



LAND ASSEMBLY AND DISPOSAL BY CITIES

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I. INTRODUCTION.

The requirements of Washington's Growth Management Act to absorb population growth and the efficiency of integrated urban designs have pushed cities to encourage substantial mixed-use developments in their urban cores. This trend has been reinforced and accelerated by the unprecedented financial challenges facing many communities. Given the initiative-based cap on property tax levels and the already-high sales tax rate in Washington, many Washington cities seek to raise additional local tax revenues and maintain existing service levels by increasing the number and size of taxable transactions. Cities are trying to encourage retail investment, often in conjunction with public improvements and townhouse and apartment development, to increase excise tax revenues and to provide attractive lifestyle alternatives.

One of the challenges to attracting private retail and mixed-use investment is the assembly of urban parcels in sufficient scale to compete with the lower cost and greater availability of land in suburban and rural areas. Although infill strategies can be implemented on a lot-by-lot basis, prime private investments (e.g., "lifestyle" shopping centers, light manufacturing facilities, or research parks), generally require larger tracks of land served by publicly-subsidized infrastructure such as transit and parking.

A city hoping to manage its property holdings to encourage private development must be mindful of state constitutional and statutory limitations on public participation in land acquisition and disposal. Article VIII, Section 7 of the Washington Constitution provides that "[n]o ... municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm." Fundamentally, the acquisition of property by a city must be for a public purpose and any private benefit derived from its ultimate use or sale may only be incidental to such public purpose. *See United States v. Bonneville*, 94 Wn.2d 827, 621 P.2d 127 (1980); *see also City of Tacoma v. Taxpayers*, 108 Wn.2d 679, 705, 743 P.2d 793 (1987). The use of eminent domain is limited to a taking for "public use and necessity." Wash Const. Art. I, Section 16. Innovative means of property assembly and disposal, such as pursuant to chapter 35.81 RCW, the Washington community renewal law (the "Act"), raise important legal questions that go to the viability of these approaches as effective tools for needed urban renewal. The purpose of this paper is (1) to explore the legal authority in Washington for cities to acquire land for purposes of economic development enhanced urban design through traditional means, including pursuant to statutory authority, and pursuant to the more innovative provisions of the Act, and (2) to discuss tactical approaches to the challenge of urban land assembly.

II. TRADITIONAL MEANS OF PROPERTY ASSEMBLY AND DISPOSAL: CONSTITUTIONAL RESTRICTIONS.

A. Authority to Purchase Property.

Cities have broad general statutory authority to acquire property for public purposes. See RCW 35.21.010 (authorizing cities to acquire, hold, possess and dispose of property); RCW 35.21.703 (declaring economic development to be a public purpose of cities). The direct purchase of real property by a city pursuant to an arm's-length transaction with a willing seller for a public use is the simplest form of property acquisition and the least likely to face a legal challenge.

The acquisition of private property could be challenged where the purchase price of the property arguably exceeds the property's "fair market value." Under these circumstances, a taxpayer or the Washington State Auditor could challenge the acquisition on the ground that the city's payment of "excess" consideration constitutes a prohibited "gift" of public funds. Under Article VIII, Section 7 of the Washington Constitution, a transaction may be characterized as a prohibited "gift" of public funds when the transfer of property occurs without consideration and with donative intent. See *Adams v. University of Washington*, 106 Wn.2d 312, 327, 722 P.2d 74 (1986). Courts will generally not inquire into the adequacy of the consideration and will uphold reasonable legislative findings by the acquiring municipality (e.g., findings by a city council) if the consideration is not grossly inadequate. See *King County v. Taxpayers of King County*, 133 Wn.2d 584, 601, 949 P.2d 1260 (1997). Still, the prohibition against the gift of public funds is constitutional, so courts retain jurisdiction to independently examine legislative intent in decisions regarding property acquisition and determine the adequacy of consideration.

