34 Siegel, "Private Residential Communities," 859, 861.
35 See *Florida State and Local Government Planning Act,* chap. 163, for exemption of downtown and infill areas from concurrency and impact fees.
36 *Kelo v. City of New London,* 545 U.S. 469 (2005); Robert H. Freilich and Seth D. Mennillo, "The Kelo Revolution Ends in California," *California Real Estate Journal,* November 13, 2006; see also Hannah Jacobs, "Searching For Balance in the Aftermath of the 2006 Takings Initiatives," *Yale Law Journal* 116 (May 2007): 1518.
37 For similar provisions, see Oregon's Measure 37 and Florida's *Bert J. Harris Act,* described in Edward J. Sullivan, "Year Zero: The Aftermath of Measure 37," *Urban Lawyer* 38 (Spring 2006).
38 *Oregon Revised Statutes* § 197.352.
39 See David L. Callies, Robert H. Freilich, and Thomas E. Roberts, *Cases and Materials on Land Use* (Eagan, Minn.: Thomson West, 2008), 388.
40 See Freilich and White, *21st Century Land Development Code.*

FOCUS ON

Design review

Brian W. Blaesser

Design review is a *discretionary* review process intended to preserve and enhance the built and natural environments in ways that the community considers to be "good design" or visually pleasing. A survey of design review practices offers the following definition: "the process by which private and public development proposals receive independent scrutiny under the sponsorship of the local government unit, whether through informal or formalized processes. It is distinguished from traditional (Euclidean) zoning and subdivision controls, in that it deals with urban design, architecture, or visual impacts."[1] Of the three terms used—*urban design, architecture,* and *visual impacts*—*urban design* is perhaps the least understood. It has been described as "the composition of architectural form and open space in a community context";[2] the author goes on to note, "The elements of a city's architecture are its buildings, urban landscape, and service infrastructure just as form, structure, and internal space are elements of a building. . . . Like architecture, urban design reflects considerations of function, economics, and efficiency as well as aesthetic and cultural qualities."

Thus, design review focuses attention on the urban fabric: light, air, views, open space, and spatial and functional relationships.[3] Broadly conceived, the purpose of design review is to address not just the architectural styles of buildings, but also the spatial relationships of buildings, streets, and public spaces that make up the urban fabric. Urban design can establish an image for areas of civic importance, and in areas that are deteriorated or blighted, it can provide a vision to garner public support and persuade investors of the potential for redevelopment. Public review of design concepts and plans can be a key tool in urban transformation.

Legal considerations

Courts in the majority of states have accepted the proposition that land use regulation can be justified by aesthetics alone if there are adequate standards and if those standards are applied appropriately. But those can be big "ifs"—first, because of the limitations inherent in zoning enabling legislation; second, because of the difficulty of fashioning meaningful standards, given the subjectivity of design judgments; and third, because communities may try to reach too far through aesthetics-based regulations.

Authority for design review

Local government authority to exercise the police power for zoning and other land use purposes, including urban design review, is derived from the state. Under Dillon's rule, local governments do not have inherent powers but are limited to those powers explicitly granted to them by the state constitution or legislature.[4] Absent a state constitutional or statutory grant of home rule authority, which gives local governments broader powers of self-government, courts have construed Dillon's rule to require strict adherence to the scope of land use regulation and procedures established by the state. In order to implement constitutionally granted home rule powers, most local governments will adopt a charter that defines their home rule authority. But unless a community has this "home rule" status, which gives it broader land use regulatory powers, the extent and manner of aesthetic regulation which is permissible is limited by the provisions in the state zoning enabling legislation.

In the absence of specific state enabling authority for exercising urban design controls, local governments often tie design review to

state-enabled discretionary decision-making processes, the three basic types of which are parcel zoning changes, special permit approvals, and planned development approvals. In addition, where development parcels are part of an existing or former urban renewal area, a local government may retain the fee interest in those parcels and, on that basis, have clear authority to impose urban design standards through design review. Nevertheless, the fact that a local government may be legally entitled to undertake design review does not guarantee that the design review process has been implemented in a way that is legally defensible.

