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AN EASEMENT FOR PUBLIC BENEFIT: A STICK IN THE BUNDLE FOR THOSE DISPLACED BY EMINENT DOMAIN

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AN EASEMENT FOR PUBLIC BENEFIT: A STICK IN THE BUNDLE FOR THOSE DISPLACED BY EMINENT DOMAIN

Maryann Herman*

ABSTRACT

When the government takes land by eminent domain, the taking must be for a public use. Courts and legislatures have adopted various approaches to the public use requirement. Many have determined that transferring taken land to a private entity for economic development or blight remediation purposes meets that requirement. But such private-transferee takings can be, and have been, used to dispossess historically disadvantaged communities of their property.

These private-transferee takings create two major issues for the communities subject to them: first, after the land is taken and transferred to a private entity, the community benefit may not endure; and second, dispossessing individuals and communities of their property inhibits their self-development. This Article proposes the creation of a statutory easement for public benefit to be held by the individuals or communities whose property was taken. The easement, modeled after conservation easements, would address both issues. It would allow those who were dispossessed to oversee and enforce the property's use for the public benefit, ensuring that the public benefit endures. And it would give them an interest in the taken property, fostering self-development.

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INTRODUCTION

On July 14, 1981, SWAT teams invaded Immaculate Conception church in the Poletown neighborhood of Detroit.¹ The dramatic scene ended a twenty-nine-day sit-in by opponents of the destruction of the historic neighborhood to make way for the new General Motors (GM) plant, which was touted as the certain savior of the struggling city.² Approximately 1,500 homes, businesses, and churches in Detroit were razed to make room for the plant.³ While many homeowners agreed to sell their homes and leave the neighborhood, some held out.⁴ A very public battle ensued, which ended in the City of Detroit acquiring the land by eminent domain.⁵ Reasoning that the public would benefit by keeping jobs and tax revenue in Detroit, which was experiencing monumental unemployment and job loss, the land was then conveyed to General Motors and the Detroit-Hamtramck plant was built. The Michigan Supreme Court upheld the City's use of eminent domain to transfer property from one private party to another to benefit the public in the case *Poletown Neighborhood Council v. The City of Detroit*.⁶

In November 2018, GM announced its intention to close the Detroit-Hamtramck plant;⁷ however, after a nationwide strike by the United Auto Workers, GM pledged to invest \$2.2 billion to retool the plant to build an electric pickup truck.⁸ The closure of the Detroit-Hamtramck plant would have left nothing more

¹ Kyle Swenson, *Thousands Lost Their Homes in Epic Fight to Build GM's Detroit Plant. Now It's Closing.*, WASH. POST (Nov. 27, 2018, 5:46 AM), <https://www.washingtonpost.com/nation/2018/11/27/thousands-lost-their-homes-epic-fight-build-gms-detroit-plant-now-its-closing/> [https://perma.cc/G54H-V54B].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *See infra* Part II.B (discussing *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981)).

⁷ Eric D. Lawrence & Christina Hall, *GM Decision to Close Detroit-Hamtramck Met with Shock, Anger.*, DET. FREE PRESS (Nov. 26, 2018, 6:34 PM), <https://www.freep.com/story/money/cars/general-motors/2018/11/26/gm-cut-jobs-detroit-hamtramck/2113462002/> [https://perma.cc/W3P3-98ZH].

⁸ Eric D. Lawrence & Jamie L. LaReau, *Deal Keeps Detroit-Hamtramck open with Electric Pickup.*, DET. FREE PRESS (Oct. 17, 2019, 6:00 AM), <https://www.freep.com/story/money/cars/general-motors/2019/10/17/uaw-gm-detroit-hamtramck-electric-pickup/3998740002/> [https://perma.cc/Y56S-7Y5W]; *Detroit-Hamtramck to be GM's First Assembly Plant 100 Percent Devoted to Electric Vehicles*, GEN.

than an abandoned brownfield where a historic neighborhood once stood. Like so many other forsaken factories, the plant likely would have degenerated into ruin porn—a decaying structure from recent history providing a macabre allure to urban explorers and photographers.⁹ The public benefit of providing jobs and economic benefits for the community, which justified the use of eminent domain, would have vanished with the production line. Yet the homes of the displaced would never have been returned.

In 2005, the United States Supreme Court upheld the use of eminent domain to take property from one private party and transfer it to another in the controversial case *Kelo v. City of New London*.¹⁰ With this decision, the Supreme Court confirmed that this use of eminent domain is permitted by the U.S. Constitution, and thus, the governments of each of the fifty states are free to use their eminent domain powers in this manner.¹¹ However, state legislatures' reactions to *Kelo* were swift and severe. Perceiving such takings as a violation of an individual's private property rights, many states placed constraints on the taking of land by eminent domain to later be conveyed to a private entity. These statutory schemes take various forms, some more permissive than others in their regulation of the eminent domain power.¹² Most permissively, some states still allow the use of eminent domain to accomplish these so-called "private-transferee takings" that transfer land from one private party to another for economic development purposes.¹³ And even those states that constrained such takings created exceptions for blight remediation.¹⁴

MOTORS, <https://news.gm.com/newsroom.detail.html/Pages/news/us/en/2020/jan/0127-dham.html> [<https://perma.cc/T5K5-JQ7H>] (last visited Jan. 1, 2023).

⁹ See J.C. Reindl, *How Detroit Lost its Title as "Ruin Porn" Capital*, DET. FREE PRESS (Aug. 16, 2018, 6:00 AM), <https://www.freep.com/story/news/local/michigan/detroit/2018/08/16/detroit-ruin-porn/979984002/> [<https://perma.cc/G2NA-R7FA>] (describing "ruin porn" as "big structures whose decay and fallen grandeur attracted photographers and so-called urban explorers from around the world."); see also Shayari De Silva, *Beyond Ruin Porn: What's Behind Our Obsession with Decay?*, ARCHDAILY (Aug. 15, 2014), <https://www.archdaily.com/537712/beyond-ruin-porn-what-s-behind-our-obsession-with-decay> [<https://perma.cc/E2ZQ-Q2MH>].

¹⁰ *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

¹¹ *Id.* at 489–90.

¹² See *infra* Part II.D.

¹³ See *infra* Part II.D; see Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 359 (1983) (coining the term "private-transferee taking").

¹⁴ See *infra* Part II.E.

The razing of Pittsburgh's Lower Hill, which began in 1956, did not garner the national attention that the destruction of Poletown did, nor did it begin a legal reform movement.¹⁵ The nation was in the clutches of urban renewal programs, and the Lower Hill's fate was similar to that of many low-income and Black resident-inhabited neighborhoods throughout the United States.¹⁶ The Lower Hill was declared blighted and taken by eminent domain to be demolished in favor of redevelopment and a new municipal arena.¹⁷ By virtue of the 1949 Housing Act, the federal government provided \$88 million to fund this development in the name of "slum clearance."¹⁸ Seeking funds from the federal government in this manner provided Pittsburgh governmental authorities with an outside incentive to declare the Lower Hill blighted.¹⁹ Yet, the federal government's \$88 million and the City of Pittsburgh's \$600,000 paled in comparison to the \$118 million contributed by private parties to demolish and redevelop the Lower Hill.²⁰

All told, 1,300 structures and over ninety-five acres were slated for demolition, displacing more than 8,000 Lower Hill residents.²¹ New, low-income housing, also provided for by the Federal Housing Act of 1949, was promised to those who

¹⁵ MARK WHITAKER, *SMOKETOWN: THE UNTOLD STORY OF THE OTHER GREAT BLACK RENAISSANCE* 318 (2018). Although this instance of eminent domain did not receive the widespread backlash and publicity that the taking in *Poletown* did, some residents of the Lower Hill vigorously opposed and fought the taking; the leaders and congregation of Bethel African Methodist Episcopal (AME) church, Pittsburgh's oldest Black church and the oldest AME congregation west of the Allegheny Mountains, appealed many times to save the structure. *Id.* at 317, 319. Currently, some efforts have been made to return taken land to dispossessed residents of color. For example, land taken from Black landowners in Manhattan Beach, California in 1924 was recently returned to the descendants of the former landowners. Roseanna Xia, *Bruce's Beach Can Return to Descendants of Black Family in Landmark Move Signed by Newsome*, L.A. TIMES (Sept. 30, 2021), <https://www.latimes.com/california/story/2021-09-30/newsom-signs-law-to-return-bruces-beach-black-family> [<https://perma.cc/7NLS-KM5A>].

¹⁶ *Renewing Inequality: Family Displacements Through Urban Renewal, 1950–1966*, UNIV. RICH. DIGITAL SCHOLARSHIP LAB, <https://dsl.richmond.edu/panorama/renewal/#view=0/0/1&viz=map&text=defining> [<https://perma.cc/A3EG-J7Z2>] (last visited Nov. 22, 2022).

¹⁷ Diane Nelson Jones, *The Lower Hill Before the Arena: A Rambunctious, Crowded, Loud Place with 'Everything You Needed'*, PITT. POST-GAZETTE (Apr. 17, 2011), <https://www.post-gazette.com/local/city/2011/04/17/The-Lower-Hill-before-the-arena-A-rambunctious-crowded-loud-place-with-everything-you-needed/stories/201104170282> [<https://perma.cc/4YYU-ZPQK>].

¹⁸ WHITAKER, *supra* note 15, at 317.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 318.

qualified.²² And those who lost property to eminent domain were assured a fair price in return.²³ But this enticing rehousing plan never came to fruition: although 230 families were moved into low-income units, many families struggled to find housing they could afford, given that they earned too much to be deemed low-income.²⁴ Additionally, many single people and those living in non-traditional family groups were not accounted for in the rehousing plans.²⁵ All things considered, the promise of better living conditions in place of these “blighted” homes had not been kept. Yet in their place stood a new arena—funded in large part by private entities—designed to host concerts and sporting events and attract conventions to the city.²⁶

Eventually, the Pittsburgh Penguins hockey team adopted the arena as its home.²⁷ In 2007, the team threatened to leave Pittsburgh, but it eventually came to an agreement with the city (as well as the county and the state) through which it would remain in Pittsburgh for thirty years in exchange for a new arena and development rights of the area surrounding the arena.²⁸ The city maintained ownership of the land, but to this day, development is directed by the Pittsburgh Penguins.²⁹

Even after post-*Kelo* statutory enactments, it is possible to declare a property blighted and convey it to a private entity.³⁰ Accordingly, it is necessary to ensure that any property taken by eminent domain from one private party and transferred to another private party—whether for purposes of economic development, as in *Poletown*, or blight remediation, as in Pittsburgh’s Lower Hill—maintains its use for the public benefit.

²² *Id.* at 316.

²³ *Id.*

²⁴ *Id.* at 317.

²⁵ *Id.*

²⁶ *Id.* at 316.

²⁷ See Michael Stainkamp, *A Brief History: Pittsburgh Penguins*, NHL (Aug. 25, 2010), <https://www.nhl.com/news/a-brief-history-pittsburgh-penguins/c-536264> [https://perma.cc/2DDY-MJ3L].

²⁸ Margaret J. Krauss, *What Do the Pittsburgh Penguins Have to Do with Affordable Housing?*, 90.5 WESA (May 19, 2017, 10:31 AM), <https://www.wesa.fm/development-transportation/2017-05-19/what-do-the-pittsburgh-penguins-have-to-do-with-affordable-housing> [https://perma.cc/SNN3-D2RD].

²⁹ *Id.*; see also *Lower Hill*, URA, <https://www.ura.org/pages/lower-hill> [https://perma.cc/3LUV-8Z6Y] (last visited Sept. 14, 2021).

³⁰ See *infra* Part II.E.

This Article proposes the legislative creation of an easement for public benefit to ensure that land taken by eminent domain and transferred to a private party remains in use for the public benefit. This proposed easement is a negative easement, modeled after conservation easements; it allows those dispossessed by eminent domain to enforce the public benefit that justified the taking by seeking injunctive or compensatory relief, thus requiring the private-party transferee to use the property for the benefit of the public.

Part I identifies two particular problems caused by private transferee takings: the lack of accountability to the will of the people and the traumatic stress incurred by the dispossessed. Part II discusses the power of eminent domain and how it evolved to allow property taken from a private party to be transferred to another private party. The *Poletown* case, which allowed the use of such private-transferee takings in Michigan, and the subsequent case, *County of Wayne v. Hathcock*,³¹ which reversed the *Poletown* decision, as well as the landmark United States Supreme Court *Kelo* case, illustrate the evolution of and controversy surrounding private-transferee takings. This section examines the resulting statutory limitations on private-transferee takings imposed by the states and then identifies the inadequacies of this post-*Kelo* legislation in instances of private-transferee takings that were accomplished under the authority of blight statutes.

Part III analyzes the utility of existing property interests to safeguard the public benefit in instances of private-transferee takings. Determining that these interests provide insufficient protection, Part IV proposes a new statutorily created easement for public benefit based on conservation easements, allowing those who have been dispossessed to ensure that the taken land continues to be used to benefit the public.

