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INTRODUCTION

The use of the public-private partnership for much of what local governments seek to accomplish, particularly in the area of economic development, is celebrated in notions and writings about good government.[1] Because such partnerships involve the administration of government through informal influence and relationships, they are also denounced as evidence of an impenetrable web of structural disadvantage for community residents and property owners.[2] Buried beneath the furor over *Kelo v. City of New London*'s[3] reendorsement of broad city discretion to use the power of eminent domain for economic development are a number of implicit questions: First, is economic development, as currently practiced, necessary? Second, are public-private joint ventures essential to implement successful economic development? Third, do public-private partnerships work? Finally, what is the basis for answering the third question—i.e., on what basis do we measure the success or efficacy of public-private partnerships? These questions are under-

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1. *See generally* STEPHEN GOLDSMITH, THE TWENTY-FIRST CENTURY CITY: RESURRECTING URBAN AMERICA (1999); Robin Paul Malloy, *The Political Economy of Co-Financing America's Urban Renaissance*, 40 VAND. L. REV. 67, 70 (1987) (describing a celebration of public-private partnerships as a successful method of financing redevelopment); Lynne Moulton & Helmut K. Anheier, *Public-Private Partnerships in the United States: Historical Patterns and Current Trends*, *in* PUBLIC PRIVATE PARTNERSHIPS: THEORY AND PRACTICE IN INTERNATIONAL PERSPECTIVE 105 (Stephen P. Osborne ed., 2000). *But see* Michael Keating, *Commentary: Public-Private Partnerships in the United States from a European Perspective*, *in* PARTNERSHIPS IN URBAN GOVERNANCE: EUROPEAN AND AMERICAN EXPERIENCE 163, 171 (Jon Pierre ed., 1997) (arguing that the attribution of positive qualities to the public-private partnership ignores power relationships which ensure that the purposes or goals of the partnership will reflect the purposes of the more powerful member of the partnership).

2. *See, e.g.*, Jotham Sederstrom, *Yards Sued on Plan to Grab Land*, DAILY NEWS (N.Y.), Feb. 8, 2007, at 1 (describing the furor over the Atlantic Yards redevelopment).

3. Kelo v. City of New London, 545 U.S. 469 (2005).

appreciated as broad normative policy questions; they are rarely asked and even more rarely answered. To the extent these questions are considered at all, the analysis hinges somewhat unproductively on irresolvable attempts to distinguish between proper public motives and improper private means.[4]

There are tangible and practical reasons for a city and private actors to align. Ideally, such alignments take place to address goals jointly that *could not* or *would not* be met by either party separately. The distinction between *could* and *would* has been at the heart of much of the controversy surrounding redevelopment, eminent domain, and public-private partnerships. However, once the term "economic development" is invoked, all analysis usually ends and these questions are typically not asked. The *Kelo* decision is consistent with the courts' general reluctance to question or scrutinize economic development justifications, no matter how attenuated, hopeful, rosy, or improbable.[5] Instead, economic-development claims are typically viewed with confidence, and the opinions cheerfully recite that the validity of the projected benefits are beyond judicial review.

As the use of economic development has broadened beyond the inner city to the suburbs and middle-class areas, this traditional deference has begun to change.[6] Recent actions at the state and local level have begun to reflect, indirectly, the current public distrust of certain public-private partnerships as well as a strong sentiment that the goals and processes of these partnerships should embody the interests of the public. Most directly illustrative of this trend are the flurry of laws that have been passed at the state and local level to limit the use of eminent domain for general economic development.[7] At least two state-court decisions illustrate this trend—that the enterprise of economic development and the vehicle of the public-private partnership are now subject to some scru-

4. *See, e.g., id.* at 477-78 (describing purely private takings as impermissible); *id.* at 501-04 (O'Connor, J., dissenting) (discussing the impossibility of this distinction because of the merger of the public and private and how it is pointless to try to "divine illicit purposes" such as "purely private").

