No. 04-108

IN THE

Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

Petitioners,

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF *AMICUS CURIAE* OF JOHN NORQUIST, PRESIDENT, CONGRESS FOR NEW URBANISM IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

With the consent of the parties, Mr. John Norquist respectfully submits this brief as an *amicus curiae*.[1] Mr. Norquist currently serves as President and CEO of the Congress for New Urbanism ("CNU"), a non-profit organization with 2500 members, most of whom are architects, planners, engineers or developers. CNU is headquartered in Chicago, Illinois and is dedicated to restoring and promoting the urban form in cities and suburbs of America.[2]

John Norquist's work promoting New Urbanism as an alternative to sprawl and antidote to sprawl's social and environmental problems draws on his experience as big-city mayor and prominent participant in national discussions on urban design. John was the Mayor of Milwaukee from 1988-2003. Under his leadership, Milwaukee experienced a decline in poverty, saw a boom in new downtown housing and became a leading center of education and welfare reform. He has overseen a revision of the city's zoning code and reoriented development around walkable streets and public amenities such as the city's 3.1-mile Riverwalk. He has drawn widespread recognition for championing the removal of a .8 mile stretch of elevated freeway, clearing the way for an anticipated $250 million in infill development in the heart of Milwaukee.

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1. Pursuant to Supreme Court Rule 37.6, counsel for Mr. Norquist state that no counsel for a party authored this brief in whole or in part and that no person, other than Mr. Norquist, his counsel, Mr. Robert W. Wilson, Mr. Stephen B. McGuire, and Mr. Toby P. Brigham, made a monetary contribution to the preparation of the brief. All parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk.

2. *See* http://www.cnu.org.

A leader in national discussions of urban design, Mr. Norquist is the author of *The Wealth of Cities*,[3] and has taught courses in urban policy and urban planning at the University of Chicago, University of Wisconsin-Milwaukee School of Architecture and Urban Planning, and at Marquette University. He also previously represented Milwaukee's south and west sides in the Wisconsin Legislature, chaired the National League of Cities Task Force on Federal Policy and Family Poverty, and served on the Amtrak Reform Council.

Mr. Norquist's years of public service and experience with redevelopment have informed his firm conviction that the use of eminent domain should be limited to the provision of infrastructure and/or the elimination of true slum conditions. He believes strongly that municipal involvement in the real estate market should continue in its successful tradition of platting, zoning, and provision of basic infrastructure (water, sewer, bridges, streets, transit, etc.), but that it should not venture into investment in private business, attempts at which have mostly failed nationwide.

SUMMARY OF ARGUMENT

The opinion in *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) presents the Court with the question of whether it is constitutionally permissible for a local government to exercise the power of eminent domain to transfer private property from one owner to another private party for the sole purpose of economic development—with the goal of hopefully creating jobs, enhancing the tax base and revitalizing the local economy. This brief aims to demonstrate, through historic and current examples, that land assembly for real estate development naturally occurs in the marketplace and that limitations on the

3. John Norquist, *The Wealth of Cities*, (Basic Books 1998).

use of eminent domain for such economic development would not halt the improvement of local economies.

Economic development in this country (as distinct from slum eradication or infrastructure provision) has traditionally been accomplished by the private sector. There is no real economic reason for the recent departure from that tradition evident in the suddenly rampant use of eminent domain to assemble private property for re-conveyance to private developers upon the allegation that the desired property is "underutilized." In addition to the liberty interests, potential for corruption, history of over-subsidized failures, and burden of public bond debt which militate against such a distortion of the "public use" clause (discussed in other briefs supporting the Appellants in this case), there is the simple economic reality that naturally occurring economic incentives have and will continue to adequately promote healthy economic development by the private sector. Moreover, where government wishes to stimulate economic development, there is a vast array of development incentives available to accomplish that without resort to the lend-lease of its eminent domain power for land assembly. Such speculative over-use of eminent domain may actually have a chilling effect on the rigorous economic screening of projects naturally occurring in the private marketplace, and may result in an increased number of unsustainable development projects.

ARGUMENT

I. The private sector has been and will continue to be successful in bringing about healthy economic development without the use of eminent domain.

The economy of this country was built by the private sector. Though government has at times played an important role in facilitating development, it has been the actions of the private sector that have assembled and cleared the land, and built the factories, businesses and homes which have created the economic foundation of local economies.

Today, the same economic incentives which have always attracted private investment and spawned sustainable development continue to draw private real estate developers all over America. Private developers continue to mobilize to opportunities born of supply and demand, whether they are build-to-suit projects or speculative ventures (premised upon the idea that once the project is underway, it will attract users that will rent space or purchase the project).

