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
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).
10 Duany Plater-Zyberk & Co., The Lexicon of the New Urbanism (Version 3.2: 2002), AS; for more on the new urbanism, see the Web site for the Congress of the New Urbanism at cnu.org/.

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. 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

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Elimination of blight is a public purpose, and thus the resulting redevelopment is a public use. Planners have the skills to help decision makers determine whether a property or an area is blighted.

The *Kelo* ruling reiterated what the Court had held in *Hawaii Housing Authority v. Midkiff* two decades before: that the probability of success in the redevelopment is not required. It is enough that the government could rationally believe that the taking would benefit the public, even if the results ultimately contradict that belief. Finally, the *Kelo* decision stressed the need for legislative decision making. Allowing an administrative official to make the final decision about the use of eminent domain is less defensible, especially at the local level, than assigning the decision to the legislative body.

Most knowledgeable commentators—conservative and liberal—agree that the *Kelo* decision merely restated existing law dating back half a century and did not create any new precedent. However, the decision did galvanize public interest in a number of issues: the tremendous power inherent in eminent domain, its effectiveness in revitalizing dying communities, the potential for egregious misuse by power brokers, and the risk of running roughshod over disenfranchised owners and tenants (see sidebar). *Kelo* sparked efforts at the federal, state, and local levels to change the law. The Court invited this reaction: “We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the police power.”

*Kelo* addressed only the U.S. Constitution, but there are fifty state constitutions, and

**Equity and just compensation**

Just compensation is usually defined as fair-market value: what a willing buyer would pay a willing seller when neither is under compulsion to buy or sell. Fair-market value does not reflect the tendency of people to overvalue their property, fails to take into account subjective and sentimental value (“This was the house my grandfather built with his own hands”), and ignores the emotional toll of moving to a new neighborhood and forging new connections and relationships. Tenants in rundown buildings—the kinds of properties that the government takes first when it implements renewal plans—have the fewest resources and almost always get short shrift under current laws. Equity and just compensation are controversial issues that have yet to be fully resolved at any level of government. Planners may well find themselves serving as advocates for households whose properties are the object of eminent domain proceedings.
what is legal under the federal constitution may be illegal under a state constitution, and vice versa. After Kelo, courts in Oklahoma and Ohio interpreted their state constitutions to have greater limitations than the federal constitution, as had four other state courts beforehand.

Statutes and executive orders can also change the law. Aligning himself with property-rights advocates, President George W. Bush issued an administrative regulation on June 23, 2006, that ostensibly limited the federal government’s power of eminent domain. Thirty states have enacted constitutional amendments or statutory changes limiting the reach of the Kelo decision.10 Some states, such as Arizona, have swung far to the right, adding new limitations on regulatory takings as well. Numerous local governments have also limited the use of eminent domain by legislative enactment and administrative rule. Many of these changes have mimicked others, and many terms have been left to inevitable litigation. Ultimately, a number of these laws will prove difficult to implement and will have to be amended. Planners can help guide this second round of legislation to a middle ground.11

**Land readjustment**

The focus of the eminent domain debate in coming years will likely be on three areas: constitutional amendments, legislation, and regulation. Planners have much to offer in each area, but need to be wary: in words that are often attributed to Mark Twain but that are probably from an 1866 decision by Judge Gideon J. Tucker, “No man’s life, liberty, or property is safe while the legislature is in session.”12

Voluntary exchange and eminent domain—the two means currently employed to assemble parcels for redevelopment—have not proved optimal in terms of either efficiency or equity. And in some instances, neither has furthered economic development. The redevelopment area in Kelo, for example, remains undeveloped eight years after the taking and three years after the U.S. Supreme Court’s decision upholding the taking, arguably because of the lack of any shared vision or consensus on the plan and its implementation. Nowhere did the process of assembling the land result in a meeting of the minds.

Land readjustment, in which landowners participate in a redevelopment rather than simply having their property taken, offers hope of cutting the Gordian knot created by the public’s reaction to Kelo.13 In this approach, many parcels are replatted or assembled into a unified parcel, of which the owners continue to own fractional shares; alternatively, the owners may be compensated for the value of the assembled properties. In some countries, the local government covers the cost of new infrastructure for development by selling portions of the land before returning the balance, or shares, to the original landowners. Parcel-by-parcel voluntary purchases and acquisition by eminent domain cannot offer the increment of assemblage value in most cases because the highest and best use valuation of each parcel does not reflect the value of the total assemblage. Land assembly can capture that, however, and distribute that increment of additional value on a pro rata basis to the individual parcel owners.
Putting Plans to Work

Figure 6-17  In Bangkok, land readjustment—in which an agreement is negotiated to divide the land into two parts, one for the landowner and one for the occupants—is used as an alternative to eviction.


