

**Testimony of John D. Echeverria  
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**Before the Committee on the Judiciary  
Subcommittee on the Constitution and Civil Justice  
United States House of Representatives**

**Hearing on “The State of Property Rights in America Ten Years After  
Kelo v. City of New London”**

**July 9, 2015**

Mr. Chairman, Ranking Member Cohen, and Members of the Subcommittee, thank you for the opportunity to testify today. I am honored by the invitation.

### Introduction

The subject of this hearing is plainly very broad and I could address a variety of topics in the time allotted to me. I believe I can probably be most useful to the Subcommittee by commenting on pending and potential takings-related legislation in this Congress.

By way of background, I am a Professor at Vermont Law School, where I teach property law, including the law of takings, and frequently write on the topic of takings and property rights. I have had the privilege to represent parties as well as *amici curiae* in many of the modern takings cases before the U.S. Supreme Court. In *Kelo*, I (along with Professor Thomas Merrill) represented the American Planning Association and the Congress for Community Economic Development as *amici curiae*. In 2007, based largely on my takings work, I received the Jefferson Fordham Advocacy Award from the ABA Section on State and Local Government to recognize outstanding excellence within the area of state and local government law over a lifetime of achievement.

### *Kelo* and Eminent Domain

In the decade since the *Kelo* case was decided, the House of Representatives has several times debated and passed bills to impose severe restrictions on the use of eminent domain for economic development. Each time the House has passed this legislation, the Senate has declined to move forward with it. One question implicitly raised by the convening of this hearing is whether the House should once again invest valuable time and effort on a similar legislative effort. In my view, the case for congressional intervention in the *Kelo* was weak to begin with. With the passage of time, the argument for Congress *not* to inject itself into this issue has only become stronger.

Eminent domain is obviously an important governmental power the exercise of which (even when accompanied by “just compensation,” as mandated by the Constitution) can severely intrude on the personal lives of citizens and the operations of private businesses. Yet the eminent domain power is as old as the Republic and is essential to achieve many important public objectives. While virtually everyone would prefer that the government not take private property (just like everyone would prefer not to have to pay taxes to the government) the judicious use of eminent domain is a useful, indeed essential, tool for promoting the nation’s long term economic health and vitality.

It has long been recognized that the use of the eminent domain power to seize private property is both lawful and appropriate to advance the nation’s war efforts and address other national emergencies. Thus, the U.S. Supreme Court upheld government seizure of a private coal mine in order to keep the mine operating at the height of World War II. See *United States v.*

*Pewee Coal Co.*, 341 U.S. 114 (1951). See also *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (applying the eminent domain provisions of the Second War Powers Act of March 27, 1942). In addition, in an example that is somewhat analogous to the kind of government-compelled private-to-private transfers at issue in *Kelo*, the Supreme Court upheld a government order during World War I requiring a private firm holding water rights used to generate electricity to transfer the water rights to a second private firm. See *International Paper Co. v. United States*, 282 U.S. 399 (1931). The Court upheld this compelled transfer as a legitimate taking for “public use” because the second firm could make better use of the electricity produced by the water to help mobilize the nation for war.

Second, the use of eminent domain has long been understood as essential to address the so-called holdout problem. The holdout problem is perhaps most obvious in the context of major infrastructure projects, such as interstate natural gas pipelines, electric transmission lines, or interstate highways. A long linear project of this type, whether owned and operated by the government or by a private firm, cannot succeed if the project developer has to obtain the voluntary agreement of each and every property owner to sell or grant a right-of-way across the portions of their lands affected by the project. In the absence of the eminent domain power, individual property owners would frequently if not inevitably derail such projects because one or a few owners would prefer not to sell (at any price) or because they would demand too much in the hope of obtaining a financial windfall. Thus, the federal Natural Gas Act has long granted operators of interstate gas pipelines the authority to exercise eminent domain in order to secure rights of ways across private property for their pipelines. State laws grant broad authority for the assembly of corridors for the construction of electric transmission lines. Finally, the eminent domain power was obviously used very extensively to construct the nation’s interstate highway system.

There is no gainsaying the fact that many thousands of families, farmers and businesses have been involuntarily displaced from their properties in order to construct these types of facilities, particularly interstate highways. In some instances, the use of the eminent domain power and the other effects of highway construction generated so much public opposition that certain limited segments of the interstate system were never completed. But the United States still succeeded in creating a modern highway system and many, probably the overwhelming majority of U.S. citizens are proud of the fact that the U.S., like every other economically advanced country in the world, has a modern, efficient highway transportation system. One cannot embrace or even accept the benefits of our modern highway system, which many of us use on daily basis, without acknowledging the essential role the eminent domain power played in bringing that system into existence.