Obviously, land is a key component for any real estate project—from suburban development to urban infill or redevelopment. Developers can acquire land at many stages of the development process. Some land bank property for years, waiting for the appropriate market opportunity. Others purchase the land from long term owners or land speculators who have assembled the land. They may purchase the property without a specific development in mind, but with the recognition that the market is ready for some development of the site. For speculative ventures, developers commonly acquire an option and close or lease the land only after substantial predevelopment analysis has been done and the developer is confident enough to commit to the project. If the location is right, and the value can be generated by the assembly, the private sector has a variety of negotiating techniques to induce individual private owners to either sell or joint venture in the project.

In metropolitan areas, significant land assembly efforts are often necessary for major real estate development, but the private sector does this well. For example, in Las Vegas, Focus Property Group acquired 2,400 acres of land (consisting mostly of parcels of five acres or less) in order to build a master-planned community now known as Mountain's Edge. Though it took over five years to assemble the land, the project is now under construction and will ultimately consist of 10,000 single family residences, 3,000 multi-family units, 150 acres of commercial development, parks, trails, and several schools. Focus Property Group (a company established in 1990 which specializes in the study of real estate patterns, assemblage of land, and development of planned communities) successfully secured a re-zoning, obtained development approvals, and installed preliminary infrastructure necessary to launch construction.[4] Similarly, in Howard County, Maryland, more than 15,000 acres were assembled to create the new city of Columbia.[5]

The private sector is also effective in urban land assemblage. For instance, in 1999, Commonwealth Development Group

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4. Hali Bernstein Saylor, *Focus Provides Service to Builders*, Las Vegas Newspapers, Jan. 17, 2004, available at http://*www.lvnewspapers.com/realestate/REJan-17-Sat-2004/Front/22950800.html*; Andy Flaherty, *Land Development in Nevada: From Dirt to Dream House*, Builder & Developer Magazine, June 2004, available at *www.bdmag.com/issues/jun_2004/d_headlines.htm*; Larry Bross, Nevada's Land Disposal Lauded by Federal Government, Builder & Developer Magazine, July 2004, available at http://*www.bdmag.com/issues/jul_2004/d_headlines.htm*.

5. Robert Moxley, *Creating a New City: Columbia, Maryland* in *Land Acquisition: The Realtor's Perspective* 23, (Robert Tennenbaum, ed., Perry Publishing, 1996).

assembled 21 separate parcels of land in Providence, Rhode Island to construct a 1.4 million-square-foot mall with space for 160 shops and Nordstrom's as the anchor tenant. The $460 million project included a four-level mall built atop a five level parking deck and is designed to compliment the architecture surrounding the nearby state capitol building.[6]

Likewise, in the mid-1980s, two West Palm Beach, Florida developers discreetly assembled all of 26 contiguous blocks of a run-down inner city area by purchasing over 300 separate parcels from 240 different landowners in nine months (using twenty different brokers), and then convinced the city to approve a master plan for a mixed use development, then dubbed "Downtown/Uptown." All the buildings, except for an historic church, were razed. But for the real estate crash of the early 1990's, these developers would likely have successfully completed the project. They were, however, forced into foreclosure, and the city purchased the assemblage and issued bonds for infrastructure. This attracted major developers from New York and Miami who leased the land from the City and developed it successfully. Thus, the 77 acre area that had been privately assembled is now the thriving mixed use development (residential, retail and entertainment) known as "CityPlace," and its economic impact on West Palm Beach has been compared by some to the impact of Disney World on Orlando.[7] (Disney

6. Jon Springer, *Providence Place Debuts Under Deadline*, Shopping Centers Today, Nov. 1, 1999, available at http://*www.icsc.org/srch/sct/current/sct9911/14.html.*

7. *See* Johanna Marmon, *Urban Renewal-West Palm Beach*, South Florida CEO, May 2002, available at http://*www.findarticles.com/p/articles/mi_m0OQD/is_4_5/ai_100500854*; Becky Swann, *The Story of CityPlace*, International Real Estate Digest, Feb. 27, 2001, available at *http://www.ired.com/news/2001/0102/cityplace.htm*; David Takesuye, *Reuniting Assets*, Urban Land Institute, Sept. 2003, available at *http://*

(Cont'd)

World, of course, was a paradigmatic private assemblage, the success of which is known worldwide).[8]

These examples of successful private land assemblage, driven by naturally-occurring economic forces, are in stark contrast to many publicly-funded, speculative real estate assemblages which have failed miserably. Examples of such failure are not hard to find.

Consider the recent sale of "Block 37" in Chicago, publicly acquired and cleared by the city more than fifteen years ago to foster redevelopment on State Street. The land sat idle, and the City finally sold it this year for a $23 million loss.[9] Or, the half

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(Cont'd)
research.uli.org/Content/Awards/2002/CityPlace.htm; Susan Salisbury, *Paydirt*, Palm Beach Daily Business Review, Dec. 16, 1998 at A1. Though not mentioned in these articles, the City condemned a few small parcels for CityPlace. This was because a few original owners (who had readily sold to the two developers during the original private assemblage) had gotten their properties back through foreclosure and were unwilling to re-sell to the City for the same price range later. By the time the City sought to acquire them, the large assemblage had occurred, land had been cleared for development, zoning approvals had been obtained, and their land had increased in value. When these few owners refused to accept the City's offered price (because it was premised on appraisals which included no assemblage value), the City filed eminent domain proceedings.

