

URBAN BLIGHT AND RENEWAL

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I. Introduction.

While market forces are generally relied upon to stimulate investment and development in urban areas, there are circumstances where absentee property ownership or inefficient markets deter redevelopment by discouraging potential investors, plaguing cities with underdeveloped properties that blight the community. Sometimes this lack of investment also results in health and safety concerns, e.g., where abandoned buildings deteriorate or become unsanitary shelters for the homeless. Washington cities have statutory authority to address these conditions, though application of this authority poses legal and political challenges.

The purposes of this paper are to (1) explore the legal authority in Washington for cities to acquire blighted property for public and private economic development, and (2) discuss practical approaches to implementing this seldom used and sometimes controversial authority.

II. Background.

To eliminate blight and encourage economic development, a city may undertake an urban renewal project authorized under Chapter 35.81 RCW, known as the Community Renewal Law (the “Act”). The original version of the Act, enacted in 1957 as the Urban Renewal Law (the “Original Law”) and upheld in *Miller v. City of Tacoma*, 61 Wn.2d 374, 378 P.2d 464 (1963), was premised on a finding of severe blight which justified extraordinary city powers for its eradication and to prevent its reoccurrence. These powers included the authority for cities to assemble property through condemnation for transfer to private ownership and economic development.

The Original Law was challenged in *Miller* by a property owner whose property was within an area found by the trial court to be blighted though his property was not. The Washington Supreme Court addressed the following basic constitutional question: “Are the acquisition, elimination, and redevelopment of blighted areas, and the subsequent resale of a portion of these areas to private persons, with use restrictions under the urban renewal law, a public use that warrants the exercise of the power of eminent domain and a public purpose that justifies the expenditure or loan of public funds.” *Id.* at 382. The court, in reviewing opinions that upheld urban renewal laws in other states and the factual record developed in the trial court, concluded that the eradication of blight was a “public use” as required under the Washington Constitution to justify the exercise of eminent domain.

The *Miller* court upheld the subsequent sale of the land to private persons based on several theories: (1) public ownership is not the sole method of promoting the public purposes of community redevelopment projects; (2) the subsequent conditions imposed on the private owner are an essential and continuing part of the public purpose; (3) a primary purpose of the urban renewal legislation is the prevention of the recurrence of blight; and (4) the private transfer and benefit is incidental to the main public purpose.

The plaintiff property owner also challenged the Original Law's broad grant of authority to the city in finding blight and taking these corrective actions. The court recognized that the city's determination of blight was a matter of fact, making the determination an administrative rather than legislative action (and subject to review only for being arbitrary and capricious). Finally the court held the focus of the Original Law is the remediation of "blighted areas" and that not every building within the area needs to be blighted. The court concluded a taking would be sufficiently supported when the taking as a whole is reasonably necessary to the clearance of blight and prevention of its recurrence within a blighted area or areas.

While the holding in *Miller* is a far-reaching interpretation of Washington constitutional law, it is important to note it is grounded in a particular factual record demonstrating an area plagued with serious and dangerous health and safety issues. The court noted that the record included a 26-page stipulation of counsel summarizing evidence presented to the city council, and 15 exhibits comprised for the most part of written reports, to which were attached a great number of illustrative charts, maps, and photographs. The record also included "exhaustive" reports from the Tacoma City Planning Commission, American Public Health Association, Director of Health (on rodent infestations), Building Inspector (on commercial and industrial structures), Chief Fire Inspector, Department of Public Works and the Tacoma Housing Authority. *Id.* at 390. In short, it was a carefully prepared record.

The *Miller* court commented that some of the criteria used to define blight in the Original Law may be suspect as insufficient to support the critical finding of public use. These included criteria with respect to general economic conditions and inefficient land usage. The court, however, cited the evidence of blight found by the City which, in combination, constituted the menace to public health, safety, welfare and morals required by the Original Law. This menace included "extreme fire danger, heavy rodent infestation, danger of disease transmission, ill health and infant mortality, improper ventilation, light and sanitary facilities, physical dilapidation, deterioration and defective construction..." *Id.* at 391.

In 2002, the Washington legislature amended the Original Law to expand the definition of blighted areas and the methods available to local governments to acquire and dispose of property. The legislature cited these amendments (the "2002 Amendments") as responsive 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." *See* RCW 35.81.005 (setting forth the legislative intent for the Act). For instance, a city may exercise condemnation powers based on an expanded definition of a "blighted area," including "persistent and high levels of unemployment or poverty..." Additionally, under the 2002 Amendments 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. The expanded authority given to cities by the 2002 Amendments has not been addressed by the courts, and despite the clear legislative intent, it is unknown whether a different fact pattern than *Miller* would withstand a constitutional challenge. The holding in *Miller* may very well be limited to a particularly well-documented factual pattern of health and safety danger.

III. The Community Renewal Act.

a. Authority to Undertake Community Renewal Projects.

The Act (the Original Law, the 2002 Amendments and other minor amendments) 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 development or spread of blight; (b) encourage economic growth through job creation and retention; (c) rehabilitate or redevelop community renewal areas; or (d) accomplish any other undertakings as provided in a community renewal plan (a “Plan”). RCW 35.81.015(7).

“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 unhealthful, insanitary, 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).

“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).

This broad array of authorized 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.

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, a plan of action and an opportunity for public review and comment.

b. Making a Finding of Blight.

The eradication of blight remains a public use under both the Original Law and the 2002 Amendments, though the 2002 Amendments changed the definition of blighted area to enlarge the range of economic factors that could contribute to blight in addition to public health and safety conditions. Prior to the 2002 Amendments, the *Miller* court upheld local findings of blight affecting public health, safety, morals or general welfare. Under the revised and expanded definition in the Act, a “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.” RCW 35.81.015(2). 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 circumstances of the proposed community renewal area, including factors relating uniquely to economic concerns.

c. Acquiring 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 *City of 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. *Id.* As discussed in greater detail in Section III.b, when condemning property for community renewal a finding of blight must first be made.

