unpredictable, intervening economic and political events such as the September 11 terrorist attacks or the economic crisis of 2008 influence the feasibility of development projects. In such cases, a grant of first refusal to prior owners to repurchase their property would be an effective strategy to accommodate both the interests of developers facing unanticipated economic strain while also respecting the interests of individual property owners.

### C. Community Approval

Lastly, the legal system should condition the exercise of eminent domain upon community approval of the economic development project. Eminent domain in the economic development context has consisted largely of “deal-making between private developers and local governments.”<sup>153</sup> This deal-making process cuts out the individual community members who the developments most directly adversely effect, while blindly implementing developer projects. While developers often view public participation as a hinderance to development projects,<sup>154</sup> community members have a valuable perspective in analyzing the feasibility of such projects and can offer viable alternatives. In the Atlantic Yards Project, for example, community members assembled alternate development proposals which utilized a different project footprint that would have minimized displacement.<sup>155</sup> Rather than consider the community proposal or even a compromise between the

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149. See generally *id.* at 676.

150. See Cristin Kent, *Condemned If They Do, Condemned If They Don't: Eminent Domain, Public Use Abandonment, and the Need for Condemnee Protections*, 30 SEATTLE UNIV. L. REV. 503, 504 (2007).

151. See *id.*

152. Oswald, *supra* note 148, at 674.

153. Kate Klonick, *Not in My Atlantic Yards: Examining Netroot's Role in Eminent Domain Reform*, 100 GEO. L.J. 263, 285 (2011).

154. *Id.*

155. BATTLE FOR BROOKLYN, *supra* note 51.

original plan and the community proposal, the city pushed through with the developer's original plan.<sup>156</sup> The original plan, however, largely failed after displacing more than 1,000 residents from their homes and community.<sup>157</sup>

Legislatures should enact statutory reforms that prevent the exercise of eminent domain for economic development until community members have approved redevelopment plans.<sup>158</sup> Such a statutory requirement would force dialogue between developers and impacted community members and would discourage backdoor deal-making between cities and private developers.<sup>159</sup> Residents would have decision-making authority over the future of their community, and developers would be forced to present plans that truly consider community needs.<sup>160</sup> Public benefits would be considered in conjunction with the public costs incurred. Requiring community approval is necessary to center the voices of those who directly bear the costs of the exercise of eminent domain for economic development projects.

## VI. CONCLUSION

The foregoing case studies of failed economic development projects demonstrate the need for the legal system to implement accountability mechanisms to prevent the needless displacement of individuals and communities for failed urban development projects. The current state of legislative action and judicial deference does not prevent individuals and communities from bearing the costs of failed economic development projects when the land seized remains undeveloped and when projects fail to meet their promised public outcomes. The problem is not isolated: more than 12,000 individuals and 215 businesses have been displaced by failed economic development projects in these 12 cases alone.

Susette Kelo poured her heart into renovating her dream home, and instead of serving a greater public interest, her property has remained vacant for nearly two decades.<sup>161</sup> Similarly, the entire Poletown community, once vibrant and tight knit, was demolished to open a General Motors factory that at most employed 3,600 individuals, almost closed its doors in 2019, and now employs only 1,180 total employees.<sup>162</sup> Affected communities, usually composed of working-class residents and families, shoulder the lion's share of the burden caused by failed economic development projects, while wealthy developers face more limited repercussions.

The legal system should implement accountability mechanisms to prevent and mitigate the displacement of individuals and communities for failed projects

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156. *Id.*

157. *Id.*; Greenberg, *supra* note 56.

158. See James J. Kelly, "We Shall Not Be Moved": Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation, 80 ST. JOHN'S L. REV. 923, 971 (2006).

159. *Id.* at 980.

160. *Id.* at 980–81.

161. Mehren, *supra* note 74.

162. Somin, *supra* note 102, at 1013; *Factory ZERO, Detroit-Hamtramck Assembly Center*, *supra* note 123; Hawkins, *supra* note 122.

while allowing feasible projects to continue. Courts should implement a four-factor feasibility assessment to condition the use of eminent domain on proving plan viability and accountability. Additionally, legislatures should grant a right of first refusal to prior property owners and require community approval prior to the exercise of eminent domain. Without systemic change in the law of eminent domain regarding economic development projects, marginalized communities will continue to pay the price for developers' missteps, community voices will be overlooked, and economic development projects will fail to bring about promised outcomes.