The same holdout problem that afflicts infrastructure projects also commonly afflicts redevelopment projects of the kind at issue in the *Kelo* case. A major, often insuperable obstacle to revitalization of American cities and its older suburbs is the severe fractionation of land ownership among many different owners. In many urbanized communities, old land use

practices have left multiple small, sometimes irregularly shaped, lots that free market forces cannot reassemble into larger property holdings suitable for modern development projects. A private entrepreneur can seek to redevelop deteriorated neighborhoods, but her efforts will often be thwarted by individual landowners who do not wish to sell or who hold out for a windfall profit. As a practical matter, just as the use of eminent domain has proven necessary to facilitate modern infrastructure development, it is also necessary to facilitate urban revitalization.

One response by private property rights advocates to the holdout problem is to contend that developers can and should proceed to assemble disparate properties under a shroud of secrecy. According to this theory, if a developer could succeed in negotiating purchases without alerting owners in the community to his land assembly plan, individual owners would not be able to hold out in the hope of receiving windfall gains, and land could successfully be assembled at reasonable cost. In my view, this response to the holdout problem fails miserably. First, while there are examples where developers (particularly in rural areas) have managed to assemble relatively large parcels in secret, there is a serious risk that a secret land assembly plan will be detected, meaning that significant time and effort invested in assembling land could be wasted if prospective sellers become aware of project before the land assembly has been completed. Second, and more importantly, the idea that developers should proceed with major steps toward development while keeping the landowners and the surrounding community completely in the dark is fundamentally inconsistent with democratic government. People can and do disagree on the proper balance between private property rights and the rights of citizens to comment on and control development affecting their community. But most people recognize that the public should have *some* opportunity to comment on proposed developments in their neighborhoods. The secrecy tactic would severely undermine public input on important development projects. By contrast, a public eminent domain proceeding is a relatively open and transparent process.

Examples of the use of eminent domain to overcome property fractionation and promote valuable downtown development abound. Attached to my testimony are copies of several pages from a 2006 report I coauthored titled "*Kelo's Unanswered Questions*," which graphically illustrate how divided property ownership can be an obstacle to valuable development. A few examples of highly successful development projects in the United States made possible by the use of eminent domain include Lincoln Center and the recently refurbished 42nd Street district in New York City, Baltimore's inner harbor area, and the National's baseball stadium a few blocks down the hill from the U.S. Capitol. Another pending project which depends on the use of eminent domain is the planned Skyland Mall in the Anacostia neighborhood of this city; there is enthusiastic community support for this project, which will bring valuable new shopping opportunities to a community that is currently badly underserved with commercial development.

Congress should not intervene in the *Kelo* issue by attempting to impose national, one-size-fits-all constraints on the use of eminent domain for economic development. The Supreme Court in *Kelo*, it bears emphasis, upheld the constitutionality of the use of eminent domain for economic development. While different observers obviously can and do take different positions

on the question, I believe *Kelo* was correctly decided based on the language of the Takings Clause and the limited historical evidence we have about the original purpose of this provision of the Bill of Rights. In addition, the decision was consistent with over a hundred years of Supreme Court precedent defining a taking of private property for “public use.” Importantly, the Supreme Court in *Kelo* did not suggest that use of the eminent domain is beyond all judicial control in egregious circumstances, in particular when the asserted public purpose of a taking is a mere “pretext” to benefit some private individual or firm. But, in the main, the Court reaffirmed its traditional deferential stance, recognizing that the determination of whether a proposed taking serves a public use should largely be left to our elected representatives and their appointees, subject of course to the constitutional requirement to pay just compensation to the owner of the property subject to the taking. Significantly, the Takings Clause is one of the very few money-mandating provisions of the Constitution, meaning that the government can only take private property for a public use if it is able and willing to pay for it; this important requirement imposes a self-enforcing limitation on the extent to which the government can exercise the eminent domain power. Consistent with our system of federalism, the U.S. Supreme Court wisely left to our state and local governments a broad discretion to decide whether and how to use the eminent domain power for economic development. After *Kelo* was decided, there was no good reason for Congress to pass legislation superseding the *Kelo* standards for the use of the eminent domain power and thankfully Congress did not do so.