I. DOUBLE TROUBLE: PRIVATE-TRANSFEREE TAKINGS CREATE A BINARY ISSUE FOR THE COMMUNITY

This Article proposes the creation of an easement for public benefit as a solution to two issues created by private-transferee takings. The first problem affects the community in that the private-transferee's use of the land is not accountable to the will of the people. The second problem harms former landowners who were dispossessed of their property, as displacement likely causes traumatic stress reactions.

³¹ *County of Wayne v. Hathcock*, 684 N.W.2d 765, 772 (Mich. 2004).

First, private-transferee takings lack continued public accountability.³² That is, if the government does not maintain title to the taken land, it has no way of ensuring that the land continues to generate a public benefit.³³ Instead, the private-transferee is free to use the land in any way it chooses. Accordingly, the community will suffer if the land is taken from it, yet the private-transferee's usage benefits only itself and not the community. Because of this, private-transferee takings are perceived as more offensive than takings where title remains with a government entity, as the government is subject to the will of the people.

Second, private-transferee takings harm the individual who was dispossessed of the land. Famously, Professor Margaret Jane Radin theorized that the recognition of property rights is necessary for personal development.³⁴ In her critical work, *Property and Personhood*, she asserts, “[t]he premise underlying the personhood perspective is that to achieve proper self-development[—]to be a person[—]an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights.”³⁵

Of course, not all property is elevated to a level of being necessary for personal development—an individual must have a significant relationship with an item for it to contribute to their personhood.³⁶ Whether any particular item bears such significance depends on the pain the individual would incur if it were lost.³⁷ Some property, however, does not induce pain upon its loss—it is primarily utilitarian and can simply be replaced.³⁸ Professor Radin thus classifies these two types of property as personal property and fungible property, respectively.³⁹ These two classifications are not strictly dichotomous; rather, they exist at opposite ends of a continuum upon

³² Ross, *supra* note 13, at 369.

³³ *Id.* at 375.

³⁴ See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

³⁵ *Id.*

³⁶ *Id.* at 959.

³⁷ *Id.*

³⁸ *Id.* at 959–60.

³⁹ *Id.*

which all property can be placed.⁴⁰ The closer property exists to the personal property end of the continuum, the more deserving it is of protection.⁴¹

Thus, in accordance with the personhood theory of property, when an individual is dispossessed of their property—especially their home—their self-development will be inhibited.⁴² In fact, residents who lost their homes as a result of urban renewal in the 1950s and 1960s suffered not only economically, but socially, emotionally, culturally and politically, as well.⁴³ Dr. Mindy Thomson Fullilove has termed this phenomenon “root shock”—“the traumatic stress reaction to the destruction of all or part of one’s emotional ecosystem.”⁴⁴ Dr. Fullilove likens the trauma of being uprooted from one’s home to the shock the body experiences due to physical injury.⁴⁵ She observes that just as the human body will cease all non-essential functions so that the essential organs can function, those who have been displaced must cease activities that further self-development in favor of mere survival.⁴⁶ This, in turn, causes weakened communities, the effects of which can persist for generations.⁴⁷ Further, relocating these individuals to a new community does not alleviate this issue.⁴⁸ A community allows individuals to form relationships and social status; a home’s physical placement within other structures, institutions, services and people is as significant as the shelter the home provides.⁴⁹

⁴⁰ *Id.* at 987.

⁴¹ *Id.* at 978.

⁴² *But see* D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 279–80 (2006) (arguing that many of the personhood aspects of a home, such as legal protections, family life, personal belongings, and value of ownership, are moveable and thus, not all individuals will experience deleterious effects to their self-development upon the loss of a home).

⁴³ Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. L. & SOC. SCI. 171, 177 (2016) (discussing MINDY THOMSON FULLILOVE, *ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT*, at 11 (2004)).

⁴⁴ FULLILOVE, *supra* note 43.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Atuahene, *supra* note 43, at 172.

⁴⁸ *See* Bethany Y. Li, *Now Is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 FORDHAM L. REV. 1189, 1201 (2016).

⁴⁹ *See* Atuahene, *supra* note 43.

The social and psychological effects of losing control over resources in the external environment due to displacement is clear:⁵⁰

Root shock, at the level of the local community, be it neighborhood or something else, ruptures bonds, dispersing people to all the directions of the compass. Even if they manage to regroup, they are not sure what to do with one another. People who were near are too far, and people who were far are too near. The elegance of the neighborhood—each person in his social and geographic slot—is destroyed, and even if the neighborhood is rebuilt exactly as it was, it won't work.⁵¹

Professor Radin posits that the personhood theory is limited with regard to takings. She reasons that the law does not recognize a limitation to eminent domain for a family home, even though such property would fall on the extreme personal property end of the personal-fungible continuum.⁵² Similarly, a higher level of scrutiny is not placed on the taking of such property. That is, the government need not show a “compelling state interest” and the taking need not be the “least intrusive alternative.”⁵³ Thus, she concludes, the personhood theory cannot adequately explain takings law.⁵⁴

This Article discusses the taking of homes by eminent domain; thus, its focus is on real property rather than personal property.⁵⁵ Ownership—that is, title to—real property is often described as a “bundle of sticks.”⁵⁶ When the government takes an

⁵⁰ See Li, *supra* note 48 (discussing the psychological effects of displacement due to urban renewal examined by psychiatrist Dr. Mindy Thomson Fullilove in her book *Root Shock*); see also FULLILOVE, *supra* note 43, at 11.

⁵¹ FULLILOVE, *supra* note 43, at 14.

⁵² Radin, *supra* note 34, at 1005–06.

⁵³ *Id.* (discussing the lack of strict scrutiny in the taking of personal property, such as a family home). The government must show only a “public purpose,” which, in judicial review, is generally found to exist. See *id.* n.173.

⁵⁴ *Id.* at 1006. Radin hypothesizes that either the personhood perspective of property ownership is not strong enough to outweigh governmental concerns in takings, or the perspective is “so deeply embedded” that it is assumed governmental entities will not take personal property when it could instead take fungible property. *Id.*

⁵⁵ The term “personal property” in this context refers to a “movable or intangible thing that is subject to ownership and not classified as real property” and not property that aids in a person’s self-development, as styled by Radin. *Property*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁵⁶ See Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 870–71 (2011). Professor Robilant explains that the “bundle of sticks” metaphor is used to describe the “bundle of

individual's home through its power of eminent domain, the government takes every stick in the bundle. Thus, in exercising its power of eminent domain, the government is taking all the sticks that build personhood and uprooting the bundle's place in the community, leading to root shock.⁵⁷

The proposed easement for public benefit addresses these two issues. First, it provides the community with a mechanism to enforce the stated justification for the taking; that is, it allows the holder of the easement to seek injunctive and compensatory relief in court if the private-transferee ceases using the land for the public benefit. Second, it gives the dispossessed landowners a stick in the bundle of rights to the land. Although these landowners would lack the right to possess the land, the ability to safeguard the land's use for public benefit is an important right that could ameliorate the damage to personal development inflicted by the taking.

II. BACKGROUND

A. *Eminent Domain Power*

It is axiomatic that the government can take private property by its power of eminent domain. Although the exact origin of this power is unknown, its existence is now unquestioned. During the American colonial period, taking land from private individuals with compensation for the taking was practiced in England, and, as a

entitlements regulating relations among persons concerning a valued resource" that comprise property in the common law system. *Id.* Further, Wesley Hohfield specified those rights in his 1913 and 1917 essays:

The fact that A is the fee-simple owner of Blackacre, Hohfield noted, means that his property relating to the tangible object we call land consists of a complex aggregate of rights (or claims), privileges, powers, and immunities. First, A has a legal right that others may not enter the land or cause physical harm to the land. Second, A has an indefinite number of legal privileges of entering the land, using the land, and harming the land. Third, A has the legal power to alienate his legal interest to another. Finally, A has an indefinite number of legal immunities, among which are the immunity that no ordinary person can alienate A's aggregate of jural relations to another, and the immunity that no ordinary person can extinguish A's privileges of using the land.

Id. at 879. Robilant goes on to argue that property could potentially be better understood as the civil law concept of a tree. The trunk represents "the core entitlement that distinguishes property from other rights" and the branches symbolize the "resource-specific bundles of entitlements." *Id.* at 872.

⁵⁷ See generally JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH, at 24–63 (5th ed. 2021) (explaining that property can be defined as "rights among people concerning things," and the most important rights—or sticks—are the right to transfer, the right to exclude, the right to use, and the right to destroy).

result, American jurisprudence now perceives the taking of property as a necessary and inherent power of government.⁵⁸ Thus, the U.S. Constitution does not establish the power of the government to take land by eminent domain, but the rights of those whose land is taken. The Takings Clause of the Fifth Amendment provides that “private property be taken for public use, without just compensation.”⁵⁹ The existence of this right requires that the government have the power to take private property by its power of eminent domain.⁶⁰

The power of eminent domain is a legislative power.⁶¹ Therefore, the legislature—either Congress or the state legislature—must initiate eminent domain proceedings. Thereafter, the legislature may delegate the implementation of the project to the executive branch.⁶² Often, the power is delegated to governmental subunits, such as counties or municipalities. It may also be, and often is, delegated to statutorily created authorities or districts, such as housing authorities, port authorities, transit authorities, water districts, sanitary districts, or school districts.⁶³

Three issues may arise when the government attempts to use its power of eminent domain: (1) is the government use of land a taking?; (2) were the owners given just compensation?; and (3) is the use of land for public use?⁶⁴ Although the first two issues are often litigated, this Paper is concerned with the third issue—circumstances in which takings are considered to be for “public use.”

Courts have adopted either a narrow or a broad view of what constitutes public use. Under the “narrow view,” public use means quite literally, “use by the public.”⁶⁵ That is, the public is free to enter onto the land and use it for its intended purpose.

⁵⁸ See William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 554, 559 (1972); see also *Kohl v. United States*, 91 U.S. 367, 372 (1875) (“The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned.”).

⁵⁹ U.S. CONST., amend. V.

⁶⁰ *Kohl*, 91 U.S. at 372–73.

⁶¹ 13 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 79F.01[3] (Michael Allen Wolf ed., 2022).

⁶² *Id.* § 79F.01[3][a].

⁶³ *Id.* § 79F.01[3][b].

⁶⁴ DAVID A. SCHULTZ, *PROPERTY, POWER, AND AMERICAN DEMOCRACY* 54–55 (1992).

⁶⁵ POWELL, *supra* note 61, § 79F.03[3][a] (citing 2A NICHOLS ON EMINENT DOMAIN, ch. 7, § 7.02[2] (Matthew Bender 3d ed., 1997)) (“[T]he property acquired by eminent domain must actually be used by the public or that the public must have the opportunity to use the land taken.”).

For example, government buildings, public highways and other automobile transportation infrastructure, railroads, subways, airports, parks, and sewers all generally bestow a public use.⁶⁶ On the other hand, the “broad view” characterizes public use as not only literal use by the public, but any use that contributes to the general welfare of the community.⁶⁷ The designation is conferred even if the property taken by eminent domain is not open for actual use by the public.⁶⁸ For instance, under the broad view, taking of land by eminent domain to construct factories, stores, and farms has been found to be for public use because the existence of these private enterprises benefits the public through job creation or increased tax revenue.⁶⁹ While the narrow view presents a traditional and generally accepted use of eminent domain, the broad view is more controversial; some jurisdictions allow for the use of eminent domain when the property will not be open to the general public, and some jurisdictions disallow the same.⁷⁰ The United States Supreme Court has accepted the broad view,⁷¹ but the treatment by each individual jurisdiction is disparate and varied.⁷²

The broad view of public use gives rise to private-transferee takings—that is, using the process of eminent domain to take land from a private individual and eventually transfer it to another private entity.⁷³ Private-transferee takings are an especially controversial use of eminent domain; their most vehement objection being that they generally devalue private property ownership rights.⁷⁴ Specifically, private-transferee takings have been criticized as resulting from an improper motivation to assist one citizen while harming another.⁷⁵ Additionally, private-transferee takings

⁶⁶ 2A NICHOLS ON EMINENT DOMAIN, ch. 7, § 7.06 (Matthew Bender 3d ed., 1997).

⁶⁷ See POWELL, *supra* note 61, § 79.03[3][a].

⁶⁸ *Id.*

⁶⁹ See 2A NICHOLS ON EMINENT DOMAIN, *supra* note 66, § 7.07.

⁷⁰ See *infra* Part II.D.

⁷¹ See *infra* Part II.C (discussing *Kelo v. City of New London*, 545 U.S. 469 (2005)).

⁷² POWELL, *supra* note 61, § 79F.03[3][b]; see also 2A NICHOLS ON EMINENT DOMAIN, *supra* note 66, § 7.02[5] (“The majority of state and federal courts appear to follow the broad definition of public use.”).

⁷³ Ross, *supra* note 13, at 359.