An appraisal establishing the market value of the acquired property and legislative findings that articulate the consideration relied upon by the acquiring municipality will generally insulate these transactions from being judicially overturned. Although not addressing the purchase of property but its subsequent lease, the court in *King County v. Taxpayers of King County* reviewed the adequacy of consideration in the context of the constitutional prohibition against gifts. The plaintiffs challenged the lease by King County of a new baseball stadium to the Seattle Mariners, claiming that the inadequacy of consideration constituted an unconstitutional gift of public funds. The plaintiffs asserted that the "nominal rent and grossly inadequate consideration" provided by the Mariners for use of the stadium demonstrated intent by the municipality to donate or "gift" the use of the facilities to the private baseball club. *Id.* at 598-599. The court disagreed, finding that the totality of the team's financial contribution to the facility (e.g., the profit-sharing provision in the arrangement, the twenty-year lease obligation, the stadium maintenance requirement, and the team's obligation to pay insurance) was legally sufficient consideration. *Id.* at 598-601. Each of these components of the consideration had been carefully enumerated in findings contained in various documents cited to the court. In further support of its decision, the court found that the state legislation authorizing the leasing arrangement did not reveal any intention by the state legislature to authorize the donation of public funds to the team. *Id.* at 599.

In summary, any purchase price that exceeds appraised value, even if consented to in an arm's-length arrangement between the buying public entity and the selling private entity, suggests a potential constitutional problem and will likely require additional findings of consideration inuring to the public that may not be quantifiable. For example, a city may be prepared to pay more than the appraised value of the last parcel of a larger redevelopment plan to be eligible to receive additional grant funding and to commence construction of the project. The challenge is to appropriately determine and articulate the value of the acquisition by the

municipality, i.e. why it is willing, as a public and political matter, to pay the agreed-upon price. This finding of “value received” helps defeat an accusation that the transaction involved donative intent or a prohibited gift.

B. Authority to Acquire Property through Condemnation.

Although cities have general constitutional and statutory authority to acquire private property through condemnation, such authority is severely limited to situations where the city can find that the taking is for public use and necessity. See Wash. Const. Art. I, Section 16. The power of eminent domain is not inherent and must only be exercised upon express authorization by the legislature. See *Tacoma v. Welcker*, 65 Wn.2d 677, 399 P.2d 330 (1965). When using condemnation as a means of property acquisition, cities must follow the procedures found in chapters 8.12 and 8.25 RCW. Although the power of eminent domain is strictly construed by the courts, it is not to be construed so narrowly as to defeat the underlying purpose of the grant of power. *Tacoma*, 65 Wn.2d 677. Additionally, as discussed in greater detail in Section III, when condemning property for community renewal a finding of blight must first be made.

1. *Public Use and Necessity.*

The Washington State Supreme Court has stated that the proposed use of condemned property must be (1) truly public, (2) required by the public interest and (3) necessary for carrying out the public purpose. See *In re Petition of City of Seattle*, 96 Wn.2d 616, 638 P.2d 549 (1981). Whether a use is “truly public” is a judicial question, while determinations of whether a given acquisition is “necessary” to carry out the public use are largely left to the acquiring municipality’s legislative body. See *Wash. State Convention Ctr. v. Evans*, 136 Wn.2d 811, 823, 966 P.2d 1252 (1998).

A merely beneficial use to the public has been determined to be insufficient to constitute public use. See *Petition of City of Seattle*, 96 Wn.2d at 627; *Healy Lumber Co. v. Morris*, 33 Wn. 490, 504, 74 P. 681 (1903) (stating that private use, even if it confers “great public benefit, interest, or advantage” is not a public use and will not support condemnation of private property). In *Petition of City of Seattle*, the city attempted to condemn certain real property located in downtown Seattle for use in significant part by a private developer for private retail purposes. Because the court found that the use of the condemned property was to be primarily private, and the public benefit was merely incidental, the court held the condemnation unconstitutional. 96 Wn.2d at 634. In its reasoning, the court drew a distinction between this situation, where it found the primary purpose of the condemnation was to promote private retail uses, and a more typical urban renewal project where the expressly authorized statutory purpose was to alleviate blight and private involvement had been specifically contemplated. *Id.* at 629, 632.