8. Richard E. Foglesong, *Married to the Mouse: Disney World and Orlando* (Yale Press 2001); Kent Wetherell, *Florida Law Because of and According to Mickey: The "Top 5" Florida Cases and Statutes Involving Walt Disney World*," 4 Fl. Coastal L. J. 1 (Fall 2002) at 1-3; Mark Derr, "Tommorrowland Today," *St Petersburg Times*, Oct. 22 1989.

9. Gary Washburn, *City Loses on Block 37 Sale, Bets on Future*, Chicago Tribune, Oct. 13, 2004; William Sluis, *Block 37: New Partner Sought; Tenant Wavers*, Chicago Tribune, Nov. 28, 2004.

city block (formerly eight separate properties) on Wisconsin Avenue (a main retail corridor) condemned, cleared, and consolidated by the City of Milwaukee in 1985 for hotel development—it has been used as a parking lot ever since.[10] Demolition and consolidation of parcels failed miserably in Detroit and St. Louis where populations dropped significantly from 1950 to the year 2000 after urban renewal, intended to foster economic growth, backfired.[11] Several abysmal failures have resulted more recently from economic development condemnations in California.[12] These are but a few examples of

10. Tom Daykin, *Hotel Planned to Complement Midwest Airlines Center*, Milwaukee Journal Sentinel, Nov. 13, 2004, available at http://*www.jsonline.com/bym/news/nov03/184819.asp*; Tom Daykin, *City Sells Downtown Site for $1*, Milwaukee Journal Sentinel, Mar. 24, 2004, available at *www.jsonline.com/bym/news/mar04/217054.asp*; Mark Savage, *New Hotel Planned for Downtown*, Milwaukee Journal Sentinel, Nov. 28, 1999, available at *www.jsonline.com/news/metro/nov99/hotel29112899.asp*.

11. Regarding Detroit's decline despite (or perhaps because of) urban renewal efforts, see Joel Kotkin, *The Future of the Center: The Core City in the New Economy* (Davenport Inst. Nov. 1999), available at: *http://www.publicpolicy.pepperdine.edu/davenportinstitute/reports/center/center3.html* and Julia Vitullo-Martin, *Detroit Fights Back*, 5 City Journal 55 (Summer 1995), available at: *http://www.city-journal.org/html/5_3_detroit_fights.html*. Regarding the ineffectiveness of urban renewal in St. Louis, see the City's own website available at *http://stlouis.missouri.org/citygov/planning/research/data/about/history.html*, stating "urban renewal efforts and public housing development programs could not stem the tide of population loss, and in some cases contributed to the decline." *See also* M. Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal 1949-1962* (The M.I.T. Press, 1964).

12. *See* Douglas Shuit, *Long Beach Mall Finds Its Niche, But Not Survival*, L.A. Times, June 15, 1999 at. B13; Anne Rackham, *Legal*

(Cont'd)

municipal land speculation, underwritten by taxpayers, which were never economically sustainable. Several more are discussed in S. Greenhut, *Abuse of Power: How the Government Misuses Eminent Domain* (2004).

This pattern of failure is often the result of inadequate planning and economic evaluation by governments and/or undue influence of special interests. As one commentator put it:

> The greater involvement of business in setting local public policy, the increasing competition for jobs between localities, and a concomitant rise in the amount of state and local government subsidy of corporate activity all suggest that local government is extremely susceptible to corporate influence when making its economic development decisions. Such influence may prevent local officials from performing the rational calculus needed to decide whether a taking's displacement costs—including the loss of valuable affordable housing stock, small business matrices, and viable communities—are indeed outweighed by unenforceable promises, or no promises at all, of job creation, income, sales, and property tax revenue, and speculative spin-off spending.[13]

(Cont'd)
Costs, Failed Project Plan Carry Hawthorne to Brink, Auditor Reports, L.A. Bus. Jour., Apr. 24, 1995 at 1; Michael Flagg, *Troubled Hotel Becomes Symbol To Critics*, L.A. Times, Sep. 12, 1994; Ted Rohrlich, *City Made Bad Realty Investments, Report Shows*, L.A. Times Mar. 30, 1998 at B1.

13. Adam Hellegers, *Eminent Domain as an Economic Development Tool*, 2001 L. Rev. M.S.U.-D.C.L. 901 (2001) at 903. See also John Gibieaut, *The Money Chase*, A.B.A. Jour., Mar. 1999 and Robin Paul Malloy, *The Political Economy of Co-Financing America's*
(Cont'd)

II. Prohibiting the exercise of eminent domain for purely economic development purposes will not prevent redevelopment given the array of other incentives available to government authorities interested in stimulating economic development.