⁷⁴ See, e.g., *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 464–65 (Mich. 1981) (Ryan, J., dissenting).

⁷⁵ Ross, *supra* note 13, at 369–70.

have also been criticized as lacking continued public accountability.⁷⁶ That is, if the government does not maintain title to the taken land, it has no way of ensuring that the land continues to have a public use.⁷⁷ Thus, this argument posits, the private-transferee is free to use the land in any way it chooses, while land held by the government is subject to the will of the people.

B. Poletown and Hathcock—Michigan Adopts, Then Rejects, the Broad View

1. *Poletown*

Because *Kelo* held that the broad view and private-transferee takings did not violate the U.S. Constitution, each state was then left to determine whether such takings violated its state constitution or other statutory provision. That is, the states could choose to afford greater protection of individual property rights than the U.S. Constitution. In 1981, the Michigan Supreme Court became the first court in the nation to decide the constitutionality of the broad view of private-transferee takings.⁷⁸ In *Poletown Neighborhood Council v. City of Detroit*, the court addressed the issue of whether a municipality can “use the power of eminent domain . . . to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state?”⁷⁹ The case arose out of a plan by the City of Detroit, through its Economic Development Corporation, to acquire a large tract of land to convey to General Motors for construction of an assembly plant.⁸⁰ The court, quoting the Michigan Constitution, which states that “[private] property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law,” concluded that the “public purpose” is synonymous with “public use” in Michigan eminent domain jurisprudence.⁸¹ The court noted that the

⁷⁶ *Id.* at 369.

⁷⁷ *Id.* at 375.

⁷⁸ John E. Mogk, *Eminent Domain and the “Public Use”*: Michigan Supreme Court Legislates an Unprecedented Overruling of *Poletown in County of Wayne v. Hathcock*, 51 WAYNE L. REV. 1331, 1339 (2005).

⁷⁹ *Poletown*, 304 N.W.2d at 457 (Mich. 1981) (determining whether the Michigan Constitution allows the Economic Development and Corporations Act (MCL § 125.1601 *et seq.*) to take private property and transfer that private property to another private entity).

⁸⁰ *Id.*

⁸¹ *Id.* (quoting MICH. CONST. art. X, § 2).

responsibility of determining what constitutes a public purpose falls primarily on the legislature.⁸² And, in this instance, the legislature had delegated the authority to determine whether a project constitutes a public purpose to the municipalities involved.⁸³ Although the court recognized this authority in the legislature, it nonetheless applied a heightened scrutiny, stating:

The power of eminent domain is restricted to furthering public uses and purposes and is not to be exercised without substantial proof that the public is primarily to be benefitted. Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature.⁸⁴

In applying this heightened scrutiny, the court found that the City of Detroit's use of eminent domain was essential to the purpose of alleviating unemployment and building the economy of the community, and further, that any benefit to General Motors was merely incidental.⁸⁵ Thus, the City of Detroit prevailed in its use of eminent domain.⁸⁶

In this 5-2 decision, Justice Ryan dissented in the use of eminent domain in this particular case and in all situations where the stated public use is economic development.⁸⁷ Importantly, however, the dissent recognized circumstances in which private-transferee takings are allowable under Michigan law; stating that the clearance of blighted property is in itself a public use, the dissent recognizes that blighted properties can be taken by eminent domain and later transferred to private entities.⁸⁸ The dissent declared that "the object of eminent domain when used in connection with slum clearance is not to convey land to a private corporation as it is

⁸² *Id.* at 459 (quoting *Gregory Marina, Inc. v. Detroit*, 144 N.W.2d 503 (Mich. 1966)).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 460.

⁸⁷ *Id.* at 464–65 (Ryan, J., dissenting).

⁸⁸ *Id.* at 477 (Ryan, J., dissenting).

in this case, but to erase blight, danger and disease.”⁸⁹ Thus, Justice Ryan argues, instances of blight removal—or slum clearance—are wholly different than conveying taken land to a private entity for economic development.⁹⁰

The *Poletown* case arose from especially difficult facts. In the early 1980s, the auto industry was forced to contend with the obsolescence of its post-WWI factories and construct new, more advanced facilities.⁹¹ To increase the energy efficiency of auto assembly, these facilities were required to be single-story, which demanded much more land than the outdated, multi-storied factories.⁹² Thus, General Motors announced the closing of its Dodge Main plant, which was located in Hamtramck, just outside the City of Detroit.⁹³ At the same time, the City of Detroit was facing severe financial struggles.⁹⁴ Because of this, Detroit’s then-mayor concocted a plan with General Motors: if the City could provide the appropriate land, then General Motors would build its new plant there, employing 6,000 people while bolstering the economic base of the City of Detroit and replacing the tax revenue that Hamtramck would lose along with Dodge Main.⁹⁵

The selected land straddled the border of Hamtramck and Detroit.⁹⁶ While Hamtramck was able to secure the land fairly easily, Detroit was forced to use its power of eminent domain.⁹⁷ Some residents refused to vacate their property—including the Immaculate Conception Church, which was eventually raided by SWAT teams.⁹⁸ After the Wayne County Circuit Court failed to find the condemnation proceedings illegal, the Michigan Supreme Court granted a motion

⁸⁹ *Id.* (Ryan, J., dissenting).

⁹⁰ *Id.* (Ryan, J., dissenting).

⁹¹ *Id.* at 465–66 (Ryan, J., dissenting); *see also* Mogk, *supra* note 78, at 1336–39.

⁹² *See Poletown*, 304 N.W.2d at 465–66; *see also* Mogk, *supra* note 78, at 1336–37.

⁹³ Mogk, *supra* note 78, at 1337.

⁹⁴ *Poletown*, 304 N.W.2d at 467.

⁹⁵ *Auto Plant vs. Neighborhood: Poletown Remembered*, DET. NEWS (June 15, 2020, 9:53 AM), <https://www.detroitnews.com/picture-gallery/news/local/michigan-history/2020/06/14/auto-plant-vs-neighborhood-poletown-remembered/3016708001/> [<https://perma.cc/NNN4-A7ZG>].

⁹⁶ Mogk, *supra* note 78, at 1337.

⁹⁷ *See id.* at 1337–39.

⁹⁸ Kathy Sawyer, *Police in Detroit Evict Squatters From Church*, WASH. POST (July 15, 1981), <https://www.washingtonpost.com/archive/politics/1981/07/15/police-in-detroit-evict-squatters-from-church/5a19e72e-64fb-4786-b99d-3ab7adc46d69/> [<https://perma.cc/27J9-HS7M>].

for immediate consideration and upheld the Circuit Court's decision.⁹⁹ At that time, the final holdouts were forcibly evicted, the remaining structures were demolished, and the Detroit-Hamtramck assembly plant was constructed.

2. *Hathcock*

In 2004, the Michigan Supreme Court once again addressed the issue of whether a private-transferee taking complied with the Michigan Constitution. In *County of Wayne v. Hathcock*, the court reevaluated the “public purpose” test set forth in *Poletown* in the context of Wayne County's proposed use of eminent domain to acquire land to construct a technology park.¹⁰⁰ The case stemmed from the expansion of Detroit Metropolitan Airport.¹⁰¹ With the addition of a new terminal and runway, Wayne County was awarded a grant from the Federal Aviation Administration to mitigate increased noise experienced by neighboring landowners.¹⁰² To help insulate residential land from the airport noise, the County planned to construct a business and technology park containing a conference center, hotel accommodations, and a recreational facility on a 1,300-acre plot of land adjacent to the airport.¹⁰³ It was estimated that the project would generate 30,000 jobs, as well as \$350 million in additional tax revenue.¹⁰⁴ The County was able to purchase all but nineteen parcels necessary for the project through voluntary sales and it instituted condemnation actions on these remaining parcels.¹⁰⁵ While the court found that the County's use of eminent domain would benefit the public, it adopted the narrow view of public use, holding that private-transferee takings violate the Michigan Constitution.¹⁰⁶ In doing so, the Court overruled *Poletown*, stating that its “conception of a public use—that of ‘alleviating unemployment and revitalizing the economic base of the community’—has no support in the Court's eminent domain jurisprudence.”¹⁰⁷

⁹⁹ *Poletown*, 304 N.W.2d at 457.

¹⁰⁰ *County of Wayne v. Hathcock*, 684 N.W.2d 765, 771–72 (Mich. 2004).

¹⁰¹ *Id.* at 770.

¹⁰² *Id.*

¹⁰³ *Id.* at 770–71.

¹⁰⁴ *Id.* at 771.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 778, 787.

¹⁰⁷ *Id.* at 787.

Yet, the *Hathcock* court was clear in its statement that private-transferee takings would be permissible in situations where the taking itself advanced a public concern.¹⁰⁸ In doing so, the court adopted the view expressed by Justice Ryan's *Poletown* dissent regarding takings for the purpose of clearing properties determined to be blighted.¹⁰⁹ Thus, *Hathcock* concluded that when the power of eminent domain is used for reasons independent of the land's eventual use—such as public health and safety—the exercise of the power is valid regardless of whether the land is transferred to a private entity.¹¹⁰ For this reason, the *Hathcock* court upheld its 1951 decision *In re Slum Clearance in City of Detroit*, where it determined the taking of private property later sold to a private entity was valid.¹¹¹ Thus, after *Hathcock*, although private-transferee takings were unconstitutional for reasons of economic development, such transfers were still available for blight clearance or takings that advanced other public concerns.

C. *Kelo v. City of New London: The U.S. Supreme Court Upholds the Broad View*

In 2005, the Supreme Court of the United States weighed in on the topic through *Kelo v. City of New London*.¹¹² Specifically, *Kelo* involved the government's use of eminent domain to procure property for the development of a hotel and a museum, as well as restaurants, shopping, marinas, residences, and office space.¹¹³ The land at issue comprised the Fort Trumbull area of the City of New London,¹¹⁴ which had fallen on hard economic times. In 1990, the State of Connecticut designated New London as a "distressed municipality" due to decades of economic decline.¹¹⁵ In 1996, the U.S. Government closed a military installment in the Fort Trumbull area, causing an additional loss of 1,500 jobs.¹¹⁶

¹⁰⁸ *Id.* at 782–83.

¹⁰⁹ *Id.* at 783.

¹¹⁰ *Id.*

¹¹¹ *Id.*; see *In re Slum Clearance*, 50 N.W.2d 340 (Mich. 1951).

¹¹² *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹¹³ *Id.* at 474.

¹¹⁴ *Id.* at 473.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

State and local officials identified the Fort Trumbull area as an opportunity for economic revitalization and they allocated millions of dollars of bonds towards that cause.¹¹⁷ Soon thereafter, the pharmaceutical giant Pfizer announced it would build a \$300 million facility near Fort Trumbull.¹¹⁸ The City continued on with its plans, intending to take advantage of business attracted by the new facility.¹¹⁹ The approved plan required the City to acquire several privately owned properties, as well as the land formerly occupied by the Naval facility.¹²⁰ Although the City was able to negotiate the purchase of most of the needed land, its negotiations with one owner, Susette Kelo, failed.¹²¹ As a result, the City began condemnation proceedings in order to acquire the land through its power of eminent domain.¹²²

The City estimated that the project would create more than 1,000 jobs, increase the tax base, and generally revitalize New London.¹²³ Citing its deference to legislatures in its public use jurisprudence, the U.S. Supreme Court held that the City's development plan unquestionably served a public purpose and satisfied the public use requirement.¹²⁴ The Court refused to implement a bright-line rule specifying that economic development does not constitute public use; nor did it impose a heightened scrutiny requiring reviewing courts to determine that there is a "reasonable certainty" that public benefits will, in fact, materialize.¹²⁵ However, the Court stressed that nothing in its decision precluded states from placing further restrictions on eminent domain, and many states did just that.¹²⁶ In fact, the majority

¹¹⁷ A private, nonprofit entity, The New London Development Corporation, was reactivated to assist in planning. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 473–74.

¹²⁰ *Id.* at 474 (“The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility . . .”).

¹²¹ *Id.* at 475.

¹²² Susette Kelo, the named plaintiff and petitioner in front of the U.S. Supreme Court, was not the only plaintiff/petitioner in this case; in total, there were nine petitioners, who owned a total of fifteen properties in Fort Trumbull. *Id.*

¹²³ *Id.* at 472.

¹²⁴ *Id.* at 483–84.

¹²⁵ *Id.* at 484–87.

¹²⁶ *Id.* at 489.

of states have enacted legislation to limit their own use of eminent domain with regard to private transferee takings.¹²⁷

D. *Statutory Limitations on Private Transferee Takings*

The legislative response to *Kelo* was quick and decisive.¹²⁸ In anticipation of the *Kelo* decision, two states passed legislation limiting eminent domain powers.¹²⁹ The issuance of the decision opened the floodgates of legislation limiting state eminent domain power: before 2006—within a mere one-and-a-half years of the June 23, 2005 holding—thirty-three states had passed such legislation.¹³⁰ In 2007, nine additional states enacted legislation limiting takings authority.¹³¹ Between 2008 and 2013, four more states either passed legislation or constitutional amendments restricting eminent domain powers.¹³² This leaves only five states lacking post-*Kelo* eminent domain legislative reform.