In *Kelo v. City of New London et al.*, 545 U.S. 469, 125 S.Ct. 2655 (2005), the United States Supreme Court reviewed the condemnation powers of a local government under the Takings Clause of the Fifth Amendment of the United States Constitution.¹ In *Kelo*, the city of New London, Connecticut, implemented a comprehensive development plan for a 90-acre parcel within the city that “was ‘projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city’”. *Id.* at 472. The city council approved the development plan, which included land sites for research and development facilities adjoining a pharmaceutical facility, marina and parking facilities, a waterfront conference hotel, an

¹ “Nor shall private property be taken for public use, without just compensation.” U.S. Const., Amend. 5. The Fifth Amendment is made applicable to the states by the Fourteenth Amendment of the U.S. Constitution. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581 (1897).

“urban neighborhood,” and office and retail space. *Id.* at 474. The city council authorized the use of private negotiation and eminent domain to assemble the parcels of land necessary to fulfill the plan, and the city instituted condemnation proceedings. Property owners challenged the condemnations arguing that the development plan did not constitute a “public use” and that the plan was primarily for private benefit. The Connecticut Supreme Court upheld the condemnation on the grounds that the city had statutory authority to condemn the land as part of an economic development plan and that the Connecticut Legislature had expressed its intent that such a taking is a “public use” and in the “public interest.”

The U.S. Supreme Court upheld the condemnations and held that the purposes articulated by the city satisfied the public use requirement of the Fifth Amendment. *Id.* at 485. In its reasoning, the Court deferred to the judgment of the local government and stated that the city had fulfilled the public use requirement by carefully formulating a program of “economic rejuvenation” that was thoughtfully designed to “provide appreciable benefits to the community, including – but by no means limited to – new jobs and increased tax revenue” in furtherance of clear statutory authority to engage in economic development. *Id.* at 483. The Court noted that the condemned property in the city was not “blighted or in otherwise poor condition” but nonetheless allowed the taking by eminent domain pursuant to the economic development statute.²

Although the Court’s controversial holding seems to open the door for use of condemnation in furtherance of economic development, the holding in *Kelo* may have limited application to Washington cities. In its reasoning, the Court recognized that other states may impose “further restrictions on its exercise of the takings power” and that the federal constitutional restrictions merely constitute a “baseline” for analysis. *Id.* at 489. As discussed above, the Washington Constitution imposes stricter public use requirements than those approved by the Court in *Kelo*. It remains doubtful under Washington law that the public purpose of economic development would demonstrate adequate public use and necessity to justify condemnation of unblighted private property for ultimate private use.

2. *Just Compensation.*

Under Article I, Section 16 of the Washington Constitution, private property must not be taken without just compensation, and RCW 8.12.030 requires just compensation prior to taking private property by condemnation for public use. “Just compensation” is the “fair market value of the property” including any permanent fixtures or improvements and is measured as of the date of the condemnation trial or the date the municipality takes possession of the property. *See State v. Wilson*, 6 Wn.App. 443, 447, 493 P.2d 1252 (1972). “Fair market value” has been held to mean the amount of money a well-informed willing purchaser would be willing to pay for the property that a well-informed willing seller would accept as a purchase price for the property. *Id.* (citing *Donaldson v. Greenwood*, 40 Wn.2d 238, 242 P.2d 1038 (1952)). Because the property is valued as of the date of the condemnation trial or as of the date that a municipality takes possession of the

² In response to the holding in *Kelo*, several bills were introduced or passed in the United States House and Senate prohibiting use of federal funds to condemn property in any economic development project that primarily benefits private entities and these bills continue to resurface today. *See* Private Property Rights Protection Act of 2012, H.R. 1433 (passed by the House on February 28, 2012; reintroduced H.R. 4128 (Private Property Rights Protection Act of 2005)); Private Property Rights Protection Act, S. 1895 (reintroduced without success on January 4, 2007 as S. 48); and Transportation, Treasury, the Judiciary, Housing and Urban Development and Related Agencies Appropriations Act, 2006, H.R. 3058 (signed into law on November 30, 2005).

property, a city is not required to compensate an owner of property for any increase in value that may predictably result from implementation of a community renewal project. See RCW 8.04.092; RCW 8.26.180.

C. Authority to Acquire more Property than is Necessary.

When economic development (as opposed to the construction of a specific public improvement) is the basis for acquisition, it becomes particularly difficult to identify limits on the amount of property that can be purchased or condemned. In a traditional acquisition or taking for actual physical use by the municipality, the limits are reasonably clear but remain subject to argument. Generally, purchasing or condemning more property than the city needs at the time of the acquisition is only permitted if the city has a use for the property in the foreseeable future. See *Tacoma v. Welcker*, 65 Wn.2d 677.