5. *See, e.g.*, Maready v. Winston-Salem, 467 S.E.2d 615 (N.C. 1996) (rejecting a state constitutional challenge to business tax incentives based on optimistic predictions about the projected benefits of jobs and an increased tax base).

6. Wendell E. Pritchett, *Beyond* Kelo*: Thinking About Urban Development in the 21st Century*, 22 GA. ST. U. L. REV. 895, 909 (2006).

7. *See* Lynn E. Blais, *Urban Revitalization in the Post-*Kelo *Era*, 34 FORDHAM URB. L.J. 657, 659 (2007). Since *Kelo* was decided, thirty-four states have adopted some responsive legislation or constitutional amendment. *Id.*

tiny. In *County of Wayne v. Hathcock*, the Michigan Supreme Court restricted the use of eminent domain to projects in which the public has a legal right to use or to blight.[8] In *Baltimore Development Corp. v. Carmel Realty Associates*, the Maryland Court of Appeals interpreted an "open meetings" law to apply to a quasi-private economic development entity working on behalf of the City of Baltimore.[9] Communities have also begun to respond, not by protesting development, but by organizing to negotiate directly with private developers to assure certain community benefits arise out of redevelopment projects.[10] This variety of activities suggests that the once sacrosanct and private domain of development is increasingly being subjected to some form of external check on behalf of the public. I will discuss these approaches briefly and then offer some observations about the benefits and limitations of these attempts to increase the "publicness" of public-private partnerships.

PUBLIC-PRIVATE PARTNERSHIP AND THE PRIVATIZED CHARACTER OF LOCAL GOVERNMENTS

Though the aim and work of local governments seem inherently public, local governments' history has consistently displayed both public and private characteristics.[11] Municipal corporations and other forms of general-purpose local governments receive a grant of the states' police and taxation powers to enable government in furtherance of the public health, safety, and welfare. However, the reality is that many services and activities provided by local governments are equally capable of being defined as private.[12]

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8. County of Wayne v. Hathcock, 684 N.W.2d 765, 773, 788 (Mich. 2004).

9. Baltimore Dev. Corp. v. Carmel Realty Assocs., 910 A.2d 406 (Md. 2006).

10. *See* Sharon Pian Chan, *What's In It for the Community?*, SEATTLE TIMES, Dec. 6, 2006, at B1, *available at* 2006 WLNR 21111718 (Westlaw); Terry Pristin, *In Major Projects, Agreeing Not to Disclose*, N.Y. TIMES, June 14, 2006, at C2, *available at* 2006 WLNR 23749812 (Westlaw); Milan Simonich, *Hill Residents Call for Their Share of the Arena Pie: Strategy Sessions Held to Secure Pens' Help in Improving Area*, PITTSBURGH-POST GAZETTE, July 29, 2007, at B3, *available at* 2007 WLNR 14564436 (Westlaw).

11. *See* Gerald Frug, *Property and Power: Hartog on the Legal History of New York City*, 9 AM. B. FOUND. RES. J. 673, 673-78 (1984) (reviewing HENDRICK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 (1983)) (discussing the history of the interaction between private power and use of city-owned property for profitable purposes).

12. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985) (rejecting the "traditional governmental function" standard as the basis for federalism doctrine making states immune from the application of federal law); Ball v. James, 451 U.S. 355 (1981) (determining that a local governmental entity had a nominal and insufficiently public character and performed narrow functions that were not traditionally an

Also, local governments must find a way to attract the mainstream economy to operate within their borders, providing tax revenue, jobs, and other economically beneficial activities.

