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AFFORDABLE HOUSING CRISIS OR SHORTAGE?: RECONCILING  
LEGAL SCHOLARSHIP WITH FREE MARKET SOLUTIONS OVER  
THE USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT

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AFFORDABLE HOUSING CRISIS OR SHORTAGE?: RECONCILING  
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*Anthony W. Cosgrove\**

INTRODUCTION

Throughout the United States low-income families are having an increasingly difficult time finding an affordable place to live.<sup>1</sup> Due to high rents, static incomes, and a shortage of housing, local communities, particularly in urban areas, are struggling to fight off this wave of decline and displacement.<sup>2</sup> Currently in the United States an estimated 12 million families are now spending more than half of their income on rent.<sup>3</sup> According to Federal Guidelines, “[f]amilies who pay more than 30 percent of their income for housing are considered cost burdened and may have difficulty affording necessities such as food, clothing, transportation, and medical care.”<sup>4</sup>

A large reason for low-income families’ overspending in this way is that the supply of affordable housing is shrinking.<sup>5</sup> Landlords and tenants are both adding to the affordable housing problem as “all sides are being squeezed.”<sup>6</sup> Today most new construction of rental housing is for the high-end market,

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<sup>1</sup> Pam Fessler, *Why Affordable Housing Could Become Harder to Find*, NPR (Jan. 9, 2018, 4:52 PM), <https://www.npr.org/2018/01/09/576535681/advocates-fear-tax-bill-will-worsen-u-s-affordable-housing-shortage>.

<sup>2</sup> *Id.*

<sup>3</sup> *Affordable Housing*, HUD.GOV, [https://www.hud.gov/program\\_offices/comm\\_planning/affordablehousing/](https://www.hud.gov/program_offices/comm_planning/affordablehousing/) (last visited Mar. 5, 2018).

<sup>4</sup> *Id.*

<sup>5</sup> Fessler, *supra* note 1.

<sup>6</sup> *Id.*

“not for low and middle-income families.”<sup>7</sup> So while the problem is clear, its cause is anything but.

This Note seeks a better understanding of the current housing problems plaguing local communities around the United States. Whether it is attributable to a crisis of societal construction or a shortage in the supply of affordable housing, this note attempts to reconcile current legal scholarship on local government initiatives, and economic free market solutions to lower barriers.

Part I of this Note examines the historical background of government initiatives to promote local development primarily through the mechanism of eminent domain. Frequently one of the first tools used from the local government toolkit, eminent domain has evolved over the past century together with a shroud of controversy over its use. Part II details the current problems associated with local governments’ use of eminent domain, particularly regarding its effectiveness (or lack thereof) in accomplishing the government’s intended policy. Part III observes many of the incentives local governments are using beyond eminent domain and examines their effectiveness in redeveloping their communities for all classes of residents.

Part IV reviews current proposals of legal and government-side solutions including “inclusionary” eminent domain, Community Benefits Agreements (CBAs), and Community Development Corporations (CDCs). Part V proposes alternatives to these regulatory proposals through market-oriented solutions based on increasing the overall supply in the market through deregulation of the zoning and permitting process. Exploring case studies in Durham, North Carolina; Atlanta, Georgia; and Anaheim, California, this Note will make the case that the solution to creating more affordable housing can be found in a reconciliation of both the legal/government and market-based proposals. Part VI offers this reconciliation and provides a comparative study of a proposal first implemented in Rotterdam, Netherlands, and its potential application to local governments in the United States. Lastly, the Note concludes by describing how local governments should help alleviate the affordable housing problem in light of the reconciliation of government and market-based solutions.

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<sup>7</sup> *Id.*

## I. HISTORICAL BACKGROUND OF EMINENT DOMAIN

### *A. Doctrinal Establishment of Eminent Domain*

In the United States, the federal government's power of eminent domain has long been used to acquire property for public use and was directly attributed to its rights as a sovereignty.<sup>8</sup> Presuming a government's right to acquire land as an exercise of its sovereignty, the United States Constitution regulated the exercise of such a right by attaching a responsibility to the government to justly compensate the land owner for the fair market value of the property.<sup>9</sup> Thus the Fifth Amendment to the Constitution states: "nor shall private property be taken for public use, without just compensation."<sup>10</sup>

The first challenge to the federal government's eminent domain power came in 1876 in *Kohl v. United States*. In *Kohl*, the Court found that the right of eminent domain exists in the federal government of the United States, and may be exercised by it within the States so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.<sup>11</sup> The Court opined that "[t]he right [of eminent domain] is the offspring of political necessity; and it is inseparable from sovereignty."<sup>12</sup> The Court continued:

[i]f the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.<sup>13</sup>

The Court further articulated that the proper view of the right of eminent domain is as a right belonging to the federal government under its power as a sovereignty to take private property for its own public uses and not for those of another,<sup>14</sup> and that the right includes both the exercise by purchase or condemnation.<sup>15</sup>

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<sup>8</sup> *History of the Federal Use of Eminent Domain*, THE U.S. DEP'T OF JUST., <https://www.justice.gov/enrd/history-federal-use-eminant-domain> (last visited Mar. 6, 2018) (citing *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1879)).

<sup>9</sup> *Id.*

<sup>10</sup> U.S. CONST. amend. V.

<sup>11</sup> *Kohl v. United States*, 91 U.S. 367, 372 (1876).

<sup>12</sup> *Id.* at 371–72.

<sup>13</sup> *Id.* at 371.

<sup>14</sup> *Id.* at 373–74.

<sup>15</sup> *Id.* at 374.

### *B. Eminent Domain for Redevelopment*

Many decades later, in *Berman v. Parker*, the Court first tackled a challenge to the constitutionality of whether redevelopment was a public purpose falling within the acceptable uses of the federal government's exercise of eminent domain. The Court found that a legislative act, the District of Columbia Redevelopment Act of 1945, was constitutional as applied regarding the use of eminent domain pursuant to a comprehensive development plan for the redevelopment of a large area to eliminate and prevent slum and substandard housing conditions.<sup>16</sup> The Court found that “[m]iserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden.”<sup>17</sup> Ultimately, the Court determined that the role of the judiciary in determining whether the power of eminent domain is being exercised for a public purpose is “an extremely narrow one”<sup>18</sup> and that it should be within the purview of the legislature to determine that a community should be “beautiful as well as healthy, [and] spacious as well as clean. . . .”<sup>19</sup> Therefore, the Court found that “[t]he concept of public welfare is broad and inclusive” and that redevelopment of slums and blighted communities properly fits into the constraints to when a government may use eminent domain.<sup>20</sup>

Along with determining that redevelopment of blighted areas fits within the constitutional responsibility applied toward governments, the Court also extended the use of eminent domain further than to just those properties that were blighted, finding that “community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.”<sup>21</sup> The Court reasoned that if an individual owner was “permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for

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<sup>16</sup> *Berman v. Parker*, 348 U.S. 26, 36 (1954).

<sup>17</sup> *Id.* at 32–33.

<sup>18</sup> *Id.* at 32 (quoting *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

<sup>19</sup> *Id.* at 33.

<sup>20</sup> *Id.* at 34.

<sup>21</sup> *Id.* at 35.

redevelopment would suffer greatly.”<sup>22</sup> Under the legislature’s decision, the entire area within the redevelopment zone needed redesigning “so that a balanced, integrated plan could be developed for the region.”<sup>23</sup> Essentially, the Court allowed the taking of non-blighted properties to fit within the design of the redevelopment area under a completely heightened sense of judicial deference toward exercises of eminent domain.