The use of eminent domain may appear expedient, but it is not essential to economic development. As illustrated by developments like Mountain's Edge and CityPlace, discussed above, there is a wide array of economic incentives which government can offer to facilitate economic development without resort to eminent domain. The favorable rezonings granted for Mountain's Edge and CityPlace or the bond-financed infrastructure provided for CityPlace are common examples of how local governments have effectively encouraged sound economic development without undertaking land speculation themselves or virtually loaning out their eminent domain power to vicarious private speculators, at taxpayer expense. One treatise described the respective roles of government and the private sector as follows:

> Development in the United States has traditionally occurred through a conventional process in which the public and private sectors perform independent functions and therefore tend to remain at arm's length

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(Cont'd)

Urban Renaissance, 40 Vand. L. Rev. 67 (1987) which advocates leaving commercial/retail economic development to the marketplace because:

> Under current practices for facilitating urban revitalization through co-financing activities, special interest groups are using the political means to reallocate resources to their own uses. This results in a distortion of market allocations because allocations are made on the basis of pure political power rather than according to competitive criteria. *Id.* at 99-100.

> from one another. As a general rule, simple projects in strong markets have historically followed conventional modes of development, and any mix of function between the public and private sectors has been seen as a conflict of interest on the part of local government. . . , the public sector was expected to perform the functions of regulation and broad planning, providing the needed services—schools, roads, water, sanitation, fire and police protection—to support new development. The private developer originated projects based on information about the market and formulated a specific plan for a project with public policy in mind—all without the public's direct involvement in stages one and two of the process. Consequently, the public sector did not assume any of the entrepreneurial risks or absorb any project-specific costs typically borne by the private sector.[14]

Much has been written about the departure from this traditional model, when government took on more of an entrepreneurial role during the period of federally-funded urban renewal, and there has been substantial criticism of how local government handled the roles of land assembly and developer selection, and the resulting impacts on municipalities.[15]

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14. Mike E. Miles, Gayle Berens and Marc A. Weiss, *Meshing Public and Private Roles in the Development Process* in *Real Estate Development: Principles and Process* 269 (Nancy H. Stewart, ed, 3d ed., Urban Land Institute 2000).

15. *See, e.g.*, M. Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal 1949-1962* (The M.I.T. Press, 1964) and C. Hartman, *Between Eminence & Notoriety: Four Decades of Radical Urban Planning*, (CUPR Press, 2002).

As a result of cutbacks in federal urban aid in the late 1970's, local governments were forced to return to the more traditional model of providing catalytic incentives for development instead of themselves undertaking land assemblage. The cessation of federal funding for massive acquisition and demolition programs necessitated use of other means to attract developers to financially risky redevelopment. Developers had not done very well with urban renewal, and were therefore concerned about whether project economics were realistic.[16]

A popular text on real estate development[17] provides the following exhaustive list of incentives which local governments have devised. It illustrates that there are many catalytic alternatives beside use of eminent domain:

> Strategies and Incentives for Public Assistance:
>
> Strategies for Enhancing the Risk/Return Relationship of Private Investment
> —Reduce capital costs
> —Absorb demands for new or improved infrastructure
> —Lower operating cost

---

16. M. Anderson, *id.* p.122. recites that

> . . . the developer's investment is relatively small and the potential profit is high, but so are his risks, and the past experience of private developers indicates that urban renewal under federal auspices has not been as lucrative or as easy as originally anticipated. Most of the developer's profits are still on paper, and though they may be large, his chances of getting them are small.

17. Mike E. Miles, Gayle Berens and Marc A. Weiss, *Real Estate Development: Principles and Process* (Urban Land Institute, 3d ed., 2000).

—Increase opportunity for development
—Reduce debt service burden
—Reduce predevelopment risk of approval
—Enhance availability to private capital

Direct Financial Assistance
- —Land Assembly
  - Acquisition
  - Demolition
  - Relocation
  - Writedowns
- —Capital Improvements
  - Infrastructure
  - Parking garages
  - Open space and amenities
  - Programmatic facilities
- —Grant Assistance
  - Cost sharing of private improvements
  - Payment for predevelopment studies
- —Debt Financing
  - Direct loans
  - Below-market interest rates
  - Loan guarantees
  - Credit enhancements
- —Indirect Assistance
  - Zoning or density bonuses
  - Transfer of development rights
  - Transfer of air rights
  - Regulatory relief from zoning and building codes
  - Reduced processing time for project inspections
  - Quick take by eminent domain
  - Design coordination in public/private projects

Below-cost utilities if publicly owned
Arbitration of disputes that might arise
Government commitments to rent space

—Financing Strategies
Intergovernmental Grants
Community development block grants
Section 108 guaranteed loans
State economic development grants
Local Debt Financing
General obligation bonds
Industrial development bonds
Off-Budget Financing
Lease/purchase agreements
Ground leases
Land/building swaps
Property tax abatements

Dedicated Sources of Local Funds
Special district assessments
Tax increment financing
Earmarked sales or special-purpose taxes
Reuse of UDAG loan paybacks
General Budget Revenues[18]

The most common form of government incentive, and historically, the most effective, is the provision of infrastructure. Investments in water, sewer, bridges, street grids and transit helped create, for example, the high real estate values in New York City's Manhattan Island. A pattern of such successful intervention extends across the nation.

