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# Participatory Planning and Procedural Protections: The Case for Deeper Public Participation in Urban Redevelopment

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# PARTICIPATORY PLANNING AND PROCEDURAL PROTECTIONS: THE CASE FOR DEEPER PUBLIC PARTICIPATION IN URBAN REDEVELOPMENT

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ABSTRACT

*For decades legal and planning commentators have advocated a deeper and more meaningful level of public participation in urban revitalization efforts. The result of such advocacy has increased the use of public participation as a criterion for awarding federal redevelopment funds but has had little impact on participatory requirements in state redevelopment law. This article explores the theoretical arguments in favor of increased public participation in the redevelopment context and finds that there is an overemphasis on direct democracy arguments and the "empowerment" theory, a concept that belies simple definition. This article explores the intrinsic and instrumental benefits of public participation and finds that participatory planning is beneficial as a legitimizing form of deliberation in governance, but only when used as a supplement to, rather than a replacement for politically accountable legislative authorities. This understanding of the role of participatory planning provides a more convincing rhetorical and normative regime that justifies the difficulties that arise when granting greater resident control of redevelopment and further legitimizes the planning process in a way that is legally cognizable by courts reviewing urban redevelopment plans. As a result, this article describes the need for more robust procedural legal rights that would allow low-income residents to resist redevelopment in those instances where the goals of participatory planning are not attained due to government corruption or inattention to public input. This new rhetorical and normative regime is tested against actual urban redevelopment planning methods used in Camden, New Jersey and East St. Louis, Illinois. This article suggests specific changes to state redevelopment laws that would enshrine deeper public participation*

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*values and concludes with an eye towards the additional research and advocacy necessary for achieving those changes.*

## I. INTRODUCTION - THE COMMUNITY PLANNER'S CONUNDRUM

Imagine the dilemma of a modern urban planner in a severely distressed American riverfront city. Her community, which was once a bustling industrial powerhouse whose geographic advantages made it the locus of transnational rail and river cargo shipments, is now a shell of its former self. The population had grown steadily after the turn of the 20th century as European immigrants and African American migrants from the South were attracted to the city's plentiful employment opportunities for low-skilled workers.[1] The population and industrial productivity, however, peaked in the early 1950s.[2]

Post WWII, a shift occurred in the economy and new development was catalyzed by construction of the interstate highway system, decreasing the need for rail and ship cargo while also providing a means of escape for those interested in moving away from the industrial pollution and overcrowded housing conditions in urban centers.[3] Aided by federal housing programs that favored suburban tract housing, redlining banks that refused to lend in areas populated with a majority of racial minorities and unscrupulous Realtors who played on racial fears, the city bled residents at increasing rates throughout the next two decades.[4]

By the 1980s, "white flight" had turned into "green flight" with almost all residents of means fleeing the community's rapidly rising rates of unemployment, poverty, and crime.[5] The city that had once been considered a

1. *See* Nell Irvin Painter, *Foreword* to THE GREAT MIGRATION IN HISTORICAL PERSPECTIVE: NEW DIMENSIONS OF RACE, CLASS AND GENDER viii–ix (Joe W. Trotter, Jr. ed., 1991); Joe William Trotter, Jr., *Introduction. Black Migration in Historical Perspective: A Review of the Literature*, *in* THE GREAT MIGRATION IN HISTORICAL PERSPECTIVE: NEW DIMENSIONS OF RACE, CLASS AND GENDER 1, 5–7 (Joe W. Trotter, Jr. ed., 1991).

2. *See* Peter Gottlieb, *Rethinking the Great Migration: A Perspective from Pittsburgh*, *in* THE GREAT MIGRATION IN HISTORICAL PERSPECTIVE: NEW DIMENSIONS OF RACE, CLASS AND GENDER 68, 78–79 (Joe W. Trotter, Jr. ed., 1991).

3. *See*, KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES, 190–209 (1985).

4. *See* Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1122 (2007) ("Through its creation of the interstate highway system and the discriminatory policies of the Federal Housing Administration (FHA), which would not guarantee mortgages in urban or racially integrated neighborhoods, government policy both lured and pushed investment capital out of inner cities and into outlying areas. Following the path laid by the FHA, private mortgage lenders simply refused to lend money for the construction or upkeep of properties within many urban neighborhoods.").

5. Sheryll D. Cashin, *Drifting Apart: How Wealth and Race Segregation Are Reshaping the American Dream*, 47 VILL. L. REV. 595, 597–98 (2002) ("About half of the one-hundred largest

regional economic engine with name-brand company headquarters became better known for its label as "Murder Capital" of the nation.[6] By the last decade of the 20th Century, the city government, long considered corrupt, was unable to balance a budget with a dwindling tax base and the state intervened by taking control of the local school district and most municipal functions.[7]

Given this history, our modern community planner is faced with two common choices in community economic development practice. On the one hand, she could pursue a bottom-up strategy by convincing municipal officials and local residents to engage in a participatory planning process designed to facilitate resident input into the development of neighborhood and community revitalization plans. In the alternative, she could pursue a top-down strategy by packaging public powers, such as eminent domain and tax abatement, to entice private developers to pick neighborhoods to develop according to plans that the municipality could then adopt with little or no community consultation.

The state's redevelopment law appears neutral on its face to either decision, but the planner notes that the public participation requirements enshrined in that law could easily be met with only one or two public hearings.[8] In addition, the state redevelopment law provides few procedural protections that residents of low-income communities could use to successfully fight against redevelopment or the municipality's right to use eminent domain in such an economic development context.[9]

The hypothetical above roughly describes the development trajectories of East St. Louis, Illinois and Camden, New Jersey, which are two of this nation's most economically distressed communities. Despite their similarities, these cities have followed different paths in terms of redevelopment planning and

metro areas became majority-minority . . . in no small part because of the widespread suburbanization of the white middle class . . . . All racial groups are rapidly moving to the suburbs.").

6. *See* Editorial, *Gary Drops to 9th on List of Most Dangerous*, POST-TRIBUNE, Nov. 21, 2005, at A1 (describing Camden, NJ as the most dangerous city in America); Beth Hundsdorfer, *St. Clair County Reports Fewer Homicides in '04 Number Falls from 33 to 31*, BELLEVILLE NEWS-DEMOCRAT, Jan. 1, 2005, at 1A (describing East St. Louis' former designation as most dangerous city in America).

7. Laura M. Litvan, *States Try to Rescue School*, INVESTOR'S BUS. DAILY, Feb. 17, 1998, at A1 ("After years of watching the school board in East St. Louis fail to improve one of Illinois' worst school districts, state officials had had enough. They took over the district. The state set up a management panel four years ago to control all of the school system's financial decisions."); Melanie Burney & Dwight Ott, *Judge Allows Camden Recovery Act*, PHILADELPHIA INQUIRER, Mar. 19, 2003, at B1 ("In a major victory for the McGreevey administration, a state judge yesterday upheld New Jersey's $175 million plan to revitalize Camden and seize unprecedented control over the city's daily operations and school board.").

8. *See infra* Part III.

9. *See infra* Part III.

community participation, with East St. Louis following the participatory planning route and Camden following the top-down planning approach.[10] This article explores part of the legal framework giving rise to the choices described above and advocates for a change in that framework to favor the participatory approach.

The central thesis of this article is that deeper participatory planning procedures, as defined below, should be included in state redevelopment laws in recognition that the planning process serves a number of important functions. These functions include: 1) legitimizing economic redevelopment decisions in the eyes of the public and the judiciary; 2) providing important procedural legal protections for residents who live in distressed communities; and 3) providing an opportunity for low-income residents to share in the benefits of redevelopment. Although the legal literature often describes public participation in economic development planning as exemplary of purely direct democracy and empowerment principles, this article is animated by the belief that a rhetorical shift to emphasize how participatory planning adds value to the decisions ultimately made by elected legislative bodies, and provides a more legally coherent rhetorical and theoretical framework to justify such participation.

As a former neighborhood planner, I have faced the planner's dilemma described above. I recognize the need to protect the rights of individual community residents impacted by redevelopment efforts and the need to protect the use of eminent domain as a necessary economic development tool to arrest urban decay. This article proposes a participatory planning process that strikes a balance between those who argue for elimination of eminent domain, for economic development purposes, and the overuse and abuse of eminent domain powers that have plagued urban communities for decades. Participatory planning can provide a forum of deliberation and discussion that informs and legitimizes urban redevelopment efforts and simultaneously serve as a bulwark against overreaching by redevelopment advocates.

