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Transparency and Efficiency to Yes: Support of the Application of Principled Evaluative Mediation in Property Holdout Situations

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Introduction

Holdout property owners: who are they and what are their interests? The answer to this, of course, is relative to which side defines the term, and will be more fully analyzed throughout this Comment. Most fundamentally, however, holdout situations occur when existing landowners resist selling during "property assemblages" of multiple properties by either private developers or the government that occur for the purpose of a larger development.[1] As a result of this refusal to sell, one frequent perception of holdouts is that their goal is to either "seek increased compensation" for their properties or to simply resist "new development in the area."[2] From the developer's perspective, these holdouts boil down to opportunistic property owners' seeking to capitalize on the fact that a developer's inability to acquire any one property can effectively halt the entire development.[3] Scholars have argued that this opportunistic gaming of circumstances, at times, prevents "socially desirable" transfers from occurring.[4]

On the other hand, from the property owner's perspective, he is often refusing to sell for a variety of non-monetary reasons, such as sentimental attachment to his home.[5]

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[1] Makowski v. Mayor of Balt., 94 A.3d 91, 101–02 (Md. 2014) (citing Mayor of Balt. City v. Valsamaki, 916 A.2d 324 (Md. 2007)).

[2] Kelo v. City of New London, Conn., 545 U.S. 469, 495–96 (2005).

[3] *Valsamaki*, 916 A.2d at 345 n.18.

[4] Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 19 (2006) (referencing existing owners who become aware of a larger project that requires their respective property and who subsequently hold out for "inflated prices").

[5] Lucas J. Asper, *The Fair Market Value Method of Property Valuation in Eminent Domain: "Just Compensation" or Just Barely Compensating?*, 58 S.C. L. REV. 489, 491 (2007) (arguing that, "Subjective value in the home results from the personal dignity and social status that accompany homeownership, as well as the sentimental value an individual places on the home and surrounding land."). *See also* Brian

For instance, in a 2006 publicized episode illustrating the combination of both financial and non-financial rationale for refusing to sell to a large development, Vera Coking refused a $2 million offer from Donald Trump to purchase her Atlantic City property; in July 2014, this property had an auction reserve price of $199,000.[6] Ms. Coking's grandson has stated that Ms. Coking does not regret the decision, because she did not view any of the offers as "reasonable": "a few million dollars may sound like a lot, but it's not for the place she loved."[7]

As an additional example of the non-monetary rationale for refusing to sell to a large development, the story of Edith Macefield, who was the alleged inspiration for the film *UP*, proves illustrative.[8] Although her house later sold for $310,000 in March of 2014, Ms. Macefield previously refused a $1 million offer from developers seeking to build a mall in Seattle, Washington.[9] Ms. Macefield stated that she did not wish to make a grand statement by standing up to a large development, but rather, had strong sentimental attachment to the property.[10]

Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 595 (2013) (noting that, "[T]he owner of a house may have great sentimental attachment to the property because of happy memories of watching her children grow up there, but the market neither knows nor cares about her memories, so their value to her is not reflected in the property's market price. As a result, there is a substantial gap--a "subjective premium"--between the compensation that owners receive when they are paid the market value of their property and the substantially higher value that the owners themselves actually place on that property.").

[6] Matt A.V. Chaban, *A Homeowner's Refusal To Cash Out In a Gambling Town Proves Costly*, N.Y. TIMES, July 19, 2014, at A19, *available at* http://www.nytimes.com/2014/07/22/nyregion/a-homeowner-who-refused-to-cash-out-in-a-gambling-town-may-have-missed-her-chance.html.

[7] *Id.*

[8] Dominic Kelly, *The Story of The Woman Who Turned Down $1 Million For Her Historic Seattle Home*, OPPOSING VIEWS (Mar. 21, 2014), http://www.opposingviews.com/i/society/story-woman-who-turned-down-1-million-her-historic-seattle-home.

[9] *Id.*

[10] *Id.* (quoting Ms. Macefield as stating: "Where would I go? I don't have any family and this is my home. My mother died here, on this very couch. I came back to America from England to take care of her. She made me promise I would let her die at home and not in some facility, and I kept that promise. And this is where I want to die. Right in my own home. On this couch.").

Thus, this Comment will analyze the competing and divergent ways in which holdouts and developers perceive each other. Part II of the Comment discusses the case history of the eminent domain clause,[11] starting with an analysis of the seminal cases in this area and culminating in a discussion of the most recent decisions from both state courts and the Supreme Court.[12] This section additionally analogizes the holdouts in eminent domain proceedings for real property to those holdouts refusing to release covenants, through analysis of *Rick v. West*.[13] Part III then examines and evaluates the various, recommended methods to circumvent or resolve a holdout situation, such as "secret buying agents"[14] and "land assembly districts."[15] Part IV then proposes an additional, possible solution to the holdout problem as an alternative to eminent domain: alternative dispute resolution. It first surveys both the evaluative and transformative mediation models. This section then ultimately espouses that alternate dispute resolution, in the form of evaluative mediation that implements a *Getting to Yes*[16] principled negotiating framework, represents a transparent and efficient avenue to solutions for both the developer and the holdout property owner.

II. History of Holdouts in Eminent Domain Proceedings

A. Real Property Holdouts

Scholars have observed that the Supreme Court addressed the "connection between eminent domain and the holdout problem" in its very first decision involving the

[11] U.S. CONST. amend. V (stating that "No person shall…be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").
[12] *See infra* Part II.
[13] Rick v. West, 228 N.Y.S.2d 195 (N.Y. Sup. Ct. 1962).
[14] Kelly, *supra* note 4, at 19.
[15] Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1469–70 (2008).
[16] ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce M. Patton ed., 1981).

federal government's implementation of its eminent domain power.[17] The Supreme Court's subsequent decisions in this area, up until *Hawaii Housing Authority v. Midkiff*,[18] "signaled that almost any governmental taking, including a taking involving a private transfer, would qualify as a legitimate public use."[19]

After *Midkiff*, the Supreme Court did not decide a "major public use case" for nearly twenty years.[20] This occurred in the *Kelo v. City of New London* decision.[21] In *Kelo*, nine owners of fifteen properties, including Susette Kelo, refused to sell to a development corporation[22] that envisioned a plan to replace the homes with privately owned office buildings and a hotel in order to capitalize on a new research facility for a large pharmaceutical company.[23] After having successfully negotiated with the majority of property owners within the planned development, city officials in New London argued that the condemnations were justifiable because of the extended condition of the city as a "depressed municipality."[24] In a split decision, the Court held the transfer of property from one private owner to another in the interest of economic development as a legitimate "public use."[25] Justice O'Connor's dissent vigorously argued that this was much too expansive and that "all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded."[26]