When making a determination of what amount of land acquisition is “necessary,” courts defer heavily to the local legislative body’s determination of what is reasonably necessary under the circumstances. See *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005). Reasonable need for property is not limited to immediate, absolute, or indispensable need. See *Des Moines v. Hemenway*, 73 Wn.2d 130, 437 P.2d 171 (1968). Cities therefore are authorized to acquire property by purchase or condemnation based on anticipated future needs and not just current needs. See *Tacoma v. Nisqually Power Co.*, 57 Wn. 420, 107 P. 199 (1910); *Chandler v. Seattle*, 80 Wn. 154, 141 P. 331 (1914). Similarly, in some cases a city may be permitted to acquire property solely to serve temporary current needs, even if the city suspects that it will no longer need the property a few years into the future. See *Seattle Popular Monorail Authority*, 155 Wn.2d at 634 (upholding a municipal entity’s condemnation of property that was necessary for construction of a monorail system even though the property might be leased or sold after construction is completed).

In the context of an acquisition for economic development, it is obviously more difficult to make findings with regard to the public value of future use to justify the acquisition. Is municipal land banking, for example, a public purpose that would justify property acquisition or condemnation if such an investment were reasonably likely to facilitate only future economic development and public benefit?

As a practical matter a city may be given an opportunity to acquire strategic parcels before it has defined the scope of its intended public use. The city may want to control its destiny, e.g. the uses of its downtown core, without knowing how much of the available property will ultimately be needed for public ownership and how much may be surplus to such need. It seems reasonable for the city to acquire more than it may ultimately need and proceed with a planning process to determine how much will be surplus, assuming that it has a reasonable expectation that a portion of the parcel will be retained for a public purpose. For example, a city may reasonably believe that it wants to acquire the parcel to build a civic center without knowing how much land will be needed for the facility itself as well as ancillary parking, street and sidewalk improvements. Furthermore, until the public improvement is designed, it may be impossible to know which parts of the site could be available for subsequent sale. Finally, if the public improvement is to be potentially integrated with a private development, it may be impossible to determine the extent of public land ownership until a private partner is identified and the integrated public/project is defined. See Section II. E. regarding *Authority to Sell Property*.

D. Financing Property Acquisition.

While there are a variety of methods available for financing property acquisition, the following sections discuss three potential methods: issuing tax-exempt debt, tax increment financing, and creating a local improvement district.

1. Tax-Exempt Bonds.

Cities may issue tax-exempt debt to finance the acquisition of property payable from general taxes or from the income, proceeds, and revenues derived from the acquired property. The debt may also be paid in part from assessments levied within a local improvement district on property benefiting from public improvements on the acquired property.

From a federal tax perspective, a city may not acquire property under threat of condemnation by giving the seller a tax-exempt obligation. See *Holley v. United States*, 124 F.2d 909 (6th Cir. 1942), cert. denied, 316 U.S. 685 (1942); Rev. Rul. 72-77, 1972-1 CB 28. Furthermore, the tax exemption on the city's debt requires the city to reasonably expect to own the financed property during the term of the debt. Tax-exempt (as opposed to taxable) financing may be difficult for municipalities that are acquiring land but expect to make public use of it for only a few years. See, e.g., *Seattle Popular Monorail Authority*, 155 Wn.2d 612 (municipal entity acquires property recognizing that it will likely sell or lease some of the property to a private party after a construction project is complete). Even a subsequent "change in use" that a city did not anticipate could trigger a need to redeem the debt. See I.R.C. § 150(b)(3).