In many ways, the term "public-private partnership" has saved city government. City government undertakes very few activities well enough to avoid being met with criticism or with negative regard. In popular discourse, "public" is far too often a dirty word. Similarly, in local government doctrine, it is on those occasions when the city's functions are comprehended as private that the city is perceived more favorably and often given more autonomy as well as immunity from complying with constitutional guarantees.[13] Presumably, a city acting in a "private" capacity is sufficiently circumscribed by business-profit motives or operational concerns that act as a proxy check on the city's exercise of governmental power. Thus, it would appear that in almost all other *public* governmental functions, there is a kind of psychic need for governmental legitimacy. Unable to supply this legitimacy itself, a city must align itself with private entities in order to enjoy some of the positive association, as well as autonomy, to address the public's needs through employing private, business-like techniques. Ironically, the result of this driving need to utilize private means to address public business is both the solution and the problem.

However, one commonly perceived privatizing aspect of local governments (but inadequately accounted for in the law) derives from the role that "local leading citizens" often play, both formally and informally, in influencing the direction of government. Interest group theory suggests that private business elites can only direct government to operate in a way that benefits their interests.[14] While the jury is out, however, much skepticism abounds regarding whether promoting the interests of business elites works to the benefit of the public. One significant privatizing aspect of the practice

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aspect of government sovereignty and thus need not comply with the Equal Protection Clause's guarantees of one person, one vote).

13. *See, e.g.*, *Ball*, 451 U.S. at 362-72; Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728-29 (1973); Mun. Bldg. Auth. v. Lowder, 711 P.2d 273, 277-80 (Utah 1985). *See generally* KATHRYN A. FOSTER, THE POLITICAL ECONOMY OF SPECIAL PURPOSE GOVERNMENT (1997).

14. *See* Jeffrey M. Berry et al., Power and Interest Groups in City Politics 4-6 (Dec. 2006) (unpublished manuscript, on file with the Western New England Law Review) (describing how the evolution of interest group theories from pluralism theories and elite theories to, most recently, regime theories in order to most accurately describe the informal working relationships between government and elite citizens). *See generally* JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE (1987).

of economic development may be the accepted local government practice of spinning off quasi-private entities as either special- or limited-purpose governments or public authorities. Public authorities, special districts, and even business improvement districts are all examples of local government structures to which significant amounts of local government economic development activities have been transferred. These entities have been recognized in local government law as acceptable vehicles to evading state constitutional limits on local governments' discretion to issue bonds or raise taxes. They do not have to comply with other state or municipal mandates designed to ensure fairness and ethical behavior in public employment or procurement of services. Unfortunately, these controls to prevent municipal corruption are seen as "red tape"[15] because they seem to come at the expense of nimble responsiveness, flexibility to adjust to new circumstances, or creative innovation.[16] These entities, which often take part in the public-private partnership for development, also make significant portions of public decision making private. Thus, they are immune from direct, and often even indirect, public accountability. For example, the business improvement district is a form of public-private partnership, indirectly related to development, where private property owners are empowered to form something akin to a homeowners' association for neighborhoods to take advantage of enhanced services such as security, streetscape improvements, and sanitation.[17] Not only is the district taking on duties formerly charged solely to the municipality, it is, in effect, sanctioning the city's failure to meet formerly expected levels of municipal services. The city is thus being carved up into private enclaves, not merely in terms of property ownership, but also in terms of financing and governance.

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15. *See* Barry Bozeman, *A Theory of Government "Red Tape,"* 3 J. PUB. ADMIN. RES. & THEORY 273 (1993).

16. These entities also facilitate intergovernmental decision making and action without disturbing local government political boundaries allowing joint action while maintaining separation between city and suburb, or between publicly elected government officials (i.e., the Mayor) and unpopular decisions that can be attributed to economic realities without political cost. The impact of the decision is thus passed seamlessly to taxpayers. *See* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 375-78 (1990) (discussing the costs of special-purpose governments to central cities and the benefits to suburbs).

17. *See generally* Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999); Audrey G. McFarlane, *Preserving Community in the City: Special Improvement Districts and the Privatization of Urban Racialized Space*, 4 STAN. AGORA 5 (2003), *available at* http://agora.stanford.edu/agora/volume4/mcfarlane.shtml.