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[17] Kelly, *supra* note 4, at 10 (citing Kohl v. United States, 91 U.S. 367 (1875)).
[18] Kelly, *supra* note 4, at 10 (citing Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 230–31 (1984)).
[19] Kelly, *supra* note 4, at 10 (citing Mark C. Landry, *The Public Use Requirement in Eminent Domain-A Requiem*, 60 TUL. L. REV. 419, 430 (1985)).
[20] Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 516 (2006).
[21] *Id.* (citing Kelo v. City of New London, Conn., 545 U.S. 469, 470 (2005)).
[22] *Kelo*, 545 U.S. at 494–95.
[23] *Id.* at 474.
[24] *Id.* at 504. The New London legislature characterized the city as a "depressed municipality" because of its "ailing economy." *Id.* At 469.
[25] *Id.* at 484–486.
[26] *Id.* at 494 (O'Connor, J., dissenting) (arguing that "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it

In the immediate aftermath of *Kelo*, Ohio was the first state to confront the issue of "economic redevelopment takings."[27] In the case of *Norwood v. Horney*, the Supreme Court of Ohio refused to "extend state law to the extent allowed by Kelo."[28] *Norwood* dealt with a situation where a developer was predominantly able to have property owners within a potential development sell their property voluntarily, but a small minority refused to do so.[29] In its ruling, the court emphasized the importance of individual property rights, which are thought "to be derived fundamentally from a higher authority and natural law," and are "so sacred that they could not be entrusted lightly to 'the uncertain virtue of those who govern.'"[30]

In this case, a city sought to acquire property from existing owners and transfer it to another private entity as a part of an "urban renewal plan" for a "deteriorating area."[31] The court declined to allow such a transfer through eminent domain, noting that "judicial review of the taking is paramount" when the government seeks to seize private property and transfer it to another private entity.[32] The court here observed that the commingling of the private and public interests in such cases creates the possibility that the government's decision to impose eminent domain "may be influenced by the financial gains that would flow to it or to the private entity because of the taking."[33]

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might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.").

[27] Erik Stock, *"We Were All Born on It. And Some of Us Was Killed on It": Adopting A Transformative Model in Eminent Domain Mediation*, 23 OHIO ST. J. ON DISP. RESOL. 687, 691 (2008) (citing Ian Urbina, *Ohio Supreme Court Rejects Taking of Homes for Project*, N.Y. TIMES, July 27, 2006, at A18).

[28] Stock, *supra* note 27, at 691 (citing Norwood v. Horney, 853 N.E.2d 1115, 1128 (Ohio 2006)).

[29] *Norwood*, 853 N.E.2d at 1124–25.

[30] *Id.* at 1128 (citing Parham v. Justices of Decatur Cty. Inferior Court, 9 Ga. 341, 348 (Ga. 1851)).

[31] *Norwood*, 853 N.E.2d at 1115.

[32] *Id.* at 1139.

[33] *Id.* at 1140.

An additional case that serves to exemplify the use of eminent domain in holdout situations is a 2010 New York Court of Appeals ruling regarding Columbia University's acquisition of land to expand its campus.[34] The court in *Matter of Kaur v. New York State Urban Dev. Corp.* allowed Columbia to effectuate the taking of 17 acres for a satellite campus in West Harlem, New York.[35] The holdouts challenging the condemnation were several business owners within the zone of the potential development who contended that the blight findings that allowed the taking were illegitimate and "only serve[] the private interests of Columbia."[36] The court, however, reasoned that, since an earlier state decision held that the Brooklyn Nets basketball arena served a "public purpose," then the educational promotion of Columbia University, although private, was also authorized as serving an equal, if not greater, "public purpose."[37] The court favorably cited the anticipated, additional benefits of the campus in Harlem, including the development of two acres of park-like space, a stimulus to job growth in the local area through the anticipated hiring of 14,000 people for the construction site area, and upgrades to the overall transit infrastructure in Harlem.[38] Scholarly interpretation of this decision argues that the standards for review and deference that the decision of the Court of Appeals of New York gave preserve the "tradition of broad eminent domain power in New York by limiting the judiciary's power to invalidate state condemnations."[39]

Makowski v. Mayor and City of Baltimore provides an additional, even more recent example of the potential adverse outcomes that complete litigation can bring for a

[34] Kaur v. New York State Urb. Dev. Corp., 933 N.E.2d 721 (N.Y. 2010).
[35] *Id.* at 724.
[36] *Id.* at 730.
[37] *Id.* at 734 (citing Develop Don't Destroy (Brooklyn) v. Urb. Dev. Corp., 874 N.Y.S.2d 414 (N.Y. App. Div., 1st Dep't. 2009)).
[38] *Kaur*, 933 N.E.2d at 729.
[39] Matthew Pickel, *Standing Pat in A Post-Kelo World: Preservation of Broad Eminent Domain Power in Kaur v. New York State Development Corp.*, 52 B.C. L. REV. 257, 259 (2011).

holdout in a condemnation proceeding.[40] In this case, the city of Baltimore sought to immediately take possession of an existing property owner's office building.[41] In recounting the facts that the trial level found, the Court of Appeals of Maryland drew attention to the history of the East Baltimore neighborhood that was the subject of the proceeding.[42] In particular, the court noted the neighborhood's historic loss of manufacturing jobs, dating as far back as the 1950s and continuing the economic decline into the 1990s.[43] This continued loss in jobs carried with it corresponding, deleterious impacts to the community, including substantial crime rates and population decreases, which collectively forced the neighborhood's property values precipitously down and produced the image of East Baltimore as a "proverbial ghost town."[44]

As an initial effort to ameliorate these problems, Baltimore attempted to restore buildings within this zone on an individual basis.[45] These efforts, however, did not work to effectively combat the "urban decay."[46] As a result of these ineffective initial efforts, the city refocused its efforts of rehabilitating the neighborhood to a more "comprehensive" plan, which aimed to achieve "massive revitalization."[47] This plan focused on redeveloping eighty-eight acres near Johns Hopkins University Medical Center through the construction of buildings for such things as biotechnology research and senior housing.[48]

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[40] Makowski v. Mayor of Balt., 94 A.3d 91 (Md. 2014).
[41] *Id.* at 92–94.
[42] *Id.* at 94–95.
[43] *Id.* at 94.
[44] *Id.* at 95.
[45] *Id.* at 94–95.
[46] *Makowski*, 94 A.3d at 95.
[47] *Id.*
[48] *Id.*