Vague or meaningless standards

Lack of clarity or certainty in the language of regulation triggers the "void for vagueness" doctrine, which is derived from the constitutional right to notice under the due process clause of the Fourteenth Amendment of the U.S. Constitution. The purpose of the due process clause is to prevent decision makers from arbitrarily implementing the law. Because of the subjective nature of urban design considerations, various vagueness problems can occur in design review, the four most common examples being the failure to use commonly understood terms, the use of imprecise language, the use of language that lacks practical application, and the use of vague principles to define the context of design review.

Terms that are not commonly understood A common failing in design review regulations is the use of terms that do not give meaningful guidance to those who are expected to implement and comply with the regulations: notably, public officials, applicants, and the design professionals who are often appointed to serve on design review bodies or are hired to assist applicants. Terms can fail to meet this standard in one of two ways: (1) they may not be sufficiently technical or precise to be understood by design professionals, or (2) they may not have any settled meaning on the basis of usage and custom—what the courts call "common law" meaning. These two requirements may occasionally contradict each other; that is, a word that is sufficiently technical and precise may be considered too professionally oriented and therefore lacking in any settled meaning.

In Washington State, for example, a court found that the building design criteria that a city had established were too vague: the criteria stated that evaluation of a proposed building project would be based on the "quality of its design and relationship to the natural setting of the valley and surrounding mountains."[5] Windows, doors, eaves, and parapets were required to be of "appropriate proportions" and, as recited by the court, seldom "bright" or "brilliant"; mechanical equipment was to be screened from public view; and exterior lighting was be "harmonious" with the building design. Monotony was to be "avoided," and the project was to also be "interesting." "Screens and site breaks, or other suitable methods and materials," were to be used to render buildings and structures "compatible" with adjacent buildings that had "conflicting architectural styles." Finally, "harmony in texture, lines and masses" was "encouraged."[6]

Imprecise language Although urban design criteria are usually focused on the totality of a project,[7] imposing design criteria on individual development projects affects constitutional rights. Hence, the language used in design criteria must be sufficiently precise to enable an applicant to ascertain what is being requested, and to enable decision makers to arrive at fair, consistent decisions. Admittedly, this is a difficult task. Examples of imprecise language abound. For example, the following criteria, which applied to signs in the borough of Stone Harbor, New Jersey, were successfully challenged on the grounds of vagueness. The court italicized the offending terms:

> Signs that *demand* public attention rather than *invite* attention should be discouraged. Color should be selected to *harmonize* with the overall building color scheme to create a *mood* and reinforce symbolically the sign's primary communication message.... Care must be taken not introduce *too many* colors into a sign. A restricted use of color will maintain a communication function of the sign and create a *visually pleasing* element as an integral part of the *texture* of the street.[8]

Language that lacks practical application Sometimes language appears to have a

commonly understood meaning, but when it is applied to actual circumstances, the language fails to give meaningful guidance. In a New Jersey case, for example, the court reviewed a design standard that required that a building design be "early American."[9] The court did not address whether "early American" was an adequately precise standard; instead, it examined the standard in light of the physical development in the surrounding area and found that nearby structures had no consistent character. Consequently, the court noted, "early American" could refer to anything from log cabin or a tepee to a Cape Cod or Dutch colonial style.

Vague principles for defining the context for design review The concept of the public realm—"those parts of the urban fabric that are held in common, such as plazas, squares, parks, thoroughfares and civic buildings"[10]—is central to new urbanism, which emphasizes walkability, interconnectedness, and the ways in which streets, lots, and buildings fit together. The form-based code is an important regulatory tool in new urbanism; and the public realm, in turn, is one of the central organizing principles of form-based codes. The "reach" of the public realm is critical in efforts to redesign existing, built-up areas; however, it may also raise concerns about the vagueness of design criteria.