Before launching into this project, it is necessary to define "participatory planning." This article adopts the belief that participatory planning, properly understood, is a process rather than an end of itself.[11] In terms of breadth and depth, planners must endeavor to include local community leaders, business owners, nonprofits, homeowners, tenants, landlords and other impacted individuals in an iterative and interactive series of pre-development activities designed to share information and garner community opinion and preferences. In addition, it requires municipal officials, urban planners and design

10. *See* discussion *infra* at Part V.B.

11. For a larger description of participatory planning as process, see generally JOHN FORESTER, THE DELIBERATIVE PRACTITIONER: ENCOURAGING PARTICIPATORY PLANNING PROCESSES (1999).

professionals to conduct a series of surveys, focus groups, design charettes and community workshops. In sum, a truly successful participatory planning process requires that redevelopment agencies provide: 1) multiple engagement forums to share data, collect information, and gather opinions; 2) a focus on collaboration and deliberation in the determination of community preferences and potential outcomes prior to the designation of an area as one in need of redevelopment; and 3) a feedback mechanism to allow participants to gauge responsiveness to community concerns in a manner that prevents erosion of trust, participation and collaboration over successive events.

Part II of this article provides a brief history of urban renewal efforts and describes the public participation requirements added to redevelopment laws in light of urban renewal failures. Part III explores the structure of public participation requirements in modern state redevelopment laws, with particular emphasis on the shallow nature of the participation and the importance placed on the accountability of elected bodies.

Part IV reviews the controversial U.S. Supreme Court case *Kelo v. City of New London*, where a bare 5-4 majority upheld the use of eminent domain for purely economic development purposes as consistent with the Fifth Amendment protection against the taking of private property for public use without just compensation. This part emphasizes that the majority opinion rests upon an underlying belief in the legitimacy of the comprehensive economic development planning processes due to interplay of public engagement and the imprimatur of a politically accountable legislature. This participatory planning process can be summarized as one involving careful formulation, thorough deliberation, public outreach, and public education.

Part V describes the use of direct democracy and empowerment theory by scholars to justify public participation and suggests the utility of using arguments that are more consistent with the goals of participatory planning defined above and the legitimizing role of legislative authority described by the *Kelo* majority.

Part VI describes recent changes to state redevelopment laws as a result of *Kelo* that have increased substantive legal protections for middle- and upper-income communities faced with redevelopment without providing any additional protections for low-income communities.

Part VII advocates the strengthening of procedural protections afforded low-income community residents targeted by redevelopment efforts by enshrining participatory planning principles into state redevelopment law.

Parts VIII and IX explore the arguments in this article through the lens of deep participatory planning utilized in East St. Louis, Illinois and top-down planning utilized in Camden, New Jersey.

Part X concludes this article with an eye towards the next steps in research and advocacy, which are needed to implement this article's recommendations.

## II. BRIEF HISTORY OF URBAN REDEVELOPMENT AND PUBLIC PARTICIPATION

For decades, urban redevelopment projects have been controversial because they were catalysts for the dissolution of low-income urban communities, particularly low-income communities of color.[12] The urban renewal projects of the 1950s and 1960s were often hailed by business interests as long overdue reinvestments in urban centers and assailed by community groups as land grabs by powerful state and private interests at the expense of the urban poor.[13] The initial urban renewal programs were dubbed "Negro Removal" by opponents because they had, at best, a disparate racial impact, and, at worst, they seemed to equate physical blight with the presence of an assumed human blight.[14]

In all, it has been estimated that the first two decades of urban renewal resulted in the displacement of more than 200,000 urban households, disproportionately impacting low-income African Americans.[15]

Commentators still lament the loss of community and social support structures that resulted from the demolition of deteriorated housing in the name of progress.[16] The shining towers of public housing built pursuant to those

12. *See* Barbara L. Bezdek, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 38 (2006) ("The displacement of low-income communities accomplished by urban redevelopment law and practice in the U.S. continues the inequities of urban renewal and targets 'low-mobility populations' – those mostly poor and minority city residents who toil in the background in the office towers and tourist spots."); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 46 (2003) ("Urban renewal . . . was an economic development program with profound racial implications.").

13. Pritchett, *supra* note 12, at 37–47.

14. *Id.* at 47. *See also* Ilya Somin, *Why Robbing Peter Won't Help Poor Paul: Low-Income Neighborhoods and Uncompensated Regulatory Takings*, 117 YALE L.J. 71, 72–73 (Supp. 2007), *available at* http://www.yalelawjournal.org/content/view/1587/123 ("[U]rban renewal, and 'blight' condemnations have often disproportionately targeted low-income neighborhoods. Since World War II, some three to four million low-income Americans have been displaced by such condemnations. In the 1960s, urban renewal takings were sometimes referred to as 'negro removal,' because so many of them targeted poor African Americans. Such takings continue to victimize poor communities to this day.") (citation omitted).

15. See Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-Kelo Legislation*, 82 N.Y.U. L. REV. 177, 200–01 (2007) ("In the 1950s and 1960s, cities across the country engaged in massive urban renewal projects that relied heavily on the use of eminent domain. Major sections of many cities were demolished and rebuilt. Throughout its course and across the country, the urban renewal movement resulted in the displacement of '177,000 families and another 66,000 single individuals, most of them poor and most of them black.'") (citation omitted).

16. *See* J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 569 (2007) ("Eliminated buildings sometimes lacked basic plumbing and sanitation, which was always provided in the new public housing, but urban renewal displaced many poor people from functioning communities that

redevelopments to house the urban poor were not the solution and, more often than not, became the "blight" that was later demolished to make way for even newer redevelopment schemes.[17]

The continued use of urban redevelopment can partly be traced to these temporary successes in replacing physically deteriorated structures, but there was an insidious understanding that part of the blight in need of excising was the poor residents of color themselves.[18] Most displaced residents were relocated to other impacted and impoverished neighborhoods in the region without any opportunity to enjoy the benefits promised by their revitalized and rebuilt neighborhood.[19]

These early planning and development failures led to legal reforms in the late 1960s and early 1970s that amended federal redevelopment laws, requiring greater public participation and relocation assistance for those residents impacted by urban renewal.[20] Municipalities and redevelopment officials reacted cynically to these federal requirements and, in a legacy that endures to this day, often provided insufficient notice of perfunctory hearings at times and locations inconvenient to those ultimately impacted by the proposed redevelopment.[21]

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helped sustain them. The new construction tended to adopt self-defeating forms of architecture and streetscape that undermined and rendered dangerous public space.") (citations omitted); Bezdek, *supra* note 12, at 67–68 ("[I]f the redevelopment area requires the relocation of residents, these residents leave not only the familiar roofs but also streets, friends, neighbors, churches, child care arrangements, schools and transit routes.").

17. *See, e.g.*, Amy Widman, *Replacing Politics with Democracy: A Proposal for Community Planning in New York City and Beyond*, 11 J.L. & POL'Y 135, 157 n.84 (2002).

18. Byrne & Diamond, *supra* note 16, at 569 ("Subsidized housing programs often have pursued some notion of urban vitality. Urban renewal demolished 'blighted' low-income housing and replaced it with modern public housing. The architects of urban renewal believed that excision of blight, like the surgical removal of a gangrenous limb, would enhance urban vitality. Although in practice blight became a term of elasticity, allowing removal of anything believed to stand in the way of desired projects, it properly denotes sites with a negative economic value. This also takes into account the effects on surrounding properties. These projects had some successes and many legendary disasters.") (citations omitted).

19. Bezdek, *supra* note 12, at 68 ("Evidence of the huge loss in number and affordability of units to working and poor households is a cost imposed with little in-kind benefit returned to society. During the first decade of Urban Renewal, just one-quarter of the thousands of units demolished were replaced–at much higher rents and housing wealthier residents. The displaces almost always incurred higher shelter costs and increased cost burdens relative to their ability to pay.") (citations omitted).

20. *See, e.g.*, Uniform Relocation Act, 42 U.S.C. §§ 4601–4655 (2000) (first passed in 1970 and designed to prevent harm to residents involved in urban redevelopment by ensuring that they receive relocation and other types of social service assistance).

21. *See, e.g.*, Paul Angiolillo Jr., *A Town Goes to War Over the Ultimate Truck Stop*, BUS. WK., Jan. 11, 1988, at 16D; Editorial, *An Issue in the Closet*, THE CAP. TIMES (Madison, Wis.), Mar. 7, 1997, at 14A ("[I]n matters legislative, the most telling details often have to do with when and where hearings on important issues are held. If an issue is controversial . . . to legislators on

Federal redevelopment laws eventually evolved to address this problem by requiring "public input" in redevelopment plans as a pre-requisite for even applying for federal funds. Today, successful applicants for federal redevelopment funds must almost always show some level of predevelopment public participation in order to qualify for federal assistance.[22]

Although this evolution of federal law is a welcome departure from past practice, the results are mixed, with most commentators arguing that such an approach does not guarantee that participatory planning is truly encouraged and realized.[23] In addition, while federal redevelopment laws have made some progress, evolution in state redevelopment laws over the same period has made little to no progress in ensuring meaningful participation by residents.