Before delving into the ultimate ruling in *Makowski*, it is sensible to first examine the cases to which the court cites in support of its ultimate ruling on this holdout situation: *Mayor & City Council of Baltimore City v. Valsamaki*[49] and *Sapero v. Mayor & City Council of Baltimore*.[50] *Valsamaki* involved a case concerning Baltimore's attempt to use quick-take condemnation.[51] The court held that the city must establish the reasons that require it to possess a respective property immediately.[52] The court additionally stood for the proposition that an impasse in negotiations for a property as part of a development does not allow for quick-take condemnation, since regular condemnation that affords "procedural due process protections" is still available in that event.[53] Furthermore, the court also examined the definition of a holdout and indicated that a failure to show the presence of a holdout situation in conjunction with the failure to show immediate necessity for possession would defeat a quick-take claim.[54]

The Maryland Court of Appeals, two months after its decision in *Valsamaki*, again examined the idea of the holdout in a quick-title action in *Sapero*.[55] As in *Valsamaki*, the court in *Sapero* noted that there was potential for permitting a quick-take condemnation in the event of necessity, but held that the facts of the case, which demonstrated proposals that the city had received to redevelop the land, amongst other things, did not establish such necessity.[56] *Sapero* additionally noted that the city's lack of necessity manifested itself through its decision to stall continuing with condemnation

[49] Mayor and City Council of Balt. City v. Valsamaki, 916 A.2d 324 (Md. 2007)
[50] Sapero v. Mayor and City Council of Balt., 920 A.2d 1061 (Md. 2007).
[51] *Valsamaki*, 916 A.2d at 326. Quick-take condemnation allows a municipality to obtain "immediate possession and immediate title to a particular property." *Id.* at 327.
[52] *Id.* at 324.
[53] *Id.*
[54] *Id.* at 345 n.18.
[55] Makowski v. Mayor and City Council of Baltimore, 94 A.3d 91, 104 (Md. 2014).
[56] Sapero v. Mayor of Balt., 920 A.2d 1061 (Md. 2007).

proceedings for over a year and instead going forward with the quick-take action that effectively "curtailed the property owner's ability to present a defense."[57]

Applying the same standards espoused in both *Valsamaki* and *Sapero*, the court in *Makowski* held that the presence of a holdout in this case warranted the use of quick-take condemnation.[58] The court observed that the property owner was indeed a holdout who made immediate possession necessary because the owner at issue was the only one in a block of over one hundred parcels of land who refused to sell, and his refusal obstructed the broader "urban renewal plan."[59] The court proceeded to declare that the existing owner "retained leverage to hold a hammer over the City in order to gain financial advantage."[60] As support for its assertion, the court noted that governments seeking to develop public projects suffer from unequal bargaining power as a result of public knowledge of the attempted acquisition of certain properties.[61]

B. Residential Covenant Holdouts

While the previous discussion focused primarily on cases of real property holdouts, the concept of holdouts extends beyond refusing to sell real property to refusing to release residential covenants.[62] For instance, in the case of *Rick v. West*, the plaintiffs sought to force the defendant to release a covenant that restricted the respective land to single family dwelling status so that the plaintiffs could build a hospital.[63] After the

[57] *Id.* at 1076.
[58] *Makowski*, 94 A.3d at 102.
[59] *Id.* at 106 (citing Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 OHIO ST. L.J. 451, 468–69 (2003)).
[60] *Makowski*, 94 A.3d at 106.
[61] *Id.* at 105.
[62] Rick v. West, 228 N.Y.S.2d 195 (N.Y. Sup. Ct. 1962).
[63] *Id.* at 196.

defendant refused, the court held that a covenant that provides a real benefit to the person seeking to use it is enforceable.[64]

In so ruling, *Rick v. West* noted that the plaintiffs' predecessor in interest was free to decide that, as an "inducement to purchasers," he would create the residential covenants.[65] The court continued to assert that, since the defendant had established reliance on these covenants, the covenants would continue to have effect because "it is not a question of balancing equities or equating the advantages of a hospital on this site with the effect it would have on defendant's property."[66] There is, however, a "reverse damages" scenario where "restrictive covenants should not be enforced unless the parties who seek enforcement pay compensation to the parties who maintain that changed conditions have rendered the restrictions unenforceable."[67] In addition, a current New York statute effectively renders unenforceable "non-substantial" restrictions on the use of land.[68]

The situation in *Rick v. West* is, in a way, analogous to the large developer who seeks to take the land of an existing owner to put it to a supposedly better use for the public.[69] The court in *Rick v. West* held that such a consideration of the competing equities to determine the supposed best societal use was not warranted.[70] So, the question then becomes, what techniques are there to confront the "holdout" in either the real property or residential covenant context?[71]

III. Comparative Survey and Analysis of Proffered Solutions

[64] *Id.* at 201.
[65] *Id.* at 200.
[66] *Id.*
[67] JESSE DUKEMINIER ET AL., PROPERTY 933 n.1 (8th ed. 2014).
[68] *Id.* at 934 n.2 (citing N.Y. REAL PROP. ACTS. § 951).
[69] *See, e.g.*, Kelo v. City of New London, Conn., 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting).
[70] *Rick*, 228 N.Y.S.2d at 200.
[71] *See infra* Part III.

A. Secret Purchasing Agents

One proposed alternative to eminent domain for confronting a real property holdout situation is the use of secret purchasing agents.[72] This proposal makes the observation that the government customarily must make use of its eminent domain power to avoid a holdout situation.[73] The proposal observes, however, that private parties can circumvent the use of eminent domain through the use of undisclosed agents, which can make "the use of eminent domain for private parties unnecessary and indeed undesirable."[74]

Daniel Kelly, an advocate of this solution, notes that secret purchasing agents, as seen in the situation of a private party's seeking to purchase the properties on a development plan, derive their foundational legitimacy from agency law.[75] For agency law purposes in this area, the developer acts as the principal and authorizes the secret purchaser to act as an agent to deal with the third party existing owner.[76] The way in which these purchases occur is through a "double-blind acquisition system," where neither the existing owner nor the buying agent is aware of the larger development that would require the purchase of the property.[77] This would potentially address a central issue of the holdout problem: differentiating between those existing owners who are refusing to sell in order to achieve an inflated price versus those who are not.[78] Since purely governmental use of eminent domain is "subject to democratic deliberation" and thus