For example, one way to implement the concept of the public realm in form-based codes is to apply building design standards and to require design review of aspects that are "clearly visible from the street." The term "street" typically means squares, civic greens, parks, and all public spaces except alleys. This definition is inherently vague and arbitrary, dependent as it is on what is visible to the human eye. Such a definition can raise legal issues under the "void for vagueness" doctrine.

Principles for drafting design review standards and guidelines

Where the local government has legal authority to impose urban design standards, whether the standards can be successfully applied depends on how well they are drafted. Planners should keep the following principles in mind when creating urban design standards.

Address preliminary considerations

Before embarking on design review, a community should carefully consider whether it has the prerequisites for establishing a meaningful, effective, and legally defensible program. A community that attempts to impose design controls but that has no definable character, or that lacks a clear vision of what it is or what it wants to become, will develop vague and often contradictory standards that are applied on an ad hoc basis, with inconsistent—and legally indefensible—results.

Establish a vision that is supported by plans and studies

A visioning or goal-setting process, in which a community creates a fifteen- or twenty-year vision of what it wants to become, can provide the foundation for more in-depth, geographically based plans and studies. Such plans and studies, in turn, are legally necessary to justify design standards. Sometimes the exercise can expose real fissures in the community, and a fractured vision at best. But if done properly, the vision step can provide the foundation for preparing more in-depth, geographically based plans and studies—a necessary legal component—to justify the resulting design standards.

Define the basic characteristics of community form

Defining community form addresses two basic issue:

- The location of a building in relation to the front property line and adjacent buildings, which defines the basic form and spatial characteristics of an urban area and also addresses the idea of certain uses along the street. For example, a building that is set back from the street leaves open the possibility of a parking lot that faces the street, which has a far different visual effect than a row of shops or homes. The build-to line also determines the degree of continuity—as opposed to separation and discontinuity—along a street.
- Land uses at the street level—that is, whether the street will have regular pedestrian activity. Is it a shopping street where pedestrians are invited in, or a residential environment where people

seek privacy from passersby? With respect to locations of entrances, both pedestrian front doors and service, where is the pedestrian activity to be located? Where are the back doors?

Determine the level of control that will be exercised

Once community form has been identified, the next step is for the community to decide what level of control it wishes to exercise through design review, and whether state law (statutory or judicial decisions) authorizes that level of control. Mandatory ("shall") controls are usually limited to such judicially accepted areas that have design implications, such as build-to lines, height, bulk, and setbacks. Whether the scope of mandatory aesthetic regulations may be broadened will depend on two factors: (1) whether the specific studies or plans have been done to support such requirements and (2) the extent to which state law can be read to authorize such prescriptions. Design guidelines, in contrast, set down desired design outcomes ("should"), but as they are not mandatory, they leave room for the applicant and the local government to work out design solutions that are consistent with the aspirations of the community.