## III. PROTOTYPICAL STRUCTURE FOR STATE REDEVELOPMENT LAWS

Standard state redevelopment laws require public participation at two stages of the redevelopment planning process. The first stage is prior to designating an area as being in need of redevelopment, and the second is upon the adoption of a specific redevelopment plan for the designated area.[24] Given

one side or another, they often seek to limit public input and attention by scheduling hearings at inconvenient times and in remote locations.").

22. *See, e.g.*, Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriation Act, Pub. L. No. 102-389, 106 Stat. 1571 (1993) (codified as amended at 42 U.S.C.A. § 14371 (1988 & Supp. IV 1993) (effective September 30, 1993)) (requiring public participation processes by applicants for "HOPE VI" projects for the revitalization of failed public housing developments); 24 C.F.R. § 597.200 (2007) ("The strategic plan should: (1) Indicate and briefly describe the specific groups, organizations, and individuals participating in the production of the plan and describe the history of these groups in the community; (2) Explain how participants were selected and provide evidence that the participants, taken as a whole, broadly represent the racial, cultural and economic diversity of the community; (3) Describe the role of the participants in the creation, development and future implementation of the plan; (4) Identify two or three topics addressed in the plan that caused the most serious disagreements among participants and describe how those disagreements were resolved; (5) Explain how the community participated in choosing the area to be nominated and why the area was nominated . . . . (7) Provide a brief explanation of the community's vision for revitalizing the area.").

23. *See* Audrey McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 866–92 (2000).

24. *See* Daniel R. Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25, 29 (1967); Elizabeth Bd. of Educ. v. City of Elizabeth, No. UNN-L-0435-06, 2007 WL 2891078, at *1 (N.J. App. Div. Sept. 28, 2007) ("Council passed a resolution authorizing the City's Planning Board to investigate 'if the area adjacent to the Kapkowski Road Redevelopment area is an area in need of redevelopment, and, if so, further authorize[d] the development of such a redevelopment plan' . . . . [T]he City's Planning Board passed a resolution 'designat[ing] . . . the Marine Waterfront-Trumbull Street Redevelopment Area . . . as a 'redevelopment area'' and recommended that the Council also designate the area as such. On December 7, 2000, the Council resolved to adopt the redevelopment plan recommended by the

my definition of participatory planning, this article is focused on the public participation at the pre-designation stage rather than at a later stage when a plan is being adopted.[25] Although many of the participatory planning tenets described in this article remain beneficial at later stages of planning, the agenda-setting nature of predevelopment planning makes it more effective in meeting the short- and long-term goals of participatory planning.

Standard public participation provisions require public notice that an area is under consideration for redevelopment, including the publication and mailing of public hearing information to those in geographic proximity to the area under consideration, the posting of maps showing the proposed redevelopment area and the holding of the public hearing itself.[26] There are

Planning Board."); 65 ILL. COMP. STAT. ANN. 5/11-74.4-5 (Lexis Nexis 2009) ("Prior to the adoption of an ordinance proposing the designation of a redevelopment project area, or approving a redevelopment plan or redevelopment project, the municipality by its corporate authorities, or as it may determine by any commission designated under subsection (k) of Section 11-74.4-4 . . . shall adopt an ordinance or resolution fixing a time and place for public hearing . . . . At the public hearing any interested person or affected taxing district may file with the municipal clerk written objections to and may be heard orally in respect to any issues embodied in the notice. The municipality shall hear all protests and objections at the hearing and the hearing may be adjourned to another date without further notice other than a motion to be entered upon the minutes fixing the time and place of the subsequent hearing. At the public hearing or at any time prior to the adoption by the municipality of an ordinance approving a redevelopment plan, the municipality may make changes in the redevelopment plan. Changes which (1) add additional parcels of property to the proposed redevelopment project area, (2) substantially affect the general land uses proposed in the redevelopment plan, (3) substantially change the nature of or extend the life of the redevelopment project, or (4) increase the number of inhabited residential units to be displaced from the redevelopment project area, as measured from the time of creation of the redevelopment project area, to a total of more than 10, shall be made only after the municipality gives notice, convenes a joint review board, and conducts a public hearing.").

25. For a fuller discussion of this latter controversy, see generally 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 (2006).

26. *See, e.g.*, N.J. STAT. ANN. § 40A:12A-6 (West Supp. 2008) ("a. . . . The governing body of a municipality shall assign the conduct of the investigation and hearing to the planning board of the municipality. b. . . . (2) The planning board shall specify a date for and give notice of a hearing for the purpose of hearing persons who are interested in or would be affected by a determination that the delineated area is a redevelopment area. (3) The hearing notice shall set forth the general boundaries of the area to be investigated and state that a map has been prepared and can be inspected at the office of the municipal clerk. A copy of the notice shall be published in a newspaper of general circulation in the municipality once each week for two consecutive weeks, and the last publication shall be not less than ten days prior to the date set for the hearing. A copy of the notice shall be mailed at least ten days prior to the date set for the hearing to the last owner, if any, of each parcel of property within the area according to the assessment records of the municipality. A notice shall also be sent to all persons at their last known address, if any, whose names are noted on the assessment records as claimants of an interest in any such parcel . . . . Failure to mail any such notice shall not invalidate the investigation or determination thereon. (4) At the hearing, which may be adjourned from time to time, the planning board shall

few if any provisions for how a redevelopment agency must consider the information gathered at a public hearing aside from a requirement that minutes of proceedings be kept in the public record.[27]

Although these redevelopment statutes describe the authority of appointed planning bodies as recipients of delegated local government powers, most statutes require that locally-elected representative bodies such as city or county councils play a prominent role in the decision-making.[28] The powers typically vested in local elected government include the powers to permit an appointed planning body to study an area for designation for redevelopment, to approve or disapprove the planning body's recommendation arising from that study, to approve or disapprove any specific redevelopment plan arising from the area, and certification that such plans conform to local comprehensive planning goals.[29]

The role of these deliberative elected bodies impacts judicial review by legitimizing the planning process. Participatory planning can add value to and deepen this legitimizing function as long as it does not interfere with or replace legislative determinations by elected officials. This combined impact of public participation and legislative determination may be seen in the U.S. Supreme Court's most recent decision about the limits of economic development powers, *Kelo v. City of New London*. The *Kelo* case, and state reaction thereto, also point out the need for greater public participation to further these legitimizing functions and to increase procedural protections for low-income communities targeted for redevelopment.

## IV. KELO'S RELIANCE ON PLANNING PROCESSES, POST-KELO REFORMS AND THE NEED FOR GREATER PROCEDURAL PROTECTIONS

The Supreme Court's controversial decision in *Kelo v. City of New London*[30] engendered a level of public outrage not seen since the *Bush v. Gore*[31] decision. Many urban scholars were generally not as surprised or outraged over *Kelo* as the general public but still recognized the need for reformation of urban redevelopment laws.[32] Ultimately, *Kelo* and its aftermath

hear all persons who are interested in or would be affected by a determination that the delineated area is a redevelopment area. All objections to such a determination and evidence in support of those objections, given orally or in writing, shall be received and considered and made part of the public record.").

27. *Id*.

28. *See* 65 ILL. COMP. STAT. ANN. 5/11-74.4-5 (Lexis Nexis 2009).

29. *See id.*

30. *See generally* Kelo v. City of New London, 545 U.S. 469 (2005).

31. *See generally* Bush v. Gore, 531 U.S. 98 (2000).

32. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1423 (2006) (defending the *Kelo* majority opinion while recognizing that "[f]ew takings cases sparked as harsh a reaction as did *Kelo*. The decision attracted criticism

provide a window into possible reformation of redevelopment laws that recognizes the need for greater deliberation, deeper participation, and procedural protections for low-income residents.