18. *Id.* at p. 281. This list is not comprehensive. Other sources include lists with additional incentives. *See, e.g.*, T. Lyons and R. Hamlin, *Creating an Economic Development Action Plan: A Guide for Development Professionals* (Praeger Publishers, 2001).

Other common and effective government incentives are zoning and density allowances to attract corporate relocation and to increase the economic feasibility of the desired development. This regulatory form of incentive can be further augmented by fast track regulatory processes for desired types of development, including one-stop permitting program where a staff person is assigned specifically to shepherd targeted types of projects efficiently through the administrative process.

Waivers and rebates of fees are also substantial regulator incentives. Direct financial assistance is common in the form of property tax abatements, bond financing, low interest loans, infrastructure improvements, or utility rate incentives. The list of examples could go on and on, and it illustrates the "let's make a deal" ability of local government to work with a developer to make the economics of a desired project work.

The public sector therefore has many tools at its disposal to foster redevelopment and economic development. Land assembly is just one of them, and there are many techniques to facilitate land assembly without resort to eminent domain, including contribution of surplus government property,[19] land exchanges or swaps between the public and private sectors, and relocation assistance from the public sector for owners or space users in the property slotted for redevelopment.

III. Allowing existing landowners to participate in economic development projects is a common practice in many countries, and is a viable alternative to condemning out existing property owners.

The United States is a relatively young country, and has not had the wealth of experience in land assembly that many

19. A sizable chunk of the Mountain's Edge assemblage was government surplus land acquired by auction. *See* sources cited at note, *supra.*

older nations have accumulated.[20] During the modern era, it has used eminent domain for land reassembly to a much larger extent than many other countries because of the spate of federally supported condemnations for slum and blight clearance. This, and the more recent trend of using eminent domain for purely economic development/re-conveyance, has arguably retarded the use of resourceful assembly techniques developed in other countries.

Over time, the practice of including property owners in redevelopment through economic incentives, rather than condemning them out, may nonetheless increase in the United States because of the lack of funds to acquire the property, objections to the use of eminent domain, and the growing recognition that, for truly successful economic development, the existing landowners must be brought to the table as one of the important "stake holders." [21] The following are just a few examples of how this can be done:

A. Government-Created Incentives: An Historic Example

Though land assembly in partnership with existing landowners has become more common in other countries, the United States is not without some precedent for it. President George Washington resourcefully accomplished the land assembly needed to develop our nation's capital by involving landowners in the process and allowing them to share in the economic rewards.

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20. W. Doebele, *Land Readjustment: A Different Approach to Financing Urbanization* (Lexington Books, 1982).

21. Florida Atlantic University / Florida International University Joint Center for Environmental and Urban Problems, *Development Without Displacement Community Handbook* (August 2000), available at http://www.catanese.fau.edu/3publications/dvlp_wo_displacement.pdf.

He accomplished this without any exercise of eminent domain, through a joint venture by which land would be voluntarily pooled, re-zoned (agricultural land to platted developable lots), and redistributed among the contributing landowners, who would be compensated for the new public spaces in cash and swap-backs of up-zoned land. One historical account described Washington's program as follows:

> The Proprietors Enter Partnership with the Government. The new arrangement provided that the proprietors should convey their land to the federal government, and after the city plan had been prepared they would receive back, in exchange, every other one of the platted lots. For a set price of twenty-five pounds per acre, the proprietors would be compensated for federal building reservations as well as for the unplatted lands required for public use as squares, walks, and similar elements. The land required for streets and alleys would be dedicated by the proprietors without charge. At one stroke, this new arrangement placed the proprietors in partnership with the federal government—and with each other—in urban development.[22]

This historic example is still timely, given the array of economic incentives which governments can extend, as discussed in Section II, *supra.*

B. Landowner-Organized Assembly

There are also instances where the landowners themselves recognize the economic benefit of assembly and act on their

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22. F. Gutheim, *Worthy of the Nation: The History of Planning for the National Capital*, The Smithsonian Institution Press, 1967), p. 23. For the full text of the agreement, *see* H. P. Caemmerer, *Washington: The National Capital* (1932), pp. 19-21 and W. Tindall, *Standard History of the City of Washington* (1914), pp. 76-78.

own to mobilize to the economic opportunity. An interesting account of this is chronicled in the magazine piece, *When Neighbors Sell as a Group*, Changing Times Magazine, August 1985, as follows:

> To Randy and Susan Campbell the prospect of selling their Atlanta home at anything near its appraised value looked dim. Newly erected office buildings had hemmed in their neighborhood, forever changing the rural character that had attracted them to the area just four years ago. The traffic had become so bad that it blocked the entrance to their subdivision during morning and afternoon rush hours. To top it off, property values were on the skids.
>
> But you needn't feel sorry for the Campbells; their property is now under contract for $225,000, which is easily twice what it normally would have fetched as a residence. That, however, is a fair price when the Campbell's half-acre lot is packaged with other lots that make up the Lake Hearn subdivision and sold as part of an 83-acre tract of commercial real estate. One of these days their neighborhood will turn into six office buildings, a hotel and possibly even a museum.
>
> Other sets of neighbors who have banded together to cut deals with commercial developers are reporting that they're getting prices three and four times higher than the going residential prices. It hasn't been easy by any means, but the handful of neighborhoods that have succeeded (there have been about a dozen to date, with dozens more taking a stab at it) have blazed a trail for those who want to try it.")[23]

23. *Id.*, pp. 45-48.

In addition to describing steps for neighbors to follow in assembling their properties, finding a developer, and selling as a single site, the article discusses "holdout" problems and compensation issues, as follows:

> More than likely there will be a few holdouts, but they don't have to stop you at this point. Architects have produced any number of ingenious designs that can skirt missing pieces. . . .
>
> The 22 residents of the Courtlands neighborhood in Arlington, Va., and 45 Atlanta families in the Peachtree-Dunwoody Valley subdivision agreed that sellers would get an equal number of dollars for each square foot of land they owned. . . .
>
> The 46 Oak Brook, Ill., residents living in the Ernie Pyle subdivision also worked out a compromise. They developed a formula for sharing the wealth that was weighted in favor of land area owned, with some concessions made to the value of the homes.[24]

The obvious economic incentive for voluntary landowner participation in projects that will enhance the tax base and stimulate local economic vitality is the ability to be compensated, not on the current use market value, but on the basis of the value of their land for the more intensive use envisioned. That is why the owners band together and work in concert with a selected developer to obtain local government approvals for the redevelopment project.[25]

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24. *Id.* at 46.

25. The landowners in both the Lake Hearn neighborhood of Atlanta, Georgia and the Courtlands neighborhood of Arlington, Virginia assisted the developer during the rezoning process, the success of which was a precondition for the purchase by the developer of the properties (Cont'd)

This is well illustrated by yet another example of self-organized assembly involving a Boca Raton, Florida condominium. As a result of a deal which closed in early 2004, the aging "Villa del Mar" building will be replaced by a new condominium project known as the "Luxuria. To accomplish this, all the existing owners agreed to dissolve their condominium and sell everything to a developer. Rather than paying a necessary assessment of over $1 million to address structural and safety upgrades to their aging building, each unit owner will receive about $600,000, about three times the fair market value of their existing units.[26]

Self-organized reassembly also occurs in the commercial setting. An effort by a group of downtown Schenectady, New York, businessmen to pool their business property in the mid-1970s led to the rebirth of the deteriorated downtown business district into a two-level shopping mall that vied with the suburban centers for beauty, charm and variety. Their efforts won them an Award for National Excellence in the National

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(Cont'd)

at the higher price. *See When Neighbors Sell as a Group*, Changing Times Magazine, August 1985 at 48, T. Clary and P. Rasmussen, *The Buyout Phenomenon*, Planning, October 1985, at 18, and Robert Guenther, *Atlanta Neighborhoods Unite to Sell Homes to Developers*, The Wall Street Journal, May 23, 1984, Page 33, col 1.

26. R. Londoner, *Trump Group to Raze and Raise in Boca Raton*, South Florida Business Journal, Mar. 5-11, 2004, at 16. *See also*, Robyn Friedman, *Name of Pricey Boca Condo to Says it All: Luxuria*, Sun-Sentinel, October 19, 2004, at 1D. For more examples of landowner-driven assembly, see Frank Schnidman, *Suburban Land Assembly* in 1991 *Zoning and Planning Handbook* 125 (Clark Boardman, 1991), based upon a study of a substantial number of landowner assemblages in the metropolitan areas of Atlanta, Phoenix and Washington, D.C.