2. Tax Increment Financing.

Tax increment financing ("TIF") may be a means to finance the acquisition of property for public use to stimulate economic development. Authorized in chapter 39.89 RCW, TIF is a financing tool allowing certain local governments to capture future increases in property taxes, with limited exceptions,³ resulting from public investment and improvement within a designated tax increment area. A city using TIF could issue tax-exempt debt to finance public infrastructure, such as roads, parking facilities and other publicly owned amenities. In cooperation with other taxing districts within the increment area, a city could capture consequent increases in property tax revenues from properties within the area that would otherwise be disbursed to various other taxing jurisdictions.⁴ The tax revenues would then be used to repay the debt of the city issued to build the public infrastructure until the bonds are repaid. At that time, the various taxing jurisdictions would receive their respective share of the increased property tax collections. Economic development in the increment area benefits both the public and the private sectors, as the public investment in infrastructure is intended to encourage private investment in the increment area and to thereby fuel economic growth and expansion. Given that the private sector is likely to benefit from this initial public investment, cities should articulate the public

³ A city or other taxing jurisdiction may not capture the incremental property taxes payable to the State of Washington levied for the support of common schools under RCW 84.52.065. Regular property taxes levied by port districts or public utility district specifically for the purpose of making payments on general indebtedness and excess property tax levies that are exempt from the aggregate limits for junior and senior taxing districts under RCW 84.52.043 are also excluded. RCW 39.89.020(6).

⁴ This amount is limited to the amounts derived from 75% of any increase in the value of the property. The taxes allocable to the remaining 25% of any increase (plus the taxes derived without regard to any increase) continue to be allocated to the levying jurisdictions. RCW 39.89.020(10); RCW 39.89.070.

goals of such efforts and make the case that any private benefits are incidental to the benefit that the public is to receive.

3. *Local Improvement Districts.*

Local improvement districts (“LIDs”) are a traditional means of financing public infrastructure and can stimulate economic development by providing the public infrastructure necessary for private investment. LIDs involve the levying of assessments on real property in an amount not exceeding the special benefit to the assessed property derived from the public improvement. In a LID financing, the benefitted property owners pay for the public improvement. In a TIF financing, it is arguably the general taxpayer who pays for the public improvement, though the direct impact is felt by the taxing jurisdictions that forego incremental taxes until the improvement is paid for. Both mechanisms require adherence to statutory procedural requirements and require the cooperation and support of property owners (in the case of LIDs) and overlapping taxing districts (in the case of TIF). See chapters 35.43 through 35.56 RCW. The Washington legislature, however, recently has authorized cities and counties to establish “community facility districts” that employ local improvement district assessments to finance projects that benefit undeveloped lands owned by a few owner/developers.

4. *Financing Acquisition for Economic Development.*

Financing the acquisition of property intended to stimulate future economic development, however, may be problematic. From a credit perspective, it may be difficult to borrow money when repayment relies exclusively on the future development or sale of the property. Cities are generally not in the development business and their capacity to predict the future is no more reliable than that of any other investor. Cities may pledge their full faith and credit to a borrowing to acquire property, but unlike developers, cities may be unable, from a legal and a political perspective, to spin-off limited liability entities to segregate losses or to declare bankruptcy and walk away from the debt obligation if the development fails to materialize.

E. Authority to Sell Property.

Selling a parcel of land to facilitate economic development, even at fair market value, may give rise to challenges under the constitutional prohibition against the giving of public funds and the lending of public credit. See *Lassila v. Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978). In *Lassila*, the city undertook an economic development plan for portions of its central business district. Prior to acquiring property necessary for the plan, the city engaged in discussions with a private developer for the construction of a theater on a portion of property to be included in the plan. The city then acquired the land and approximately one month later sold it to the developer. *Id.* at 808-809. The court voided the sale, holding that it was an unconstitutional lending of the city’s credit. The court stated that regardless of whether the city received fair market value for the property, the acquisition of property with the intent to resell to a private developer constituted an unconstitutional lending of the city’s credit. The court reasoned that “[a]t acquisition a municipality must at very least intend a public purpose to insure that a later sale to a private party does not violate the constitutional prohibition.” *Id.* at 811. It is not clear whether the identification of the developer in advance of the purchase was a fatal fact or whether other considerations, e.g., a threat of condemnation, were considered by the court in reaching its conclusion. See *Bonneville*, 94 Wn.2d 827. At least one case suggests that a different outcome might result where the ultimate private purchaser is not yet known and would not take ownership for several years. See *Seattle Popular Monorail Authority*, 155 Wn.2d 612.