### *A.* Kelo *in Brief*

Given the extensive literature generated by *Kelo*, it is only necessary here to briefly sketch the contours of the case to get insight into the legal significance it places on the planning process. In *Kelo*, the city of New London, Connecticut, pursuant to a state authorizing statute, exercised eminent domain to condemn properties for use as part of a commercial development that included, *inter alia*, a waterfront hotel and conference center, public and commercial marinas, a public walkway, 80 new homes, a Coast Guard Museum, substantial office space, 90,000 square feet in research and development facilities, retail space, and related uses.[33]

The development plan required the amassing of necessary acreage through use of the city's eminent domain authority and subsequent transfer of title to a non-profit development corporation which would then ground lease the properties to various private developers for construction and operation of different aspects of the economic development plan.[34] The resulting development was estimated to create 518-867 construction jobs, 718 to 1,362 direct jobs and 500-940 indirect jobs after construction.[35] The development would also contribute an estimated $680,544 to $1,249,843 in annual property tax revenues into the city tax coffers.[36]

The dispossessed families had land tenures ranging from a few years to decades, but each claimed strong attachments to their homes and their neighborhood.[37] The residents filed suit to enjoin the use of eminent domain, received a split decision at a lower court level, lost at the Connecticut Supreme Court and, ultimately, lost at the U.S. Supreme Court.[38]

The primary issue in *Kelo* was whether "economic development" alone, defined roughly as job creation and increase to the tax base of a community, is a sufficient rationale to satisfy the "Public Use" clause of the Fifth Amendment to the Constitution, as applied to the States by the Fourteenth Amendment.[39]

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from commentators of diverse, and often conflicting, political persuasions. Virtually all commentators found the ruling disconcerting, albeit for different reasons. *Kelo* also sparked a political maelstrom.").

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

34. *Id.* at 476 n.4.

35. Kelo v. City of New London, 843 A.2d 500, 510 (Conn. 2004).

36. *Id.*

37. *See Kelo*, 545 U.S. at 475.

38. *Id*. at 475–77, 490.

39. U.S. CONST. amend. V ("[N]or shall private property be taken for *public use*, without just compensation.") (emphasis added).

For decades, municipalities used eminent domain powers to take private property for economic development planning (most often in clearing "blighted" areas that are purportedly injurious to the public health, safety and general welfare), and the U.S. Supreme Court reviewed such takings using the "rational basis" test giving great deference to municipal and state legislatures' determination of the public purpose behind such actions.[40] Despite this deference, the Court had never declared economic development alone as a "public use" in and of itself.

The *Kelo* Court held, 5-4, that the city's actions and state redevelopment law were constitutional because economic development alone may satisfy the Public Use Clause.[41] To reach that conclusion, the Court majority cited precedents indicating that: 1) "public use" is equivalent to the "public purpose" for which property is being taken, and great deference has been given to state legislature's expression of the public purpose behind the use of eminent domain; 2) private property may be taken by eminent domain and conveyed to other private entities, provided that the grantee-private entity uses the property to further the "public purpose"; and 3) the Court has allowed the taking of non-blighted property where the condemning entity found that it was necessary, as part of a comprehensive redevelopment plan, to achieve its public purpose.[42]

In dissent, Justice O'Connor argued that the precedents relied upon by the majority should be read as allowing eminent domain for economic development purposes, but only when the targeted properties were "blighted" and affirmatively injurious to the public, health, safety, and general welfare.[43]

Justice Thomas' dissent argued that economic development purposes could never be a "public use" unless the subsequent transfer of ownership resulted in actual public ownership or access to the condemned property.[44]

### *B. The Planning Processes as Legitimacy for Redevelopment*

Justice Stevens' majority opinion, and the precedents upon which it rests, describe the planning process as one of the reasons that the Court and society at large should have faith that the use of eminent domain for redevelopment comports with a truly public purpose. In other words, part of the justification for the Court's deference to the state and local authorities' definition of the

40. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

41. *Kelo*, 545 U.S. at 489–90.

42. *Id*. at 488–89 (citing *Berman*, 348 U.S. at 35–36).

43. *Id.* at 500 (O'Connor, J., dissenting) ("[P]recondemnation use of the targeted property inflicted affirmative harm on society . . . [and] the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm.").

44. *Id*. at 521 (Thomas, J., dissenting) ("I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.").

public purpose for economic development planning is satisfaction with the planning processes itself. This process, based in state redevelopment law, includes a mix of administrative agency action, legislative votes, and direct public engagement. The *Kelo* Court focuses on the interplay between the latter two elements in particular.

The Court notes the redevelopment authority "held a series of neighborhood meetings to educate the public about the [planning] process."[45] Later in the opinion, Justice Stevens states that "The City has carefully formulated an economic development plan [and] . . . [g]iven the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us . . . to resolve the challenges of the individual owners . . . in light of the entire plan."[46]

Justice Kennedy's concurrence cites the planning procedures even more directly by pointing out that "[t]his taking occurred in the context of a comprehensive development plan meant to address a serious citywide depression [and] . . . [t]he city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes."[47]

Undoubtedly, the satisfaction expressed by the majority and concurrence regarding the planning process in this case stems largely from necessity given the limitations of judicial competence and concerns about substituting judicial conceptions about the wisdom and efficacy of public plans for a legislature's determination.[48] As a result, however, the Court placed great emphasis on the need for careful deliberation as part of economic development planning, stating that "[a]s the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate."[49]

The implication of these arguments about planning procedures and public debate is that one can take solace in the fact that the planning in this case was comprehensive in nature, approved by a deliberative elected body and included public education and outreach. One may argue that Justice Stevens' faith in planning is misguided, but it is impossible to gainsay the importance that *Kelo*, and the precedents described therein, place on deliberative bodies, public outreach and procedural protections in establishing the legal legitimacy of economic development planning.

45. *Id*. at 473.
46. *Kelo*, 545 U.S. at 483–84.
47. *Id.* at 493 (Kennedy, J., concurring).
48. *See id*. at 489–90.
49. *Id*. at 489.

Within the *Kelo* opinion and in subsequent interviews, Justice Stevens specifically cites the political structure as an alternative avenue of redress for those persons aggrieved by the use of eminent domain for purely economic development purposes.[50] The fact that legislators who approve eminent domain as part of a redevelopment planning process must ultimately answer to the will of the voters is an important component of the procedural protections that Stevens sees at work in these cases.

Some have argued that Stevens' faith in this political and planning process is naive.[51] Certainly, this article argues that the public participation requirements must be more thorough and stringent to justify such faith in the planning process. Regardless of one's opinion about the *Kelo* majority's success in accurately describing the planning process, any normative changes to state redevelopment law should recognize the crucial legitimizing function elected bodies have as part of that process. Unfortunately, many urban scholars try to justify increases in participatory planning by unnecessarily rejecting the legislative role in this process in favor of direct democracy arguments. Ultimately, such changes undermine the judicial search for legitimacy in the planning process rather than enhancing it.[52]

## V. DEMOCRATIC THEORY AND PUBLIC PARTICIPATION

Every few years, a legal or planning scholar calls for a reformation of urban redevelopment law to allow for greater public participation.[53] The

50. *Id.* ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.") (footnote omitted). *See also* John F. Geis, *Eminent Domain Controversy Continues to Rock Legislatures*, 233 THE LEGAL INTELLIGENCER 3523, May 18, 2006, at 7 ("On Aug. 18, 2005 Justice John Paul Stevens, who crafted the majority opinion in Kelo v. City of New London, spoke before the Clark County, Nev., Bar Association in Las Vegas. He said that the majority opinion is 'entirely divorced from my judgment as concerning the wisdom of the program' that takes private homes for private redevelopment. Stevens added that *Kelo* was 'unwise' policy. 'My own view is that the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials,' he said, while acknowledging the constitutionality of eminent domain use for economic development.").

51. *See infra* note 76.

52. *See infra* note 76.

53. *See, e.g.*, Bezdek, *supra* note 12 (advocating the establishment of stakeholder rights and Community Equity Shares in Redevelopment); James J. Kelly, Jr., *"We Shall Not Be Moved": Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN'S L. REV. 923 (2006) (favoring referenda rights giving residents a veto over eminent domain decisions not involving public ownership or access and providing an alienable right to return for anyone displaced by redevelopment); McFarlane, *supra* note 23 (arguing for empowerment and political control theory that emphasizes the recognition of conflicting interests

connective tissue for these various approaches is the ubiquitous call for "resident control" of redevelopment, but the theoretical framework surrounding that control and the means for creating it are incredibly varied.[54] Unfortunately, "resident control" as a goal for participatory planning is at odds with the judicial search for a consultative and legislative role in the planning process.