More directly connected to development are the set of activities conducted jointly by cities and the private sector that are loosely termed "economic development." These activities take place in a myriad of formal and informal ways. Often an independent agency is chartered by the state or the city, or both, to search for and attract business relocation or expansion to the locale.[18] Part of the attraction strategy at the heart of the public-private partnership is to use a public subsidy to facilitate a particular real estate development project. In return for the public subsidy, the city gets (1) a success story to promote; (2) needed business activity in the city and its attendant benefits; (3) the potential for increased tax revenues through increased taxable activities—though many of the deals are subsidized by the city foregoing the very taxable increases one would think were sorely needed; and (4) indirect synergistic benefits of signaling that the city is on the rise—that the city is the "place to be."

Because of the shifting nature of public and private in understanding the methods and motivations of local governments, the partnership between local governments and private business is longstanding. However, this relationship is poorly conceived, misunderstood, and mistreated by the law. Sorting through how and whether public-private partnerships work to fulfill public purposes is difficult. Some partnerships explode the public-private distinction by intermingling aspects of public powers aligned with private purposes for profit, and public purposes for improving the city's economic health aligned with private methods. However, the law's treatment of these classifications has tended towards extreme deference depending on the economic circumstances.[19] The greatest impact of the public-private partnership is probably mostly one of perception. Notwithstanding the positive associations that the label evokes, the techniques utilized recast the perception of local gov-

18. *See* Lynne B. Sagalyn, *Public/Private Development: Lessons from History Research and Practice*, 73 J. AM. PLAN. ASS'N 7, 10 (2007) ("Local officials set up special public development corporations or redevelopment authorities and staffed them with business-oriented executive directors who relied on specialized consultants to help compare developer responses, price the development opportunity, and analyze the terms and conditions of the business deals for presentation to the public.").

19. *See, e.g.*, Kessler v. Grand Cent. Dist. Mgmt. Ass'n, 158 F.3d 92, 94-95 (2d Cir. 1998) (finding Business Improvement Districts to be special, limited purpose governmental entities and, thus, appropriate for fulfilling narrow, i.e., private, purposes). *See generally* Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998); Daniel R. Garodnick, Comment, *What's the BID Deal? Can the Grand Central Business Improvement District Serve a Special Limited Purpose?*, 148 U. PA. L. REV. 1733 (2000).

ernments' emphasis and motivation in development as private. The quasi-private entity set up to pursue development's success is measured by how much it can accommodate private business's interests and needs. Thus, its emphasis is on commercial success and what markets define as the most lucrative technique. Due to municipal inability to provide adequate services, local government law has authorized private business districts to manage these neighborhoods. The financing techniques involve leveraging off future tax revenues arising from the new developments. It is the very intermingling of those purposes, therefore, that threatens to subvert, if not subordinate, the public purposes to those defined or circumscribed by private interest.

Whether the strands of public and private can be meaningfully disentangled is made altogether more difficult given the ubiquity of public-private partnerships. According to urban planner Lynne Sagalyn, the public-private partnership has evolved over time through three stages, each stage progressively more private.[20] When the federal government played a significant role as financier, the first stage of public-private partnerships was characterized by city-initiated projects.[21] The second stage, characterized by the era of sharply waning federal financial support, also involved city-initiated projects, but out of necessity turned to bootstrap techniques like revenue bonds and tax increment financing.[22] These strategies were inherently of less general public benefit because the projected increase in tax receivables or revenue was limited to the district or the project. Most, if not all, of the increased taxes were used to repay the district's debt.[23] Thus these projects were of limited benefit to the rest of the city. The third and current state of public-private partnership has turned from city-initiated or city-owned projects to developer- or private-corporation-initiated/owned projects, now referred to, somewhat ironically, as the *private-public* partnership.[24] This shift towards private dominance has magnified the challenge that the public-private hybrid model of development

20. Sagalyn, *supra* note 18, at 7-8.

21. *Id.* at 8-9.