States enacting legislation in 2005 though the beginning of 2006 concentrated primarily on prohibiting the use of eminent domain to transfer property to a private

¹²⁷ *Id.*; see also POWELL, *supra* note 61, § 79F.03[3][b][vi] (“Within a little more than one year after the date on which the Court announced its holding, more than half of the states enacted eminent domain reform legislation.”).

¹²⁸ Gregory J. Robson, *Kelo v. City of New London: Its Ironic Impact on Takings Authority*, 44 URB. LAW. 865, 889 (2012).

¹²⁹ See POWELL, *supra* note 61, § 79F.03[3][b][iv]; see also Anastasia C. Scheffler-Wood, Comment, *Where Do We Go from Here? States Revise Eminent Domain Legislation in Response to Kelo*, 79 TEMP. L. REV. 617, 625 (2006) (explaining that Utah and Nevada enacted legislation in anticipation of the *Kelo* decision in March 2005 and June 2005, respectively).

¹³⁰ POWELL, *supra* note 61, § 79F.03[3][b][iv] (“Within a little more than one year after the date on which the Court announced its holding, more than half of the states enacted eminent domain reform legislation. By the end of 2006, the states that had made it to the finish line were, in order, Delaware, Alabama, Texas, Ohio, South Dakota, Utah, Idaho, Indiana, Kentucky, Wisconsin, Georgia, West Virginia, Maine, Nebraska, Vermont, Pennsylvania, Florida, Kansas, Minnesota, Tennessee, Colorado, New Hampshire, Alaska, Missouri, Iowa, Illinois, North Carolina, Michigan, California, Louisiana, South Carolina, Arizona, and Oregon.”).

¹³¹ *Id.* In 2007, Wyoming, New Mexico, Virginia, North Dakota, Washington, Maryland, Montana, Nevada, and Connecticut all passed legislation limiting eminent domain powers. *Id.*

¹³² *Id.* In 2008, Rhode Island passed eminent domain reform legislation. *Id.* In 2011, Mississippi voted to strengthen the constitutional rules on eminent domain. *Id.* In 2013, New Jersey also passed legislation restricting eminent domain powers. *Id.*

party for economic public benefit.¹³³ Throughout the 2006 legislative session, the issue of blight was more often addressed.¹³⁴

The post-*Kelo* state legislation limiting eminent domain power took various forms. Generally, states enacted statutes limiting such takings using the following methods:

- (1) Prohibiting eminent domain for economic development purposes, to generate tax revenue, to increase employment, or to transfer private property to another private entity;
- (2) Defining what constitutes “public use” to be the possession, occupation, or enjoyment of the property by the public at large, public agencies, or public utilities;
- (3) Restricting eminent domain to blighted properties and redefining what constitutes blight to emphasize detriment to public health or safety;
- (4) Requiring greater public notice, more public hearings, negotiation in good faith with landowners, and approval by elected governing bodies; and
- (5) Requiring compensation greater than fair market value where property condemned is the principal residence.¹³⁵

The first two types of statutes preclude the broad view of public use by directly prohibiting private-transferee takings, or by essentially proscribing any use that is not literally open to the public. The remaining types of statutes do not foreclose the broad view or private-transferee takings; instead, they limit the properties subject to eminent domain or impose greater procedural or compensatory requirements.¹³⁶ In these jurisdictions, dispossessed landowners are left with no property rights and no method of ensuring that the taken land’s use for the public benefit endures. Because of this, situations like that of the Detroit-Hamtramck Plant occur: the private party-transferee threatens to cease the property’s use for the benefit of the public and the

¹³³ Robson, *supra* note 128. The legislation enacted in this time period—2005 to the beginning of 2006—is often referred to as the “first wave” of anti-*Kelo* legislation. *Id.*

¹³⁴ *Id.* Legislation enacted during the 2006 legislative session is often referred to as the “second wave” of legislation. *Id.* The definition of “blight” and what it means for property to be deemed “blighted” are important questions in private-transferee takings. These questions are addressed in the next section.

¹³⁵ Patrick R. Baker & Henry Webb, *The Mine Void and Pore Space Conundrum Posed by the Anti-Kelo Movement*, 66 OIL, GAS & ENERGY Q., no. 1, 2007, at 4 (citing Larry Morandi, *State Eminent Domain Legislation and Ballot Measures*, NAT’L CONF. STATE LEGISLATURES (Jan. 1, 2012)).

¹³⁶ See POWELL, *supra* note 61, § 79F.03[3][b][iv] (noting that in many states, the legislative and constitutional changes brought on by *Kelo* were unanticipated and likely unnecessary due to the law already existing in these jurisdictions). However, the procedural and compensation protection updates were long overdue and necessary. *Id.*

community which it benefits has no recourse.¹³⁷ An easement for public benefit would address this issue by giving the community a method to seek injunctive or compensatory relief.

Michigan codified its desire to eliminate situations like *Kelo*—and, importantly, *Poletown*—by enacting several measures designed to protect landowners whose land was taken by eminent domain in 2006.¹³⁸ After the exercise of the government eminent domain power in *Kelo*, Michigan voters passed a ballot initiative defining “public use” in the state constitution.¹³⁹ Accordingly, the Michigan Constitution now provides, “‘Public Use’ does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues.”¹⁴⁰ The provision also places the burden of proof on the government or other condemning authority to show that the taking is for public use.¹⁴¹ These changes prevent *Kelo*-type private-transferee takings. However, this use of eminent domain was already prohibited by the *Hathcock* decision.¹⁴² Private-transferee takings to ameliorate blight, however, are still possible.

E. Remediation of Blight as a Public Use

Many jurisdictions that have precluded transfers to private entities altogether, effectively prohibiting *Kelo*-type transfers, often still allow the taking of private property for development by private entities.¹⁴³ Notably, property determined to be blighted—like Pittsburgh’s Lower Hill—is regularly excepted from such

¹³⁷ See *supra* Introduction (discussing the taking of Detroit’s Poletown neighborhood and subsequent conveyance to General Motors). A nationwide strike by the United Auto Workers forced the Detroit-Hamtramck plant to continue its use as a factory, and thus, the land continued its use for the public benefit. However, without the support of a large labor union, this result was unlikely to have occurred.

¹³⁸ See POWELL, *supra* note 61, § 79F.03[3][b]. The legislation, among other measures, increased recoverable moving expenses, allowed recovery of attorney’s fees in certain circumstances, and provided enhanced compensation for certain owners. *Id.*

¹³⁹ *Id.*

¹⁴⁰ MICH. CONST. art. X, § 2 (1963).

¹⁴¹ *Id.*

¹⁴² See *supra* Part II.B.

¹⁴³ See *supra* Part II.D.

legislation.¹⁴⁴ Although efforts have been made in some jurisdictions to abate government discretion, and thus, abuse allowed by blight statutes, all of these jurisdictions, other than Florida, still allow property taken by eminent domain due to blight to be transferred to private parties.¹⁴⁵ That is, these jurisdictions determined that the removal of blight is a public use in itself; once the blighted properties have been removed, the public use has been served, so the later transfer to a private party is of no consequence.¹⁴⁶ Although several jurisdictions redefined “blight” post-*Kelo*, the government can nevertheless declare a property blighted, condemn the property, and transfer it to a private party.¹⁴⁷

1. Pre-*Kelo* Blight Statutes

For the better part of the past century, cities have been exercising their power of eminent domain to clear blighted properties. In a few states, this practice began in 1920s and 1930s; the federal government then stepped in to assist in clearing slums and building public housing.¹⁴⁸ In the 1940s, several states began enacting legislation in an effort to facilitate private development in urban areas.¹⁴⁹

Ultimately, blight removal’s watershed moment arrived in 1949 with the enactment of Title I of the Housing Act of 1949.¹⁵⁰ Throughout this movement, blight was disparaged, not just as a social or sanitary issue, but as an economic drain on cities.¹⁵¹ Thus, it was deemed necessary to demolish blighted properties and replace them with new, often private, development. Consequently, development came to be viewed as financially advantageous for cities.¹⁵²

¹⁴⁴ See *supra* Introduction (discussing the taking by eminent domain of Pittsburgh’s Lower Hill neighborhood to construct a municipal arena).

¹⁴⁵ See POWELL, *supra* note 61, § 79F.03; see also David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365, 365 (2006).

¹⁴⁶ See *supra* Part II.B.

¹⁴⁷ See *supra* Part II.D.

¹⁴⁸ Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 FORDHAM URB. L.J. 1119, 1121 (2011).

¹⁴⁹ *Id.*

¹⁵⁰ Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (1949).

¹⁵¹ Gold & Sagalyn, *supra* note 148.

¹⁵² *Id.* at 1121–22.

Title I of the Housing Act of 1949 extended funding to local governments for “slum clearance.”¹⁵³ Federal loans were made available “[t]o assist local communities in eliminating their slums and blighted areas and in providing maximum opportunity for the redevelopment of project areas by private enterprise.”¹⁵⁴ Title I also makes capital grants available to local agencies “to enable such agencies to make land in project areas available for redevelopment”¹⁵⁵ Such loans and grants, however, are not available for projects on open land.¹⁵⁶ By providing these funds, the federal government triggered urban renewal projects requiring decimation of communities that local governments considered to be blighted. Further, it prioritized the involvement of private enterprise in redevelopment. Thus, the process by which a local government uses eminent domain to take land from private parties and vest control of the land in another private party was enshrined in law. In fact, the Act’s “Declaration of National Housing Policy” states, in pertinent part:

The policy to be followed in attaining the national housing objective hereby established shall be: (1) private enterprise shall be encouraged to serve as large a

¹⁵³ Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413, 414 (1949).

¹⁵⁴ *Id.* Section 102(a) of the Housing Act of 1949 established loans for slum elimination:

To assist local communities in eliminating their slums and blighted areas and in providing maximum opportunity for the redevelopment of project areas by private enterprise, the Administrator may make temporary and definitive loans to local public agencies for the undertaking of projects for the assembly, clearance, preparation, and sale and lease of land for redevelopment. Such loans (outstanding at any one time) shall be in such amounts not exceeding the expenditures to be made by the local public agency as part of the gross project cost, bear interest at such rate (not less than the applicable going Federal rate), be secured in such manner, and be repaid within such period (not exceeding, in the case of definitive loans, forty years from the date of the bonds evidencing such loans), as may be deemed advisable by the Administrator. *Id.*

¹⁵⁵ *Id.* at 416. Section 103(a) of the Housing Act of 1949 established capital grants available to local governments:

The Administrator may make capital grants to local public agencies to make land in project areas available for redevelopment at its fair value for the uses specified in the redevelopment plans: *Provided*, That the Administrator shall not make any contract for capital grant with respect to a project which consists of open land. The aggregate of such capital grants with respect to all the projects of a local public agency on which contracts for capital grants have been made under this title shall not exceed two-thirds of the aggregate of the net project costs of such projects, and the capital grants with respect to any individual project shall not exceed the difference between the net project cost and the local grants-in-aid actually made with respect to the project.

¹⁵⁶ *Id.* at 416. Under Title I, loans were available to local governments for “the provision of public buildings or facilities necessary to serve or support the new uses of land in the project area.” *Id.* at 414.

part of the total need as it can; (2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need; . . . (4) governmental assistance to eliminate substandard and other inadequate housing through the clearance of slums and blighted areas, to facilitate community development and redevelopment, and to provide adequate housing for urban and rural nonfarm families with incomes so low that they are not being decently housed in new or existing housing shall be extended to those localities which estimate their own needs and demonstrate that these needs are not being met through reliance solely upon private enterprise, and without such aid¹⁵⁷

Although large sections of the Act have since been repealed—including those sections providing for loans and grants, the “Declaration of National Housing Policy” remains.¹⁵⁸ In kind, the policy of involving private parties in housing development remains.

From its inception, “blight” was difficult to define, yet easy to find. In the 1930s, descriptions of blight included “areas where property values are decreasing; where buildings have become obsolete; where fundamental repairs are not being made; where high vacancies exist; where economic development has been substantially retarded or normal development frustrated; or, where taxes do not pay for public services.”¹⁵⁹ Although Title I financed the clearance of blight, it left to local governments the task of determining what “blight” actually means.¹⁶⁰ Because Title I required these local authorities to work with private developers, their interests were aligned and an enduring relationship between local governments and developers was created.¹⁶¹

Rather than actually defining blight, most states provided lists of conditions that would cause a property to be considered blighted.¹⁶² Although blight statutes

¹⁵⁷ *Id.* at 413.

¹⁵⁸ See 42 U.S.C. § 1441 *et seq.* In 1954, the United States Supreme Court held that the taking of land from a private party and later transferring it to another private party for purposes of blight remediation is constitutional. *Berman v. Parker*, 348 U.S. 26, 33–34 (1954).