### *C. A New Level of Judicial Deference*

The heightened level of deference given to legislatures over exercises of eminent domain seemed to reach a climax in the landmark case of *Kelo v. City of New London*, where eminent domain for a public purpose was not limited to the redevelopment of slums and blighted areas within a zone for residential purposes, but instead permitted for the initiative of economic development of the surrounding areas, which the Court deemed a public purpose. In *Kelo*, the city of New London approved a redevelopment plan submitted by a development agent to revitalize an area along the waterfront in the city.<sup>24</sup> The plan called for the use of eminent domain to acquire the remainder of currently owned property in the redevelopment zone that was unable to be purchased on the open market.<sup>25</sup> The Court found that the redevelopment plan served the public purpose of economic rejuvenation, which constituted a public use under the Fifth Amendment and was therefore entitled to judicial deference.<sup>26</sup> Writing for the majority of the Court, Justice Kennedy found that “[w]ithout exception, our cases have defined [public use] broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”<sup>27</sup>

By expanding the acceptable definition of “public use” under the Fifth Amendment, the Court in *Kelo* effectively rejected the contention that the mere fact that the property was transferred to private individuals immediately after condemnation diminished the “public character of the taking.”<sup>28</sup> Justice

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 34.

<sup>24</sup> *Kelo v. City of New London*, 545 U.S. 469, 473 (2005).

<sup>25</sup> *Id.* at 472.

<sup>26</sup> *Id.* at 476.

<sup>27</sup> *Id.* at 480.

<sup>28</sup> *Id.* at 482.

Kennedy reasoned that “[q]uite simply, the government’s pursuit of a public purpose will often benefit individual private parties,”<sup>29</sup> and it cannot be said “that public ownership is the sole method of promoting the public purposes of community redevelopment projects.”<sup>30</sup> The Court found that “[i]t is only the taking’s purpose, and not its mechanics that matters in determining public use.”<sup>31</sup>

In reasoning to defend its heightened deference, the Court articulated that “our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”<sup>32</sup> According to the majority, “[t]he City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community . . .”<sup>33</sup> and that promoting economic development is a “traditional and long accepted function of government.”<sup>34</sup>

#### *D. Post-Kelo Reactions Towards the Use of Eminent Domain*

While the Supreme Court in *Kelo* stressed a high level of judicial deference to public use jurisprudence, the Court explicitly left the door open to states to place further restrictions on the exercise of takings power by governments within their state sovereignty.<sup>35</sup> As a result, many states have scaled back the perceived power granted to local governments over the exercise of their eminent domain power from the Court in *Kelo*. For example, in California, a city may only take land for economic development purposes in blighted areas.<sup>36</sup> In Florida, any political subdivision authorized with the power of eminent domain “may not exercise the power of eminent domain to take private property for the purpose of preventing or eliminating slum or

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<sup>29</sup> *Id.* at 485.

<sup>30</sup> *Id.* at 486 (citing *Berman*, 348 U.S. at 34).

<sup>31</sup> *Id.* at 482 (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)); *see also Berman*, 348 U.S. at 35–36 (“Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.”).

<sup>32</sup> *Id.* at 483.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 484.

<sup>35</sup> *Id.* at 489.

<sup>36</sup> CAL. HEALTH & SAFETY CODE ANN. §§ 33030–33037 (2010).

blight conditions.”<sup>37</sup> Going further than a majority of the states, the Florida legislature overtly objected to the Court’s reasoning in *Berman* and invalidated the use of eminent domain for eliminating slum or blight conditions as a valid public purpose or use for which private property may be taken.<sup>38</sup>

Pennsylvania occupies a middle ground between Florida and California, developed after *Kelo*, where a condemnor is authorized to use eminent domain on multiple units within a redevelopment area only if a *majority* of the units of property fall under certain conditions to be deemed blighted under statute.<sup>39</sup> Such conditions include property that is: (1) declared a public nuisance; (2) an attractive nuisance to children; (3) a “dilapidated, unsanitary, unsafe vermin-infested” or failing under the building code; (4) a fire hazard; (5) tax delinquent for a period of two years; (6) abandoned; etc.<sup>40</sup> Thus, while many states have reacted to the Supreme Court’s decision in *Kelo*, views on the appropriate measures to take in response to the heightened level of judicial deference afforded to public takings varies significantly.

More recently, national debate over eminent domain since *Kelo* spans from its practicality in its ability to spurn effective development in low income areas, to issues arising over what the proper interpretation of “just compensation” should be. Most recently, the Supreme Court denied a certiorari petition in *S. Lafourche Levee Dist. v. Jarreau*.<sup>41</sup> The case involved the question of whether or not the government must pay entrepreneurs if it destroys their businesses by acquiring the land used for the business via eminent domain.<sup>42</sup> States are split on this issue, even though it seems like a basic principle of fairness—i.e. pay for the value of what you take—though many courts have found otherwise.<sup>43</sup> Thus, the issues surrounding local

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<sup>37</sup> FLA. STAT. ANN. § 73.014(2) (West 2004 & Supp. 2018).

<sup>38</sup> *Id.*

<sup>39</sup> 26 PA. CONS. STAT. ANN. § 205 (West 2009).

<sup>40</sup> *Id.*

<sup>41</sup> *S. Lafourche Levee Dist. v. Jarreau*, 217 So. 3d 298 (La. 2017).

<sup>42</sup> *Id.*

<sup>43</sup> *Compare* *Redevelopment Auth. of Phila. v. Lieberman*, 336 A.2d 249 (Pa. 1975) (ruling that the condemned party was owed compensation for the value of his liquor license which was lost when the condemnor acquired his property through eminent domain), *with* *City of Janesville v. CC Midwest, Inc.*, 734 N.W.2d 428 (Wis. 2007) (holding that the condemnor’s requirements to provide just compensation were satisfied even if the identified relocation sites were not to the condemned’s liking as relocation assistance benefits do not have a direct relationship with fair market value of a tenant’s interest).



governments' use of eminent domain have not been settled by the *Kelo* ruling; instead more fervent debate over its merits have developed over what *Kelo* could mean for the future of eminent domain.

## II. CURRENT PROBLEMS WITH EMINENT DOMAIN AND AFFORDABLE HOUSING

When cities use their eminent domain power to advance development projects, it rarely includes affordable housing.<sup>44</sup> Across the country “[a]s the need for affordable housing increases, cities’ taking of private property for ‘public purposes’ has helped decrease the number of affordable housing units instead of helping keep up with the demand.”<sup>45</sup> Regarding uses of eminent domain in blight removal, local governments are often criticized further because instead of creating more affordable housing in place of the blighted communities they remove, they “have a history of replacing low-income housing with housing that [is] too expensive for the current residents.”<sup>46</sup>

Adding to these complications, typically “[a]s housing prices and rents have increased at astronomical rates . . . the income levels of low income households have not kept up proportionately, thus making private sector, non-government-subsidized rental units less affordable.”<sup>47</sup> This has created economic problems for cities due to the fact that the impact that an affordable housing shortage can have on the economic vitality of a city is directly correlated to the potential disruptions in the labor pool that a shortage of housing can have on low income workers who would not be able to live and thereby work in the cities from which they were displaced.<sup>48</sup> This seemingly

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<sup>44</sup> Matthew J. Parlow, *Unintended Consequences: Eminent Domain and Affordable Housing*, 46 SANTA CLARA L. REV. 841, 842 (2006).

<sup>45</sup> *Id.*; see also *id.* at 856–57 (“Not only do cities fail to use their eminent domain power to build more affordable housing units, but they often use their power to raze them. Cities often take property that has existing affordable housing units owned and operated by private owners. These units are oftentimes inexpensive, private-sector housing that do not have ties to government-subsidy programs. They are, nevertheless, ‘affordable’ housing units in the sense that low-income residents can afford to rent them and live within the city. By taking such affordable housing units off the market by their exercise of eminent domain power, cities reduce the available housing stock for low-income residents as such units are usually replaced by new high-end commercial, residential, and mixed-use projects.”).