The primary problem with embracing the concept of pure "resident control" or "empowerment" is that it is difficult to separate this from "Not In My Backyard" (NIMBY)-like resident vetoes over neighborhood changes.[55] Secondly, it ignores the economic reality that outside capital infusions are often necessary to arrest neighborhood decline and the inherent limits to what cumulative efforts of low-income residents can accomplish in the absence of public and private-sector partnerships. Given the connections between calls for "empowerment" or "resident control" and notions of "self-government" it is natural that many urban scholars use direct democracy theories as the most common justifications for more meaningful public participation in redevelopment.[56] Unfortunately, as discussed below, this overemphasis on direct democracy principles undercuts the role of deliberative legislative bodies and the interplay between those bodies and participatory planning that gave rise to *Kelo*'s reliance on the planning process.[57]

### *A. Direct Democracy as Incomplete Theory for Participatory Planning*

In some respects the participatory planning process advocated by this article lends itself to direct democracy theories. Participatory planning advocates often share the desire to see low-income communities exercise some level of control over their destinies.[58] Despite this, the perceived legitimacy that procedural protections, found by the majority and concurrence in *Kelo*, could be undermined by too much reliance on such a theory.

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and redistribution of power); Georgette C. Poindexter, *Who Gets the Final No? Tenant Participation in Public Housing Redevelopment*, 9 CORNELL J.L. & PUB. POL'Y 659 (2000) (advocating a "right of consultation" to build a sense of community, educate tenants and empower them by "giving them a voice"); Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City With Resident Control*, 27 U. MICH. J.L. REFORM 689 (1994) (suggesting resident controlled development via community organizations vested with public powers of eminent domain).

54. Quinones, *supra* note 53, at 753.

55. *See infra* Part VII.B.1.

56. *See, e.g.*, Kelly, Jr., *supra* note 53.

57. *See supra* Part IV.B.

58. Frank I. Michelman, *"Protecting the People From Themselves," or How Direct Can Democracy Be?*, 45 UCLA L. REV. 1717, 1730 (1998) (describing the reason we care about democracy generally as wanting "government to be *by* the people as well as *for* them – because, in other words, we care about people exercising their own charge over the politically decidable conditions of their lives").

One of the most recent and effective advocates of direct democracy in redevelopment law is Professor Audrey McFarlane.[59] Professor McFarlane has argued that public participation in redevelopment activities is a species of direct democracy that is merely of a "different qualitative nature than the more familiar methods of direct democracy . . . such as the initiative and the referendum."[60] Professor McFarlane argues that the voting structure of such initiatives and referenda are merely replaced with "face-to-face form of discourse and negotiation" arising during public participation required by state redevelopment law.[61] Most importantly for McFarlane, perhaps, is that the goal of the participatory interaction is to provide a forum for community resistance to more powerful interests represented by the city, developer and other non-residents.[62]

McFarlane's argument illustrates the dramatic shift required to justify participatory planning as direct democracy rather than as an intrinsically beneficial activity within a larger process. The direct democracy arguments create the need to defend and carve out space for direct democracy in a legal system designed to protect "voting" as the *sine qua non* of individual political power.[63] This is particularly problematic in light of compelling arguments that courts react negatively to exercise of such devolved power and favor more centralized and legislative decision-making structures.[64]

As discussed in Part III above, state redevelopment laws often require elected bodies to vote on redevelopment specifically to embed political accountability into the planning process.[65] A number of state actors have

59. *See* McFarlane, *supra* note 23.

60. *Id*. at 903.

61. *Id*.

62. *Id*. at 928–29 ("Instead, meaningful participation (i.e., having a decisive voice in favor of issues that may go against the prevailing value placed on economic development) is ultimately participation that is really an act of resistance. It seeks to bring a voice not to tinker with the process, but to redirect its emphasis away from uses and developments that gentrify centrally located neighborhoods, displacing poorer residents or channeling the resources of the city exclusively to the downtown business district to the detriment of neighborhoods that could also benefit from the infusion of their fair share of resources.").

63. *Id.* at 908 (arguing, inter alia, that a further development of a legal jurisprudence of direct democratic political participation beyond "one person, one vote" protections is necessary to protect public participation in economic development context).

64. *See* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 168–73 (1999) (pointing out that U.S. court decisions vary widely in seeing referenda as lacking deliberation and cementing prejudices or alternatively as pure democratic exercises that see "the people" as ultimate repositories of decision-making power).

65. Richard Degener, *Mention of Redevelopment Alarms Some in Cape May*, THE PRESS OF ATLANTIC CITY, Dec. 5, 2007, at C4 ("Council members and City Solicitor Tony Monzo downplayed the unanimous vote accepting the plan. . . . Monzo said any changes would come before City Council").

resisted referenda as amendments to state redevelopment laws because it is such a drastic departure from the current role for elected officials in those laws.[66] McFarlane points out that critics of direct democracy as a normative regime for local decision-making often argue that it lacks deliberation and careful thought expected from representative government.[67] Given the need McFarlane sees to create space for more direct democracy before it can effectively provide legal protections for residents impacted by redevelopment it seems unwise and unnecessary to moor participatory planning to this narrow landscape within democratic theory. Instead, participatory planning can be better understood as complementary to legitimating representative bodies rather than a replacement for them.

In a similar vein, appeals to "empowerment theory" as either a subset of direct democracy arguments or an alternative to them, are not sufficient to serve the legitimizing function ascribed to planning processes by the *Kelo* court and its precedents.

### *B. "Empowerment" as Benefit of Participatory Planning*

Empowerment is a second popular theory but it presents a problematic justification for increased public participation in urban redevelopment. The "empowerment" argument is often described in instrumental terms as the desired direct or indirect outcome of participatory planning processes.[68] This argument posits that the planning process must empower residents to take

66. Saba Ali, *Solicitor: State Won't Allow Eminent Domain Referendums*, THE PRESS OF ATLANTIC CITY, Feb. 22, 2007, at C1 ("Any referendum, binding or nonbinding, will go against the state statute that protects the city's use of eminent domain in redevelopment zones, said City Solicitor Richard McCarthy.").

67. Brief for the Am. Planning Ass'n et al. as Amici Curiae Supporting Respondents at 24–25, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108) ("The legislature or its delegate must make an actual determination that condemnation is for a public use before exercising the power of eminent domain. We do not believe that a restrictive judicial gloss should be imposed on the meaning of public use, or that courts should apply a heightened standard of review to public use determinations. But we *do* believe it is important that some politically accountable body determine that the exercise of eminent domain is for a public use, and that judicial review of such determinations remain available, even if under a deferential standard."). *Cf.* McFarlane, *supra* note 23, at 905 ("Direct participation has been primarily described and understood in its negative sense, however, through the well-known warnings of James Madison. He urged ratification of the then-proposed U.S. Constitution based on the protection that its representative structure and system of checks and balances would provide against the dangers and evils of direct democracy. He wrote: 'From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction.").

68. *See, e.g.*, McFarlane, *supra* note 23, at 918 ("Another set of arguments in favor of participation justify citizen or community involvement as a means to political and economic empowerment.").

control of their destiny in a manner similar to the arguments embedded in the direct democracy arguments described above.

Unfortunately, many scholars summarily dismiss public participation for "empowerment" because the term is vague and belies precise definition and scope.[69] If one reconceptualizes empowerment within the context of the search for a legitimizing function of the planning process, then it can be better understood as a potential intrinsic benefit derived from a participatory planning process rather than a desired outcome that must result from any "successful" planning process.[70] Using this understanding, a well-structured planning process is intrinsically beneficial to participants if it provides individuals and community groups with *the opportunity* to impact the future of their community and to effectuate change despite years of disenfranchisement, disinvestment and neglect by public and private actors.[71]

In other words, the act of participation planning itself constitutes "empowerment" simply by providing a forum for the performance of important civic duties, even if it fails to achieve every outcome that a community might deem desirable. Focusing on the intrinsic benefits of "empowerment" allows the term, as a theoretical concept, to more easily reside alongside a powerful role for elected legislative bodies described in state redevelopment law, rather than adopting the instrumental description typically used for empowerment theory that all but swallows the role of elected officials.

This does not mean that the instrumental goals are rendered irrelevant, but it does mean that we should measure the outcome of any particular planning exercise based on participation in the process rather than requiring community agreement with the ultimate decisions voted on by lawmakers. One may have

69. *See, e.g.*, Bezdek, *supra* note 12, at 109–10 ("A remedy premised on equity participation reconfigures the ubiquitous yet vague aspects of prior efforts to articulate communities' rightful roles in the community development field – participation, empowerment, and stakeholding – into ownership shares . . . . *Empowerment* of poor people is a much-articulated objective, from grass-roots claims through the federal and state Empowerment Zone programs enacted in the 1990s. Its meanings vary greatly in practice."); James J. Kelly, Jr., *Refreshing the Heart of the City: Vacant Building Receivership As a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 210, 224–25 (2004) ("As a community development buzzword, empowerment has already shown surprising longevity . . . . Despite its overuse, empowerment still invokes that sense of buy-in so essential to the survival of urban communities.").