¹⁵⁹ Gold & Sagalyn, *supra* note 148, at 1123.

¹⁶⁰ *Id.* at 1123–24.

¹⁶¹ *Id.*

¹⁶² *Id.* (“[M]ost states, in fact, stopped short of defining blight and instead offered a descriptive catalogue of blighted conditions—often pasted verbatim from Progressive-era health or safety statutes.”). See *id.* at 1124 (quoting Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *FORDHAM URB. L.J.* 305, 310 (2004)).

differed from state to state, conditions indicating blight in the various statutes could be grouped into the following categories:

Structural defects; Health hazards; Faulty or obsolescent planning; Taxation issues; Lack of necessary amenities and utilities; Condition of title; Character of the neighborhood; Presence of blighted open areas; Declared Federal and State disaster areas; Economic use of the land; Presence of vacant lots and abandoned buildings; and Physical and geological factors.¹⁶³

¹⁶³ Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 414–15 (2000) (cited in Gold & Sagalyn, *supra* note 148, at 1123–24). In analyzing this list, Gold and Sagalyn state,

Several themes stand out: (1) Blight is commonly and intuitively defined by structural defects and health hazards in nearly every state statute. Insufficient light, air, ventilation, and access to utilities, all typically associated with necessary standards of living, are also included as blight criteria in two-thirds of the statutes. Condensed together, these criteria represent the police-power definition of blight, conditions that are a threat to public health and safety. (2) Planning features, whether faulty or obsolescent (including irregular or small-lot layout, insufficient street capacity, overcrowding, lot areas covered by buildings, and insufficient green spaces, parks, or recreational facilities), define a second broad category that all but eight statutes include as a condition of blight. (3) Neighborhood character or the presence of blighted open areas (large areas of undeveloped or vacant land) are far less common as criteria of blight; only thirteen statutes include neighborhood character, and only a different set of twelve include blighted open areas as a determinant. (4) Criteria often cited for condemnation abuse—economic use of land and vacancies impacting private redevelopment efforts—are relatively infrequent as preconditions for a positive finding of blight; as of 2000, in only ten states (or twenty percent), New York among them, could the economic use of land qualify as a condition of blight; only nine statutes admit vacancies as a qualifying condition. In contrast, taxation and legal conditions are far more common blight criteria—sixty-nine and sixty-one percent, respectively. Though the common practice is to show evidence of as many blighting factors as possible, all but five states base a positive determination of blight on the presence of a single blighting factor. Moreover, only seven states, according to another analysis include any quantification in their designation of what is a blighted area.

Id. at 1125–26 (2011).

Regardless of the conditions considered by any particular local government, each local government was generally given broad discretion in declaring property blighted.¹⁶⁴

2. Blight Statute Reforms

Several states enacted blight statute reforms prior to the *Kelo* decision.¹⁶⁵ These reforms amounted to an attempt to limit discretion in assessing a property as blighted. However, these changes did not ultimately eliminate the subjectiveness of the statutory criteria. Further, developers sought to have property deemed blighted, so local governments benefitted from vague criteria to court development.¹⁶⁶

Additional states enacted blight statute reforms as part of their post-*Kelo* eminent domain legislation.¹⁶⁷ However, of the states that enacted legislation limiting the power of eminent domain after *Kelo*, the majority made explicit exceptions for eliminating blight.¹⁶⁸ Much like the anti-*Kelo* legislation itself, blight reform statutes varied by state. Only two states eliminated blight altogether as a condition justifying eminent domain.¹⁶⁹ Utah eliminated blight as a precondition of

¹⁶⁴ Gold & Sagalyn, *supra* note 148, at 1124; *see also* Luce, *supra* note 163, at 404.

¹⁶⁵ Gold & Sagalyn, *supra* note 148, at 1128 (“These reforms included a rewording of the descriptive criteria in order to avoid the ‘double-counting’ of similar factors (Illinois), the addition of new descriptive criteria (Missouri), a ‘check-list’ formula (Illinois and California), and a tighter definition of eligible properties by restricting land eligible for designation as a blighted area (primarily wetlands, vacant lands, and agricultural land).”) (citations omitted).

¹⁶⁶ *Id.* (quoting Colin Gordan, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *FORDHAM URB. L.J.* 305, 336–37 (2004)) (“[The reforms] do not change the fact that judgments as to things like ‘obsolescence,’ ‘dilapidation,’ or ‘deleterious land uses’ remain highly subjective. Moreover, blight remains a designation sought by developers, and hence shaped not by public purpose, but by private interests seeking public subsidies.”).

¹⁶⁷ *See supra* Part II.D.

¹⁶⁸ Gold & Sagalyn, *supra* note 148, at 1128. Note that two states, Mississippi and New Jersey, limited eminent domain powers after this article was published. Mississippi voters passed a constitutional amendment prohibiting property taken by eminent domain to be transferred to a private party for a period of ten years. *See* POWELL, *supra* note 61, § 79F.03[b][iv]; Mississippi Initiative #31 (2011). Additionally, New Jersey passed legislation in 2013, making procedural changes for redevelopment. It does not limit *Kelo*-type takings and thus, there is no need for it to except findings of blight. *See* POWELL, *supra* note 61, § 79F.03[b][iv]; 50 *State Report Card: New Jersey*, CASTLE COAL., http://castlecoalition.org/new_jersey [https://perma.cc/K743-THAW] (last visited Feb. 1, 2023).

¹⁶⁹ Gold & Sagalyn, *supra* note 148, at 1152–53. Florida banned all use of eminent domain for blighted properties and New Mexico banned condemnation for blight except in the case of antiquated platting, which occurs when a landowner subdivides their land into plots for sale with no plan to actually develop the plots. *See also id.* at 1124.

takings prior to *Kelo*, bringing the total number of states that do not allow takings for blight to three.¹⁷⁰ Several states redefined blight to include those conditions that pose a threat to public health and safety or remain unfit for human habitation.¹⁷¹ This definition is often referred to the “police power” rationale of blight takings.¹⁷² Additional states somewhat narrowed the criteria for finding blight, but stopped short of requiring the property to pose health and safety hazards or be unfit for human habitation.¹⁷³ Some states adopted a check-list approach, requiring the presence of several criteria for a finding of blight.¹⁷⁴ Finally, some states passed legislation requiring a finding of blight by clear and convincing evidence.¹⁷⁵ Another approach several states adopted is to require a parcel-specific finding of blight, rather than an area-wide determination.¹⁷⁶ Yet, some states failed to enact blight reform and maintained their existing definitions of blight or did not explicitly address blight criteria at all.¹⁷⁷ Still other states maintained in their blight definitions areas where obstacles to “sound growth” or conditions that constitute an “economic or social liability” exist.¹⁷⁸

¹⁷⁰ Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2138 (2011).

¹⁷¹ Gold & Sagalyn, *supra* note 148, at 1155–56. Fifteen states narrowed their definition of blight to include only property posing a threat to public health and safety or is unfit for human habitation—Alabama, Arizona, Delaware, Georgia, Indiana, Kansas, Louisiana, Minnesota, New Hampshire, New Mexico, Oregon, Pennsylvania, South Carolina, Virginia, and Wyoming. Minnesota and Pennsylvania, however, made geographic exceptions to this limitation. *Id.* Mississippi has since also redefined blight to include only these conditions, bringing this category of blight reform to sixteen states. *Id.* at 1157.

¹⁷² *Id.* at 1155.

¹⁷³ *Id.* at 1156. California, Montana, Ohio, Tennessee, and Wisconsin narrowed the criteria required for a finding of blight. *Id.*

¹⁷⁴ *Id.* California and Georgia have adopted this approach. *Id.*

¹⁷⁵ *Id.* Arizona, Colorado, Iowa, and Michigan require a finding of blight by clear and convincing evidence. *Id.* (citations omitted).

¹⁷⁶ *Id.* at 1157. Arizona, Georgia, Iowa, Kansas, Louisiana, Michigan, Missouri, Nevada, North Carolina, Ohio, Oregon, South Carolina, Virginia, West Virginia, Wisconsin, and Wyoming enacted this type of reform. *Id.* (citations omitted).

¹⁷⁷ *Id.* at 1156–57. Illinois, Kentucky, and Maine maintained their pre-existing blight definitions. *Id.* at 1157 (citations omitted). Maryland, North Dakota, Rhode Island, and Washington did not explicitly address blight criteria. *Id.* at 1158.

¹⁷⁸ *Id.* at 1157–58. These states are Alaska, Colorado, Missouri, Nebraska, North Carolina, Ohio, Texas, Vermont, and West Virginia. *Id.*

Pennsylvania, the home of Pittsburgh's Lower Hill, enacted legislation limiting eminent domain powers in 2006, quickly after the issuance of the *Kelo* decision.¹⁷⁹ This legislation consisted of two bills.¹⁸⁰ One bill contained primarily procedural reforms.¹⁸¹ Importantly, the other bill, with some exceptions, prohibited private transferee takings.¹⁸² One of the exceptions is, "[t]he property taken meets the requirements of Section 205 (relating to blight)."¹⁸³ Section 205 defines a single blighted property as any one of the following: a public nuisance; an attractive nuisance to children; unfit for human habitation; a fire hazard or otherwise dangerous; or unfit for its intended use due to the utilities having been disconnected.¹⁸⁴ Additionally, Section 205 allows a single property to be declared blighted if three of the following conditions are present: unsafe conditions that violate use, occupancy, or fire code; unsafe accessways; accessed by an unsafe street; violation of a municipal maintenance code and an immediate threat to health or safety; vacancy; or located in a redevelopment area with a density of at least 1,000 people per square mile, a redevelopment area with more than 90% nonresidential property, or a municipality with a density of at least 2,500 people per square mile.¹⁸⁵

Under Section 205, multiple properties comprising a certain area may be declared blighted if either of the following conditions are met: a majority of the

¹⁷⁹ POWELL, *supra* note 61, § 79F.03(3)(iv) (discussing Pennsylvania's 2006 eminent domain legislation).

¹⁸⁰ *Id.* (discussing House Bill 2054).

¹⁸¹ *Id.* (discussing House Bill 2054).

¹⁸² Act of 2006, Pub. L. No. 35 § 204. The bill, codified as 26 PA. CONS. STAT. § 204 (2021), provides, in pertinent part:

§ 204. Eminent domain for private business prohibited.

(a) Prohibition.—Except as set forth in subsection (b), the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise is prohibited.

(b) Exception.—Subsection (a) does not apply if any of the following apply:

...

(5) The property taken meets the requirements of section 205 (relating to blight).

(6) The property taken is acquired by a condemnor pursuant to section 12.1 of the act of May 24, 1945 (P.L.991, No. 385), known as the Urban Redevelopment Law.

¹⁸³ *Id.* § 204(b)(5).

¹⁸⁴ *Id.* § 204(b).

¹⁸⁵ *Id.* § 205(b)(12).

properties could be individually declared blighted as described above; or properties representing a majority of the geographical area could be declared blighted as described above and at least one-third of the individual properties meet the conditions described above.¹⁸⁶ Further, the declaration of any area as blighted expires after twenty years.¹⁸⁷

This Act limiting private-transferee takings is subject to exceptions in addition to blight. Pertinent to the Pittsburgh Hill District takings,¹⁸⁸ property taken pursuant to Section 12.1 of the Urban Redevelopment Law is excepted.¹⁸⁹ Additionally, while the blight definitions in this Act apply notwithstanding the Urban Redevelopment Law,¹⁹⁰ thus superseding the latter if the former conflicts, the Act more-or-less mirrors the previously-existing blight definitions of the Urban Redevelopment Law.¹⁹¹

Regardless of the reforms enacted, it is clear that private-transferee takings after a finding of blight are still possible. In fact, although the law is moving to restrict takings for economic development post-*Kelo*, it primarily allows blight condemnations.¹⁹² Thus, while condemnations in middle-class areas, like in *Poletown* and *Kelo*, tend to be restricted by legislation, condemnations in poorer areas are still available under the blight statutes.¹⁹³ Because most reforms lack objective criteria, determinations of blight remain subjective.¹⁹⁴ Although these more restrictive definitions of blight may be more prohibitive, their effect is to protect better housing stock while still allowing for the condemnation of homes in poorer areas with poorer housing stock.¹⁹⁵ In sum, the vast majority of states advantage

¹⁸⁶ *Id.* § 204(c).

¹⁸⁷ *Id.* § 205(e).

¹⁸⁸ See *supra* Introduction (discussing the taking of Pittsburgh's Lower Hill).

¹⁸⁹ 26 PA. CONS. STAT. § 204(b)(6) (2021).

¹⁹⁰ *Id.* § 205(a).

¹⁹¹ See Urban Redevelopment Law, Pub. L. 991, No. 385 § 12.1(c) (1945); 26 PA. CONS. STAT. § 205(b) (2021).

¹⁹² Dana, *supra* note 145, at 5.

¹⁹³ *Id.*

¹⁹⁴ See Luce, *supra* note 163, at 389, 407–09.