<sup>46</sup> Emma Westbrook Perry, Note, *No Room for the Poor—the Blight of Eminent Domain on America’s Lowest Economic Classes*, 94 TEX. L. REV. 155, 162 (2016).

<sup>47</sup> Parlow, *supra* note 44, at 848.

<sup>48</sup> *Id.* at 849.

forced exodus of low-income workers could wreak havoc on the daily operations of businesses within a city who depend on a labor pool willing to work for modest wages.<sup>49</sup>

Under the current, broader view of the public use doctrine exemplified in *Kelo*, “the government may take private property and transfer it to another private party as long as the use will serve a public purpose.”<sup>50</sup> Public purposes including the creation of jobs, economic development, and the “revitalization of blighted areas.”<sup>51</sup> This public purpose justification “encourages exercises of eminent domain power that not only stymies efforts to increase affordable housing, but that actually reduce existing affordable housing stock.”<sup>52</sup> The fact of the matter is that cities need the private sector’s assistance in building and managing housing projects. Still, a fear remains, particularly among legal scholars, that due to a proven history of cities using their eminent domain powers to benefit only private interests, engaging with the private sector will come at the cost of further hurting lower-income residents.

It is often argued that the “government’s current wide-ranging power to condemn housing via blight removal projects can have significant long-lasting effects on the low-income people who are disproportionately affected by these projects.”<sup>53</sup> Yet, because local governments “receive a significant portion of their budget through sales and property taxes” they are therefore more likely “to advance projects that will increase such revenue”<sup>54</sup> rather than focus their attention on projects that emphasize benefiting their low-income residents. This relative distrust in local government’s ability to use their eminent domain power to promote the development of affordable housing is largely found in the contention that “[o]pportunities to create affordable housing . . . tend not to create new sales tax revenue and they do not maximize the potential property taxes that can be generated from a new development.”<sup>55</sup> Therefore, the generalized incentive for local governments to exercise their eminent domain power to increase taxable revenues directly competes with the promotion of affordable housing.<sup>56</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 851.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 853.

<sup>53</sup> Perry, *supra* note 46, at 176.

<sup>54</sup> Parlow, *supra* note 44, at 854.

<sup>55</sup> *Id.* at 855–56.

<sup>56</sup> *Id.*

As this Note will go on to elaborate, the incentive for local governments to increase redevelopment to promote their tax base ends up with ineffective results. Therefore, if local governments' purpose for using eminent domain to incentivize development is for tax generating purposes, then those incentives will prove unsuccessful. However, it is incorrect to conclude that it is impossible to use eminent domain for promoting affordable housing. Rather local governments need only to refocus their power of eminent domain in a more effective way.

#### *A. The Rise and Spread of Urban Decline*

Cities such as Buffalo, Cleveland, Detroit, and Pittsburgh have all lost “more than 40 percent of their populations over the last four decades.”<sup>57</sup> Urban decline occurs “when low [citywide] housing demand leads to population loss in the lowest-price neighborhoods, and falling prices allow lower-income households to move into formerly middle-income neighborhoods. As this happens, housing prices in those middle neighborhoods fall.”<sup>58</sup> Concurrent with this decline, these cities have also seen “income growth in the top three housing-price deciles” within certain neighborhoods.<sup>59</sup> Therefore, when higher-income residents move in, they are more likely to make improvements to the housing stock of that neighborhood,<sup>60</sup> whereas when lower-income residents move in, “they may be more likely to defer home maintenance when finances are tight.”<sup>61</sup> This creates a push-pull effect where cities are seeing “retreating boundaries of high income” neighborhoods as urban decline spreads throughout the remaining lower and middle-income neighborhoods.<sup>62</sup>

In discussions regarding the affordable housing problem in the United States, one term often thrown around is gentrification. Simply put, “[g]entrification describes the socioeconomic upgrading of a previously,

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<sup>57</sup> Daniel Hartley, *Urban Decline in Rust-Belt Cities*, FED. RES. BANK OF CLEVELAND: ECON. COMMENT (May 20, 2013), <https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2013-economic-commentaries/ec-201306-urban-decline-in-rust-belt-cities.aspx>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

low-income central city neighborhood, characterized by the influx of residents of a higher socioeconomic status relative to incumbent residents and rising home values and rents.”<sup>63</sup> Often gentrification is criticized as the root cause for displacement of low-income families. However, “[t]he empirical evidence on the relationship between gentrification and residential displacement . . . is far from conclusive.”<sup>64</sup> Instead, “at the aggregate level[,] movers out of gentrifying neighborhoods are no more likely to move to lower-income neighborhoods compared with those from non-gentrifying, low-income neighborhoods.”<sup>65</sup> Nevertheless, while low income families are not necessarily more likely to move from gentrifying neighborhoods than similar residents in nongentrifying neighborhoods, the fact remains that low-income families “have a higher risk of downward mobility” when they do move out of gentrifying neighborhoods.<sup>66</sup> This creates a spread of urban decline which reaches into once middle-income neighborhoods and results in the retreating boundaries of high-income neighborhoods and the decline of home values across the large swaths of growing disadvantaged neighborhoods.

Land values are usually calculated based on their “physical and locational attributes,” and what is often neglected “is the bundle of legal rights conveyed with land.”<sup>67</sup> A component of the land value calculation are the options that a potential buyer has for their property. To better understand the option component of urban land values:

[r]eal option theory implies that [1] raw land contains an option to develop the optimal structure at the optimal time (development option), [2] developed land contains an option to redevelop the existing improvements to a higher and better use (redevelopment option), and [3] both raw and developed land contain an option to sell or completely abandon the property (abandonment option).<sup>68</sup>

Therefore, for a newly constructed property, the presumption is that its value reflects that it has been built to its most valuable, optimal use. Thus, since

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<sup>63</sup> Lei Ding, Jackelyn Hwang & Eileen Divringi, *Gentrification and Residential Mobility in Philadelphia*, 61 REG’L SCI. & URB. ECON. 38, 38 (2016).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 39.

<sup>66</sup> *Id.* at 49.

<sup>67</sup> Henry J. Munneke & Kiplan S. Womack, *Valuing the Redevelopment Option Component of Urban Land Values*, REAL EST. ECON., Dec. 2016, at 1.

<sup>68</sup> *Id.* at 1–2.

the current property value and its “best use value” are equivalent at this point in time, “the redevelopment option would be zero.”<sup>69</sup> However, over years when physical deterioration and obsolescence start to set in, the property value and “best use value” begin to inverse—for as the property value begins to depreciate, the redevelopment option value begins to increase.<sup>70</sup> This cycle eventually leads to the property being far removed from its “best use” potential, and its current property value is then comprised almost entirely of its land value, which is in turn a direct reflection of its redevelopment option value.<sup>71</sup>

Research indicates that prior improvements on properties purchased with the sole intent to immediately tear down do not contribute to the price of the property during sale.<sup>72</sup> Instead it was solely land value and its associated redevelopment option that was being valued on the market. This ultimately demonstrates the rise of urban decline in many communities around the United States. Many local communities “lack sufficient incentives for redevelopment indicating little to no option value is observed.”<sup>73</sup> In fact, “the redevelopment option value is estimated to be around 4% of a property’s selling price on average.”<sup>74</sup> Thus, with little redevelopment option factored into the value of housing in unincentivized areas, urban decline spreads throughout low and middle income areas of the community as home values in those areas are seemingly being valued for only their land. In the end, this demonstrates that for local governments to curtail the spread of urban decline in their cities, they must find ways to promote incentives for redevelopment in areas throughout their locale including, but not exclusively, the potential exercise of eminent domain. Declining home values can promote more market development, but the push-pull dynamic in the market is eroding the middle of the housing-price-spectrum and creating a market with only two subsections—luxury high end, and everything else. This is the reason why only luxury units are being built today, which in turn exacerbates the spread of urban decline and the problem of affordable housing.