Choose a format and structure

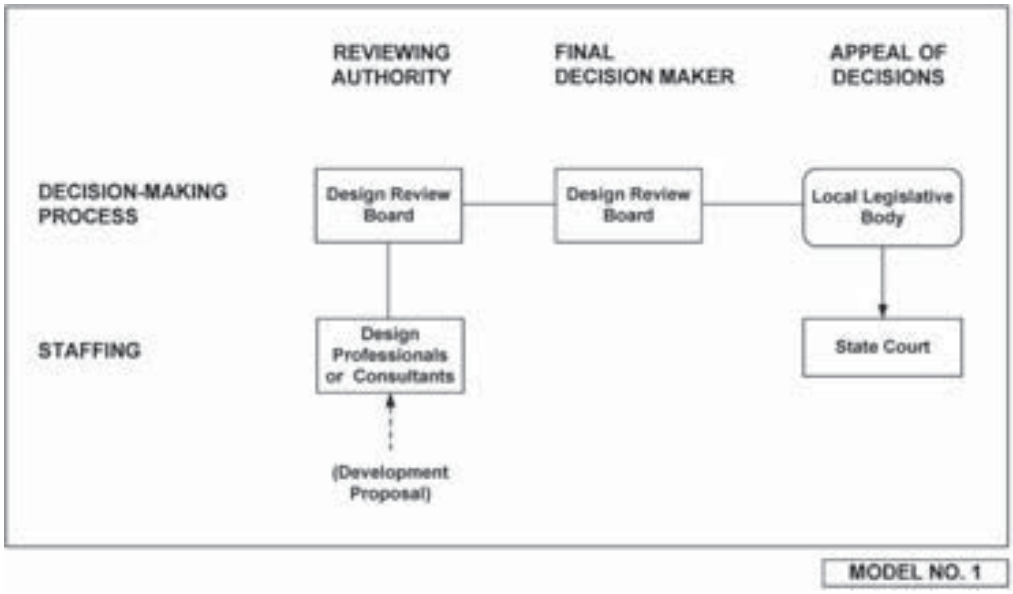
From the perspective of both the developer and the government, design review is best implemented through an ordinance after a thorough debate about the objectives and standards to be applied. A design manual alone, unaccompanied by an ordinance that establishes basic standards, can become an open invitation for the abuse of discretion by staff or a design commission. To select graphics and photos for the manual, planners should consult with design professionals who are commonly retained by landowners and developers. Such design professionals have practical experience with which standards or guidelines can be depicted effectively through graphics.

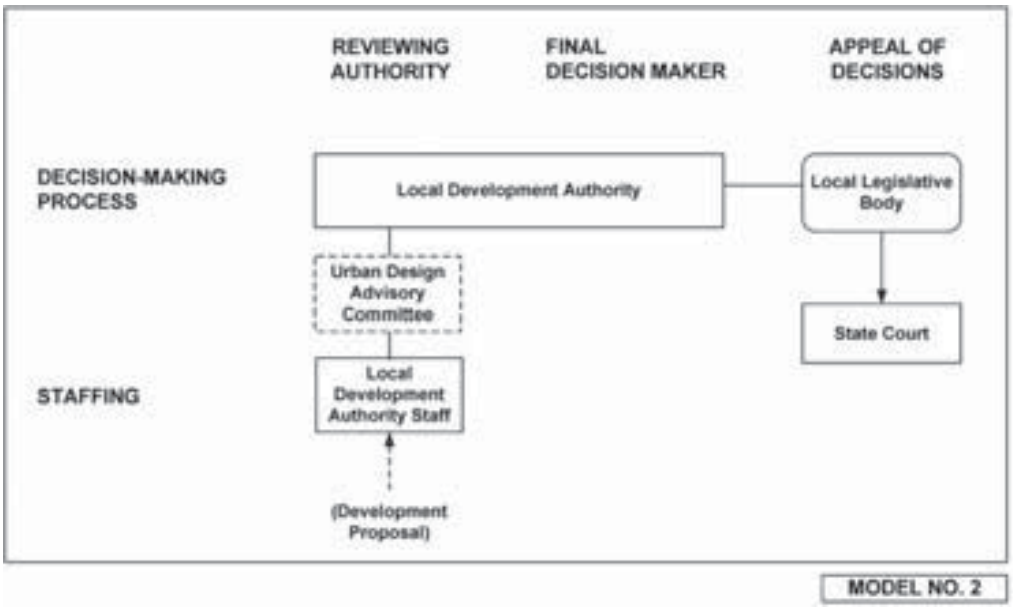
Select the type of review process

There are five basic ways to structure the design review processes; which model is appropriate will depend on the constraints and opportunities within a particular jurisdiction.

From the perspective of the developer and the local government, the first model represents an ideal design review process. Why? Because the structure is based on state legislation that authorizes the establishment of a separate design review board to implement design review policies. The state legislation should also require that the local government take certain steps, including a careful planning study that identifies the critical design elements of a geographic area, followed by the adoption of clear standards and procedures to implement the plan.