The Washington Supreme Court's view of Article VIII, Section 7 has evolved significantly since 1978 and the court may now be less willing to intervene in a municipal action that does not expose the municipality to significant risk and does not resemble the troublesome financing schemes of the 19th century. See Jay A. Reich, *Lending of Credit Reinterpreted: New Opportunities for Public and Private Sector Cooperation*, 19 Gonz. L. Rev. 639, 645-46 (1984); see, e.g., *CLEAN v. City of Spokane*, 133 Wn.2d 455, 947 P.2d 1169 (1997), cert. denied, 525 U.S. 812 (1998).

In *Lassila*, the court apparently perceived the city as an instrumentality of the developer, rather than as furthering the public purpose of economic development through a public/private partnership. Carefully characterizing this private benefit as incidental to an express public purpose through specific findings may be critical to withstanding legal and political challenge. Negative perceptions of such a transaction are reinforced when the resale price is less than the purchase price or the fair market value, even if the private use of the sold property furthers a public purpose. Clearly, any municipal purchase and subsequent resale requires careful analysis.

As discussed previously (see Section I.C), a city may find after acquiring property reasonably intended for public use that upon detailed planning the amount of acquired property exceeds the amount needed. Under these circumstances, the city should be able to declare the property surplus pursuant to its own procedures and sell the property for appropriate consideration. This process of potentially acquiring more property than it may ultimately need provides an opportunity for the city to shape the development of the property, including the private development of surplus property interests. The city, for example, could seek proposals from developers willing to acquire the excess property (or property interests including air rights) and sell the property with deed restrictions furthering the city's interests in good urban design or particular private uses, e.g. affordable housing. If the city can afford the acquisition of property for ultimate public use pending detailed planning, its control of the site can be leveraged to facilitate an integrated public/private development. Remaining mindful of *Lassila* (as discussed previously), a city should be cautious about identifying the ultimate private user of the excess property prior to its purchase to prevent any characterization of its role as merely an agent of the ultimate private developer. Nonetheless, the control afforded by ownership may be the key to the land assembly and integrated development that the city desires.

III. PROPERTY ASSEMBLY TO STIMULATE ECONOMIC DEVELOPMENT: COMMUNITY RENEWAL LAW.

To encourage economic development and eliminate blight, a city may undertake an urban renewal project authorized under the Act. The original version of the Act, enacted in 1957 as the Urban Renewal Law, was limited in its application as it required a finding of severe blight for cities to assemble property for transfer to private ownership for the purpose of economic development.

In response to what it declared to be an "urgent need" to "enhance the ability of municipalities to act effectively and expeditiously to revive blighted areas and to prevent further blight due to shocks to the economy of the state," the Washington Legislature amended the Act in 2002 to expand the definition of blight and methods available to local governments to acquire and dispose of property. See RCW 35.81.005 (setting forth the legislative intent for the Act). For instance, under the amended Act a city is explicitly authorized to select and contract with for-profit and nonprofit developers for the sale of property before the city acquires the property. Additionally, a city may exercise condemnation powers based on a significantly expanded definition of blight. The expanded authority given to cities by the 2002 amendments to the Act has not been addressed by

the courts, and despite the clear legislative intent, it is unknown whether the amendments would withstand a constitutional challenge.

A. Authority to Undertake Community Renewal Projects.

The Act empowers cities to engage in “community renewal projects.” Community renewal projects under the Act are “undertakings or activities” of a municipality designed to: (a) eliminate or prevent the creation or spread of blight; (b) encourage economic growth through job creation and retention; (c) rehabilitate⁵ or redevelop⁶ community renewal areas; or (d) accomplish any other undertakings as provided in a community renewal plan (a “Plan”). RCW 35.81.015(7).

The Act sets forth an elaborate series of procedural requirements for municipalities seeking to use its extensive authority. These procedures require the development of a clear record establishing the public purpose of any land assembly or sale actions and thus provide an opportunity to defend such actions in the event of challenge. In addition to undertaking community renewal projects to eradicate blight, the Act authorizes a city to engage in a variety of activities in furtherance of community renewal.⁷ When fulfilling the procedural requirements or exercising the powers authorized by the Act, cities should be aware that the same constitutional and legal restrictions discussed in Section II apply in this context.