22. *Id.* at 9-11.

23. *See* Peter Eisinger, *Financing Economic Development: A Survey of Techniques*, GOV'T FIN. REV., June 2002, at 20, 22 (explaining tax increment financing).

24. CHRISTOPHER B. LEINBERGER, BROOKINGS INST., TURNING AROUND DOWNTOWN: TWELVE STEPS TO REVITALIZATION 5 (2005), http://www.brookings.edu/metro/pubs/20050307_12steps.htm.

presents for notions of general public welfare and sharply attenuated the democratic accountability issues.

The reality of public-private partnerships is that they involve pragmatic trade-offs, compromises, and learning by doing. The public wins some and loses some based on knowledge, expertise, and market conditions of the city representatives involved in the deal.[25] According to Christopher Leinberger,

> The public sector, usually lead [sic] by the mayor or some other public official, may convene the strategy process but it must quickly be led by the private entities whose time and money will ultimately determine the effort's success. A healthy, sustained partnership is crucial to getting the revitalization process off the ground and building the critical mass needed to spur a cycle of sustainable development.[26]

But Lynne Sagalyn notes that "public and private players rarely have, and do not need, equal bargaining power or equal stakes if risk is proportional to each partner's investment. A public official's bargaining power is usually greatly affected by the strength of the local market and the real estate cycle."[27]

Thus, apart from how suspicious it may look for cities to be partnering with private companies for projects that will be privately owned, the measure of efficacy of these projects for furthering the public interest will obviously depend on the criteria selected to evaluate the partnerships. Since these projects are now more fre-

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25. Sagalyn, *supra* note 18, at 13.

26. LEINBERGER, *supra* note 24, at 8. Leinberger adds,

> The potential roles of the public in this process can vary tremendously based upon the needs of the particular downtown and how much political capital politicians are willing to expend in the effort. There are a host of activities the public sector may be well-positioned to undertake, however, such as improving public safety, increasing transit options and availability, constructing parking facilities, attracting and retaining employment, providing appropriate tax incentives for new real estate development, developing an impact fee system, assembling land, and perhaps most importantly, creating easy-to-use zoning and building codes to enable the walkable urbanity that defines a thriving downtown.

Id. at 9.

27. Sagalyn, *supra* note 18, at 13. Perhaps it is also the case that a business-friendly discourse may contribute to a lack of imagination or creativity in approaches to development. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999) (arguing that our notions of development are too narrowly focused on economic goals and should include human development goals); *see also* David Wilson, *Metaphors, Growth Coalition Discourses and Black Poverty Neighborhoods in a U.S. City*, 28 ANTIPODE 72, 73 (1996) (arguing that a "growth discourse[ ]" exists that guides and limits the direction of economic development).

quently privately owned, and often (but not always) initiated by developers, cities have "less bargaining power than when they [held] legal title" under an earlier generation of federally funded development projects.[28] Therefore, in order to answer the question of whether the public-private or private-public partnerships work, the predicate questions must be answered: What is the basis on which to measure the answer to the question? Should such partnerships be evaluated purely by project completion or the types and levels of public benefit that result from the partnership?

A. *The Measure of Public-Private Partnership Efficacy*

The problem highlighted by the recent focus on the eminent domain doctrine is whether, and how to measure the extent to which, the "publicness" of a city's proffered public benefit justification is adequately demonstrated. The backlash following the *Kelo* decision can, in some part, be attributed to the perceived insulation of public authorities or other independent development entities from public accountability. One source of the problem for legal doctrine has been that the consistent goal of public-private partnerships is to shield their operations from red tape, including public participation. Thus, a consistent and troubling aspect of public-private partnerships is the extent to which their decision making is shielded from public accountability. Traditionally, courts have not adequately dealt with this issue, coming down on the side of the private part of the deal and finding against democratic accountability. Cities have been allowed to transfer government functions to private entities and, based on the formalism of the arrangement, the enterprises and their decisions have been treated as private.[29] The popular sentiment, however, has been that some external check is needed because of economic development's case-by-case, transactional deal-making methods.[30] As discussed in the Introduction,