It is important to emphasize that while private property rights advocates pressed Congress to act immediately after the *Kelo* decision, there was also broad opposition to the proposed legislation. The mayors of many major cities, including the mayor of Washington, D.C. and New York City, made public statements insisting that large-scale redevelopment would be impossible in their communities without eminent domain. *Kelo’s Unanswered Questions*, at 18. The mayors of nineteen U.S. cities, ranging from Miami to San Francisco, signed a resolution making the observation that the problem of land assembly is “one of the biggest obstacles to the revitalization of our metropolitan areas,” and affirming that “eminent domain is . . . critically important for municipalities to promote sensible land use, revitalize distressed communities . . . and alleviate the problem of unemployment and economic distress by fostering economic development.” Michael R. Bloomberg et al. Resolution on Eminent Domain (December 22, 2005) (signed by the Mayors of New York City, San Francisco, Sacramento, Boston, Denver, San Jose, Salt Lake City, Carmel, San Leandro, Chicago, Dearborn, Philadelphia, Miami, Oklahoma City, Kansas City, Baltimore, Charleston, Providence and Bridgeport). The National Conference of Black Mayors declared that “eminent domain is often a municipality’s only recourse when faced with reclaiming forgotten communities in the face of uncooperative absentee landowners and vice establishments.” National Conference of Black Mayors, Resolution Supporting Neighborhood Renewal (April 28, 2006).

If national eminent domain legislation was a bad idea immediately after the *Kelo* decision, it would be an even worse idea today. The reason is that the States, including not only

the legislatures but the state courts, have listened to and carefully weighed public concerns about the use of eminent domain for economic development and have adopted a wide variety of reforms in response. This wave of reform activity was hardly accidental; it was a direct response to an explicit invitation made by the Supreme Court itself in the *Kelo* decision. After affirming that the Takings Clause, properly interpreted, gives states and local government's considerable discretion in exercising the eminent domain power for economic development, the Court stated:

'We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.'

*Kelo*, 545 U.S. at 489.

The states responded to this invitation from the U.S. Supreme Court with enormous energy; according to scholar Ilya Somin, more state legislation has been adopted in response to the *Kelo* decision than in response to any other Supreme Court decision in history. I suspect that, by now, the appropriate use of eminent domain to advance economic development has been debated in every statehouse in the nation. Over 40 states have adopted some kind of post-*Kelo* reform legislation. Also, several state supreme courts have adopted new interpretations of their state Takings Clauses restricting the use of eminent domain for economic development.

The most important feature of the post-*Kelo* activity at the state level for present purposes is the *very wide diversity* of responses by the different states. Some states, such as Florida and New Mexico, have essentially abolished the use of eminent domain to promote private economic development activity. Other states, such as Maryland and New York, have largely or completely retained their pre-*Kelo* eminent domain authority. And, in between these two positions, many other states have adopted a variety of reforms, including laws that distinguish between so-called "blight" takings and pure economic development takings, laws that provide for payment of above fair-market-value compensation in certain cases, laws that impose new procedural constraints on the use of eminent domain, and so on and on.<sup>1</sup> The bottom line is that different states have adopted different positions that reflect the values and preferences of their citizens and the relative need for eminent domain as a tool for urban revitalization in each state. As the founding fathers

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<sup>1</sup> The wide variety of post-*Kelo* reform measures adopted by different states are described in detail on the website of the National Conference of State Legislatures, see <http://www.ncsl.org/research/environment-and-natural-resources/eminent-domain-legislation-and-ballot-measures.aspx>

intended, the states are not only charting their own paths but they are serving as the laboratories of democracy, testing different approaches to the use (and non-use) of eminent domain.

Congress should not step in now and in effect squelch all of this state reform activity by imposing a one-size-fits-all national policy on the use of eminent domain for economic development. National legislation would preempt and largely make a waste of all this recent state law-making activity. National legislation would also trump the considered judgments of elected state officials about what uses of eminent domain are appropriate to address the local redevelopment needs of each state. National legislation would also prevent us from learning the different costs and benefits of different approaches to the use of the eminent domain. For all these reasons, Congress should continue to stay its hand on the eminent domain issue.

### Regulatory Takings Issue

The topic of regulatory takings presents very different questions from those presented by the topic of eminent domain. In an eminent domain case, there is typically no debate about whether a taking has occurred, and the government is generally able and willing to pay “just compensation,” but the question is whether or not the taking serves a “public use.” If the taking is not for a public use, it cannot go forward under the Takings Clause, regardless of whether the government is willing to pay just compensation. By contrast, a regulatory taking claim proceeds on the premise that the government regulation serves a “public use,” for example by protecting the neighborhood or preserving important resources, and the issue is whether or not a “taking” has occurred; if so the government can continue to enforce the regulation only if it is able and willing to pay compensation.