Recognition Program for Community Development Partnerships from President Ronald Regan in 1982.[27]

C. Third Party Private Sector Assemblage

Brokers and developers have also discovered the merit of involving existing landowners in assembly and development. Real estate brokers often specialize in neighborhood buyouts, seeking areas that fit a profile for profitable assembly and then packaging them for sale to a developer.[28] For example, in the mid-1980's, a strong trend of such brokerage assembly in older residential neighborhoods led the City Commission of Dallas, Texas to adopt a policy for dealing with the increased number of neighborhood requests for rezoning and redevelopment.[29]

In Northern Virginia, a real estate broker hired by a group of neighbors in the Poplar Terrace subdivision is currently working with a selected developer toward a rezoning which would replace their 70 existing homes on 40 acres with 1,326 residential units. This development project has been cited as an example of "Smart Growth" because of its proximity to public transit, and even has support from environmentalists. The average price of the homes in Poplar Terrace is currently

27. *See* P. Jansak, *Private Lot Pooling for Urban Revitalization: The Case of Schenectady, New York*, The Platted Lands Press, October 1985, at 4. Though for a variety of economic and management reasons, the corporation filed for bankruptcy, it was not because of the assembly effort, and in spite of the financial problems, the merchants who formed the corporation did what the local government had not been able to accomplish—they instigated the multi-million dollar renaissance of a truly blighted downtown.

28. *See* R. Knack and J. Peters, *Starting to Spread*, Planning, October 1985, at. 21.

29. Dallas, Tex, Res. 852290 (July 17, 1985). A similar ordinance became necessary in Arizona. *See* Scottsdale, Ariz., Res. 3157 (May 15, 1989) on "Neighborhood Assemblage Policy."

around \$400,000. Under the terms of their agreement, the selected developer (Centex Homes) will pay participating homeowners \$760,000, or more depending on the number of homes approved by local government. There are five holdouts among the 70 owners in the subdivision, but "Centex can just build around them," according to the leader of the neighborhood association.[30]

Developers also go directly to landowners to negotiate for the sale of their assembled land or for their participation in the development project on the economic premise that the value of the future assemblage justifies either buying out existing landowners at premiums above current appraised value[31] or allowing them to share in the profits of the future development through joint venture.[32]

An example of a premium buyout is the 1984 sale of forty-five acres in the underutilized "Farmer's Market" area of Downtown Dallas, Texas, comprising 5 percent of the downtown. Under the lead of a private developer, existing landowners formed an assemblage partnership. Though this project began with the expectations that the partnership would be involved in the development, a syndicate of investors and developers who saw the potential of the project made the traditional "offer too good to refuse."[33]

30. P. Whoriskey, *N. Va. Neighbors Hoping to Raze, Rebuild, Profit*, The Washington Post, Sept. 20, 2004, p. A1.

31. *See When the Commercial Builders Invade Suburbs*, U.S. News & World Report, Apr. 29, 1985, at 70 for a discussion of instances where landowners have sold directly to developers—for the right price.

32. *See* R. Knack and J. Peters, *Starting to Spread*, Planning, Oct. 1985, at .21 for a discussion of the growing experience with neighborhood assemblages.

33. For a discussion of the land assemblage and development partnership in the Farmer's Market area in Dallas, *see* J. Northrup, (Cont'd)

A good example of joint venturing with existing landowners is found in Ft. Lauderdale, Florida where a successful urban townhome development, known as The Ellington at Victoria Park, is underway. It all started when a developer approached the owner of the first of three sites needed along 6th Street and persuaded him to contribute his properties to a joint venture. Through a refinance, the owner was given some cash out of the deal immediately, and he then assisted the developer in obtaining contracts from his neighbors. In total, the joint venture accomplished nine separate purchases of older homes, apartment buildings, motels, duplexes, etc. to assemble the land for the now award-winning (American Institute of Architects Award for Excellence) development.[34] By remaining with a project in this fashion, existing owners can share in the risks and rewards of redevelopment.

D. Foreign Experience Involving Landowners in "Land Readjustment"

Providing land owners with the opportunity to assemble their own property and work with developers, to either participate in the redevelopment project or benefit from the increased value created by the assemblage, has existed for many

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The Land Assemblage and Development Partnership, 16 Real Estate Review 1986)at 90. A case study of this effort can be found at J. Northup, *The Farmer's Market District: A Land Assembly and Redevelopment Program in Downtown Dallas*, Urban Land, Nov. 1984 at 19. This article also outlines the role that the city played to assist in the success of the District's redevelopment.

34. *See* Robyn A. Friedman, *Townhouse Project Slated for Victoria Park*, Sun-Sentinel, Jul. 8, 2002 at 10, Hannah Sampson, *Up on a Roof; a New High Life*, Miami Herald, Aug. 2, 2004 at B1, and *http://www.theellington.net*. Some facts surrounding the private assemblage are based on the personal knowledge of undersigned counsel from written correspondence with the developer, Scott Brenner.

years in a number of foreign countries. Referred to as "Land Readjustment," "Land Consolidation," "Land Pooling," etc., this process essentially pools the land parcels into a single site with the owners retaining a percentage share of ownership rights before and after the development.[35]

An interesting case study of foreign land assembly is Roppongi Hills in Tokyo, Japan. Roppongi Hills is a widely acclaimed, $5 billion mixed-use project on 27 acres (11 hectares) in the heart of the city. It was privately assembled over several years, involving negotiations with more than 600 separate land-right holders. In the end, 200 of these owners chose not to wait for the completion of Roppongi Hills and sold to the developer/ landowner partnership, but 400 landowners have remained in