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28. Sagalyn, *supra* note 18, at 7. The Urban Development Action Grant (UDAG) program was a particularly popular and flexible federal funding program for local economic development. *See* Duane A. Martin, *The President and the Cities: Clinton's Urban Aid Agenda*, 26 URB. LAW. 99, 108-09 (1994) (discussing the beginning and end of the UDAG program).

29. *See* Jonathan Rosenbloom, *Can a Private Corporate Analysis of Public Authority Administration Lead to Democracy?*, 50 N.Y.L. SCH. L. REV. 851, 854 (2005) (arguing that public authorities, often legally regarded as public governmental entities, are private corporate entities).

30. *See, e.g.*, Terry Jill Lassar, *Introduction* to CITY DEAL MAKING 3 (Terry Jill Lassar ed., 1990) (discussing tension in government's role in the public-private partnership as both regulator and real estate developer).

the redevelopment scenario described in the *Kelo* opinion indicates that the Supreme Court's approach to public-private partnerships may be idealistically deferential.[31] It trusts the public-private partnership and regards the broad goals of development as positive, albeit indefinable. The dissent, in contrast, regards public-private partnerships with deep suspicion.[32] Also, the goal of the public-private partnership to further traditional local government projects through promoting economic development seems too troublingly vague.[33] In particular, the subsidy to private corporations is viewed as inherently corrupting. Of course, the truth lies somewhere in between.

What is unsatisfying about the *Kelo* decision is that the deference to city government decision making on economic development is unsettlingly unprotective of existing communities, residents, and property owners. It provides very little public oversight or check other than requiring the redevelopment to be undertaken with respect to a well-considered plan.[34] Therefore, a more satisfying or effective external check on public-private partnerships seems in order. By taking a hands-off approach under the rubric of federalism, the Court has thrown these difficult questions back to the states to resolve. In refusing to provide federal constitutional protection against the perceived excesses of eminent domain, the Court gave strong incentive to reject the formerly complacent sense of inevitability regarding economic development. It is up to state policymakers, both courts and legislatures, as well as ordinary people, to get involved in how local communities are developing and grapple directly with the real underlying questions about their preferred vi-

31. *See generally* Kelo v. City of New London, 545 U.S. 469 (2005).

32. *Id.* at 494 (O'Connor, J., dissenting).

33. *Id.* at 506 (Thomas, J., dissenting).

34. *Id.* at 478-79 (majority opinion) (approving the exercise of eminent domain "pursuant to a 'carefully considered' development plan" (quoting Kelo v. City of New London, 843 A.2d 500, 536 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005)). The notion of the "carefully considered" plan, as discussed in *Kelo*, is derived from land use regulation traditions that allow a municipality broad discretion to use zoning regulation to regulate land use if it is carried out according to some kind of master plan or comprehensive plan. While most states today, have general mandates to local government to prepare long-range comprehensive plans, it was not that long ago that cases regularly indicated how loose a standard of this was. Some states have held that the plan can be reflected in the nature of the zoning ordinances themselves. *See, e.g.*, Kuehne v. Town of East Hartford, 72 A.2d 474 (Conn. 1950) (viewing the comprehensive plan as reflected in the general plan of zoning ordinances.); *see also* Nicole Stelle Garnett, *Planning as Public Use?*, 34 ECOLOGY L.Q. 443 (2007).

sion of economic development. The question is, what do states think that check on economic development could be?