¹⁹⁵ Dana, *supra* note 145, at 5 (“Some of these states have recently adopted somewhat more specific definitions of ‘blight,’ but this re-definition of blight only accentuates the link between poverty and blight by making it more difficult for local officials to stretch the ‘blight’ category to include non-poor areas

middle-class housing over poor housing and will more frequently condemn the homes of poor individuals over the middle-class individuals.¹⁹⁶ This, in turn, causes displacement of the most vulnerable and no doubt exacerbates income inequality and other social ills.

Although these various blight statutes differ—some providing more protection for the landowner than others—it is clear that post-*Kelo* legislation primarily benefits those with means.¹⁹⁷ Those who live on the fringe of society are still subject to dispossession by eminent domain. The taking of this property affects the self-development and personhood of the dispossessed: as lacking property, they have lesser control on their environment.¹⁹⁸ Exacerbating this struggle, the land may be transferred to a private party.¹⁹⁹ The purpose of vesting ownership in the private party is to enable development of better conditions and housing for those who were previously living in properties deemed blighted. However, once the property is taken, the dispossessed owners lose all control over the land and the housing because they no longer have the power to influence how the land is used. An easement for public benefit would give the dispossessed owners a way to ensure that the land is used for housing.

III. EXISTING PROPERTY INTERESTS

A. *Interests that Revert to the Government*

A fee simple defeasible is “a present interest that terminates upon the happening of a stated event that might or might not occur.”²⁰⁰ A present interest is an interest

with higher quality housing stock.”). Professor Dana asserts that post-*Kelo* reforms protecting middle-class housing from condemnation for economic development while continuing to subject poorer housing to condemnation under blight statutes is consistent with the public outcry over the *Poletown* and *Kelo* cases. *Id.* Quoting *Washington Times* columnist Bruce Fein, Dana states, “the ‘*Kelo* litigation is a middle-class reenactment’ of the *Berman* case in which the Supreme Court approved blight condemnations in poor areas. The media, commentators, and (most importantly) legislators have revolted against the *Kelo* condemnations, however, while they quietly approved or at least accepted the *Berman* condemnation.” *Id.* at 5–6 (citations omitted).

¹⁹⁶ *Id.* at 16.

¹⁹⁷ *Id.* at 5.

¹⁹⁸ See *supra* Part I (discussing Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982)).

¹⁹⁹ See *supra* Parts II.D and II.E.

²⁰⁰ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 23.1 (AM. L. INST. 2011).

that allows the owner to take possession.²⁰¹ A future interest is an interest that allows the owner to potentially take possession at some time in the future.²⁰² So, with a defeasible fee, the present interest holder has possession until occurrence of a particular event, at which time the future interest holder will assume possession. Thus, it is possible for the state to convey private property taken by eminent domain to another private entity using a fee simple defeasible. In doing so, the grantee-private entity would be the holder of the present interest and the grantor-state, or some third party would be the holder of the future interest.²⁰³ Possession would revert back to the state or some third party if the condition of ownership for the benefit of the public was broken.

While it is possible to structure a conveyance of land taken by eminent domain using a defeasible fee, the question remains as to whether it would be feasible or desirable. In the *Poletown* situation, the City of Detroit approached the automobile manufacturers and requested that any new or relocated plants be built in the city.²⁰⁴ General Motors replied to this request with specific and strict criteria for the plant site; it stated that the city must provide “a parcel 450 to 500 acres in size with access to long-haul railroad lines and a freeway system with railroad marshalling yards within the plant site.”²⁰⁵ Knowing that no such site existed, General Motors was prepared to build the plant outside of Detroit, and most likely outside of Michigan.²⁰⁶ With such a strong bargaining position, General Motors was likely in a position to demand a fee simple absolute, and not some defeasible fee with a condition attached.

Also, it is worth considering whether, in this situation, a conveyance in a defeasible fee is even desirable for the city. If, at some point in the future, the property was used for the benefit of the public, possession would revert back to the city. But it is unlikely that Detroit would want possession of an abandoned factory. Additionally, this does nothing to recreate the public benefit. Furthermore, conveying a future interest to the former landowners whose property was taken by eminent domain would also be futile; it is highly unlikely that these individuals would find value in an abandoned factory.

²⁰¹ *Id.* § 24.1.

²⁰² *Id.* § 25.1.

²⁰³ The Third Restatement abolishes the distinctions between the three types of defeasible fees. *See id.* § 24.3 cmt. a.

²⁰⁴ Mogk, *supra* note 78, at 1337.

²⁰⁵ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 467 (Mich. 1981) (Ryan, J., dissenting).

²⁰⁶ *Id.*

B. Easements and Servitudes

An easement is a limited, nonpossessory right in the land of another.²⁰⁷ Easements are created by various methods, including by conveyance.²⁰⁸ An easement can be affirmative or negative.²⁰⁹ An affirmative easement allows the easement holder to engage in certain acts on the landowner's land.²¹⁰ Thus, the grantor-landowner conveys to the grantee-easement holder an easement for the purpose of engaging in that act on the landowner's grantor's land.²¹¹ A negative easement, on the other hand, gives the easement holder the power to prevent the landowner from taking a particular action on the landowner's own land.²¹² So, the grantor-landowner will convey to the grantee-easement holder the right to prevent the landowner from engaging in that act on the landowner's land.²¹³

Additionally, an easement can be appurtenant or in gross. In an appurtenant easement, two estates are involved: the dominant estate, which is benefitted by the easement, and the servient estate, which is burdened by the easement.²¹⁴ The owner of the dominant estate is the easement holder and is thus entitled to use the servient estate for the limited purpose specified in the easement grant.²¹⁵ An in gross easement, however, involves only one estate: the servient estate. The easement holder's use of the servient estate does not benefit any particular parcel of land; the use is personal to the owner.²¹⁶ If the easement holder is prevented from using an easement (or, in the case of a negative easement, if the holder of the servient estate takes some action that violates the easement), the easement holder can sue to enforce

²⁰⁷ 4 RICHARD POWELL, POWELL ON REAL PROPERTY, § 34.01 n.5 (Michael Allen Wolf ed., 2000). Although the Third Restatement of Property: Servitudes has proposed labeling all easements, profits, and covenants as servitudes and treating them alike, few jurisdictions have adopted this view. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1(2) (AM. L. INST. 2011).

²⁰⁸ POWELL, *supra* note 207, § 34.04.

²⁰⁹ *Id.* § 34.02.

²¹⁰ *Id.* § 34.02[2][c].

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* § 34.02[2][d].

²¹⁵ *Id.*

²¹⁶ *Id.*

the easement.²¹⁷ The easement holder can opt to sue for damages or for injunctive relief.²¹⁸

A feature of easements is that they are sometimes transferrable. In the case of an appurtenant easement, a transfer of the dominant estate will also affect transfer of the easement.²¹⁹ Contrarily, easements in gross are traditionally transferable by their holder only if their purpose is commercial;²²⁰ however, some jurisdictions allow transfer of easements in gross regardless of whether it is for commercial or personal use.²²¹ It is this disparate treatment of transfers of appurtenant easements and easements in gross that has led to the development of the conservation easement.

For conservation and preservation of land, a negative easement in gross is necessary.²²² That is, a negative easement will prevent the holder of the servient estate from developing or altering the land as specified in the easement and it must be in gross so that interested parties who may not own an appurtenant dominant tenement may hold the easement.²²³ Additionally, because conservation and preservation are long-term endeavors, the easement must be transferrable.²²⁴

1. Conservation and Preservation Easements

A desire—or need—to protect the environment led to increased regulation in the 1960s.²²⁵ Early protections either involved only public lands or used nuisance law to achieve their goals.²²⁶ Yet, as the need to regulate further developed, private land also became subject to restrictions.²²⁷ Governmental restrictions on the use of

²¹⁷ Jessica Owley Lippmann, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043, 1077 (2006).

²¹⁸ *Id.*

²¹⁹ POWELL, *supra* note 207, § 34.15.

²²⁰ *Id.* However, many courts now allow transfer of non-commercial easements. *Id.*

²²¹ Lippmann, *supra* note 217, at 1077.

²²² *Id.* at 1084.

²²³ *Id.* (“Uncertainty about transferability combined with limitations on permissible negative easements mean that easements do not work well to achieve long-term land protection goals.”).

²²⁴ *Id.* at 1077.

²²⁵ *Id.* at 1046.

²²⁶ *Id.*

²²⁷ *Id.* at 1047.

public land were subject to much resistance, which led to the desire to control land use through private mechanisms.²²⁸ While common law easements provided an avenue to accomplish these private restrictions, their limitations required legislatures to design new easements for that purpose.²²⁹ Various early conservation easements protected wetlands and land adjacent to highways.²³⁰ Subsequently, the National Conference of Commissioners on Uniform State Laws developed the Uniform Conservation Easement Act (“UCEA”), which was approved in 1981.²³¹ Many states modeled their conservation easement acts on the provisions in the UCEA.²³² These conservation easements acts allow parties to create flexible conservation arrangements without being subject to government control.²³³

A conservation easement is a restriction that prohibits the burdened landowner from taking certain actions with regards to the land.²³⁴ It is generally a negative easement—that is, the holder of the easement is granted the right to prevent the landowner from taking the proscribed actions.²³⁵ Further, it is typically in gross, meaning it is held by an entity and the burden on the servient land does not benefit

²²⁸ *Id.* at 1046–47 (“The 1960s and 1970s saw the birth of more widespread environmental regulation expanding to include, among other things, actions on private lands. Environmental law extended to cover many facets of society. There was a growth of restrictions on private activities including restrictions on what one could do with privately owned land. Regulation and government bureaucracy grew, facing an eventual backlash with the Reagan administration in the 1980s. Property rights advocates rejected government control of both public and private land. People grew distrustful of the machinery of government and lobbied for a rollback of the restrictions.”).

²²⁹ Additional common law property restrictions—real covenants and equitable servitudes—are equally unfit for use for conservation and preservation purposes. *See id.* at 1078–84.

²³⁰ John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENV’T LAW 319, 333 (1997). The first conservation easements protected land adjacent to parkways in Massachusetts in the 1880s. *Id.* Additional early uses included the U.S. Fish and Wildlife Service’s protections of refuge areas and wetlands beginning in the 1930s. *Id.* Further, in the 1930s and 1940s, the National Park Service used conservation easements to protect scenic views along the Blue Ridge Parkway in Virginia and North Carolina and the Natchez Trace Parkway in Alabama, Mississippi, and Tennessee. *Id.* This was the earliest comprehensive use of conservation easements.

²³¹ UNIF. CONSERVATION EASEMENT ACT Prefatory Note (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2007); Lippmann, *supra* note 217, at 1086.

²³² *Id.* at 1086.

²³³ *Id.* at 1072.

²³⁴ POWELL, *supra* note 207, § 34A.01.

²³⁵ Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 435 (1984).

another dominant parcel.²³⁶ Additionally, the easement is transferable and runs with the land, despite it being negative and in gross.²³⁷ Although, for conservation purposes, a negative easement is generally desirable, some may be affirmative—that is, they impose on the holder of the burdened land duties to take particular actions.²³⁸ Such affirmative obligations, primarily duties to maintain and repair, may be present in preservation easements designed to preserve historic structures.²³⁹ Thus, in creating conservation easements, the UCEA and state legislatures used existing common law property interests to suit the purpose of conservation.²⁴⁰ Accordingly, “[t]he legal concept of a conservation easement is a statutory construction that contradicts principles of common law despite being linked to the traditional notions of easements and other servitudes.”²⁴¹

The UCEA has the stated purpose of “facilitat[ing] the enforcement of conservation easements serving the public interest.”²⁴² Thus, the Act provides a mechanism for parties to execute their agreements concerning conservation and preservation which serve the public interest. The Act itself does not create specific restrictions or duties, but it allows the parties to create such restrictions and duties in an enforceable property interest.²⁴³ In explaining the rationale for extending the use of the easement to encompass conservation and preservation purposes, the drafters

²³⁶ POWELL, *supra* note 207, § 34A.01.

²³⁷ UNIF. CONSERVATION EASEMENT ACT PREFATORY NOTE (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2007); *see also* POWELL, *supra* note 207, § 34A.01.

²³⁸ UNIF. CONSERVATION EASEMENT ACT § 4(5) & Comment (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2007). “Achievement of conservation or preservation goals may require that affirmative obligations be incurred by the burdened property owner or by the easement holder or both. For example, the donor of a facade easement, one type of preservation easement, may agree to restore the facade to its original state; conversely, the holder of a facade easement may agree to undertake restoration. In either case, the preservation easement would impose affirmative obligations.” *Id.* at Comment.

²³⁹ Marcia E. Hepford, Note, *Affirmative Obligations in Historic-Preservation Agreements*, 51 GEO. WASH. L. REV. 746, 749 (1983).

²⁴⁰ Hollingshead, *supra* note 230, at 335.