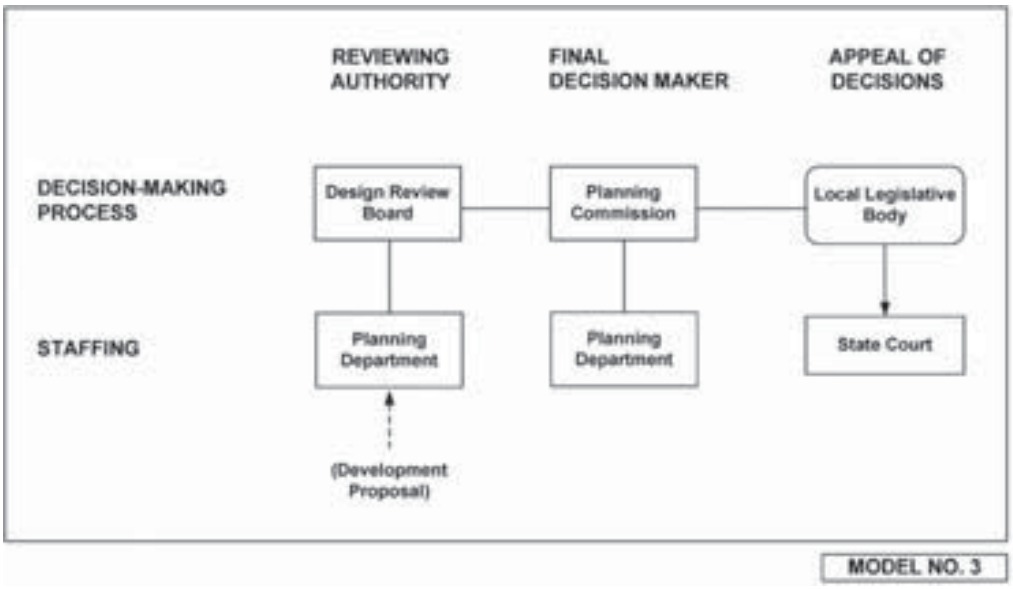
The second model ties the objectives of design review to economic development by empowering a local development author-

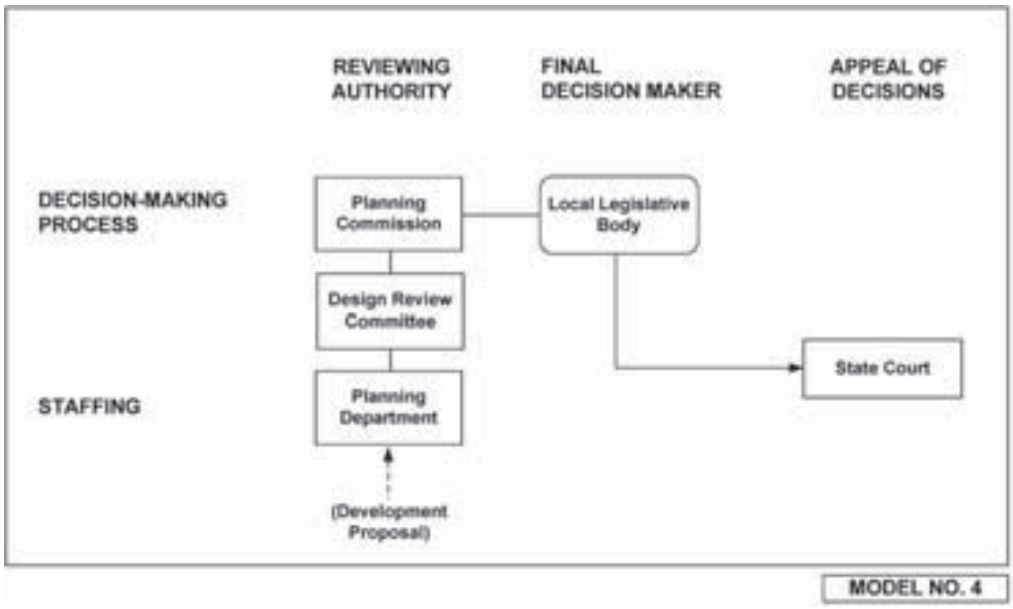




ity, enabled under state legislation, to carry out both economic development and design review. This model can be found, for example, in Kentucky's state legislation, which authorizes the establishment of overlay districts that provide additional regulations for design standards and development in areas that have historical, architectural, natural, or cultural significance and are suitable for preservation or conservation.[11]