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<sup>69</sup> *Id.* at 2.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 38.

<sup>73</sup> *Id.* at 39.

<sup>74</sup> *Id.*

### III. CURRENT TOOLS EMPLOYED BY LOCAL GOVERNMENTS TO INCENTIVIZE DEVELOPMENT

When trying to incentivize development, local governments have employed many tools over the years besides eminent domain, with varied to little success. A quick survey of some of the tools most frequently used will demonstrate their past effectiveness (or lack thereof) as potential affordable housing solutions.

#### *A. Inclusionary Zoning*

Inclusionary zoning programs “either require developers to make a certain percentage of the units within their market-rate residential developments available at prices or rents that are affordable to specified income groups, or offer incentives that encourage them to do so.”<sup>75</sup> Advocates for such inclusionary zoning policies, including many legal scholars, argue that they can be “an effective means of producing below-market-rate units that would not otherwise be produced and that, unlike traditional affordable housing programs, it does not require direct public subsidies and produces affordable units in a geographically dispersed pattern.”<sup>76</sup> However, there is overwhelming evidence that restrictive land use regulations, such as inclusionary zoning policies, have actually contributed to higher housing prices and therefore less affordable housing.<sup>77</sup> By constraining the supply in jurisdictions that adopt inclusionary zoning policies, many economists and developers believe that such policies impose “additional costs on new residential development” that result in increasing housing prices.<sup>78</sup> Therefore, while the argument exists for forcing developers to include affordable units in new developments, the results speak otherwise.

Descriptive statistics regarding inclusionary zoning policies reveal that there is considerable diversity in the structure and characteristics of these programs around the country.<sup>79</sup> However, what these statistics also disclose

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<sup>75</sup> Jenny Schuetz, Rachel Meltzer & Vicki Been, *Silver Bullet or Trojan Horse? The Effects of Inclusionary Zoning on Local Housing Markets in the United States*, 48 URB. STUD. J. 297, 298 (2011).

<sup>76</sup> *Id.* at 298.

<sup>77</sup> *Id.* at 297.

<sup>78</sup> *Id.* at 298.

<sup>79</sup> *Id.* at 320.

is that the strength of the regional housing market is what drives the impact that inclusionary zoning policies have on local communities.<sup>80</sup> Thus, these inclusionary policies “contribute to increased sales prices of existing single-family homes during rising regional markets, and may depress local housing prices when regional prices decline.”<sup>81</sup> So while inclusionary zoning policies have the ability to reduce local housing prices and make units in depressed housing markets more affordable, they should not be seen as a total solution to the problem but rather as a potential hinderance to increasing the overall housing supply that could ultimately result in a tenable solution. While these policies do still serve a purpose in a possible solution, their overall ineffectiveness towards curtailing the problem should highlight that reliance on these policies as an ultimate solution is ill-advised.

### *B. Tax Abatements*

In many declining communities, local governments have proffered tax-based incentives to try and curtail the problem of urban decline. One of these tax-based incentives is residential property tax abatement programs. The logic behind these abatement programs is that “[a]batements as subsidies are expected to change consumers’ locational choices through the availability of higher-quality homes at lower overall prices.”<sup>82</sup> In Cleveland, Ohio, the city promoted an abatement program that was designed to promote job growth and foster new residential development. The abatements extended to new construction residents for 100% of the value of the new residences and thus only made home owners responsible for the taxes that were attributable to the value of land, which was established as 20% of the sale price of the new home.<sup>83</sup> For rehabilitation projects, the abatements were extended to the full value of the improvements of more than \$5,000.<sup>84</sup> A study of these abatement programs, however, found that the abatements were unable to influence the economic decline of the city and “did not create the scale of changes needed

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<sup>80</sup> *Id.* at 322.

<sup>81</sup> *Id.* at 321.

<sup>82</sup> Mark S. Rosentraub, Brian Mikelbank & Charlie Post, *Residential Property Tax Abatements and Rebuilding in Cleveland, Ohio*, 42 ST. & LOC. GOV. REV. 104, 106 (2010).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

to shift the overall patterns of decline.”<sup>85</sup> Thus, it was ultimately concluded that residential property tax abatement programs can assist in overall job creation and “the formation of new companies” in declining areas of a community, but “substantial changes in median household income, employment levels, tax receipts for local governments, and the removal of blighted conditions lie in a robust economy propelled by new jobs and new companies.”<sup>86</sup> Similar to inclusionary zoning, tax abatement programs for residential properties are not a driver of nor a substitute for true economic development that can sustain a market of all types of housing.

### C. Tax Increment Financing (TIF)

On the development-financing side of local government tax-based incentives, tax increment financing (TIF) is the most widely used program for fostering economic development in the United States.<sup>87</sup> The theory behind TIF is that the revenue growth generated from new development “will pay for physical infrastructure and other expenditures designed to spur further economic growth” within the developing area.<sup>88</sup> TIF laws vary by state, but the basic idea is that a territorial district is created within a city, and a base valuation of all the properties within that district is determined with property taxes being assessed based on the base value of each property.<sup>89</sup> Revenues derived from the taxes within that district are then directly set aside “to be used for public improvements and other economic development programs within the district.”<sup>90</sup> TIF-generated funds can be used for numerous purposes within the district, including the maintenance and construction of physical infrastructure such as “streets and street lighting, curbs and sidewalk improvements, bridges and roads, water mains and supply, and sewage removal,” as well as for parks and planning upgrades.<sup>91</sup> For the most part, “it

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<sup>85</sup> *Id.* at 114.

<sup>86</sup> *Id.* at 115.

<sup>87</sup> Richard Briffault, Symposium, *Reassessing the State and Local Government Toolkit: The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 65 (2010).

<sup>88</sup> *Id.* at 66.

<sup>89</sup> *Id.* at 67.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 68.



appears that TIF districts succeed in creating a ‘solid and robust’ revenue base” as “[p]roperty values and retail sales in TIF districts generally increase.”<sup>92</sup>

Local government use of TIFs carries with it the explicit goal of increasing the tax base of a district, but they do not necessarily prioritize increasing the number of quality jobs or the amount of affordable housing.<sup>93</sup> Fiscalization policies like TIFs have been “sharply criticized by those who would like to refocus local planning and development policies on other goals, like job creation, improved service delivery, affordable housing, or preservation of quality of life.”<sup>94</sup> To reform TIF programs, some advocates have urged that local governments require a percentage of TIF Funds be dedicated to the creation of affordable housing.<sup>95</sup> So, in their current existence and practice, TIFs do little to create affordable housing, but still assist in redeveloping areas to potentially entice further development.

#### *D. Tax Credits*

Many tax credit projects involve substantial renovations of older government housing projects that “are occupied by households with tenant-based housing vouchers that provide owners with additional revenue.”<sup>96</sup> The Low-Income Housing Tax Credit (LIHTC) is “the largest and fastest growing housing program” in the United States and it is designed to subsidize “the construction and renovation of more units each year than all other government programs combined.”<sup>97</sup> However, while local governments frequently use tax credits, their effectiveness towards contributing to a solution to the affordable housing problem is uncertain.