[72] Kelly, *supra* note 4, at 19.
[73] *Id.* at 1.
[74] *Id.*
[75] *Id.* at 21–22.
[76] *Id.*
[77] *Id.* at 20–21.
[78] Kelly, *supra* note 4, at 24.

becomes public knowledge, however, sovereign use of secret buying agents to forego eminent domain proceedings generally does not occur.[79]

This proposed solution ultimately seeks to prevent "socially undesirable" transfers of land that might otherwise occur in certain circumstances where eminent domain is used to transfer land to private parties.[80] These "inefficient transfers" occur because courts have no way of understanding an owner's subjective value and instead rely on an objective metric: fair market value.[81] This sometimes "socially undesirable" outcome, Kelly observes, also occurs in situations where "properties in a purportedly blighted neighborhood are valued more highly by the existing owners than by the assembler."[82]

There are notable examples of large-scale implementations of secret purchasing agents.[83] For instance, Harvard University, in an attempt to circumvent a potential holdout issue involving an existing property owner's seeking an inflated price, used secret purchasing agents to purchase multiple parcels of land at a total cost of $88 million.[84] Likewise, Disney also used these agents to amass over one thousand acres of land for its theme parks.[85] Disney primarily took advantage of the secret purchasing agents to "overcome potential strategic behavior among sellers."[86]

While these instances certainly provide illustrations of the potential efficacy of secret purchasing agents, there are also countervailing risks associated with the mechanism.[87]

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[79] *Id*. at 1.
[80] *Id*. at 25.
[81] *Id*. at 6–7.
[82] *Id.* at 58.
[83] *Id*. at 6.
[84] Kelly, *supra* note 4, at 6.
[85] *Id*. (citing Mark Andrews, *Disney Assembled Cast of Buyers To Amass Land Stage for Kingdom*, ORLANDO SENTINEL, May 30, 1993, at K-2).
[86] Kelly, *supra* note 4, at 22–23 (citing Tim O'Reiley, *Playing Secret Agent for Mickey Mouse*, LEGAL TIMES, Jan. 10, 1994, at 2).
[87] Kelly, *supra* note 4, at 41–49.

These risks include: (1) foregoing positive externalities; (2) long durations of assembly and the possibility of collusion; and (3) distrust in the system.[88] The use of purchasing agents will potentially fail to overcome disincentives to development in instances where the societal benefit is greater than the value of the properties of the existing owners, but where the private benefit is lower than the value of those properties.[89] In these cases, the private party will not receive sufficient inducement to proceed with the development—even with secret purchasing agents—and a project that would have a net societal benefit will not take place.[90]

In addition, the use of secret purchasing agents carries with it an elongated bargaining process and the threat of collusion.[91] For example, the use of secret purchasing agents is often a time-intensive process because it requires bargaining with each existing owner, whereas eminent domain allows for relatively instantaneous acquisitions.[92] While eminent domain still might require years of litigation,[93] its use is potentially preferable to secret purchasing agents where the development necessitates expedience.[94] Furthermore, there exists a possibility of collusion in the process between the agent and the existing owner where the agent, if cognizant of the larger development, could either inform the owner of the development or increase the price offer for a "kickback."[95]

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[88] *Id.*
[89] *Id.* at 42.
[90] Kelly, *supra* note 4, at 42.
[91] *Id.* at 45–47.
[92] *Id.* at 45 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 40–42 (2d ed. 1977); Richard A. Epstein, *Holdouts, Externalities, and the Single Owners: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553, 572 (1993); Thomas Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1570 (1986) (book review)).
[93] Kelly, *supra* note 4, at 45.
[94] *Id.* at 46.
[95] *Id.* at 46–47.

Moreover, there exists the issue of creating general distrust in the system when developers administer secret purchasing agents.[96] Since use of these agents is contrary to normal "full disclosure" negotiation, the practice has the potential to engender the perception of the developer as "deceptive."[97] In fact, when the owners discover the hidden developer, the negotiations often fail.[98] Existing owners who find out that they have dealt with secret agents may subsequently lose their trust in future property transactions.[99] This breakdown in trust can ultimately compel the developer to attempt to make costly amends with the community, such as where Harvard—in response to public censure of their use of secret purchasing agents—paid the government voluntarily.[100] Furthermore, even those who have not directly dealt with secret purchasing agents but become aware of their general existence may take "wasteful precautions" to determine whether a buyer is a secret purchasing agent.[101]

B. Land Assembly Districts

Another proposed alternative to eminent domain for dealing with the holdout issue is known as the "land assembly district" ("LAD").[102] This solution aims to provide a way in which property assemblages can occur "without harming the poor and powerless," which is the type of harm that advocates of the proposal believe eminent domain can do in certain instances.[103] The advocates of this mechanism note that holdouts pose the

[96] Kelly, *supra* note 4, at 47–49.
[97] *Id.* at 47.
[98] Heller & Hills, *supra* note 15, at 1468.
[99] Kelly, *supra* note 4, at 47.
[100] *Id.* at 47–48 (citing See Marcella Bombardieri, *Town Tensions Thawing as Harvard Earns Allston's Trust: University Wins Plaudits with Housing Support*, BOS. GLOBE, Dec. 4, 2003, at B3).
[101] Kelly, *supra* note 4, at 48.
[102] Heller & Hills, *supra* note 15, at 1468.
[103] *Id.* at 1467.

problem of "underassembly" in private property transactions.[104] This issue occurs where a developer values a parcel of a desired assembly higher than the individual owner of that parcel contained within that assembly, but that owner nevertheless strategically seeks a higher price thereby diminishing the interest of the developer to assemble the properties at all.[105]

While the government has the power of eminent domain to deal with this issue, scholars note that eminent domain proceedings can result in "confiscatory condemnations" [106] and often do not compensate the owner with any "subjective surplus." [107] The proposal seeks to have the law "retrofit a community with a condominium-like structure."[108] The LAD formation and approval would be subject to a process "substantially parallel to those involved in existing redevelopment and condemnation procedures," but the approving commission would need to "certify that a LAD is necessary to overcome the problem of excess fragmentation."[109] This structure would place a community into a district that would require a majority vote to approve the sale of the district to a "developer or municipality seeking to consolidate the land into a single parcel."[110] Scholars contend that this would circumvent the holdout situation because the owners would be subject to a "collective voting procedure."[111]

While this proposal certainly has the potential to mitigate the holdout problem, it too brings corresponding concerns. For instance, there exists the risk of "majoritarian