The third model reflects the typically constrained situations of jurisdictions that want to implement design review processes. Provided that state legislation recognizes urban design as a legitimate object of the police power, it is usually possible to establish a design review board to advise the planning commission—the body that, in most jurisdictions, is authorized by statute to make certain discretionary decisions. This structure has the advantage of limiting the design review board to an advisory role—and, provided that there are adequate standards, allows the planning commission to take account of the design review board's recommendations in conditional use decisions, rezonings, or other actions. In addition, the appeal to the local legislative body is often desirable in this instance because, as in Model No. 2, it provides a safety valve through which disputes can be resolved administratively.





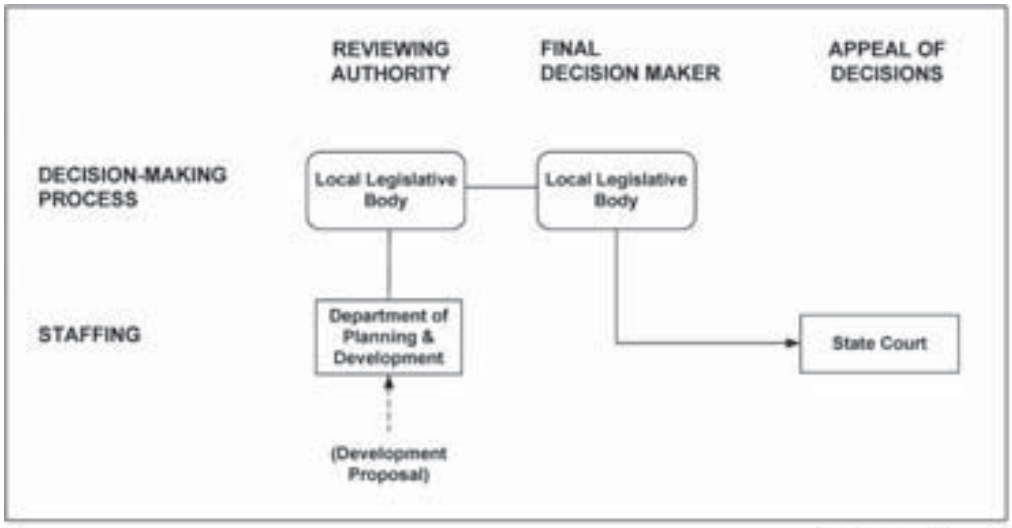
MODEL NO. 4

The fourth model reflects the reality in many villages and small cities—namely, that the planning commission does not have the authority to make final decisions on matters involving aesthetic considerations or even to grant conditional uses. Under such an arrangement, the local legislative body acts as the final decision maker on most land use approvals.

In the fifth model, the local legislative body is the final decision maker on development projects. This model has potential application in those circumstances, usually a downtown, in which a city has retained control of certain parcels of land through urban renewal or other means. Usually, downtown projects that are subject to design review involve significant sites or large structures that can substantially benefit or impair the downtown, and the local legislative body wants to be involved from the beginning. This model allows for that involvement, but its success depends on the effectiveness of staff in presenting to local legislators the issues that emerge from the design review.

Conclusion

Whether driven by the desire to implement smart growth or new urbanist principles, urban design has become a centerpiece of current planning and regulatory initiatives around the country. Urban design, with its



MODEL NO. 5

focus on spatial relationships of buildings, streets, and public spaces that make up the urban fabric, can make communities function better physically and make urban life more enjoyable. Design review, if properly structured and based on meaningful standards and guidelines, can be an effective means for communities to produce design outcomes that achieve a balance between planning objectives and market constraints.