70. Ken Reardon et al., *Participatory Action Research from the Inside: Community Development Practice in East St. Louis*, 24 AM. SOCIOLOGIST 69, 71–72 (1993).

71. FORESTER, *supra* note 11, at 123 (describing this same benefit in purely instrumental terms: "[planning] support is really giving them power, empowering them and exciting them, and it's paying off for the community. You can begin to see people change in the process: they are more likely to voice their concerns. If they are not listened to, they pursue the point and feel like they have a right to do so, whereas before they might not have. They have learned not to back down . . . .").

an intuition that a community engaging in this type of activity will *ipso facto* guarantee better planning and development outcomes, but such outcomes are not required for one to support participatory planning.

With this better understanding of how direct democracy and empowerment theory can operate within state redevelopment law as reviewed by courts, it is possible to understand ways that the states should reform their planning procedures.

## VI. STATE LEGISLATIVE RESPONSES TO *KELO*

States have responded to *Kelo* by proposing and adopting numerous amendments to their redevelopment laws.[72] Justice Steven's majority opinion stated that nothing stated therein "precludes any State from placing further restrictions on its exercise of the takings power" or imposing "'public use' requirements that are stricter than the federal baseline."[73] Thus far, over 40 states have taken up this challenge and proposed or adopted changes to their eminent domain laws to restrict them further than the *Kelo* court does under the federal Constitution.[74]

Justice O'Connor wrote in her dissent that "[a]ny property may now be taken for the benefit of another private party."[75] Regardless of one's belief in that description, the sentiment behind it briefly united residents of every income level in opposing *Kelo* because the opinion was seen as allowing the use of sovereign eminent domain powers solely for attaining some "highest and best use" for any piece of private property.[76] This unified response was short-lived because, instead of banning such uses of eminent domain for all economic development activities, many states simply buttressed or created a two-tier structure whereby a strictly defined "blight" designation is required before eminent domain may be exercised for purely economic development purposes.[77] These efforts to define "blight" in the narrowest terms possible simply ensure that middle- and upper-income property owners will feel safe from economic redevelopment efforts while residents in low-income communities are the only ones who can be impacted.

72. *See, e.g.*, Mark Seidenfeld, *In Search of Robin Hood: Suggested Legislative Responses to Kelo*, 23 J. LAND USE & ENVTL. L. 305, 306 (2008).

73. Kelo v. City of New London, 545 U.S. 469, 489 (2005).

74. *See* Bell & Parchomovsky, *supra* note 32, at 1418 n.27.

75. *Kelo*, 545 U.S. at 505.

76. *See, e.g.*, Gideon Kanner, *We Don't Have To Follow Any Stinkin' Planning – Sorry About That, Justice Stevens*, 39 URB. LAW. 529, 531 (2007) ("For all that appears from *Kelo's* black letter holding, 'economic redevelopment' can be freely used by affluent communities as well as distressed ones.").

77. *See* Nat'l Conference of State Legislatures, 2007 Eminent Domain State Legislation, http://www.ncsl.org/?Tabid=17584 (last visited Feb. 9, 2010).

The result of this dichotomy of property rights based on community underlies the need to strengthen procedural protections for low-income neighborhood residents impacted by urban redevelopment projects. This focus on procedural rights ensures that, although the substantive property rights will still diverge, the overall protections for low-income residents will more closely approximate middle- and upper-income residents.

## VII. PARTICIPATORY PLANNING AMENDMENTS AND OBJECTIONS

### *A. Participatory Planning as Procedural Protection*

The academic literature on the intersections of planning and the law has long called for deeper and more effective public participation for the reasons discussed previously. The suggestions, however usually revolve around changes that enshrine general policies that favor outcomes like "community empowerment" instead of specific procedural protections that could arise as a result. Given that state redevelopment law contains incredibly detailed but ineffective public participation requirements, it seems reasonable to conclude that such language may be amended to enshrine detailed requirements for participatory planning. To some extent this reformation attempts to add real teeth to the public participation that Stevens relies upon in *Kelo* and attempts to make such protections live up to their promise.

My proposal is for state redevelopment law to require three public hearings, opportunities for joint agency-participant data collection and analysis and at least one public design charrette. In addition, input received from planning participants should be legally presumed to materially impact any final revitalization plan adopted by the redevelopment authority. With such a legal presumption, the redevelopment authority should affirmatively have to demonstrate such impact to a reviewing court or provide "good faith, reasoned analysis" for why such an impact was not feasible.[78]

In his *Kelo* concurrence, Justice Kennedy stated that "there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, . . . that courts should presume an impermissible private purpose . . . ."[79] The adoption of clearer and more effective procedures in state redevelopment laws can highlight when those cases are before a reviewing court.

For example, state redevelopment law requiring public hearings should be modified to require redevelopment agencies to hold an initial public hearing that describes the participatory planning process and allows interested and

78. *See, e.g.*, Los Angeles Unified Sch. Dist. v. City of Los Angeles, 68 Cal. Rptr. 2d 367, 373 (Cal. Ct. App. 1997) (establishing this standard for upholding environmental impact statement determinations).

79. *Kelo*, 545 U.S. at 493.

available participants to sign up for a future sessions of data collection and community outreach. Planners collecting data via traditional surveys, housing conditions would present that data at a second public hearing, where it can be presented to residents and analyzed by participants, with an eye towards ascertaining the consensus strengths, weaknesses, opportunities and threats facing the community.

Next, the redevelopment authority would hold a design charette to determine resident preferences and priorities with respect to aesthetic, architectural and design elements involved in any revitalization efforts. The purpose of this session would be to determine whether neighborhood needs and preferences align sufficiently to support a redevelopment designation. At the end of the process, the redevelopment authority would provide a written report indicating how community input was incorporated into the final determination of the redevelopment area boundaries and a report of community preferences that presumptively would be included in future adoption of any neighborhood redevelopment plan. The final report would be presented at a third public hearing where elected officials would publicly vote to designate the community as a redevelopment area.

These additional procedures provide protection to residents impacted by redevelopment in two ways. First, any time a redevelopment authority is faced with procedural requirements in redevelopment law there is the possibility that they will fail to meet all of their enumerated obligations.[80] As a result, any increased burden upon such a redevelopment agency increases the chances that residents will have legal recourse if such procedures are not followed.[81] Secondly, unlike a simple public hearing with no requirement to consider public opinion, fulfilling obligations like those described herein requires that the city engage its planning staff and consultants in a longer and more thorough process that does not allow for simple fixes after the fact.

These procedures offer the opportunity for additional benefits to accrue to individual residents and the community. First, neighborhood residents will be better informed than under the current approach because they will have more opportunities to hear municipal officials and planning professionals speak about potential redevelopment options. When public hearings require only the announcement of a designation or a plan and an opportunity to speak, there is no feedback process and residents are left to draw conclusions without any dialogue.[82]

80. Brief for the Am. Planning Ass'n et al. as Amici Curiae Supporting Respondents at 25, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

81. *See infra* Part IX.

82. FORESTER, *supra* note 11, at 115 ("Inspired by liberal models of voice and empowerment, many analysts unwittingly reduce empowerment to 'being heard' .... Participation is thus reduced to speaking ....").

Second, residents who take part in data collection on housing conditions, street conditions and surveys of residents start from the same baseline of information as the planning professionals. The usual fights about whether a particular parcel is deteriorated or not can be avoided by ensuring that the definition of "deteriorated" is agreed upon by community members and the redevelopment specialists beforehand and that the determination that a particular parcel is "deteriorated" was potentially made by representatives of both constituencies.

Third, by holding several design charettes, residents are better able to identify a range of options for neighborhood redevelopment and can communicate community preferences by both visual and verbal means to ensure that their input is not lost through miscommunication or misunderstanding.

Finally, planning as a generic concept is an activity engaged in by laypersons of different socioeconomic backgrounds. It involves issues, language and tools that are readily understood and usable by laypersons after a short period of time. As such, participatory planning provides residents with the means to protect themselves from future redevelopment plans that are not in the community's interest by engaging in a new level of discourse and deliberation with redevelopment officials.[83]

Ultimately, the process that I prescribe will also be beneficial for state and local redevelopment authorities because it is more likely to result in community support and decreases the likelihood of delaying legal fights. It is possible that the increased time and expense required in the initial planning process will be minimal in comparison to the post-designation legal battles like those involved in traditional top-down planning.

### *B. Objections to Participatory Planning Proposals*

There are a number of obvious objections to my proposal, some of which were dealt with in the text above. However, additional attention is deserved for NIMBY[84] concerns and the continued desire to equalize substantive property rights between the rich and poor.