²⁴¹ Lippmann, *supra* note 217, at 1087–88; *see also* Hollingshead, *supra* note 230, at 336 (“A conservation easement is also valid under the UCEA even if it is in gross, may be or has been assigned, is not of a character traditionally recognized at common law, imposes negative or affirmative obligations, or does not touch or concern real property.”).

²⁴² UNIF. CONSERVATION EASEMENT ACT Prefatory Note (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2007).

²⁴³ *Id.*

state: “[T]he American legal system generally regards private ordering of property relationships as sound public policy. Absent conflict with constitutional or statutory requirements, conveyances of fee or non-possessory interests by and among private entities is the norm, rather than the exception, in the United States.”²⁴⁴ Thus, implicit in this policy is the power of parties to use existing property interests to further legislatively-endorsed policy goals.

Every U.S. jurisdiction has enacted statutes that allow for the creation of conservation easements.²⁴⁵ Although legislation allowing conservation easements vary amongst the jurisdictions, the UCEA defines conservation purposes as including “retaining or protecting the natural, scenic, or open-space value of land, assuring the availability of land for agricultural, forest, recreational, or open-space use, protecting natural resources, including plant and wildlife habitats and ecosystems, and maintaining or enhancing air or water quality or supply,” while “[p]reservation purposes include preserving the historical, architectural, archaeological, or cultural aspects of real property.”²⁴⁶ Most conservation easements are generally enacted for the preservation of land, but state statutes vary in allowable purposes of conservation easements.²⁴⁷ Some statutes include protections for historical or archaeological sites and some allow for only historical preservation and lack conservation protections for open space.²⁴⁸

Conservation easements enable a landowner to transfer a restriction or affirmative duty on that land in the form of an easement to an easement holder.²⁴⁹ Under the UCEA, both governmental entities and charitable organizations supporting conservation efforts may be holders of a conservation easement.²⁵⁰ The

²⁴⁴ *Id.*

²⁴⁵ POWELL, *supra* note 207, § 34A.01.

²⁴⁶ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 (AM. L. INST. 2011) (Defining conservation servitudes. Easements are a type of servitude. § 1.1).

²⁴⁷ POWELL, *supra* note 207, § 34A.03[1].

²⁴⁸ *Id.*

²⁴⁹ UNIF. CONSERVATION EASEMENT ACT Prefatory Note, § 1(1) (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2007). Conservation easements will often take the form of a restriction, prohibiting the landowner from taking certain actions on his land. Preservation easements, on the other hand, may include affirmative duties to preserve the property. *See id.*

²⁵⁰ *Id.* § 1(2). Who may hold an easement varies amongst the states: The more restrictive states allow only various government entities to hold conservation easements, while the more permissive states allow non-profit charitable organizations as well as government entities to be holders. POWELL, *supra* note 207, § 34A.03[2].

UCEA also enables parties to the conservation easement to grant third parties the right of enforcement.²⁵¹ The third-party holder of this right must be a governmental entity or charitable organization, and it is able to enforce the easement should the holder be unwilling or unable to do so.²⁵² Thus, under the UCEA, four classes of plaintiffs may bring actions for violation of the conservation easement.²⁵³ First, the owner of the servient estate burdened by the conservation easement can enforce the conservation easement—although normally landowners would not want to enforce the easement, they may be motivated to do so if the land is held in a co-tenancy and one cotenant opposes the actions taken by another cotenant in violation of the conservation easement.²⁵⁴ The second and third parties able to enforce the conservation easement are the holder of the easement and any third party who was granted enforcement rights.²⁵⁵ Finally, the fourth class of plaintiffs under the UCEA is “a person authorized by other law,” a category which recognizes that a jurisdiction may have authorized standing in others under common law or by statute.²⁵⁶ The right of enforcement is simply the right to enforce the restrictions contained in the instrument creating the conservation easement.²⁵⁷ Although not provided in the UCEA, some states grant the easement holders the right of inspection to assure compliance.²⁵⁸

²⁵¹ UNIF. CONSERVATION EASEMENT ACT § 1 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2007).

²⁵² *Id.* § 1 cmt. (“Recognition of a ‘third-party right of enforcement’ enables the parties to structure into the transaction a party that is not an easement ‘holder,’ but which, nonetheless, has the right to enforce the terms of the easement [as stated in Sections 1(3), 3(a)(3) of the Act]. But the possessor of the third-party enforcement right must be a governmental body or a charitable corporation, association, or trust.”); *see also* POWELL, *supra* note 207, § 34A.03[3].

²⁵³ UNIF. CONSERVATION EASEMENT ACT § 3(a) cmt. (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2007).

²⁵⁴ POWELL, *supra* note 207, § 34A.03[4]. Similar issues may arise between the landowner and a tenant or a life tenant and the holder of the remainder. *Id.*

²⁵⁵ These parties are the most likely to bring an action for violation of the easement. *Id.*

²⁵⁶ UNIF. CONSERVATION EASEMENT ACT § 3(a)(4) cmt. (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2007) (“In addition to these three categories of persons who derive their standing from the explicit terms of the easement itself, the Act also recognizes that the state’s other applicable law may create standing in other persons. For example, independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.”); *see also* POWELL, *supra* note 207, § 34A.03[4].

²⁵⁷ POWELL, *supra* note 207, § 34A.03[3].

²⁵⁸ *Id.* § 34A.03[4] n.32.

The UCEA does not specify available remedies. While a remedy at law is assumed, many states provide for injunctive relief by statute.²⁵⁹ For example, Colorado’s conservation easement statute enumerates injunctive relief, along with money damages, as an available remedy for violation of conservation easements.²⁶⁰ Such injunctive relief was awarded in the Colorado case, *Mesa County Land Conservancy, Inc. v. Allen*.²⁶¹ In that case, the United States, the original owner of the servient estate, conveyed a conservation easement to Mesa County Land Conservancy that required the water rights to remain on the land.²⁶² The defendants in the case, the Allens, purchased the land subject to the easement from the United States.²⁶³ The Allens then attempted to convey the land without the water rights.²⁶⁴ Mesa County Land Conservancy brought suit seeking declaratory and injunctive relief against the Allens for violating the terms of the conservation easement.²⁶⁵ The Court of Appeals of Colorado affirmed the trial court’s holding which granted injunctive relief against the Allens for their violation of the easement and required the water rights to remain with the land.²⁶⁶

On the other hand, Maine has adopted the UCEA, and like the UCEA, does not specify remedies in its statute.²⁶⁷ Yet, Maine courts have also allowed injunctive relief. In *Windham Land Trust v. Jeffords*, the owners of the servient estate planned to charge guests for “wagon rides and horse-drawn sleigh rides, hiking, snowshoeing,

²⁵⁹ *Id.*

²⁶⁰ COLO. REV. STAT. ANN. § 38-30.5-108(3) (West 2022) (“In addition to the remedy of injunctive relief, the holder of a conservation easement in gross shall be entitled to recover money damages for injury thereto or to the interest to be protected thereby. In assessing such damages, there may be taken into account, in addition to the cost of restoration and other usual rules of the law of damages, the loss of scenic, aesthetic, and environmental values.”).

²⁶¹ *Mesa Cnty. Land Conservancy, Inc. v. Allen*, 318 P.3d 46, 49 (Colo. App. 2012).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *See* ME. REV. STAT. ANN. tit. 33, § 479 (West 2022); *see also Conservation Easement Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?communitykey=4297dc67-1a90-4e43-b704-7b277c4a11bd> [<https://perma.cc/86Z9-TA8G>] (last visited Feb. 4, 2023) (showing the states which have adopted the UCEA).

and Nordic skiing[.]” as well as fishing and ice skating on the protected parcel.²⁶⁸ The Supreme Judicial Court of Maine upheld the lower court’s holding that these uses violate the conservation easement and an injunction prohibiting such use.²⁶⁹ Thus, even when not provided for by statute, injunctive relief is often available. In fact, injunctive relief is generally necessary to effectuate the purpose of conservation easements; if activities violating the statutes cannot be stopped, then the land cannot be preserved.

Because the goal of conservation is long-term protection of resources, conservation easements must endure for long periods to be effective.²⁷⁰ Thus, under the UCEA, a conservation easement’s duration is unlimited unless otherwise provided in the instrument creating it.²⁷¹ State statutes have generally adopted this approach.²⁷² However, federal income tax benefits are available only for perpetual easements.²⁷³

Conservation easements may be terminated in a number of ways. Of course, a conservation easement will end on its own terms if the instrument creating it specifies a time limit or occurrence of event for its termination.²⁷⁴ Conservation easements may also be terminated similarly to common law easements. State statutes vary in methods and procedures for termination, but the UCEA provides that “a conservation easement may be created . . . released, modified, [or] terminated . . . in the same manner as other easements.”²⁷⁵ Typical forms of easement termination include

²⁶⁸ *Windham Land Tr. v. Jeffords*, 967 A.2d 690, 694 (Me. 2009).

²⁶⁹ *Id.* at 695, 702.

²⁷⁰ POWELL, *supra* note 207, § 34A.03[5].

²⁷¹ UNIF. CONSERVATION EASEMENT ACT § 2(c) (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2007) (“Except as provided in Section 3(b) [recognizing a court’s power to modify or terminate an easement under the law], a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.”).

²⁷² *Id.*; see also POWELL, *supra* note 207, § 34A.03[5].

²⁷³ POWELL, *supra* note 207, § 34A.03[5] (citing I.R.C. § 170(h)(2)(C)).

²⁷⁴ POWELL, *supra* note 207, § 34A.07[1] (“Conservation easements also can be created for a variety of durations. Some are term easements, which expire after a specified term, usually a term of years. Others are perpetual and intended to run with the land and bind all future owners “in perpetuity,” which generally means for as long as continuing to carry out the conservation purpose of the easement remains possible or practicable. Still others provide that they are terminable upon satisfaction of certain conditions short of frustration of the easement’s conservation purpose, such as the holding of a public hearing or approval of a public official.”).

²⁷⁵ UNIF. CONSERVATION EASEMENT ACT § 2(a) (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2007).

eminent domain, foreclosure of a pre-existing mortgage, and merger. That is, if the servient land is taken by the government by eminent domain, the easement will terminate and not remain on the land once it is transferred to the state.²⁷⁶ Additionally, if a mortgage encumbered the servient estate prior to the granting of the easement and the mortgagee forecloses, the easement will terminate.²⁷⁷ An easement may also terminate by merger if the easement holder also gains title to the servient land; yet, state statutes vary regarding whether a conservation easement will terminate by merger.²⁷⁸ Typically, easements may end by abandonment.²⁷⁹ Generally, abandonment requires the easement holder's inaction coupled with an unequivocal act showing the holder's intention to abandon the easement. But in the context of a conservation easement, because any duties associated with the easement are generally negative, acts deemed as showing intention to abandon the easement are rare.²⁸⁰

IV. PROPOSAL: AN EASEMENT FOR PUBLIC BENEFIT

The law has shown that it is amenable to using old concepts to solve new problems. Easements were developed in the common law; they are primarily used for rights-of-way for railways and utilities. The conservation easement originated from this common law interest to solve twentieth century problems—conservation of open space and preservation of historic structures.²⁸¹ Accordingly, it has been shown that the sticks can be unbundled and disbursed to various interest holders to enforce their rights in land. When individuals are dispossessed of their property by eminent domain, they are dispossessed not only of a home, but also of property which supports their self-development.²⁸² Further, if the property is condemned for a public benefit—such as economic development—or for blight removal, the property can then be transferred to a private party.²⁸³ That property is then outside of the observation and control of the dispossessed former owner. Once the former owner

²⁷⁶ POWELL, *supra* note 207, § 34A.07[d][ii].

²⁷⁷ *Id.* § 34A.07[d][iii].

²⁷⁸ *Id.* § 34A.07[d][v].

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ See *supra* Part III.B (discussing the Uniform Conservation Easement Act's stated purpose of a conservation easement).

²⁸² See *supra* Part I (discussing Margaret Jane Radin's *Personhood and Property*).

²⁸³ See *supra* Parts II.D and II.E.

loses all the sticks in their bundle of property rights, the ability to control their surroundings by property ownership is no longer realized.²⁸⁴ Creating a stick to be maintained by the dispossessed could help alleviate this problem.²⁸⁵

Conservation easements evolved from a need for environmental protection and the desire to effectuate such protection without government regulation. State interference with the use of private land was viewed with much skepticism, so a private mechanism was devised. Old concepts were used to create new law, and all states now have conservation easement acts, some modeled on the Uniform Conservation Easement Act.²⁸⁶ Just as conservation easements protect environmental interests, an easement for public benefit must protect the public by ensuring that land taken by eminent domain and transferred to a private entity remains in use for the public benefit.

The UCEA provides a clear and specific stated purpose for conservation and preservation easements.²⁸⁷ Likewise, the proposed easement for public benefit also

²⁸⁴ See *supra* Part I (discussing the “root shock” experienced by those displaced by eminent domain).