[104] *Id.* at 1468 (citing Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 639, 673–74 (1998)).
[105] Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 927–28 (2004).
[106] Heller & Hills, *supra* note 15, at 1527.
[107] *Id.* at 1468.
[108] *Id.* at 1469.
[109] *Id.* at 1489.
[110] *Id*. at 1469.
[111] *Id.* at 1469–70.

tyranny" due to the voting schematic of the proposal that requires a majority decision.[112] This structure threatens minority property owners, as the majority may "enact rules solely benefiting itself at the expense of a minority for no better reason than that the majority can hold together a coalition of the selfish."[113] Additionally, the majority may vote for a given assembly when other property owners within it would not do so.[114] The constituent elements of the district's majority may additionally be corporate entities, such as real estate investment funds, which may by their nature perceive the district as a strict investment endeavor and fail to account for the subjective valuation of any individual property.[115] Furthermore, those with "transient" interests within the district could potentially "gang up on owners with deep connections to their parcels."[116] Thus, while LADs offer a democratic mechanism to confront the holdout issue in the real property setting as an alternative to eminent domain, it may run the risk of failing to adequately protect the interests of the minority within the district.[117]

Each of the proposed solutions above offers theoretically attractive alternatives to the use of eminent domain for dealing with the holdout situation. Without more widespread acceptance of secret purchasing agents and in the absence of the creation of LADs, however, an already available alternative that has proven itself as a highly effective tool in numerous other areas will provide a practical solution to the problem: mediation.

IV. Proposal for Mediation That Uses Principled Framework

A. Mediation Benefits

[112] Heller & Hills, *supra* note 15, at 1499.
[113] *Id.*
[114] *Id.* at 1498.
[115] *Id.*
[116] *Id.* at 1503.
[117] *See supra* notes 102–116.

The notion of dissuading traditional litigation is not a novel one, as both federal judges and American Presidents have noted the potential drawbacks of proceeding to trial.[118] Abraham Lincoln, for instance, exhorted the following: "Discourage litigation. Persuade your clients to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses, and waste of time."[119] Furthermore, and more specifically for purposes of this Comment, the notion of alternate dispute resolution in the context of eminent domain proceedings is also well established, as the use of a form of arbitration existed as long ago as in the 1660s.[120]

An additional form of alternate dispute resolution used in eminent domain proceedings, mediation, consists of an independent mediator engaging with the government and the existing owner in order to have both parties come to terms with an agreement that both sides find suitable.[121] The mediation session is dependent on the will of the parties and can occur at any stage that the parties reach an agreement to do so.[122] In this circumstance, the mediator functions to "facilitate communication between the parties, identify their respective interests, and, hopefully, help them resolve the issues on terms with which both can live."[123] At the mediation session, both parties, with legal representation, join the mediator.[124] The format of the mediation is subject to tailoring and variation to fit the needs of the parties.[125] The process of the mediation consists first

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[118] Deborah A. Ferguson, *Eight Benefits of Mediation*, 55 ADVOC. 44, 44 (2012).
[119] *Id.*
[120] Stock, *supra* note 27, at 714 (citing LISA JARDINE, THE CURIOUS LIFE OF ROBERT HOOKE: THE MAN WHO MEASURED LONDON 157–59 (2004)).
[121] Stanley Leasure & Ray Gosack, *Eminently Sensible*, ICMA.ORG, http://icma.org/m/en/Article/104506/Eminently_Sensible (last visited Jan. 30, 2015).
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*

of a joint session with the parties and mediator together.[126] Then, the mediator conducts separate caucuses with each party.[127] At these caucuses, the mediator separately conveys offers between the parties through "shuttle diplomacy."[128] Ultimately, the goal is to have the mediator join the parties again to write and sign a settlement agreement.[129]

The advantages to mediation include high reports of settlement, low costs, increased confidentiality, and a greater degree of control.[130] Settlement rates for mediation in general come in at approximately 80%, with the settlement rate for eminent domain mediations tracking closely to that figure, albeit with a small sample size of reported settlements.[131] For instance, this sample consists of a mediator in Tennessee who has conducted eminent domain mediations and approximates the settlement rate of his cases at around 80%.[132]

Furthermore, mediation foregoes the costs associated with litigation, including the potentially sizeable expenses of "pretrial attorney fees and costs arising from discovery, depositions, transcripts, motions, briefs, research, experts and witnesses."[133] The slow nature of the litigation process further compounds these costs, which increase over time.[134] Eminent domain litigation costs additionally include "negative public perception."[135] In contrast, mediation is "far less expensive," allows the cost of the

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[126] *Id.*
[127] Leasure & Gosack, *supra* note 121.
[128] *Id*. Shuttle diplomacy is a process where the mediator is "relaying offers and counter offers between the parties and continuing to assist the parties and their representatives to analyze the important elements of the case." *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] Report of the Tennessee Advisory Committee on Intergovernmental Relations, *Eminent Domain in Tennessee*, Feb. 2013, at 9, *available at* http://www.tn.gov/tacir/PDF_FILES/Growth_Policy/EminentDomain.pdf.
[133] Ferguson, *supra* note 118, at 45.
[134] *Id.*
[135] Leasure & Gosack, *supra* note 121.

mediator to be shared equally amongst the parties, and is generally less time consuming.[136]

Moreover, mediation offers increased confidentiality, whereas litigation is often an "extremely public process."[137] This confidentiality comes about as a result of statutes that prohibit the admission of evidence concerning the mediation.[138] Statutes also view the information presented to the mediator as protected.[139] Furthermore, the parties can add further confidentiality protection through any agreed upon contract stipulations.[140]

The voluntary nature of mediation allows the parties to exert significant control over the way in which the process occurs.[141] The parties are not obligated to follow "court-mandated procedures" and instead have the freedom to define their own process.[142] Since the process is voluntary, the parties can reach a compromise.[143] This is in contrast to litigation, where the judgment at trial will create a "winner and loser."[144] Furthermore, the parties exert autonomy when they choose the mediator of the dispute.[145]

B. Examples of the Use of Mediation to Avoid Eminent Domain Proceedings

A recent example of the use of mediators to avoid eminent domain litigation is the attempt of Vermont Gas Systems to run pipeline through various private properties.[146] After failing to reach an agreement with a minority percentage of the affected property owners for the easements, the company offered those owners the opportunity to conduct