While there are continuing debates about the scope of the regulatory takings doctrine, most regulatory restrictions on the use of property do not amount to takings. When the Supreme Court first embraced the concept of regulatory takings less than a hundred years ago in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), the Court emphasized that a regulation will turn into a taking only when the regulation has gone “too far.” Subsequently, the Court emphasized that the regulatory takings doctrine is reserved for “extreme circumstances.” *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121, 126 (1985). In *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994), Chief William Rehnquist made clear that the regulatory takings doctrine was not intended to interfere with what he called “the commendable task of land use planning.”

The Supreme Court has adopted some reasonably straightforward rules to evaluate whether a regulation rises to the level of taking. In all events, the Court has emphasized, its regulatory takings jurisprudence is governed by the understanding that the purpose of the Takings Clause is 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.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). A paradigmatic taking occurs when the government directly

appropriates or physically invades private property, a rule the Court has recently affirmed applies equally to real property as well as personal property. *See Horne v. Department of Agriculture*, 2015 WL 2473384 (U.S. June 22, 2015). In addition, the Court has said that regulatory restrictions can also be takings when, by virtue of the “severity of the burden” they impose, they are “functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.” *Lingle v. Chevron USA*, 544 U.S. 528, 539 (2005).

The Court’s precedents identify two categories of regulatory action that should be regarded as *per se* takings under the Takings Clause: first, when the government requires an owner to suffer a “permanent physical invasion of her property,” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); and second, when a regulation deprives an owner of “all economically beneficial us[e]” of her land. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1019. Outside of these two relatively narrow categories, the Supreme Court has said that regulatory takings claims are governed by the multi-factor *Penn Central* analysis, which focuses on the economic impact of the regulation, the extent to which the regulation has interfered with “distinct investment-backed expectations,” and the “character” of the regulation. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

Lastly, the Court has developed a special set of rules to govern so-called development “exactions.” *See Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Each of these cases involved a government requirement that a property owner dedicate an easement for use by the public as a condition of obtaining a development permit. The Court analyzed each case based on the premise that, if the government had simply appropriated the easement, there would have been a *per se* physical taking. At the same time, the Court assumed that the government could have denied the development applications in each case without giving rise to takings liability. In these special circumstance, the Court concluded, the government could impose an exaction as a condition of granting a permit only if there was an “essential nexus” between the condition and the purpose that would have been served by a permit denial, *see Nollan*, 483 U.S. at 837, and if the burden imposed by the condition was “roughly proportional” to the impact of the proposed development. *Dolan*, 512 U.S. at 391. *See also Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013) (extending *Nollan/Dolan* to monetary exactions).

Three major considerations support the Court’s understanding that the regulatory takings doctrine is necessarily confined to extreme circumstances. First, the historical record makes quite clear that the drafters of the Bill of Right did not contemplate that the Takings Clause would apply to mere regulatory restrictions on the use of the property. As Justice Antonin Scalia has explained, “early constitutional theorists did not believe the Takings Clause embraced regulations of property at all.” *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1028 n. 15; *see also id.* at 1014 (“it was generally thought that the Takings Clause reached *only* a ‘direct appropriation’ of property, or the functional equivalent of a ‘practical ouster of [the owner’s]”

possession”). The leading scholarly investigations of the history of the Takings Clause have confirmed Justice Scalia’s conclusions. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Columbia Law Review 782, 783 (1995) (“While the evidence of original intent is limited, it clearly indicates that the Takings Clause was intended to apply only to physical takings.”); John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 Harv.L.Rev.1252, 1253 (1996). While it is almost certainly too late in the day for the Supreme Court to restore the original meaning of the Takings Clause, the historical record certainly supports a restrained reading of this provision in the regulatory context.

Second, unless the Takings Clause is confined to “extreme circumstances,” modern government simply could not operate. It is important to recall that as prominent a place as property has in our Constitution, the opening words of the Constitution are: “We the people of the United States, In Order to Form a more perfect Union . . .” In other words, the Constitution contemplates the establishment of a Republican form of government in which elected representatives can adopt laws, including laws controlling the exercise of private property interests, to advance the public welfare. However, as Justice Oliver Wendell Holmes warned in *Mahon*, “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” *Mahon*, at 413. According to some critics, the modern property rights movement arose specifically for the purpose of impeding the operation of government. As famously recounted by a former Solicitor General of the United States, early property rights advocates “had a specific, aggressive, and it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe break upon federal and state regulation of business and property.” Charles Fried, *Order and Law: Arguing the Reagan Revolution – A Firsthand Account* (1991). In sum, if government is to continue to function, especially at the state and local level, the regulatory takings doctrine needs to be kept within reasonable, predictable bounds.