²⁸⁵ Although development plans may include community participation, the consideration of the community’s interest may not be required, nor does it necessarily pass to successive stakeholders. For example, the Lower Hill Redevelopment Community Collaboration and Implementation Plan, devised to redevelop the land in Pittsburgh’s Lower Hill Community that was taken by eminent domain, provides:

By signing below, the undersigned endorse this Plan and intend to use commercially reasonable-efforts to collaborate on its implementation. Furthermore, so long as [Pittsburgh Area Redevelopment LP (PAR)] and its developers continue to use commercially reasonable efforts to collaborate on the implementation of this Plan and comply with the approved Preliminary Land Development Plan (“PLDP”), the community stakeholders will support PAR and its developers throughout each phase of the redevelopment project. In the event that any party to this Plan is sold or otherwise transferred to a new person or entity or is merged with or replaced by a new person or entity, such party will use best efforts to ensure that the new person or entity endorses this Plan and uses commercially reasonable efforts to collaborate in its implementation throughout each phase of the redevelopment project.

Lower Hill Redevelopment Community Collaboration and Implementation Plan, HILL CDC 3 (Sept. 11, 2014), https://www.hilldistrict.org/sites/default/files/lowerhilldistrict-communitycollaborationandimplementationplan-final_0.pdf [<https://perma.cc/93P4-P87V>].

²⁸⁶ See *supra* Part III.B (discussing the Uniform Conservation Easement Act).

²⁸⁷ See *supra* Part III.B. Under the UCEA the purpose of conservation easements is “retaining or protecting the natural, scenic, or open-space value of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, [including plant and wildlife habitats and ecosystems], maintaining or enhancing air or water quality [or supply], [and] preserving the historical, architectural, archaeological, or cultural aspects of real property.” UNIF.

has a clear and specific stated purpose. This purpose must reflect the catalyst of the taking: broadly, whether the land was taken for economic development²⁸⁸ or whether it was condemned as blight remediation.²⁸⁹ In the case of the former—that is, the land was taken by eminent domain and transferred to a private party for economic development—the stated purpose of an easement for public benefit must reflect the acceptable uses of the land by the private party transferee. Such uses, as articulated by the *Poletown* and *Kelo* courts, are building the economy of the community, alleviating unemployment, and increasing the tax base of the municipality.²⁹⁰ Thus, the proposed easement for public benefit imposes limitations or affirmative obligations, the purposes of which include building the economy of the community, alleviating unemployment, and increasing the tax base of the municipality.

In the case of the latter—that is, the land was taken by eminent domain and transferred to a private party because it was deemed blighted—the stated purpose of the easement for public benefit must reflect the purpose of blight remediation. Statutes define blight in various ways, but common requirements for property to be deemed blighted include the existence of conditions posing a threat to public health and safety, being unfit for human habitation, structural defects, health hazards, obsolescent planning, and economic or social liability.²⁹¹ To best assure the purpose of blight remediation is being met, an easement for public benefit should reflect a jurisdiction's blight definition. A common easement in the case of blight remediation would impose limitations or affirmative obligations including elimination of property causing threats to health of human safety or unfit of human habitation.

The UCEA allows negative, in gross easements to run with the land, notwithstanding the common law prohibition on transfer of such easements.²⁹² So, a conservation easement prohibiting landowners from taking certain actions with regards to the land (or, in the case of preservation easements, requiring landowners to take specific actions with regards to the land) is transferrable. Similarly, an

CONSERVATION EASEMENT ACT § 1(2) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2007); *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 (AM. L. INST. 2011).

²⁸⁸ *See supra* Part II.D.

²⁸⁹ *See supra* Part II.E.

²⁹⁰ *See supra* Parts II.B and II.C.

²⁹¹ *See supra* Part II.E.

²⁹² *See supra* Part III.B (discussing conservation easements).

easement for public benefit must be transferrable despite being in-gross, and perhaps, negative.

An easement for public benefit is inherently in gross; it involves only the servient estate—that is, the land taken by eminent domain and transferred to a private party. The easement does not benefit a dominant estate; it exists to protect the public benefit, not a particular parcel of land.²⁹³ Additionally, the easement for public benefit may be negative—that is, it may prohibit the landowner from taking certain actions with regards to the land.²⁹⁴ Alternatively, the easement may be affirmative, requiring the landowner to take certain actions with regards to the land.²⁹⁵ Either way, the easement for public benefit must be transferable to achieve its purpose. Like conservation, public benefit is a long-term endeavor; economic development and blight remediation must endure to be valuable to the community. Thus, the easement must be transferable from one holder to the next.

Conservation easements enable landowners to transfer a restriction or affirmative duty on that land to governmental entities and charitable organizations supporting conservation efforts in the form of an easement.²⁹⁶ Similarly, the proposed easement for public benefit should be held by a governmental entity or a charitable organization supporting community development. For example, in the *Poletown* case, the Poletown neighborhood land was taken by eminent domain and transferred to General Motors; the stated public use by General Motors was alleviating unemployment and building the economy of the community, and that any benefit to General Motors was merely incidental.²⁹⁷ Thus, governmental entities holding the easement could be the Cities of Hamtramck and Detroit or Detroit's Economic Development Corporation. Alternatively, neighborhood organizations such as the Poletown Neighborhood Council—the organization that fought the use of eminent domain, and the named plaintiff in the *Poletown* case—could also be holders of the easement.

In the blight remediation takings of Pittsburgh's Hill District, the taken land is currently held by Sports & Exhibition Authority of Pittsburgh and Allegheny County

²⁹³ See *supra* Part III.B.

²⁹⁴ See *supra* Part III.B.

²⁹⁵ See *supra* Part III.B.

²⁹⁶ See *supra* Part III.B.

²⁹⁷ See *supra* Part III.B.

(SEA), a government entity.²⁹⁸ However, the land is subject to long-term leases and development agreements with private entities.²⁹⁹ The Lower Hill Redevelopment plan states that development projects are designed to “facilitate opportunities for minority and women business enterprises,” “[t]o provide employment opportunities to residents of the Lower Hill District and other predominately minority communities[,]” and “[t]o provide opportunities for home ownership and affordable housing[.]”³⁰⁰ Thus, the current plan stemming from blight remediation ostensibly includes community input and development of safe housing. Yet, these plans have not come to fruition.³⁰¹ An easement held by a community group could force the planned development of the taken land to occur.

If conservation easements are violated, they may be enforced by the owner of the servient estate burdened by the conservation easement, the holder of the easement, any third party who was granted enforcement rights, and any person authorized by other law.³⁰² An easement for public benefit will have corresponding potential plaintiffs. Similar to conservation easements, it is unlikely that the owner of the servient estate—that is the private-party transferee—would wish to enforce the easement; as the party who owns the land and controls its use, the owner of the servient estate would simply use it in a manner that complies with the easement. Nevertheless, co-ownership structures may exist where one owner is not in agreement with their co-owner’s activities on the land and, in these narrow circumstances, the owner of the servient estate could bring suit for enforcement of the easement.³⁰³

²⁹⁸ See *Sea History*, SPORTS & EXHIBITION AUTH., <https://www.pgh-sea.com/index.php?path=about-sea-history> [<https://perma.cc/72V4-5PX2>] (last visited Jan. 8, 2023).

²⁹⁹ See *Lower Hill*, *supra* note 29; Krauss, *supra* note 28.

³⁰⁰ See *Lower Hill Redevelopment Community Collaboration and Implementation Plan*, *supra* note 285, at 10, 13, and 15.

³⁰¹ Mark Belko, *Penguins Sweeten Hill District Commitments with Proposed \$5M Opportunity Zone Fund*, PITTS. POST-GAZETTE (Apr. 16, 2021, 4:25 AM), <https://www.post-gazette.com/business/development/2021/04/16/Pittsburgh-Penguins-Civic-Arena-Hill-District-Buccini-Pollin-Group-Clay-Cove-Capital-Hill-CDC-Opportunity-Zone/stories/202104150203#:~:text=Penguins%20sweeten%20Hill%20District%20commitments%20with%20proposed%20%245M%20Opportunity%20Zone%20fund,-Mark%20Belko&text=The%20Pittsburgh%20Penguins%20are%20pitching,the%20city%20for%20final%20approval> [<https://perma.cc/3VHG-9V8C>].

³⁰² See *supra* Part III.B.

³⁰³ See *supra* Part III.B (discussing the parties able to enforce conservation easements).

The holder of the easement would be the most evident plaintiff, should the easement be violated. This situation presents the central purpose for the easement's proposal—a nonprofit community group or a governmental entity with an interest in ensuring that the land taken by eminent domain continues to be used for the benefit of the public may enforce the easement's restrictions in court. Additionally, any third party who was granted enforcement rights will have the power to enforce the easement. Granting enforcement power to a third-party nonprofit or governmental entity strengthens the goals of the easement by providing for enhanced continuity; if the holder of the easement does not endeavor to enforce the easement, the third party may step in to do so. This feature is significant because over time, group membership and priorities may change, but the use of the land should remain constant. Allowing a third party the right to secure the use of the land for the public benefit affords a greater likelihood that it will be.

Conservation easements may also be enforced by “a person authorized by other law.”³⁰⁴ This class of potential plaintiffs exist to recognize that a jurisdiction may have authorized standing in others under common law or by statute, so too should the easement for public benefit.

Generally, both monetary damages and injunctive relief are available remedies for violation of a conservation easement.³⁰⁵ The same should be true for the easement for public benefit. Ultimately, monetary damages are necessary to compensate the holder for the violation, as lack of use for the public benefit will cause an economic loss to the community. Additionally, consistent with conservation easements, injunctive relief is generally necessary to effectuate the purpose of the easement for public benefit. When land is taken from a private party and transferred to another private party in furtherance of a public benefit, the public is compensated with benefits such as increased employment opportunities or enhanced tax revenues. Similarly, when private-transferee takings are effectuated in the name of blight remediation, the public in return should receive more suitable housing. These uses must be enforceable by injunctive relief for the easement for public use to be effective. Job creation, tax revenues, and housing are long-term enterprises and thus, the use must be maintained long-term. Accordingly, in the case of *Poletown*, General Motors would be required to provide benefits to the public for the life of the

³⁰⁴ See *supra* texts accompany note 256.

³⁰⁵ See *supra* Part III.B (discussing available remedies for the violation of conservation easements).

easement. For Pittsburgh's Hill District, developers would be required to provide suitable housing for low-income residents.

Because public benefits, like conservation and preservation, are long-term undertakings, they too should be for an unlimited duration unless specified otherwise.³⁰⁶ Of course, the easement for public benefit will, like other easements, end on its own terms if it was created for a specific purpose or for a limited time.³⁰⁷ The easement for public benefit should also terminate as other easements do.³⁰⁸ Like, conservation easements, abandonment may prove to be a particularly rare method to terminate an easement for public benefit.³⁰⁹ Conservation easements are rarely abandoned because they are negative—that is, the conservation easement allows the holder to prevent the owner of the servient land from using it in a nonconforming way. The easement holder is not entitled to any use of the servient land (except, perhaps, the right to inspect the land) and thus could not use the easement in an incompatible manner.³¹⁰ The holders of the easement for public benefit have similar rights in the servient land—that is, they would be able to prevent certain uses of it, and perhaps inspect it, but not have any use of it. Thus, abandonment would be unlikely.

CONCLUSION

Government use of eminent domain to take property from one private party and transfer it to another is especially repugnant to the American conception of property ownership. Such use of eminent domain is perceived as devaluing private property ownership rights and assisting one individual or entity while harming another. But perhaps most concerning is the lack of accountability created by the government no longer holding title. After the land is taken based on the promise of some benefit to the public, the government—which is ostensibly subject to the will of the people—loses the ability to control whether that benefit endures.

Both courts and legislatures have attempted to ameliorate two instances of these private-transferee takings: takings for the public benefit and takings for blight remediation. Takings for the public benefit have been effectively diminished, albeit not eliminated, by statute. Yet, although many attempts have been made to curtail the discretion allowed in declaring a property blighted, and thus susceptible to

³⁰⁶ See *supra* Part III.B (discussing the development of conservation easements).

³⁰⁷ See *supra* Part III.B.

³⁰⁸ See *supra* Part III.B.

³⁰⁹ See *supra* Part III.B.

³¹⁰ See *supra* Part III.B.

condemnation and transfer to a private entity, this statutory reform is deficient; the discretion remains. The differing outcomes of these two efforts have left residents of lesser means vulnerable to displacement. Property is thought of as necessary for an individual's self-development, and displacing a resident can lead to root shock—a traumatic stress reaction caused by removing individuals from their homes and systems of support. Certainly, placing already-vulnerable individuals in this situation could prove ruinous.

Creating an easement for public benefit addresses both of these problems: it requires the private party transferee to be accountable to the will of the people, and it gives the dispossessed individuals a stick in the bundle of property rights of the taken property. The law has been amenable to statutory modifications to common law easements to address conservation and preservation issues. Similarly, the law can address the issues caused by private transferee takings by creating an easement for public benefit.