#### 1. Not In My Back Yard ("NIMBY")

The most frequently voiced objection to any amount of citizen involvement in a planning and redevelopment process is that residents will inevitably deny the need for any change and protect the status quo. The

83. *Id*. at 143–44.

84. NIMBY is an acronym for "Not In My Backyard" and is an all-inclusive term designed to cover neighborhood resistance to locally unwanted land uses. *See, e.g.*, Denis J. Brion, *An Essay on LULU, NIMBY, and the Problem of Distributive Justice*, 15 B.C. ENVTL. AFF. L. REV. 437, 438 (1988).

presumption is that residents targeted by redevelopment will have a NIMBY mentality and always prefer to obstruct rather than participate in planning.[85] This NIMBY phenomenon, which is extensively discussed by land use literature, is an outgrowth of the belief that constituencies involved in planning are motivated solely or primarily by self-interest and will oppose any upsetting of the status quo.[86] There are two responses to this concern when it is raised in the context of areas designated for urban redevelopment.

First, severely distressed communities do not always engage in the suburban-style NIMBY described in the most land use literature.[87] Suburban NIMBY most often involves residents who believe that their investment backed expectations require them to prevent the siting of locally undesirable land uses ("LULUS" for short) such as group homes, gas stations or other uses that are deemed incompatible with middle to high-priced single-family housing.[88] While some aspects of this commonplace NIMBY exist in any community, particularly for traditional LULUS, severely distressed neighborhoods targeted for redevelopment often organize in opposition to land uses that are traditionally deemed desirable, such as middle-income market rate housing, office space or retail.[89] More often that not in these cases, the problem is not the inherent undesirability of the proposed land use, but the inability of the current resident and business population to participate in the upside contemplated by the redevelopment.

At the very least one would have to admit that this is a rather unique type of NIMBYism, but I think even that concession overstates the similarities

85. Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L. J. 495, 495 (1994) ("It is a syndrome, a pejorative, and an acronym of our times: NIMBY, or Not In My Back Yard. It has a political arm, NIMTOO (Not In My Term Of Office), an object of attack, LULUs (Locally Undesired Land Uses), and an extreme form, BANANA (Build Absolutely Nothing Anywhere Near Anyone).").

86. Debra Stein, *Nimbyism and Conflicts of Interest*, PUB. MGMT., Aug. 1, 2006, at 31 ("The disparity between the high value of current benefits and the lower value of future benefits may suggest why it is so much easier for NIMBY neighbors to mobilize citizens to resist change to the status quo than it is for project proponents to turn out citizens to testify in favor of change in the community.").

87. *See, e.g.*, Richard A. Epstein, *Property Rights, Public Use, and the Perfect Storm: An Essay in Honor of Bernard H. Siegan*, 45 SAN DIEGO L. REV. 609, 614–15 (2008) ("In the short run, these obstructionist tactics often pay handsome dividends to the winning faction. But the entire matter is dogged by a persistent prisoner's dilemma game. Each person counts himself victorious to the extent that he is able to prevent some new home or business from being built next door, hence the NIMBY motto 'not in my back yard.' But for each time one small faction gains a local victory, others in the community may suffer from a global defeat.").

88. *Id.*; Gerrard, *supra* note 85, at 496 ("NIMBY, in its various forms, has three principal types of targets. The first is waste disposal facilities, primarily landfills and incinerators. The second is low-income housing. The third is social service facilities, group homes and shelters for individuals such as the mentally ill, AIDS patients, and the homeless.") (citations omitted).

89. *See infra* Part IX.

between low-income community opposition to redevelopment and traditional NIMBYism. Unlike the pardigmatic NIMBY argument, low-income community residents are not simply protecting the status quo, but are engaged in a fight over the nature of change so they can participate in it rather than simply acquiesce to being moved by it.[90] That is the reason that participatory planning processes can be successful in mediating disagreements over the nature of change even if such processes cannot create a desire for change in an otherwise successful neighborhood where the desire does not exist in the first instance.

Building on the previous discussion, participatory planning in low-income communities starts with an assumption that the status quo is neither sustainable nor desirable for the current or future population of the neighborhood.[91] When communities characterized by abandonment, high crime rates and substantial disinvestment are asked if they want their community to change, the answer is almost invariably in the affirmative.[92] The entire point of the planning process is to develop some rough consensus, not unanimity, about what that change will look like and to find ways that it can positively impact current stakeholders. The process does not guarantee that there will be zero holdouts (there will certainly be more than a few free riders), but it does tend to isolate holdouts as impediments to community progress rather than protectors of community desires.

2. Need for Strengthened Substantive Property Rights

Over the past several decades commentators have understandably focused on remedying the two-tiered property rights structure by eliminating the use of "blight" as a rationale for designating communities as being in need of redevelopment.[93] Notions of equity and fairness, likewise, counsel for equal treatment of property owners regardless of their income levels or the relative

90. *See generally* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961); Kenneth M. Reardon, *Enhancing the Capacity of Community-Based Organizations in East St. Louis*, 17 J. PLAN. EDUC. & RES. 323, 324 (1997).

91. JACOBS, *supra* note 90, at 393.

92. *See, e.g.*, Matt Katz, *New Cramer Hill Vision: Residents Took a Look At a More Gradual Approach*, PHILADELPHIA INQUIRER, Mar. 17, 2009, at B1 (describing the Cramer Hill community's desire to promote gradual change they can take part in after that same community rejected the radical change proposed by a private redevelopment scheme pushed by the municipal redevelopment authority) (*see infra* Part IX.). *See also* Kenneth M. Reardon, *Back From the Brink: The East St. Louis Story*, GATEWAY HERITAGE, Winter 1997-1998, at 15 (discussing the community engagement process and receptivity of community residents to reverse economic decline).

93. *See, e.g.*, Pritchett, *supra* note 12, at 6 (describing the racist assumptions built into the use of "blight" as a rhetorical argument in favor of urban renewal).

poverty in their immediate surroundings.[94] Municipalities and planning commentators argue that such notions would harm the very low-income communities they seek to empower by removing the government's ability to overcome market failure and arrest the conditions of physical and social disintegration that often accompany urban decay.[95]

The quest for a middle ground may be trying to reconcile the irreconcilable. The alternative vision described in this paper provides for a middle ground by increasing low-income residents' procedural rights as a more effective way to counter projects that do not have the support of current residents without preventing government-sponsored redevelopment activities altogether.

## VIII. THE PROMISE OF PARTICIPATORY PLANNING IN ACTION – THE EAST ST. LOUIS EXAMPLE

One of the most basic but powerful examples of the long-term potential for community participation in the planning and development process began in 1991 in two of East St. Louis' poorest neighborhoods, Winstanley and Emerson Park. The University of Illinois at Urbana-Champaign's Departments of Architecture, Landscape Architecture, Urban Planning and School of Law came together with community members and city officials to engage in a process of discerning the best methods for improving East St. Louis' most underserved neighborhoods. The planners and neighborhood leaders met first to overcome community skepticism and help establish a rapport and credibility for joint efforts.[96] Over the course of the next several months, the University sponsored community forums where hundreds of residents expressed their desires and priorities for community revitalization.

This effort, however, did not end at expression alone and instead delved much deeper. Community members and planners worked side-by-side to conduct housing condition assessments and door-to-door surveys and gather information from those residents who were unable or unwilling to participate in public forums. Planning and law students helped form a community organization and began the process of applying to the Internal Revenue Service for tax-exempt status. Design workshops allowed residents to figuratively build the types of homes that they wanted to live in and display their visions of their community's future while viewing and reacting to their neighbors' contrasting visions.

These planning efforts left the participants certain in their priorities, and successful, small-scale neighborhood cleanup efforts left them increasingly

94. *See generally supra* Part II and accompanying notes.