A third important consideration relates to the fairness of regulatory restrictions. Accurate appraisal of the fairness of regulatory burdens must consider the fact that most regulations serve to protect property and the general community and thereby tend to stabilize and increase property values. A typical zoning ordinance restricts what a property owner can do with her property, limits the profits she can make from developing the property, and thereby tends to depress the value of the property. But the very same regulation, applied to others in the community, also tends to enhance the first owner’s property values, both by protecting the community as whole and making the community a more attractive place to live, and by restricting the number of development opportunities available in the community. In order to accurately assess the impact of regulations on property values, one needs to take into account both the negative and the positive effects of regulation. In some cases, property owners complain about how regulations have reduced the value of their property, basing the claim of lost value on the difference between

the price their property would fetch if it were not subject to the regulation at issue with the market value of the property subject to the regulation. But this kind of calculation, although easy for appraisers to perform, is inherently misleading because it ignores how the neighbors' compliance with the regulation inflates the apparent unregulated value of the claimant's property. The relevant economic question, which is hardly ever asked or answered, is not what a property would be worth if it was not regulated, but what a property would be worth if no regulation applied to anyone.

I am unaware whether the Subcommittee intends to proceed to address the subject of legislation on regulatory takings issues. I know of one pending bill, H.R. 510, the Defense of Property Rights Act, which I gather has been referred to the Subcommittee. In my view this is a very radical bill that would dramatically change the law of takings to the detriment of the American people. While there is much to criticize in this bill, I will highlight just a few concerns.

- The bill is extraordinarily broad in scope. It would apply to an "agency," which is defined to include a "department, agency, independent agency or instrumentality" of either the United States or "an individual state." I take this to mean that the bill would apply to any governmental entity at the federal, state or local level. Thus, if Congress were to enact this bill, it would not only be imposing a new burden on the federal government but on every state and local government in the country.
- In many different ways the bill would expand the scope of government takings liability beyond that imposed by the Takings Clause as interpreted by the U.S. Supreme Court. Section 4(2) of the bill would define a taking as including not only a constitutionally-defined taking but also a government action "that unreasonably impedes the use of property or the exercise of property interests or significantly interferes with investment-backed expectations." This vague language would undoubtedly subject governments to a multitude of new lawsuits in which many, many thousands of hours of legal time would have to be expended figuring what the new test means. This section also would apply the same standard of liability to permanent and temporary restrictions, contradicting the Supreme Court's judgment that temporary restrictions raise lesser concerns under the Takings Clause than permanent restrictions. Section 5(a) would apply the new standard of liability by focusing only on "the part of the property" affected by the regulation, contradicting the Supreme Court's longstanding "parcel as a whole" rule. Finally, Section 5 would establish a low statutory threshold for takings liability that would generate routine findings of takings liability.
- Section 5(a) would create a claim for just compensation based on government action that "does not substantially advance the stated governmental interest to be achieved by the

legislation or regulation on which the action is based,” contradicting the Supreme Court’s unanimous repudiation of the so-called “substantially advance” takings test in 2005 in *Lingle v. Chevron USA*, 544 U.S. 528 (2005).

- Section 4(5) includes a laundry list of interests that the bill would define as “private property,” contradicting the established understanding, deeply rooted in our federalism, that property interests for takings purposes are generally defined by state law. As the Supreme Court has frequently affirmed, “[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).
- Finally, Section 6(c) of the bill would authorize the U.S. Court of Federal Claims to invalidate agency actions “that adversely affects private property rights in violation of the Fifth Amendment in the United States Constitution,” contradicting the longstanding understanding that the exclusive remedy for a taking for public use under the Takings Clause is a suit seeking just compensation, not invalidation of the government action, at least so long as the compensation remedy is actually available. *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127–28 (1985).

#### CONCLUSION

Thank you again for the opportunity to present this testimony. I would be delighted to respond to any questions that members of the Subcommittee may have.

## APPENDIX

Robert G. Dreher & John D. Echeverria,  
*Kelo's Unanswered Questions: The Policy Debate  
Over the Use of Eminent Domain for Economic Development,*  
pp. 28-31 (GELPI 2006)

(full text available at [http://www.gelpi.org/gelpi/current\\_research/  
documents/GELPIReport\\_Kelo.pdf](http://www.gelpi.org/gelpi/current_research/documents/GELPIReport_Kelo.pdf))

## THE HOLDOUT PROBLEM

"[E]minent domain applies where market exchange, if not impossible to achieve, is nevertheless subject to imperfections.... [C]onsider the most common situation in which we see the exercise of eminent domain: a public or private project requiring the assembly of numerous parcels of land.... Without an exercise of eminent domain, [the developer] must obtain [land] from each of hundreds of contiguous property owners. Each owner would have the power to hold out, should he choose to exercise it. If even a few owners held out, others might do the same. In this way, assembly of the needed parcels could become prohibitively expensive; in the end, the costs might well exceed the project's potential gains."

—Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 75 (1986).



The Cincinnati Enquirer/Glen Hartung

Houses of property owners who refused offers for voluntary sale on the site of the Rookwood Exchange Project, Norwood, Ohio.

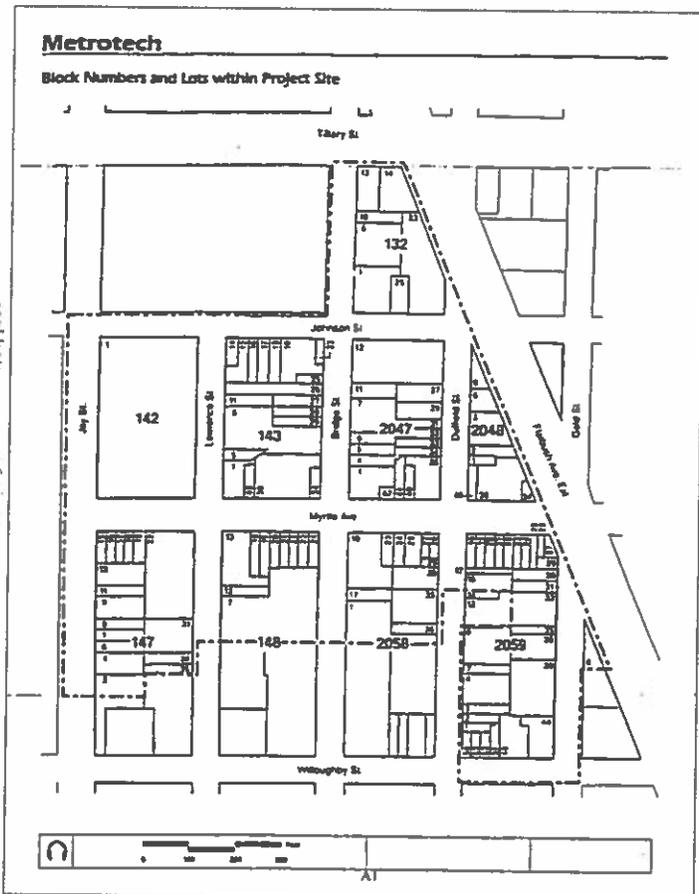


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Developers of a large office building in Washington, D.C. were forced to build around this townhouse/office when its owner demanded up to 75 times its assessed value.

# THE HOLDOUT PROBLEM

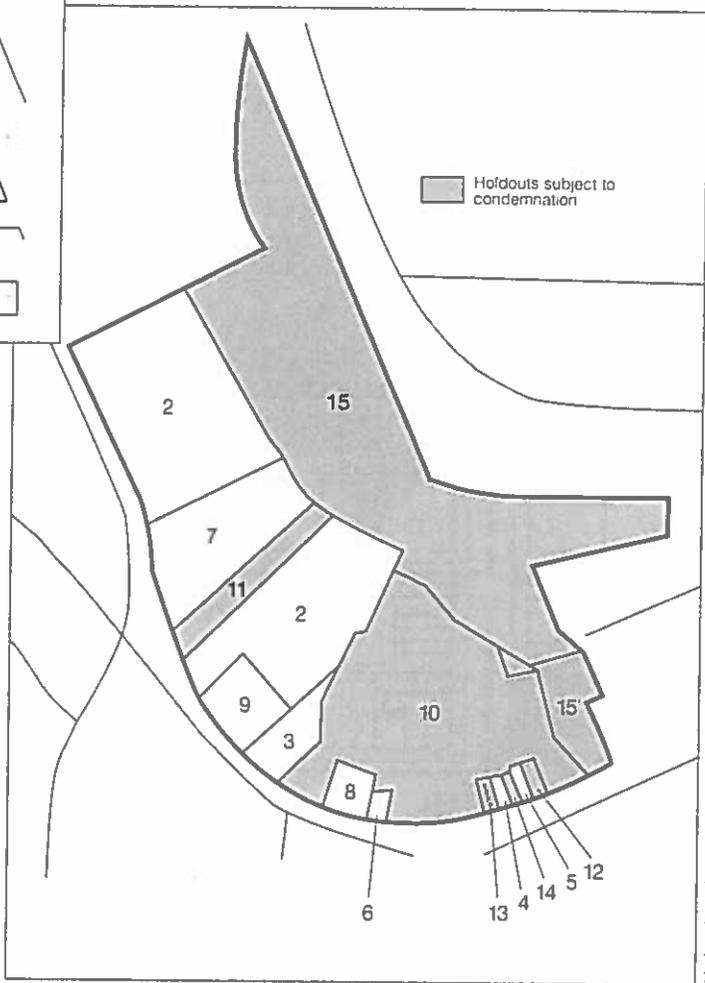
Brief Amicus Curiae of City of New York, Kelo v. City of New London, App. A



Site map of Metrotech project in Brooklyn, N.Y., showing fractionated property lines.