[136] Ferguson, *supra* note 118, at 45.
[137] Leasure & Gosack, *supra* note 121.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] Ferguson, *supra* note 118, at 44.
[142] Leasure & Gosack, *supra* note 121.
[143] Ferguson, *supra* note 118, at 44.
[144] *Id.*
[145] *Id.*
[146] Associated Press, *Vermont Gas Offers Landowners Mediation*, WASH. TIMES, Aug. 13, 2014, *available at* http://www.washingtontimes.com/news/2014/aug/13/vermont-gas-offers-landowners-mediation/.

mediations with third-party mediators.[147] A spokesperson for Vermont Gas lauded mediation as an attractive alternative to eminent domain litigation because it is "quicker and generally cheaper."[148]

Another example of the successful use of mediation to forego eminent domain proceedings is found in Fort Smith, Arkansas.[149] The city made substantial use of mediation in its efforts to acquire various properties "for expansion of a regional water-supply lake."[150] Before beginning the mediations, the town informed the landowners that the city would pay for the cost of the mediator in order to "encourage participation."[151] In the group sessions of the mediations, the city made sure to inform the property owners of the regional benefits of the project as well as the city's intention to be fair during the negotiations.[152] The mediations were so uniformly successful that every session resulted in settlement.[153]

C. Proposal for Transformative Model

One type of proposed mediation as an alternative to eminent domain proceedings is based on the "transformative" method.[154] This proposal recognizes that mediation in general may address "problematic power imbalances inherent in any eminent domain dispute."[155] The transformative model, along with the "facilitative" and "evaluative"

[147] *Id.*
[148] Joel Baird, *Vermont Gas Upbeat on Pipeline Mediation*, BURLINGTON FREE PRESS, Aug. 12, 2014, *available at* http://www.burlingtonfreepress.com/story/news/local/vermont/2014/08/12/vermont-gas-upbeat-pipeline-mediation/13966905/.
[149] Leasure & Gosack, *supra* note 121.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] Stock, *supra* note 27, at 687–88.
[155] *Id.* at 694–95.

models, is a "generally accepted mediation [model]."[156] The transformative model consists of the least involved mediator, while the evaluative process implements the most involved mediator of these three models.[157] In the transformative process, the mediator does not unilaterally establish the way in which the mediation will occur, but rather seeks input from the parties as to how to organize the session.[158] To foster and encourage "engagement" between the parties, the transformative mediator makes use of unstructured questioning without suggesting the answer beforehand."[159] While the mediator here is minimally involved, he will nevertheless draw attention to points in the discussion where one party "recognizes and acknowledges the perspective of the other."[160]

The proposal for transformative mediation espouses that model specifically in the eminent domain context because the minimal involvement of the transformative mediator may lead to maintenance of the relationship between the parties.[161] An advocate of the proposal, Erik Stock, notes that the mediator who implements a transformative methodology seeks "to foster opportunities for the disputants to experience empowerment and recognition."[162] The transformative model, Stock argues, will allow the existing owner in an eminent domain proceeding to feel "empowerment."[163] According to Stock, the use of the transformative model is particularly appealing in this context because eminent domain cases frequently involve parties located in "neighborhoods lacking in political power," and the transformative model affords those parties an opportunity to

[156] *Id.* at 696–97.
[157] *Id.*
[158] *Id.* at 697.
[159] *Id.* at 697–98.
[160] Stock, *supra* note 27, at 697.
[161] *Id.*
[162] *Id.* at 697.
[163] *Id.*

"gain a voice in a dispute where they might otherwise have none and reconnect to the government entity involved in the dispute."[164]

Stock goes on to cite the Uniform Mediation Act as reinforcement for the transformative model, since that Act emphasizes "self-determination" in order to create a sense of equity and satisfaction with the mediation proceeding.[165] This transformative dynamic, according to Stock, is potentially useful because it necessitates cooperation where there can be a large "emotional and psychic" discrepancy between the property owner and the government in eminent domain cases.[166] Furthermore, Stock contends that, on a more macro level, the transformative model will preserve the relationship between property owners and the government by engendering "democratic values" which the scholar deems potentially greater than reaching a settlement.[167] Stock's conclusion emphasizes the process value of mediation, where if the property owner feels a sense of "empowerment" while dealing with the government through a robust level of control in the mediation itself, then the use of the transformative method is justified.[168]

D. Argument for an Evaluative Model of Mediation to Avoid Eminent Domain Litigation

While the proposal of a transformative model certainly has appealing and meritorious characteristics, including the process empowerment of the existing owner as discussed *supra*,[169] a holdout situation may call for more active involvement from the mediator in an effort to reach a settlement. This active involvement is a chief feature of

[164] *Id.* at 698.
[165] *Id.* at 700.
[166] Stock, *supra* note 27, at 701.
[167] *Id.* at 702–03.
[168] *Id.*
[169] *Id.*

evaluative mediation—indeed, it consists of the highest level of mediator involvement of the three primary mediation models.[170] Whereas a transformative mediator takes a predominantly hands-off approach in an effort to bestow upon the parties a sense of control over the mediation process, an evaluative mediator focuses much more on the outcome of the mediation and "will not only encourage settlement, but will at times propose a particular outcome for the dispute."[171]

In general, an evaluative mediator "focuses on the legal rights of the parties and evaluates the merits of each party's claim."[172] A mediator who implements this methodology seeks to address the fundamental origin of the controversy.[173] While this technique engenders a "more practical focus than in a purely facilitative mediation," it does not do so to neglect either side's interests.[174]

A core competency of the evaluative model is the ability of the mediator to act as an "agent of reality" for the parties.[175] The evaluative mediator acts as such when providing objective and neutral advice.[176] The mediator in this evaluative capacity seeks to reach a settlement by overcoming "unrealistic opinions about the value of their claims" that either party may have.[177] To accomplish this end, an evaluative mediator "provides

[170] *Id.* at 696.
[171] *Id.* at 696–97.
[172] Kenneth M. Roberts, *Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement*, 39 LOY. U. CHI. L.J. 187, 195 (2007) (citing Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 268 (2000)).
[173]Roberts, *supra* note 172, at 195 (citing Richard Birke, *Evaluation and Facilitation: Moving Past Either / Or*, 2000 J. DISP. RESOL. 309, 313–14 (2000)).
[174] Roberts, *supra* note 172, at 195
[175] *Id.* at 196 ((citing Richard Birke, *Evaluation and Facilitation: Moving Past Either / Or*, 2000 J. DISP. RESOL. 309, 315 (2000)).
[176] Roberts, *supra* note 172, at 196.
[177] *Id.*

new information, helps parties realize the costs and risks of litigation, and points out weaknesses and strengths of each side."[178]