95. Brief for the Am. Planning Ass'n et al. as Amici Curiae Supporting Respondents at 10, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

96. Reardon et al., *supra* note 70, at 77.

convinced that they could undertake more complex tasks. The first difficult project identified by the residents in Winstanley was the purchase and demolition of an abandoned, dilapidated home that had been the site of numerous criminal activities, including the molestation of two neighborhood children.[97] The community members took the lead on raising the money necessary to purchase the property at tax auction and to convince recalcitrant city officials to use scarce municipal funds to demolish the structure. Once the home was torn down, pursuant to their long-range plans, the community organization leveraged University resources to raise funds and solicit donated materials and labor to build a park on the site for neighborhood children – the same children who felt terrorized and afraid when they had passed the lot previously.[98] One of the most memorable scenes from that effort is described by Professor Kenneth Reardon in the following excerpt:

> As [neighborhood] leaders prepared for their presentation, a small group of landscape architecture and planning students began meeting with the Concerned Citizens of Precinct 19 to devise a preliminary set of design guidelines for the playground. Residents said they wanted the playground to serve children under 12, who were often chased out of the city's few existing playgrounds by older children and young adults. They also wanted the park designed so they could keep an eye on their children from their front porches. They strongly opposed installing equipment, such as basketball hoops, that would draw older children.
>
> After several of these meetings, the university students developed a preliminary set of concept drawings for the playground, which they presented at a neighborhood-wide meeting held on the proposed site. The residents attending this meeting pointed out what they liked and disliked about the students' designs. As the session was about to end, one of the adults suggested involving the real play experts – the neighborhood children.
>
> Soon after, the university students returned to meet with 16 children, aged five to 12, to talk about the playground. The university students began their session with the children by inviting them to draw their "ideal" playground on a 40-by-3-foot section of butcher paper. The youngsters quickly filled the paper with images. The paper was then hung on the wall, and each child was given the opportunity to explain his or her sketch. After the presentations, the university students asked the children to pick out the design ideas they liked best. Using these ideas, the university students helped the youngsters create a preliminary site plan for the playground.
>
> The children's final design included: a large sandbox, a regulation-sized double-dutch jump roping platform, the "world's tallest" play structure, a waterworks, a tire maze and an adult sitting area. To the university students'

97. *Id*. at 77–78.
98. *Id.* at 123.

> surprise, the youngsters insisted on putting the adult seating area in the middle of the playground's most active play space. When asked why this was important, an eight-year old boy said "Cause our grandparents usually watch us after school, and they would never let us play anywhere where they could not watch us."[99]

The neighborhood park was one of a series of small first steps at the beginning of a two decade long neighborhood planning and technical assistance initiative.[100] The events described in the excerpt are the tip of the iceberg and represent one of many early successes that led to dramatic transformation of the civic community in East St. Louis. Other neighborhoods saw the success of participatory planning and engaged in participatory planning efforts of their own. A city-wide coalition of community associations successfully spearheaded reform efforts that resulted in the defeat of an entrenched political machine and election of a reform-minded community organization leader as mayor.[101] One of the largest and most successful community organizations partnered with a private developer to construct 200-units of mixed-income housing—the first private housing built in the City of East St. Louis in over 30 years.[102] The organization's public outreach efforts resulted in the successful negotiation of sale and right of return agreements with a number of land owners. Six property owners refused to sell but when the city's power of eminent domain was utilized to take those properties the recalcitrant owners were seen as holdouts, rather than victims.

Throughout these planning procedures, community residents were not seen or treated as adversaries, recalcitrant recipients of neighborhood revitalization or as disembodied voices expressing a self-serving or short-sighted desire at a public hearing. Instead, they formed the nucleus of a partnership that saw engagement of residents in a deliberative planning and redevelopment process as a crucial component in revitalizing communities.

99. Kenneth M. Reardon, *Community Building in East St. Louis*, 16 PLANNERS' CASEBOOK 1, 3 (1995).

100. Mark D. Gearan, *Engaging Communities: The Campus Compact Model*, 94 NAT'L CIVIC REV. 32, 32 (2005).

101. Doug Moore, *Ex-Colleagues Clash in E. St. Louis Mayoral Race*, ST. LOUIS POST-DISPATCH, Dec. 17, 2006, at D6 (describing the campaign of reform candidate Alvin Parks, Jr.).

102. Laura Leckrone, *Booming Development*, ST. LOUIS COM., Feb. 2000, at 30–31.

## IX. THE FAILURE OF PUBLIC PARTICIPATION IN CAMDEN

The participatory planning described by Professor Reardon contrasts sharply with the more recent example of public outreach conducted for a community development project in the Cramer Hill neighborhood in the City of Camden, New Jersey. The neighborhood of Cramer Hill, one of the most stable working class neighborhoods in the city, became the preferred site for a $1.2 billion redevelopment plan promulgated by the state redevelopment agency, the City of Camden and their private development partner, Cherokee Investment Partners, Inc.[103] The redevelopment plan contemplated the use of eminent domain for the relocation of 1,200 low-income families to make way for, among other things, market rate and high-income housing and a golf course.[104] In his book, Camden After the Fall: Decline and Renewal in a Post-Industrial City, Professor Howard Gillette, Jr. described the legally required public hearing for the designation of Cramer Hill as a redevelopment area as follows:

> What might normally have attracted a dozen or so citizens for comment drew three hundred and fifty, half of whom had to wait outside for a chance to speak. The meeting lasted so long it could not be reported in the next morning's papers, and another hearing had to be scheduled for the following week. Held this time in Cramer Hill, the second meeting attracted six hundred residents . . . After hearing a host of speakers denounce the plan, including long-time white as well as black and Hispanic residents and several businesses that had been in Camden for more than one hundred years, the [planning] board voted to approve the renewal designation. The vote was delayed slightly when one member of the board asked what the issue was. Despite having sat in the dark through two hours of testimony, he joined other board members in approving the renewal designation. Only one board member dissented by abstaining.[105]

Unfortunately, this lack of true community consultation and deliberation in the planning stages of redevelopment is all too common. Professor Gillette's description of a decision-maker unclear on the topic up for a vote undermines the legitimating function that planning procedures are supposed to provide in economic redevelopment law and highlights the need for greater protections for residents involved in redevelopment efforts.

State-mandated public hearings are often conducted to meet the letter but not the spirit of the law and municipal officials rarely demonstrate a desire to engage community residents in a process of designing, amending or modifying

103. Monica Yant Kinney, *Making Sense of Cramer Hill*, PHILADELPHIA INQUIRER, June 1, 2006, at B1.

104. *Id.*

105. HOWARD GILLETTE JR., CAMDEN AFTER THE FALL: DECLINE AND RENEWAL IN A POST-INDUSTRIAL CITY 238 (2005).

redevelopment plans. The costs that arise from this failure to engage in a deeper consultation are often ignored because opposition to urban redevelopment by impacted community residents is viewed as an unavoidable cost of doing business rather than a self-fulfilling prophecy resulting from the strategic decision to minimize the time and effort required for public engagement.

In Cramer Hill, as in other redevelopment sites, the community opposition has led to legal action.[106] The Cramer Hill Project was challenged by local community groups and residents for, *inter alia*, violating public notice and participation procedures of New Jersey redevelopment laws.[107] Fortunately, this procedural attack succeeded in temporarily halting the redevelopment designation because the redevelopment authority failed to swear in witnesses at a public hearing.[108] Unfortunately, such victories are largely transitory since a redevelopment authority can easily rectify such problems by simply re-holding the public hearing in a manner that addresses the minor procedural fault without giving additional credence to the previously ignored community preferences.

These actions of Camden redevelopment authorities are not the exception, but instead are exemplary of the oft-repeated failure to create avenues for true public participation in urban redevelopment planning. As a descriptive matter, top-down planning models of one form or another have been difficult to dislodge as the reflexive planning response to economic decline. Current state-level redevelopment laws tacitly approve of the non-consultative approach by mandating a minimal number of required participatory procedures.[109] The political cycle creates pressure to provide dramatic turnarounds and "best practice" redevelopment plans discussed in the popular media and planning literature counsels the planner to follow top-down planning models rather than engage in long-term efforts to broaden and deepen participation in urban redevelopment.[110] However, to do so flies in the face of indications that a deeper and more meaningful public participation could result in intrinsic and instrumental benefits to low-income residents and communities.

## X. CONCLUSION

Despite the difficulties, I believe that the benefits of enhanced participatory planning outweigh the burdens that it places upon redevelopment authorities

106. Cramer Hill Residents Ass'n, Inc. v. Primas, 928 A.2d 61, 63–64 (N.J. App. Div. 2007) (describing the unpublished lower court opinion that required Camden redevelopment authorities to restart the planning certification process).

107. *Id.* at 64.

108. *Id.*

109. *See supra* Part II.

110. *See generally* JACOBS, *supra* note 90.

and impacted residents. Of particular legal significance, low-income residents would gain a new voice in redevelopment planning and would be afforded new protections from destructive renewal efforts that have commonly been used to the detriment of urban communities. As noted by the objections discussed above, participatory planning is not a panacea for all of the problems involved in urban redevelopment. However, recent willingness to further define the rights of individuals impacted by such activities indicates that now may be the time to embrace participatory planning as a better way forward. State governments would do well to heed this call rather than further cementing inequitable treatment of low-income communities into redevelopment laws.