“[A] major obstacle to economic revitalization of urban cores is ‘over-subdivision,’ where old land use patterns leave the artifact of multiple small lots under different ownerships that the unassisted market, even over time, cannot assemble into lots of a shape and size that would accommodate contemporary land uses. If the private sector attempted to redevelop such a deteriorated area, some owners would sell or join as partners in a revitalization effort, but others would simply hold out for a higher price, one that rendered an already pioneering project financially impossible.”

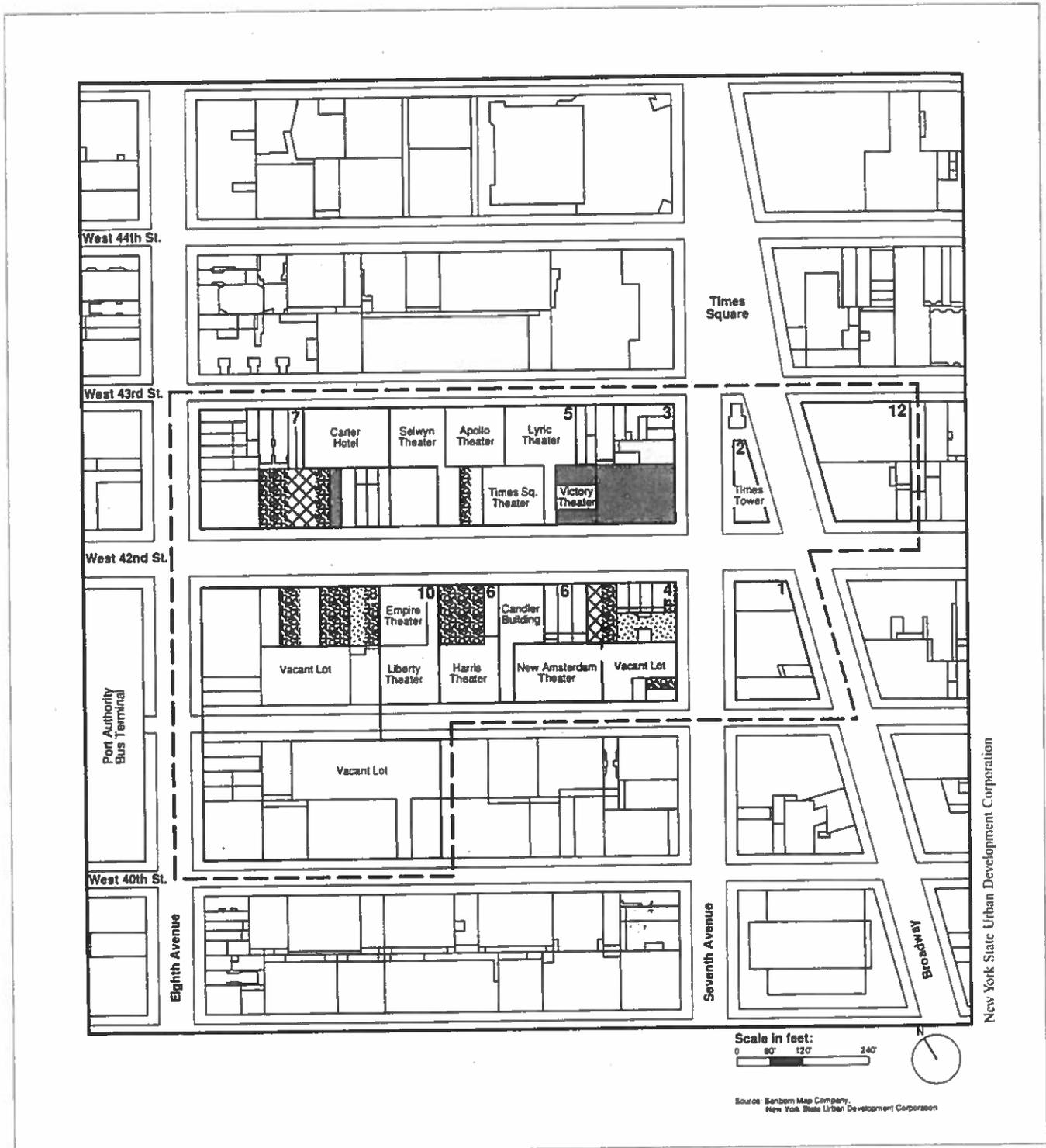
— Marc B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court*, in *THE SUPREME COURT AND TAKINGS: FOUR ESSAYS* 41, 45, (2006).