B. Making a Finding of Blight.

While the eradication of blight remains a clear public purpose of the Act, the 2002 amendments to the Act expanded the definition of blight to include economic factors in addition to public health and safety concerns. Prior to the 2002 amendments, the court upheld local findings of blight affecting social concerns, such as the public health, safety, morals or general welfare. *See Miller v. Tacoma*, 61 Wn.2d 374, 384, 378 P.2d 464 (1963) (citing *Hogue v. Port of Seattle*, 54 Wn.2d 799, 817, 341 P.2d 171 (1959)). Under revised RCW 35.81.015(2), a

⁵ Rehabilitation of a community renewal area may include restoration and renewal of a blighted area or any portion of such area, as provided in the community renewal plan, by (a) fulfilling a program of voluntary or compulsory repair and rehabilitation of buildings or other improvements; (b) acquiring real property and demolishing buildings and improvements where it is necessary “to eliminate unhealthy, unsanitary, or unsafe conditions, lessen density, reduce traffic hazards, eliminate obsolete or other uses detrimental to the public welfare,” remove or prevent blight, or to provide land necessary for public facilities; (c) constructing streets, utilities, parks, play-grounds or other improvements; and (d) disposing or selling of real property. RCW 35.81.015(19).

⁶ Redevelopment of a community renewal area may include (a) acquiring blighted areas or a portion thereof; (b) removing buildings and improvements; (c) constructing streets, utilities, parks, play-grounds, and other improvements necessary to carry out the community renewal plan; (d) making land available for development or redevelopment at its fair value for uses by private enterprise or public bodies, including the sale, initial leasing or retention by the municipality itself; and (e) making loans or grants to a person or public body for the purpose of creating or retaining jobs of which a substantial portion must be for persons of low income. RCW 35.81.015(18).

⁷ These activities include, but are not limited to (1) developing a community renewal plan; (2) creating a community renewal agency; (3) making and executing contracts; (4) disseminating blight clearance and community renewal information; (5) constructing or repairing facilities; (6) providing financial assistance to property owners and tenants as an incentive to relocate to the community renewal area; (7) acquiring real property through purchase, lease or condemnation; (8) issuing tax-exempt debt to finance community renewal projects; (9) borrowing money and accept advances, loans, grants, contributions and other forms of financial assistance; (10) forming LIDs to assist in the financing of improvements; and (11) disposing property acquired through competitive bidding or negotiation to a private developer. *See* RCW 35.81.060, .070, .100, .160, .190.

“blighted area” is an area that (a) substantially impairs or halts the “sound growth of the municipality or its environs,” (b) hinders the provision of housing accommodations, (c) constitutes an economic or social liability, and/or (d) “is detrimental, or constitutes a menace to the public health, safety, welfare, or morals in its present condition and use.” Whether any of these general conditions exist is determined by a number of factors, including:

- Substantial dilapidation, deterioration, defective construction, material and arrangement, and/or age or obsolescence of residential or non-residential buildings or improvements;
- Inadequate ventilation, light, sanitary facilities or open spaces;
- Inappropriate uses of land or buildings;
- Overcrowding;
- Defective or inadequate street layout, faulty lot layout, or excessive land coverage;
- Unsanitary or unsafe conditions or the existence of life or property endangering conditions by fire or other causes, contributing to ill health, transmission of diseases, infant mortality, juvenile delinquency or crime;
- Deterioration of the site;
- Existence of hazardous soils, substances or materials;
- Diversity of ownership;
- Tax or special assessment delinquencies;
- Defects in or unusual conditions of title;
- Improper subdivision or obsolete platting; or
- High levels of unemployment or poverty.

As amended, the Act authorizes a local governing body to make a finding of blight based on the unique circumstances of the community renewal area, including factors relating to economic and social concern.

C. *Acquiring Property Through Condemnation.*

The logic of urban renewal authority is that the eradication of blight is an important public purpose that necessarily justifies the exercise of extraordinary powers, such as condemnation. Although this rationale is clear where there is a public health and safety need, it is less clear when the goal is optimization of economic development.