In the United States, “there are . . . about 600,000 homeless people on a single night and more than 3 million vacant units available for rent.”<sup>98</sup> And for the low-income families who are spending a large fraction of their income

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<sup>92</sup> *Id.* at 82.

<sup>93</sup> *Id.* at 86–87.

<sup>94</sup> *Id.* at 87.

<sup>95</sup> *Id.* at 88.

<sup>96</sup> ED OSLEN, DOES HOUSE AFFORDABILITY ARGUE FOR SUBSIDIZING THE CONSTRUCTION OF TAX CREDIT PROJECTS? 1 (2017).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

on housing, tax credits designed to subsidize new construction are hardly useful.<sup>99</sup> Thus, the problem clearly is not supply in terms of the mass quantity of housing produced in a year, but rather a supply problem within the affordable subsections of the market on the housing-price-spectrum that is certainly lacking. For perspective, the argument for increasing supply to solve the lack of affordable housing in this country is not focused on the aggregate quantity of housing produced but instead attempts to articulate a position where increasing the supply of housing in the affordable brackets of the housing-price-spectrum (rather than on the luxury end as is the current trend) is heavily encouraged.

These current tools local governments employ to incentivize development are failing to encourage an increase in supply in affordable housing that is necessary to correct the spread of urban decline and to promote redevelopment of local communities. The current model does not work and is simply exacerbating the elimination of affordable housing all across the country. Instead, if local governments focused on using under-utilized tools in their possession instead of relying on tools such as eminent domain, and coupled those initiatives with market-based solutions, then the necessary reform on the housing market and the reintroduction of development of affordable units into the marketplace for consumers can be possible.

#### IV. GOVERNMENT-SIDE SOLUTIONS TO THE AFFORDABLE HOUSING PROBLEM

##### A. Overview

“[S]olutions that move beyond the debate over ‘public use’ versus ‘public purpose’ must be studied if cities are to address the need for affordable housing . . . .”<sup>100</sup>

Since *Kelo* was decided in 2005, government-side solutions to the affordable housing problem have been all over the board with little consensus over which methods best curtail the problem. The likely reason is that many of these solutions, addressed above, simply do not do anything to solve the problem but rather only assist to stopgap the dilemma for a temporary period.

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<sup>99</sup> *Id.*

<sup>100</sup> Parlow, *supra* note 44, at 861.

Today, current legal scholarship on the issue of affordable housing seemingly works under the supposition that the government is the solver of all ills and is therefore best suited to solve this problem once and for all. The following sections detail some of the different government-side solutions that have been proposed in recent years.

### *B. Exclusionary & Inclusionary Eminent Domain*

Exclusionary eminent domain occurs “when a taking leads to the loss of affordable housing and the displacement of residents from one neighborhood to another.”<sup>101</sup> Under the exclusionary eminent domain doctrine, legal scholars propose that “if a municipality did not substitute the low-income housing that is condemned for the public purpose of economic redevelopment, then the taking is unlawful, and the government may not exercise eminent domain.”<sup>102</sup> Essentially, for this doctrine to be deemed legal, municipalities must provide equitable substitute affordable housing to low-income residents displaced by the exercise of eminent domain. Through this “[h]eightedened judicial review,” the proposed exclusionary eminent domain doctrine seeks to rectify what many see as an abuse of the takings clause which was promulgated by the Supreme Court in *Kelo*.

Under the concept of inclusionary eminent domain, “the incentive for developers, primarily, is public support and community cooperation, which sometimes is the key to a lucrative return on the condemnation of the land anticipated for development.”<sup>103</sup> While placing “little, if any, imposition” on the courts or legislature, inclusionary eminent domain sets out to encourage “a constructive, three-way engagement process and partnership among the community, private developer and municipality. . . .”<sup>104</sup> The concept is meant to show “how private developers and municipalities can reconcile a development project in accordance with the needs and wants of the affected community,” which include elements such as “meaningful engagement, community participation, collective action and public approval.”<sup>105</sup>

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<sup>101</sup> Gerald S. Dickinson, *Non-Conference Contributions: Inclusionary Eminent Domain*, 45 LOY. U. CHI. L.J. 845, 858 (2014).

<sup>102</sup> *Id.* at 870.

<sup>103</sup> *Id.* at 881.

<sup>104</sup> *Id.* at 883.

<sup>105</sup> *Id.*

On its face, the concept is wonderful in an altruistic sense. However, inclusionary eminent domain operates under two incorrect assertions. The first incorrect assertion is that developers are willing to prioritize the attitudes of the community over their potential return on investment. Generally, developers do not prioritize the attitudes of the community over their projects unless it affects the willingness of local governments to approve their projects or potential renters/buyers from leasing/buying the result of their projects. Therefore, to assert that developers are *willing* to engage in a “three-way engagement process and partnership” with local communities is likely mistaken. Willing they would not be, but forced, they may be. This goes against the whole basis of the inclusionary concept by *including* developers not through their own subjective intent, but by holding their feet to the fire if they want to make a living.

The second incorrect assertion is that municipalities and private developers would, generally, be willing to internalize more costs associated with a project without being forced to by courts or legislatures. Inclusionary eminent domain “encourage municipalities and private developers to internalize some of the social costs involved in the taking of land without the imposition of affirmative obligations from the courts or the legislature.”<sup>106</sup> In the face of a multi-million dollar development, to assert that developers should be willing to internalize even more costs than they already have to is, again, operating under the assumption that it is fair to force a developers to do this for the benefit of lower-income groups at the potential expense of their business. Such an assumption is anything but inclusionary on the developers end. While altruistic in theory, inclusionary eminent domain conceptualizes meaningful elements that may very well prove valuable in solving the affordable housing problem. However, like so many other theories conceptualizing different ways to use the power of eminent domain, the theory fails by making the developers the ones to suffer the burdens associated with displacement—simply shifting the problem from low-income residents to developers without even trying to eliminate it altogether.

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<sup>106</sup> *Id.* at 885.

### C. Community Benefits Agreements (CBAs)

Often the complications that can be generated by a local government's eminent domain practice "stem from the confluence of various business and corporate interests that have influence over government when it carries out its authority,"<sup>107</sup> usually at the cost of the displacement of low-income residents. "The results of the exercise of the eminent domain authority can lead to the leveling of large segments of communities, the loss of affordable housing, the loss of small businesses, and the destruction of neighborhood and community social infrastructure. . . ."<sup>108</sup> Broad acceptance of neoliberal policies at the local level favors unfettered entrepreneurialism, unencumbered free markets, and individual private property rights over collective aspirations.<sup>109</sup> However, what is often ignored by such policies is the "distinction between use values and exchange values, and the fact that the benefits derived from the pursuit of exchange values by intensive development are unevenly distributed across the community."<sup>110</sup> Thus, the disparate impact is magnified as typically the "citizens/residents most affected by the economic development decisions [of local government] often have little opportunity through democratic channels to participate in the decision-making process that is affecting their community."<sup>111</sup>

Community Benefit Agreements (CBAs) are legally enforceable contracts, signed by community groups and by a developer, that lay out a range of community benefits that the developer has agreed to provide to the community as part of a development project in exchange for the community's support for the project.<sup>112</sup> In the context of affordable housing, for community advocates and local governments, CBAs can be incredibly useful to "enhance opportunities for low-income and working-class communities within the context of urban development and revitalization."<sup>113</sup> For

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<sup>107</sup> Kirk E. Harris, *Because We Can Doesn't Mean We Should and if We Do: Urban Communities, Social and Economic Justice, and Local Economic Development-Driven Eminent Domain Practices*, 29 *ECON. DEV. Q.* 245, 246–47 (2015).