Holdouts controlled the central properties needed for the Skyland Shopping Center in Southeast Washington, D.C.

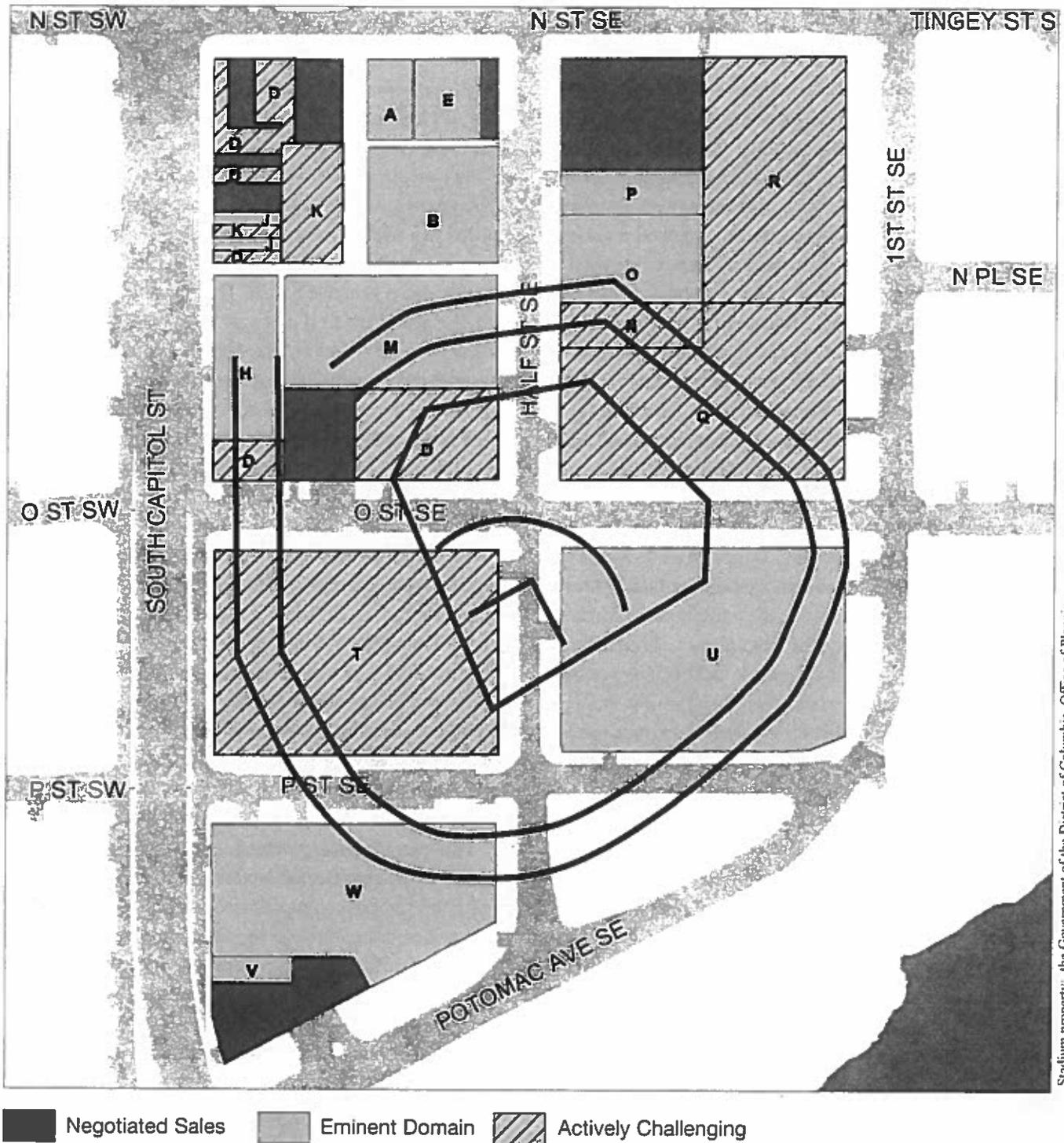
National Capital Revitalization Corporation.

# THE HOLDOUT PROBLEM



Site map of New York City's Times Square redevelopment, showing highly subdivided plots.

# THE HOLDOUT PROBLEM



Stadium property: the Government of the District of Columbia, Office of Planning.

Resisting property owners would have made construction of the new baseball stadium in Washington, D.C. impossible.