More specifically in the eminent domain context, an evaluative mediator provides the parties with "opinions on any of the many issues which arise in eminent domain matters, including the potential outcome at trial."[179] The evaluative mediator in this context may also candidly assess the costs and benefits of proceeding to litigate the issue.[180] During this discussion, the evaluative mediator may choose to present a "verdict range" that incorporates the probability of potential outcomes within that realm of possibilities.[181] Since an evaluative mediator has this ability to offer opinions on the matter, the use of an "experienced mediator with eminent domain expertise" serves to enhance the session.[182]

E. Incorporating Principled Framework to Evaluative Model

This Comment proposes that a principled negotiating framework based on the seminal book *Getting to Yes*[183] will augment the efficacy of evaluative mediation in the eminent domain context. Scholars have referred to this work as the "Bible for cooperative negotiations and generally a very useful blueprint for mediation."[184] The main precepts of the work are: "1) separating the people from the problem, 2) focusing on

[178] Roberts, *supra* note 172, at 196.
[179] Stanley Leasure, *Eminent Domain Disputes: The Role of Mediation*, RIGHT OF WAY, Mar./Apr. 2012, at 32–34, *available at* https://www.irwaonline.org/eweb/upload/web_mar_apr12_EminentDomainMediation.pdf.
[180] *Id.* at 34.
[181] *Id.*
[182] *Id.* at 33.
[183] Fisher & Ury, *supra* note 16.
[184] John Barkai, *What's A Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem*, 10 CARDOZO J. CONFLICT RESOL. 43, 81 (2008).

interests not positions, 3) inventing options for mutual gain, and 4) using objective criteria."[185]

1. Separating the People from the Problem

As to the first principle of "separating the people from the problem," the book notes that, "The ability to see the situation as the other side sees it, as difficult as it may be, is one of the most important skills a negotiator can possess."[186] This ability to analyze the situation from both sides underscores the evaluative mediator's goal of objective assessment of the root causes of the case.[187] Furthermore, while this principle recommends focusing on the problem itself, it does not disregard the emotions of the parties involved and advises negotiators to "deal with the people as human beings."[188] Since emotions on the part of the potential holdouts have the tendency to run high,[189] the evaluative mediator would be prudent to heed the advice of this principle and recognize these human emotions at the mediation session, while maintaining a simultaneous but separate focus on the problem, as the principle suggests.

The use of this principle is highly complementary to evaluative mediation, which emphasizes the role of the mediator as bringing objective and neutral reality to the parties.[190] Conversely, this principle is at odds with the precepts of transformative mediation, which does not separate the people from the problem but instead seeks to have the parties feel empowerment over the problem.[191] The use of evaluative mediation with

[185] *Id.* (citing Fisher & Ury, *supra* note 16).
[186] Fisher & Ury, *supra* note 16, at 23.
[187] Roberts, *supra* note 172, at 196.
[188] Fisher & Ury, *supra* note 16, at 39.
[189] *See, e.g.*, *supra* notes 6–10.
[190] Roberts, *supra* note 172, at 196. ((citing Richard Birke, *Evaluation and Facilitation: Moving Past Either / Or*, 2000 J. DISP. RESOL. 309, 315 (2000)).
[191] Stock, *supra* note 27, at 701.

the application of this principle is preferable to the transformative model in the eminent domain context because, while it would address the emotional element[192] of potentially selling one's property, it would not allow these emotions to create "unrealistic opinions about the value of their claims" that would conceivably interfere with settlement.[193] For instance, in the example of Vera Coking, who turned down an offer to sell her property for $2 million to Donald Trump only to ultimately have the property receive an auction reserve price of approximately $1.8 million less than that offer,[194] an evaluative mediator would have acted as an "agent of reality" to make Ms. Coking aware of this potential precipitous price decrease as well as the objective assessment of the offer at the time it was made.[195]

By adhering to this principle, the evaluative mediator would also be able to avoid the potential issue of distrust in the system related to the secret purchasing agent proposal.[196] That proposal would effectively remove the people from the problem through the use of undisclosed purchasing agents so as to not make an existing owner aware of a larger development plan, but this practice is often seen as "deceptive."[197] Indeed, property owners who come to realize that they have transacted with undisclosed agents may suffer from a breakdown in trust in future property dealings.[198] This "separating the people from the problem" principle seeks to accomplish just what it claims, however: it untangles the issue at hand from emotion, but does not wholly remove

[192] Fisher & Ury, *supra* note 16, at 39.
[193] Roberts, *supra* note 172, at 196.
[194] Matt A.V. Chaban, *A Homeowner's Refusal To Cash Out In a Gambling Town Proves Costly*, N.Y. TIMES, July 19, 2014, at A19, *available at* http://www.nytimes.com/2014/07/22/nyregion/a-homeowner-who-refused-to-cash-out-in-a-gambling-town-may-have-missed-her-chance.html.
[195] Roberts, *supra* note 172, at 196.
[196] Kelly, *supra* note 4, at 47–49.
[197] *Id.* at 47.
[198] Kelly, *supra* note 4, at 47.

the human component.[199] Thus, the evaluative mediator implementing this principle would not have to rely on deception, as is the potential case with the use of secret purchasing agents.[200] In order to achieve a positive outcome for the parties, the evaluative mediator can still objectively assess the merits of each party's position without conflating the problem with emotion.[201] This would forego the potential costs to the secret purchasing agent proposal, including the monetary costs associated with making a financial apology to the community, as was the case with the Harvard example,[202] and the costs associated with precautionary assessments of whether a buyer is a secret purchasing agent.[203]

2. Focus on Interests

As to the second principle of "focusing on interests not positions," the book asserts that, "a close examination of the underlying interests will reveal the existence of many more interests that are shared or compatible than ones that are opposed."[204] This focus on interests by the evaluative mediator would lend itself to separating those property owners who are holding out for opportunistic reasons from those holding out for non-monetary reasons.[205] For instance, the evaluative mediator would aim to objectively determine whether someone like Edith Macefield actually imputes a sentimental premium on the value of a given property, is simply strategically seeking a higher price knowing that her property is essential to the larger development scheme, or is indeed simply

[199] Fisher & Ury, *supra* note 16, at 39.
[200] Kelly, *supra* note 4, at 47.
[201] Fisher & Ury, *supra* note 16, at 39.
[202] Kelly, *supra* note 4, at 47–48 (citing Marcella Bombardieri, *Town Tensions Thawing as Harvard Earns Allston's Trust: University Wins Plaudits with Housing Support*, BOS. GLOBE, Dec. 4, 2003, at B3).
[203] Kelly, *supra* note 4, at 48.
[204] Fisher & Ury, *supra* note 16, at 42.
[205] *See supra* Part I.

attempting to make some sort of grand statement against the development itself.[206] As another example, in the Columbia University expansion case, the evaluative mediator would actively seek to establish whether the business owner holdouts in that case truly believed the area was not blighted,[207] or whether their true interest for holding out was strategic in nature.