<sup>108</sup> *Id.* at 252.

<sup>109</sup> *Id.* at 247.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 249.

<sup>112</sup> *Id.* at 253.

<sup>113</sup> *Id.*

developers, CBAs can be beneficial because they can act as “a promise of support” which could help “developers negotiate state subsidies and maintain good public relations.”<sup>114</sup> However, putting so much faith in the willingness of developers to prioritize public support may be unwise if doing so comes at the cost of losing on their bottom-line.

While CBAs can work to promote community interests, the flaw in the existing CBA model “is that it may fail to galvanize a broad and diverse cross-section of the community as stakeholders and participants in the decision-making process.”<sup>115</sup> This becomes a fatal flaw in the current promotion of CBAs towards solving issues of inclusiveness in the housing market through affordable housing because in order to achieve inclusiveness, CBAs “must have a broad coalition of organizations with demands that bring some weight to the negotiation table with municipalities and private developers.”<sup>116</sup> Thus, if efforts to establish such a broad coalition fail, the community advocate’s negotiating power is significantly reduced, and questions of the willingness of developers to enter into such binding agreements should be raised.

History has shown that, “accountability has been a problem”<sup>117</sup> with CBAs. This could demonstrate why CBAs are not influencing developers but are acting as hinderances to a free market for development. Legally binding developers to enact benefits for the community is again a potential destructive model towards encouraging free development by again holding developers’ feet to the fire. Nonetheless, the implicit goal of CBAs of increasing community participation and involvement still should be able to assist in a solution to the shortage of affordable housing. CBAs are ultimately designed to be an input mechanism for community stakeholders, but in order to have a say in the process, placing such binding constraints on developers may not be the best solution. Instead, local governments should be the ones accountable for the failure of developers to initiate developments that meet the needs of their communities.

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<sup>114</sup> Dickinson, *supra* note 101, at 889.

<sup>115</sup> Harris, *supra* note 107, at 253–55.

<sup>116</sup> Dickinson, *supra* note 101, at 889.

<sup>117</sup> *Id.* at 893.

*D. Redevelopment Authorities and Community Development Corporations (CDCs)*

One current tool that helps local governments better serve their communities and obtain the benefits sought in new developments are Redevelopment Authorities. Typically based within distinct geographic areas like cities or counties, Redevelopment Authorities are authorized agencies within local governments given the public powers of the government to promote development.<sup>118</sup> While in theory designed to be an intermediary between local government, developers, and community shareholders, Redevelopment Authorities have frequently put the neoliberal economic initiatives of the local governments and developers before the collective interests of the community. And while supposed to work autonomously from the local government that empowered them, local Redevelopment Authorities have become entwined with the economic initiatives of the local government such as job creation or expanding the community's tax base,<sup>119</sup> all the while becoming scapegoats for the government when community advocates feel as if those initiatives are not in-line with the benefits they hope new developments will provide to the community.

Community Development Corporations (CDCs) are “nonprofit entities that seek to improve economically depressed inner-city neighborhoods with, among other things, affordable housing to recreate the social fabric of distressed areas.”<sup>120</sup> As nonprofits, CDCs are completely independent from local governments. Therefore, unlike Redevelopment Authorities, CDCs are more adequately attuned to the concerns of community stakeholders and care little about economic initiatives. Also, while being independent from the local government, they provide a private means of fostering redevelopment without the use of public power or public money. Instead of relying on local government tax money, “CDCs combine several sources of equity and debt to construct economic development projects.”<sup>121</sup> While operating autonomously from local government, CDCs hold the power to work with

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<sup>118</sup> 35 PA. CONS. STAT. ANN. § 1709 (West 2018).

<sup>119</sup> *Who We Are*, URB. REDEVELOPMENT AUTH. OF PITTSBURGH, <https://www.ura.org/pages/who-we-are> (last visited Mar. 7, 2018).

<sup>120</sup> Dickinson, *supra* note 101, at 898.

<sup>121</sup> *Id.*

developers as business partners rather than as a quasi-governmental organization applying governmental leverage on developers to comply with certain requirements. Thus, CDCs hold the power to economically persuade developers to acquire land and then quickly “resell the properties to the community at a discount[,] or to buy the land and immediately sell it to the CDC so it can construct affordable housing with its investments.”<sup>122</sup> This, however, is not the only model to which CDCs can work with local developers. Alternatively, developers can “negotiate a long-term lease to build new affordable housing structures with the affected community,” and the CDC, “on behalf of the affected community, would pay the developer the property rent.”<sup>123</sup>

By taking local government out of the equation, a better relationship between developers and the local community can grow through economic incentives that are free from government entanglements. CDCs can effectively bring local community advocates to the table of government discussions on new developments not as a disadvantaged group but instead as an economic partner to the development. While not affording governmental protections and potentially making community members susceptible to economic risks, CDCs are by no means a total solution to the problem. Nevertheless, CDCs are likely the best means by which local governments can assist communities in solving the affordable housing problem by removing themselves from the negotiation table and promoting, empowering, and educating their citizens as to the potential benefits from organizing a community CDC.

While these government-side solutions cannot and should not claim to be the be-all-end-all solution to the affordable housing problem in the United States, they still are incredibly useful solutions to assist in solving the problem if coupled with market-based solutions that incentivize supply through all sections of the housing-price-spectrum.

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<sup>122</sup> *Id.* at 900.

<sup>123</sup> *Id.*



## V. MARKET SIDE SOLUTIONS TO THE AFFORDABLE HOUSING PROBLEM

*A. Increase Supply*

“Any viable solution (free market or otherwise) must involve increasing supply significantly. . . .”<sup>124</sup>

As previously articulated, many legal scholars “think the proper line to [housing reform] is to require new developments to save a proportion of units for low-income residents, which will ensure, they claim, ‘that economically diverse neighborhoods and housing affordability will be preserved for generations to come.’”<sup>125</sup> Free market economists, however, would argue, “[t]he implicit assumption behind this position is that government agents have enough information to organize complex social institutions, when in fact they are slow to respond to changes in market conditions and are often blissfully unaware of the many strategies that are needed in different market settings.”<sup>126</sup> Due to this incorrect assumption, many economists articulate that the alternative view is to “abandon the assumption that there is a systematic market failure requiring government intervention” and to “remove all barriers to entry in the housing market, so that supply can increase and prices can fall.”<sup>127</sup> These barriers “include an endless array of fees, taxes, and permits that grant vast discretionary authority to local officials.”<sup>128</sup> Thus, in the end, it is likely that the “removal of these burdens will allow [society] to harness the private knowledge of developers who will seek to work in those portions of the market that hold the greatest profit opportunities.”<sup>129</sup>

Critics of this free market approach and many legal scholars alike, often fear that “developers will look to build only mansions and high-rise towers

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<sup>124</sup> Adam Hengels, *Urban[ism] Legend: The Free Market Can't Provide Affordable Housing*, MKT. URBANISM (Mar. 13, 2015), <http://marketurbanism.com/2015/03/13/urbanism-legend-free-market-affordable-housing/>.

<sup>125</sup> Richard A. Epstein, *The Affordable Housing Crises*, HOOVER INST. (Feb. 27, 2017), <https://www.hoover.org/research/affordable-housing-crisis> (citing *Portland City Council Unanimously Approves Historic Inclusionary Housing Program*, PORTLAND HOUSING BUREAU (Dec. 21, 2016), <https://www.portlandoregon.gov/phb/article/621738>).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

to satisfy the endless desires of the millionaire class.”<sup>130</sup> However, that hyperbole is a stark exaggeration and ignores “every relevant feature of an unregulated housing market.”<sup>131</sup> In such an unregulated market, costs of housing construction and maintenance will decrease due to the ease of new entrants into the market across the full spectrum of priced units. With low barriers to entry, developers will be able to offer more affordable units to people of limited means as some developers, aware of the the luxury market trends, will move into niche markets in different neighborhoods where they can secure the highest and steadiest rate of return by building more affordable housing.<sup>132</sup> This establishment of niche neighborhood markets will provide expanded supply across a wide variant of prices thus providing more opportunities to lower-income tenants.