Under the Act, a city or county may take any property by eminent domain that it deems “necessary for a community renewal project.” RCW 35.81.080. Generally, as discussed in Section II, condemnation requires public use and necessity in addition to just compensation. In the Act, the Washington Legislature declared “[c]ondemnation for community renewal of blighted areas ... to be a public use, and property already devoted to any other public use or acquired by the owner or a predecessor in interest by eminent domain may be condemned for the purposes of this chapter.” RCW 35.81.080. Although courts will generally defer to the discretion of the local government and uphold strong findings that blight exists and thus the existence of a clear public use, the courts have only heard cases based on a more limited definition of blight. *See Miller*, 61 Wn.2d at 384. If a finding of blight based on the expanded definition is challenged, it is unclear whether it would be upheld as a “public use” justifying a “taking” through eminent domain.

D. Disposal of Property.

A city may dispose of property acquired pursuant to the Act through competitive bidding or negotiation with a private developer. If a city decides that it does not wish to sell or lease certain property, a city may also retain the property for “parks and recreation, education, public utilities, public transportation, public safety, health, highways, streets, and alleys, administrative buildings, or civic centers.” RCW 35.81.090(2).

Under the amendments to the Act, a city may select a developer for community renewal projects either before or after a city acquires the property. RCW 35.81.090(1). Developers may be selected either through the competitive bidding process existing prior to the amendments or an alternative direct negotiation process pursuant to RCW 35.81.095. Alternatively, cities may sell the property through negotiation to a non-profit organization when federal community development block grant funds under a plan or grant approved by the U.S. Department of Housing and Urban Development are involved. RCW 35.81.090(4)(c).

Amendments to the Act did not alter a city’s ability to place restrictions on properties sold to a private entity to ensure that such property continues to serve a public purpose. Cities may also impose covenants, conditions and restrictions on property as they deem to be necessary or desirable to “assist in preventing the development or spread of blighted areas” or to otherwise carry out purposes of the city. RCW 35.81.090(2).

Purchasers of property assembled by a city pursuant to a Plan must agree to devote the property “only to the uses specified in the [Plan].” *Id.* Such purchasers may also be obligated to comply with any other requirements that the city determines to be in the public interest, including an obligation to begin and complete improvements on the property consistent with the Plan. Further, cities may prohibit or impose restrictions on the subsequent sale, transfer or lease of the property. *Id.* Any covenants, easements and other deed restrictions imposed by a city must run with the land and may be taken into consideration when negotiating the selling price of the property.

While deference is given to cities in determining the adequacy of consideration, cities must receive fair and valuable consideration for the sale of its property. As with any other type of sale to a private party, an independent appraisal and findings by the city as to the adequacy of consideration can help the city avoid having the transaction be deemed a “gift” within the meaning of the constitution.

The Act has been carefully expanded to be a more effective tool for urban renewal and to maximize its ability to withstand constitutional challenge. The Act not only expands the definition of “blight” and thus broadens the public purpose, it also invites the involvement of private buyers prior to the condemnation. The courts, however, have reserved judgment on what constitutes public use and thus the requisite findings regarding blight. *See Miller v. Tacoma*, 61 Wn.2d 374. In addition, due to the prohibitions on the lending of credit and giving of public funds, the courts have historically sought a separation between the purchase or condemnation of property and its subsequent sale to a private developer. *See Petition of City of Seattle*, 96 Wn.2d 616; *Lassila*, 89 Wn.2d 804. These traditional constitutional concerns raise questions about the Act that can only be answered by the courts.

IV. CONCLUSION.

Washington cities have not traditionally played the role of land developer, assembling parcels and assuming financial risk in the hope of encouraging subsequent development. Where cities have employed urban renewal powers, their authority has been predicated on a traditional notion of blight. When these extraordinary

powers have been employed, their success has been spotty; land assembly and slum clearance do not automatically or quickly result in private investment.

The need for increased excise tax revenues and the need to plan for densities to amortize costly urban amenities such as transit impose new challenges on cities. While the Washington Legislature has equipped cities with some new legal tools for land assembly and redevelopment, there remain a host of unanswered questions about their constitutionality. Further, even if these new tools are constitutionally valid, cities may lack the financial capacity and experience to become effective land developers. Nonetheless, cities may be highly motivated to seize control of their destiny and test the legal and financial parameters outlined here in order to advance their goals.