Notes

1 Survey by Brenda Case Lightner, cited in Brenda Case Scheer and Wolfgang F. E. Preiser, "Introduction," in *Design Review: Challenging Urban Aesthetic Control* (New York: Chapman and Hall, 1994), 2.
2 Richard Tseng-yu Lai, *Law in Urban Design and Planning* (New York: Van Nostrand Reinhold, 1988), 1.
3 The term *design review,* as used here, means "urban design review." The legal principles and some of the implementation concepts in this brief are adapted from Brian W. Blaesser, *Discretionary Land Use Controls: Avoiding Invitations to Abuse of Discretion* (Eagan, Minn.: Thomson-West, 2007).
4 Dillon's Rule is named after Judge John F. Dillon, a nineteenth-century authority on municipal law.
5 *Anderson v. City of Issaquah,* 851 P.2d 744 (Div. 1 1993), citing City of Issaquah Municipal Code (IMC) 16.16.060 (D) (1)–(6).
6 Ibid., 16.16.060 (B) (1)–(3).
7 James L. Bross, "Taking Design Review beyond the Beauty Part," *Environmental Law* 9 (1979): 211, 226–227, quoting John W. Wade, *Architecture, Problems, and Purposes* (New York: John Wiley, 1977): "[T]eachers of architecture 'respond to the "Gestalt," the perceived totality of the project being presented.... [T]here is considerable flexibility in the weighting of critical values applied. . . .'"
8 *Diller and Fisher Company, Inc. v. Architectural Review Board,* 587 A.2d 674, 678 (N.J. 1990).
9 *Hankins v. Rockleigh,* 150 A.2d 63 (N.J. 1959).
10 Duany Plater-Zyberk & Co., *The Lexicon of the New Urbanism* (Version 3.2: 2002), A5; for more on the new urbanism, see the Web site for the Congress of the New Urbanism at cnu.org/.
11 1990 Kentucky Acts, chap. 479, §§ 2 and 3.

FOCUS ON

Eminent domain

Dwight H. Merriam

Eminent domain is the power of federal, state, or local government to appropriate private property for public use.[1] It connotes coercion because it is often the last resort when a voluntary purchase at a reasonable price cannot be negotiated.

The power to condemn private property for public use has been inherent in English law since the feudal era, when the crown granted rights to the use of land but continued to exercise eminent domain over it. It was not until the Magna Carta, in 1215, that compensation was required before property could be taken.[2]

Given the fundamental nature of eminent domain, the U.S. Constitution does not so much authorize the power as limit its use. The Fifth Amendment provides that private property cannot be taken "for public use, without just compensation." This clause was intended to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[3]

Impacts of the *Kelo* case

The takings clause of the Fifth Amendment, which was extended to the actions of state and local government by the application of the due process clause,[4] requires that private property may be taken only for a public use and that just compensation must be paid.[5] The interpretation of those two terms—*public use* and *just compensation*—has spawned much litigation, including the provocative split decision of the U.S. Supreme Court in *Kelo v. New London*—which, in 2005, upheld the right of the city of New London, Connecticut, to take private properties for private economic redevelopment.[6]

The definition of *public use* was central to the *Kelo* case. Even though a private developer would ultimately receive the property, the Court carefully weighed other factors in the case, including the following:

- The city imposed restrictions on the future use of the property to ensure that it remained a public use.
- The city was committed to a carefully thought-out plan that was in the public interest.
- The benefit to the private developer was incidental to the public benefit.

Had one or more of these three factors leaned in the other direction, New London might have lost. In structuring redevelopment plans that involve the use of eminent domain, it is essential for planners to apply the requirements outlined in *Kelo*.

For eminent domain to be permitted, many state laws require a finding that the property, or the area surrounding it, is blighted.[7]