No government-side solution alone will “improve the position of the developers”<sup>133</sup> and therefore by itself, is likely to fail. Legislative proposals to add more housing subsidies to the housing market are the most recent example in a long history “of ill-conceived policies that increase housing demand but do nothing about supply.”<sup>134</sup> All over the country median home prices are outpacing median household incomes. These results “are largely driven by (i) easy access to credit which drive demand and prices ever higher, (ii) local land use restrictions and regulations that constrain new supply and drive building costs higher, and (iii) housing subsidies that make it even more difficult for market rate housing to compete.”<sup>135</sup> These “layers of subsidies combined with federal, state, and local regulations act to drive up costs while simultaneously constraining supply.”<sup>136</sup> Regulations such as fixed density requirements create a bias in favor of luxury/high square foot apartments rather than more economical ones because with such a constricted density, developers are going to make the most valued use of the constrained space.<sup>137</sup> It is no wonder that the result of these policies are higher home prices and

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Edward J. Pinto, *Market-based solutions are the only way to get home prices and rents back in line*, AEI (July 18, 2016, 6:25 PM), <http://www.aei.org/publication/market-solutions-only-way-get-housing-back-in-line/print/>.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

rents, particularly for the low-income households that these initiatives profess to help.

A city is only affordable in relation to the number of residents it houses affordably. Market-based solutions “are the only way to bring home prices and rents back in line with median incomes and improve accessibility.”<sup>138</sup> Contrary to the opinions of some legal scholars, market solutions to affordable housing “do *not* include letting developers steamroll small property owners through eminent domain abuse, or allowing local communities to pass restrictive zoning and permitting requirements that are intended to block low-income housing.”<sup>139</sup> Instead, the correct approach for local governments is “to stop eminent domain abuse, to peel away layers of regulation, and to cut out the extensive network of government grants that impose strings on how housing can be built.”<sup>140</sup>

## B. Case Studies

### 1. Durham, North Carolina

After a study conducted on a new residential development constructed in Durham, North Carolina, it was determined that “[i]ncreasing the housing stock in an area not experiencing rising demand [actually] can lower prices in the neighborhood.”<sup>141</sup> The theory was that “the positive externalities of a project should create a tax increment that covers the debt cost, making the redevelopment at worst economically neutral for a municipality while contributing to the revitalization of neighborhoods or infrastructure.”<sup>142</sup> It was thought that new development in one area would increase home values in the areas surrounding the new development, making the redevelopment profitable to all nearby homeowners while also increasing the local tax base. It proved, however, that by increasing the housing supply in an area, the value of older housing stock in the nearby area actually declined. While contradictory to the hypothesis that the project would have positive externalities on the surrounding areas in terms of increased home values, this

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<sup>138</sup> *Id.*

<sup>139</sup> Epstein, *supra* note 125.

<sup>140</sup> *Id.*

<sup>141</sup> Thomas A. Newell, *Development and Neighborhood Revitalization: The Effects of Residential Investment on Property Value in Durham, NC*, 3 MICH. J. BUS. 97, 114 (2010).

<sup>142</sup> *Id.* at 98.

demonstrates support for the market-based approach to affordable housing. Increasing the supply in an area made other properties in that area more affordable to lower-income tenants, all the while highlighting the ineffectiveness of primarily incentivizing development for tax revenue growth.

New construction in an area or redevelopment “increases the aesthetic value of a structure”; this increase, in turn, decreases “the likelihood that nearby undeveloped homes are perceived favorably.”<sup>143</sup> As a result, “both consumers and appraisers lower their value assessments of older homes”<sup>144</sup> in nearby areas around new construction or redevelopment. Therefore, “[i]f negative development effects reduce surrounding property values by more than the gains of individual properties, policies promoting development reduce a municipality’s tax base.”<sup>145</sup> Any incentive by the government to use regulations on redevelopment to increase their tax base are unfounded, but incentives to increase supply through market-based solutions do in fact provide for sound economic theory. When supply increases, prices decrease. If enough supply is allowed to come to market today, “*today’s new construction will become tomorrow’s affordable housing.*”<sup>146</sup>

## 2. Atlanta Beltline

In Atlanta, Georgia, a large, multi-use land development project called the Atlanta Beltline was examined for the impacts it had on residential property values in a neighboring area. The study found that the Beltline “had positive effects on housing prices *very close* [to the redeveloped area] . . . with impacts falling off sharply after approximately a quarter mile.”<sup>147</sup> The findings of the study suggest that large redevelopment projects “have positive spillovers on residential property values” within the redeveloped area.<sup>148</sup> This however, can cause the displacement of lower-income owners who are unlikely to be able to afford the taxes on their higher assessed property

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<sup>143</sup> *Id.* at 114.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Hengels, *supra* note 124 (emphasis added).

<sup>147</sup> Dan Immergluck, *Large Redevelopment Initiatives, Housing Values and Gentrification: The Case of the Atlanta Beltline*, 46 URB. STUD. J. 1723, 1741 (2009) (emphasis added).

<sup>148</sup> *Id.* at 1745.

value.<sup>149</sup> Nevertheless, because nearby neighboring areas in Atlanta saw a decline in their property values because of the new development on the Beltline, these low-income residents living in the immediate area of the redevelopment should be afforded the opportunity to liquidate their higher valued properties and use the earnings to move into a more affordable area; which likely, after the depreciation of their value due to the nearby development, could be the neighboring communities less than a quarter mile away which, likely, were once too expensive for these low-income families to live in before the development arrived. This demonstrates the practical effects of supply in the market place driving down costs of older housing stock making it more affordable.

### 3. Anaheim, California

In the Platinum Triangle in Anaheim, California, the local government agreed that there would be no public incentives or the use of eminent domain to achieve development goals.<sup>150</sup> Instead, they relied solely on market forces to create incentives to drive development. To facilitate the market forces, the local government deregulated much of its development process by introducing easier permitting, reducing building and environment requirements, and overlay zones—designed to promote mixed-use developments.<sup>151</sup> As a result of this overall streamlined process, the area became heavily attractive to developers with property values quadrupling within 18 months.<sup>152</sup> Today, an estimated \$1.2 billion is expected to be spent on further construction over the next decade, on top of the \$500 million already spent.<sup>153</sup> When completed, the district is estimated to be home to 28,000 people when once, no one lived there.<sup>154</sup>

Deregulation of the housing market is key. The case studies clearly exemplify the role that the government can take on curbing the affordable

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<sup>149</sup> *Id.*

<sup>150</sup> Curt Pringle, *Development Without Eminent Domain: Foundations of Freedom Inspires Urban Growth*, 2 INST. FOR JUST.: PERSP. ON EMINENT DOMAIN ABUSE 1, 4 (2007).

<sup>151</sup> *Id.* at 4–7.

<sup>152</sup> *Id.* at 8.

<sup>153</sup> Art Marroquin, *Platinum Triangle development taking shape near Angel Stadium, Disneyland*, ORANGE CTY. REG. (Oct. 20, 2015), <https://www.oregister.com/2015/10/20/platinum-triangle-development-taking-shape-near-angel-stadium-disneyland/>.