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35. *See* W. Doebele, *Land Readjustment: A Different Approach to Financing Urbanization* (Lexington Books, 1982) for the first book in English on land readjustment. Though not a technical guidebook or manual, it provides an overview of agricultural and urban land readjustment. It includes chapters on Japan, South Korea, Taiwan, West Germany and Australia. *See also* F. Schnidman, *Land Readjustment*, Urban Land, Feb. 1988 at 2, which outlines the foreign experience with land readjustment and discusses how it can be used as a technique for urban development and redevelopment; M. Schultz and F. Schnidman, *The Potential Application of Land Readjustment in the United States*, 22 The Urban Lawyer 197 (Spring 1990) for a discussion of how foreign concepts of owner participation can be fostered in the United States, including examples where it has happened without general enabling legislation by traditional real estate techniques; G. Larsson, *Land Readjustment: A Modern Approach to Urbanization* (Avebury, Ashgate Publishing Limited, 1993), containing a manual-like discussion of land owner participation under land readjustment and the process by which it operates; and L. Minerbi, P. Nakamura, K. Nitz, and J. Yanai, *Land Readjustment: The Japanese System: A Reconnaissance and a Digest* (Oelgeschlager, Gunn & Hain in association with the Lincoln Institute of Land Policy, 1986) for a very detailed examination of how the process of land owner participation works in Japan.

partnership with the developer. They hold shares in the development partnership, and many have relocated to the newly constructed residential buildings.[36]

The idea of formalizing landowner participation in development and redevelopment through a land readjustment process has been of interest for a number of years, and many academics and scholars, as well as developers and government officials, continue to hold conferences and seminars on how it can be accomplished.[37]

36. *Roppongi Hills*, Vol. 33 Urban Land Institute Case Studies # 17, Oct.-Dec. 2003 also available at *http://www.casestudies.uli.org/DCS_Frameset_Other.asp?Section=8&CSID=C033017A.*

37. United States land readjustment possibilities are examined in M. Schultz and F. Schnidman, *The Potential Application of Land Readjustment in the United States*, 22 The Urban Lawyer 197 (1990). See also, G. Liebmann, *Land Readjustment for America: A Proposal for a Statute*, 32 The Urban Lawyer1 (2000). W. Doebele, *Land Readjustment: A Different Approach to Financing Urbanization* (Lexington Books, 1982), is a product of the proceedings of a 1979 conference on "Land Consolidation: Potential for New Urbanization at the Rural Fringe" held in Taoyuan, Taiwan. Since that time a dozen major international conferences have been organized with a goal of expanding the understanding and adoption of legislation to provide a framework for landowner participation in urban development and redevelopment. The most recent session was held March 21-22, 2002 in Cambridge, Massachusetts at the Lincoln institute of Land Policy. This session, "Tools for Land Management and Development: Land Readjustment," brought together experts from Japan, Korea, Israel, Finland, The Netherlands and the United States to once again review and analyze approaches to implementing a more efficient and effective process of including existing land owners in the land planning and development process.

CONCLUSION

Land assembly for healthy economic development occurs without the use of eminent domain. Just look at any big city and take notice of the tall cranes at work. A vast majority of them are not involved in public redevelopment projects. Private enterprise has built and rebuilt America's cities, and will continue to do so without over-use of eminent domain, in response to sound economic trends. The exercise of governmental authority to transfer property from one person to another is simply not an essential component in redevelopment

Moreover, the use of eminent domain to act as real estate broker to the private sector or as public land speculator, are just not appropriate roles for local government. Land assembly for purely economic development is best left to the private sector because it has the developed skill and expertise to more effectively evaluate risk, to understand the complexities of real estate development, and produce sustainable economic development. Government should maintain the limits of its traditional, complementary role in economic development by extending regulatory, infrastructure and tax incentives where appropriate.

But, taxpayers are now being asked to underwrite the risks of real estate-related economic development, and it is no longer just the costs or forgone revenue from these traditional government incentives—it is for speculative acquisition of real estate. This has resulted from the recently acquired taste for expediency among certain members of the private development community who hunger for government to speed up the development process and/or cut existing landowners off from the economic potential of their land by assembling land for them through condemnation. Lured by proffered visions of tax base enhancement and upscale amenities, some local officials are supporting this sort of "corporate welfare," and it not only raises serious Fifth Amendment questions, but skews the evaluation of projects and their long range community impacts.

For all the reasons stated here, this Court need not be concerned that a ruling in favor of the Appellants in this case will stifle economic development in America. On the contrary, this Court should rightly be concerned that allowing the unbridled use of eminent domain for economic land assembly and re-conveyance will lead to many ill-conceived, special interest projects, and have a chilling effect on the rigorous economic evaluation traditionally carried out by the private sector.

Respectfully submitted,

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