L’Enfant’s plan. Under the agreement, Washington had the authority to set aside for the government, without cost, certain land that would be used for roads, places of public assembly, and other public purposes, and to purchase additional land at $57 an acre for government buildings. The balance of the land was platted as building lots, and then allocated to the federal government and the original owners in pro rata shares.

Washington was able to assemble seventeen large farms and two small hamlets to create the District of Columbia. No money had to be advanced, and the federal government’s total outlay was $35,000 to acquire a tract of 600 acres in the center of the city and to pay for surveys of 10,136 building lots for later use or sale. Planners today marvel at the implementation of the L’Enfant plan without realizing that it was accomplished through land readjustment.

In several other instances, land readjustment has solved critical problems. A premature subdivision, laid out long before there was any real market for the lots, was replatted at Ormond Beach in Oxnard, California, from the original plat of 1906.14 Underused land in the Canal Square area of Schenectady, New York, was assembled by merchants, who joined together in 1973 to redevelop the area. Obsolete land uses have also been redeveloped effectively through land readjustment. At the Farmer’s Market district in downtown Dallas, for example, thirty separate parcels were assembled through a master development agreement. The result was 10 million square feet of office space, 1,500 hotel rooms, 400,000 square feet of retail uses, and 1,500 residential units—all without going to the U.S. Supreme Court.

Neighborhood pooling or neighborhood buyout—a form of land readjustment but without downstream rights—has been used as a land assembly tool in Atlanta, Dallas, Houston, Phoenix, and metropolitan Washington, D.C., as well as in Jacksonville, Palm Beach, Panama City, and Pompano Beach, Florida. Under this arrangement, groups of property owners form associations to sell their land, at considerable profit, for redevelopment.

Land readjustment is a concept whose time has come. There is much to be learned from how it has been practiced in the past, and planners can assist state legislatures in creating enabling legislation to allow it to be used more extensively.15 Although California, Florida, and Hawaii have considered proposals for enabling legislation, no local governments appear to have established formal programs. Nonetheless, redevelopment agencies have applied similar approaches to redevelopment projects.

Notes
2. Magna Carta (1297), “No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law,” 28 Edw. 3, c. 3.
A finding of blight was not required for the taking in *Kelo* and was not an issue before the Court.8


*Kelo* v. City of New London, at 19 of the slip opinion.10


1 Tucker 248 (N. Y. Surr. 1866).


FOCUS ON

The aftermath of Oregon’s Measure 37

Robert Stacey

The libertarian campaign to limit governmental regulation of land use reached its national zenith in the 1990s. In cases brought to the Supreme Court and in bills brought to Congress, a coalition ranging from the National Association of Homebuilders to the Club for Growth demanded compensation for property owners who experience a reduction in the market value of their holdings as the result of a governmental regulation.

Their efforts failed. The Rehnquist Court did not rewrite the Constitution, and Congress declined to strip state and local governments of their fundamental powers to balance competing interests in the use of land and to shield the public from the overzealous pursuit of personal gain. However, a number of states did enact limitations on local governments’ regulatory power; in 2000, they were joined by Oregon, whose voters approved Ballot Measure 7, a “pay for lost value” amendment to the state’s constitution.

According to a 1922 ruling by the U.S. Supreme Court, government regulation effects a taking—and requires compensation—when it “goes too far,” eliminating all reasonable economic use of private property.

The Oregon Supreme Court tossed out Measure 7 on procedural grounds in 2002. But the unusual coalition of aggrieved rural landowners and well-heeled ideologues that had campaigned for Measure 7 came roaring back in 2004, with a “pay or waive regulations” version, Ballot Measure 37, which passed with surprisingly strong support in a state known for comprehensive land use planning. In the fall of 2006, voters in four Western states considered similar measures, all but one of which failed. Nevertheless, the idea of limiting “regulatory takings” clearly continues to exert appeal. According to a 1922 ruling by the U.S. Supreme Court (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393), government regulation effects a taking—and requires compensation—when it “goes too far,” eliminating all reasonable economic use of private property. In Measure 37 and its progeny, however, that constitutional standard is abandoned, and any reduction in value becomes cause for compensation or waiver.

The fifteen-word caption that appeared on the ballot captured the visceral appeal of Measure 37’s “pay or waive” concept: “GOVERNMENT MUST PAY OWNERS, OR FORGO ENFORCEMENT, WHEN CERTAIN LAND USE RESTRICTIONS REDUCE PROPERTY VALUE.” Polling at the outset of the campaign showed that 59 percent of voters supported the idea; eight months later, the