<sup>154</sup> *Id.*

housing problem by making it easier for the private sector to increase the supply of housing across all subsections of the housing-price-spectrum. Due to this direct causation between supply and the lack of affordable housing, it becomes clear that the current problems regarding affordable housing in the United States are best described as a *shortage* rather than a crisis.

## VI. RECONCILING GOVERNMENT AND MARKET SIDE SOLUTIONS

Historically, there have been two traditional methods within the United States to assemble land—eminent domain and voluntary assembly.<sup>155</sup> Voluntary assembly tends to lead to a holdout problem, while eminent domain tends to lead to “a ‘fair market value’ problem resulting in capricious redistribution with little regard for the subjective or emotional value of property.”<sup>156</sup> Nevertheless, in practice, “nimble developers often assemble land at better prices than public entities that cannot conceal their ambitious area-wide plans from public view long before starting to acquire property for public use.”<sup>157</sup> The common mistake local governments make when trying to fight urban decline and promote redevelopment of their communities is to try and act “as both government and the private sector.”<sup>158</sup> To find a sufficient compromise between both government based and market oriented solutions a clear line must be drawn regarding the roles stakeholders play in the affordable housing shortage.

Many Americans “are serious about the sanctity of private property because they understand that it is not only inseparable from liberty but also the foundation of prosperity.”<sup>159</sup> Thus, the exercise of eminent domain is often seen as a trampling of homeowner’s individual liberties and the “easy path” to redevelopment.<sup>160</sup> “[T]oo many government officials want to dictate how and where development takes place.”<sup>161</sup> This creates the problems noted

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<sup>155</sup> Dickinson, *supra* note 101, at 896.

<sup>156</sup> *Id.*

<sup>157</sup> George Lefcoe & Charles W. Swenson, *Redevelopment in California: The Demise of TIF-Funded Redevelopment in California and Its Aftermath*, 67 NAT’L TAX J. 719, 740 (2014).

<sup>158</sup> Pringle, *supra* note 150, at 10.

<sup>159</sup> *Id.* at 13 (quoting Nicole Gelinas, *They’re Taking Away Your Property for What?*, CITY J. (2005), <https://www.city-journal.org/html/they%E2%80%99re-taking-away-your-property-what-12893.html>).

<sup>160</sup> *Id.* at 3.

<sup>161</sup> *Id.* at 10.

above where abuses of eminent domain are simply adding to the strife brought on to many residents suffering from displacement and urban decline. A free market solution where local officials make “zoning requirements more flexible and acknowledge market principles,” should help allow new projects to move forward “without taking away rights from existing landowners.”<sup>162</sup> Government has a role to play, specifically in easing restrictions and streamlining development to help increase the supply of housing on the market across the housing-price-spectrum. However, in terms of dictating how and where development takes place through exercising eminent domain or the use of CBAs, governments should cautiously do so in very limited circumstances so as to not abuse their power and add to the plight of urban decline and displacement. Instead of using government powers to grab people’s land, governments across the U.S. “should find creative ways to encourage new enterprises by working with the homeowners and businesses already in the community.”<sup>163</sup>

To be clear, the use of eminent domain and CBAs in particular do have potential benefits to helping encourage redevelopment in local communities. Property owners “should not be protected by narrowing the public use requirement so much that eminent domain can never be used for economic development projects.”<sup>164</sup> However, in terms of solving the affordable housing shortage it should only be in limited circumstances where these tools are considered.

One circumstance in which it may be appropriate to use government-based solutions like eminent domain is over the redevelopment of vacant houses. Currently, most American cities are dealing with vacant and abandoned structures resulting from “population loss, urban renewal, fluctuations in housing markets, and poor municipal management over the past several decades.”<sup>165</sup> These structures remain an eyesore within local communities but alternatively, pose a very serious potential solution toward the affordable housing shortage.

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<sup>162</sup> *Id.* at 3.

<sup>163</sup> *Id.* at 15.

<sup>164</sup> Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 *FORDHAM L. REV.* 1837, 1873 (2005).

<sup>165</sup> Hamil Pearsall, Susan Lucas & Julia Lenhardt, *The Contested Nature of Vacant Land in Philadelphia and Approaches for Resolving Competing Objectives for Redevelopment*, 40 *CITIES* 163, 173 (2014).

### A. Comparative Solution

#### 1. Rotterdam, Netherlands

In the Netherlands, city authorities in Rotterdam offered vacant units in government-owned housing to potential low-income occupants at almost no cost.<sup>166</sup> The condition was that in exchange for the property the occupants would refurbish the property by investing a minimum of €70,000 (roughly \$80,000) into their unit and shared facilities of the block and to live in the property for a number of years.<sup>167</sup> The approach was deemed a success and was adopted under the name *kluskuizen*.<sup>168</sup> A similar approach could just as easily work in the United States.

In Pittsburgh, for instance, the City owns over 3,000 properties, many of which are vacant housing.<sup>169</sup> Applying a similar approach as the Dutch *kluskuizen* could work to incentivize both the government into releasing the supply of these properties back into the market, as well as low-income tenants into finding a more reliable path to wealth building through homeownership.

### CONCLUSION

Eminent domain has a long and checkered past in American history. Frequently used as a tool by local governments in the best interest of revitalizing declining communities, eminent domain has been a flawed exercise from the beginning. Government interference within the redevelopment market has only contributed to rising tensions between developers and community members over proposed changes to a neighborhood. Many community members see local government's exercise of eminent domain as benefiting developers while sacrificing the interests of the community. Developers then get frustrated when community members object to new development plans and potentially block the approval of these

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<sup>166</sup> Marjolein Spaans, Leonie Janssen-Jansen & Maenno van der Veen, *Market-Oriented Compensation Instruments: Lessons for Dutch Urban Redevelopment*, 82 TOWN PLAN. REV. 425, 433 (2011).

<sup>167</sup> *Id.* at 434.

<sup>168</sup> *Id.*

<sup>169</sup> Lisa Wardle, *3,089 city-owned properties listed for sale on new Pittsburgh website*, PENNLIVE (July 7, 2017), [http://www.pennlive.com/life/2017/07/pittsburgh\\_city-owned\\_property\\_sale.html](http://www.pennlive.com/life/2017/07/pittsburgh_city-owned_property_sale.html).



developments even though they are in full compliance with local ordinances or codes. In the end, a vicious cycle is built pitting developers against community advocates with oftentimes the government stuck in the middle.

To best help alleviate the tensions between developers and community members it was found that creating “an organized platform for participation from a diverse set of stakeholders” could be an effective way to help respond to the diverse needs of local stakeholders.<sup>170</sup> This platform, however, should be taken out of city hall and put back into the marketplace. Through the existence of CDCs, local stakeholders can become partners rather than adversaries. Through the easing of restrictions on the market, government actors can stop being the ones to dictate where and how redevelopment exists and allow stakeholders within the market, such as developers and community members, to determine the demand and thereby supply for new development projects.

While not being fully removed from the revitalization of their communities, local governments should be tasked with facilitating and streamlining development rather than dictating it. By focusing on establishing relationships within the market between developers and community advocates, governments should become less aggressive on forcing redevelopment. Instead, local governments should use eminent domain in limited circumstances such as when vacant units/structures are being taken. To promote homeownership through programs like the *kluskuizen*, or to kickstart interest in redevelopment in a particularly deteriorating section of the community, eminent domain, in this effect, can still be an effective tool to promote demand where there might otherwise be none. Overall, the lessons that should have been learned since the realization of the effects of the Supreme Court’s decision in *Kelo* is that the role of local governments in dealing with the affordable housing shortage needs to be a passive one.

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<sup>170</sup> Pearsall et al., *supra* note 165, at 173.