This is an additional and appealing, distinguishing characteristic of evaluative mediation implementing this principle from the transformative model, since the transformative mediator would simply focus on creating the feeling of empowerment amongst the parties.[208] While there is a strong argument that this emphasis on the process will enable the parties to feel a greater sense of control over the mediation,[209] the session may very well conclude without an objective third party's determining the reasoning behind the refusal to sell, which is the precise determination that this focus on interests promotes.[210] This would ultimately better enable the evaluative mediator in the active promotion of settlement.[211]

3. Inventing Options for Mutual Gain

Moreover, in reference to the third principle of "inventing options for mutual gain", the book notes that, "[i]n a complex situation, creative inventing is an absolute necessity. In any negotiation it may open doors and produce a range of potential agreements satisfactory to each side."[212] The potential efficacy of the application of this principle is seen in the result in *Rick v. West*, a case in which the construction of a

[206] Kelly, *supra* note 8.
[207] Kaur v. New York State Urb. Dev. Corp., 933 N.E.2d 730 (N.Y. 2010).
[208] Stock, *supra* note 27, at 697.
[209] *Id.*
[210] Fisher & Ury, *supra* note 16, at 42.
[211] *Id.*
[212] Fisher & Ury, supra note 16, at 79–80.

hospital did not occur because of a holdout's enforcement of a residential covenant.[213] The court held that it would not conduct a balancing of the potential benefits of a hospital with the potential burden imposed on the covenant holder if it were not enforced, but would instead focus on whether the covenant-created reliance was an "inducement to purchasers."[214] In a case like this, an evaluative mediator implementing this principle would attempt to come up with a broad range of possible solutions[215] that could have produced the ostensibly favorable result of the construction of a hospital, such as possibly giving the holder of the restrictive covenant some interested stake in the new hospital for releasing the covenant. In addition, the evaluative mediator could use his active involvement in the mediation to create solutions based on the purported benefits of the development, such as in *Matter of Kaur v. New York State Urban Development Corp.*, where an evaluative mediator could potentially have based a number of creative solutions on the litany of potential benefits of Columbia University's expansion, such as its creation of thousands of jobs and benefits to the local transit system and environment.[216]

This is another chief advantage of evaluative mediation over its transformative counterpart, since the more active involvement of the evaluative mediator is more conducive to the creation of different, possible solutions, as opposed to the general passivity of the transformative mediator.[217] Furthermore, the evaluative mediator could also present the parties with a probability analysis of these outcomes if a trial is needed as

[213] Rick v. West, 228 N.Y.S.2d 195, 201 (N.Y. Sup. Ct. 1962).
[214] *Id.*
[215] Fisher & Ury, *supra* note 16, at 79–80.
[216] Kaur v. New York State Urb. Dev. Corp., 933 N.E.2d 729, 735 (N.Y. 2010).
[217] Stock, *supra* note 27, at 697.

a backdrop to any other possible, devised solutions so as to convey the possible risks involved with each solution.[218]

4. Establishment of Objective Criteria

Finally, *Getting to Yes* encourages establishing "objective criteria" upon which to base the negotiations.[219] This criteria, the book argues, should consider "standards of fairness, efficiency, or scientific merit."[220] This principle complements the risk-assessment and opinion-providing function of the evaluative mediator[221] by underscoring the need to establish an objective basis for that judgment.

One such possible criteria to assist the evaluative mediator's creation of a "verdict range"[222] would be the use of past holdout case results. For instance, *Kelo* could potentially provide caution to the holdout who is considering creating an impasse at mediation, as the Supreme Court, albeit in a split decision, asserted the transfer of property from one private owner to another in the interest of economic growth to be a permissible "public use."[223] Similarly, *Makowski* illustrates another example of a case result that the evaluative mediator could use as an objective benchmark to provide admonition to a would-be holdout. There, the court provided guidance as to who constitutes a holdout and ultimately held that the refusal to sell in that case amounted to interference with the more comprehensive "urban renewal plan" at issue and thus warranted condemnation.[224]

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[218] Leasure, *supra* note 179, at 34.
[219] Fisher & Ury, *supra* note 16, at 83.
[220] *Id.*
[221] *See supra* notes 179–181.
[222] Leasure, *supra* note 179, at 34.
[223] Kelo v. City of New London, Conn., 545 U.S. 469, 484–486 (2005).
[224] Makowski v. Mayor of Balt., 94 A.3d 91, 101–02 (Md. 2014).

Conversely, the evaluative mediator could juxtapose these potential outcomes with the result in *Norwood*, which held that condemnation was not warranted in a case where a municipality attempted to obtain private property and transfer it to another private party in order to ostensibly revitalize the city, with the court noting that this raises the possibility of improper financial benefits to the city or to the private party to which the property is ultimately transferred.[225] Thus, these case results could provide the evaluative mediator with the tools necessary to establish the type of "objective criteria" that *Getting to Yes* espouses.[226]

V. Conclusion

This Comment began with a definition of a holdout as a landowner who resists or refuses to sell to a larger development. These holdouts are often subject to eminent domain proceedings to effectuate the development. As discussed, various alternatives to eminent domain exist to deal with the holdout issue, including secret purchasing agents and land assembly districts. This Comment then advanced evaluative mediation as a beneficial approach to dealing with holdouts due to this model's emphasis on mediator activity and settlement.

The proposal centered on the general appeal of mediation, including the cost and control advantages compared to traditional litigation of eminent domain cases. More specifically, though, this Comment argued that evaluative mediation is better-suited to reach the needed settlements in eminent domain cases through the ability of the mediator to actively provide evaluations of the matter, distinguished from the general passivity of a transformative mediator. This Comment then offered a *Getting to Yes* principled

[225] Norwood v. Horney, 853 N.E.2d 1115, 1139–40 (Ohio 2006).
[226] Fisher & Ury, *supra* note 16, at 83.

negotiating framework to complement and enhance this evaluative mediation. Using this framework, the mediator will have a strong basis upon which to both conduct the process of these potentially highly emotional holdout cases as well as to provide an independent opinion of the case based on objective criteria.