The Washington Supreme Court has stated 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 *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 *State ex rel. Washington State Convention & Trade 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. *Id.* at 634. In its reasoning, the court distinguished this situation, where it found the primary purpose of the condemnation was to promote private retail uses, from a more typical urban renewal project where the expressly authorized statutory purpose was to alleviate blight and private involvement had been specifically contemplated as remedial in nature. *Id.* at 629, 632.

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. 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. Although courts will generally defer to the discretion of the local government and uphold findings of blight based on a strong factual record (and thus the existence of a public use), the court upheld the Original Law in *Miller* based on a limited definition of blight *and* the strong factual record. The court reserved judgment on what constitutes public use, and thus on the requisite findings necessary to ensure the eradication and prevention of blight be treated as a public use. See *Miller* at 384. If a finding of blight based on the expanded definition of “blighted areas” 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 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 2002 Amendments, 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 Act's original competitive bidding process 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).

The 2002 Amendments 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, and arguably *Miller* requires such restriction. Cities may 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 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.

The Act permits a city to sell property as part of a plan under terms that "the municipality determines adequate." RCW 35.81.090(2). This language could mean at a price that is less than fair market value, if such a below-market price is required to eradicate and prevent future blight in accordance with the plan. While deference is given to cities in determining the adequacy of consideration, as a general proposition, cities must receive fair and valuable consideration for the sale of its property or else the transfer will be deemed an unconstitutional gift of public property. *See* Wash. Const. Art. VIII, Section 5. As with any other type of sale of public property 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. However, the language of the Act suggests that the eradication of blight would justify a sales price independent of fair market value.

The Act also invites the involvement of private buyers of condemned property prior to the condemnation, although such involvement may create problems under the Constitution. Due to the constitutional prohibitions on the lending of credit and gift 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 v. City of Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978). Courts have been concerned that the government was acting on behalf of or lending its credit to the ultimate private purchaser when it secured the property from the private seller or condemnee. It is an open question whether the courts will see the eradication and prevention of blight as justifying the authority given to municipalities under the Act in light of these constitutional prohibitions.

IV. Practical Application.

a. The Political Context.

Any public discussion of urban renewal and the possibility of condemnation to eradicate blight is likely to invoke the specter of a controversial United States Supreme Court case into the public debate. In *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S. Ct. 2655 (2005), the Court upheld condemnations undertaken for a program of “economic rejuvenation” from a challenge asserting the city of New London’s program violated the Takings Clause of the Fifth Amendment of the United States Constitution.¹ Advocates for property rights frequently campaign against public programs intending to use condemnation by citing *Kelo* in public discourse.

Although the Court’s controversial holding seems to open the door for use of condemnation in furtherance of economic development, the holding in *Kelo* will likely 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. The Washington Constitution imposes stricter public use requirements than those approved by the Court in *Kelo*. See discussion under Section III.c. This nuance, however, is frequently lost in public debate.

A likely question raised by a taking under the Act is whether the primary purpose of the taking is the eradication of blight or economic development. The two may be inextricably linked since a city may be dependent on private investment to eradicate and prevent the reoccurrence of blight. While it is 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, the language of the Act identifies blight eradication and economic development as related goals. In that context, it should be expected that in the public hearings required for approval of a

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.’” 545 U.S. 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 “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 the development plan did not constitute a “public use” and 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 United States Supreme Court upheld the condemnations, finding 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 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.

“community renewal area” and in the courts, citizens concerned about public takings of private property will cite the evils of *Kelo* and suggest that a condemnation pursuant to the Act is an inappropriate use of condemnation.

To withstand political opposition to a taking under the Act and underscore the constitutional rationale of a taking to eradicate blight, it is important that a city proposal to establish a community renewal area clearly distinguish the existence of blight which would justify condemnation from the opportunities of economic development. Any condemnation under the Act that justifies blight removal as a necessary public use should be supported by evidence of health and safety issues, aside from the salutary effects of subsequent private sale of the condemned property for investment. See Jeanette Peterson, “The Use and Abuse of Washington’s Community Renewal Law,” Washington Policy Center, November 2009.

b. Tactical Considerations.

There are several practice tips that may follow from the previous discussion.

1. The establishment of a strong public record to justify the city finding of blight as a health and safety issue is likely critical to defeating a challenge to a proposed condemnation of property.
2. The creation of a community renewal area and plan under the Act does not have to result in condemnation, and taking condemnation off the table as an option may allow the process go forward, albeit without all the tools available under the Act. If a city can acquire the property by voluntary sale (even under threat of condemnation for purposes of providing favorable tax treatment to the condemnee), other special authorities under the Act including the power to sell the property at less than fair market value may still be used. The resale of the property pursuant to the Act at less than fair market value, despite the general constitutional prohibition against the gift of public funds, may be justified since arguably this is done not to bestow a gift but as a means to eradicate blight.
3. The process of public hearings and drawing attention to blighted conditions clearly projects an intent of the city to encourage investment and may change the environment for development independent of exercising the extraordinary powers of the Act.

V. Conclusion.

The Community Renewal Law is a seldom used statute that, under the right fact pattern, can be a powerful tool for urban redevelopment. Because it may enable a city to overcome constitutional limitations on the condemnation of property and prohibitions on the gift of public funds, its application is likely to be politically questioned if not legally challenged. The Act has great potential, however, if its application is grounded in a strong record of blight characterized by health and safety considerations.



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