Perhaps the states are better suited to grappling with the factual nature of the unanswered questions of economic development and the myriad of factual questions about the level of public subsidy or public involvement in a deal. The questions boil down to, how much public subsidy is actually necessary or justified to make a particular economic development deal happen? Of course, this is a case-by-case determination that will vary each time and leads to even more questions than answers: Is the public subsidy necessary as an economic, dollars and cents matter, where the deal cannot take place without the subsidy? Is the public subsidy necessary as a signal to the mobile developer that the city is business friendly? How much of a city's contribution to the venture—either through direct cash, forgone tax revenue in the form of tax incentives, payments in lieu of taxes, tax increment financing, use of eminent domain to avoid holdouts and keep the acquisition costs low, transfers to the developer at a subsidized price, or regulatory waivers—reflects shrewd, bottom-line negotiations and concessions? How much of the transaction's structure reflects overly friendly relations among elites and accordingly poor negotiations that unnecessarily cost the city money in foregone taxes, that cause the publicly unbeneficial nature and location of the development project, i.e., a soft form of corruption? Should economic development projects be rated by the most direct and clear-cut approach—that is, strictly by the city's direct economic return on investment project-by-project? The difficulty with this standard is that projects, such as stadiums, convention centers, and festival marketplaces, often fail to measure up on that basis yet are still widely adjudged to be successes. Why? It is often because of cumulative, yet intangible, synergies of symbolism and the city's improved public image from these large projects.[35] Both of these intangible synergies are reflected, for example, in the national development trends that are focused on high-end or upscale development in otherwise working-class cities. There is an intangible aspect to city development in terms of synergy and energy created, as well as symbolism or signaling that the city is a place for investment. Large-scale downtown projects probably help jump-start that image by demonstrating what is possible

35. Also, stadium projects are considered to be public, yet they charge exorbitant profit-driven entry fees that do not make access available to the general public. *See Kelo*, 545 U.S. at 498-505 (O'Connor, J., dissenting) (proposing a strict public use measure of eminent domain and listing stadia as an example of a valid public use).

in the city. How should these synergies count in the evaluation of the public-private partnership?

The salient feature of these projects may be that public participation is mostly limited to subsidy, either through direct grants, waivers, or informal shepherding, or through the permitting and regulatory approval process or the use of eminent domain. Because local governments are, at least nominally, required to justify their activities with some kind of public purpose or public benefit, cities define any development project that creates a new, commercially viable project as contributing to the public good, regardless of the ownership structure or planned use. In this climate or scenario, it seems evident that protecting the pubic interest requires considerable vigilance and attention.[36]

B. *Putting the "Public" Back in Public-Private Partnerships: Who Gets to Be Part of the Developing City Via Strict Scrutiny of Public Use?*

I believe that two questions should govern the review of public-private partnerships. First, who gets to be part of the redeveloping city? One problem is that a lot of the new promising development we see is affluent focused. Cities want, and arguably need, the affluent among their populations and luckily many affluent people increasingly want to be in cities.[37] But when this preference for the affluent is carried out through public subsidy or public facilitation in the form of site preparation or exercise of eminent domain, our latent inability to see structural biases based on race and class suddenly improve and come into focus.

One solution would be to use a *principal of inclusion*—socioeconomic diversity, community preservation, fundamental fairness—to measure public-private partnership efficacy.[38] One city legislative approach reflecting the inclusion principle is an inner-city inclusionary zoning. Baltimore recently followed a small but growing trend in enacting inclusionary zoning for affordable hous-

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36. Sagalyn, *supra* note 18, at 17.

37. The "retail concept" is affluence focused. Geodemographic profiling is used to precisely measure, tap, and shape desirable markets—blue blood estates, young digerati, big-city blues, and kids in cul-de-sacs. *See* Audrey G. McFarlane, *Who Fits the Profile: Thoughts on Race, Class, Clusters, and Redevelopment*, 22 GA. ST. U. L. REV. 877 (2006).

38. *See* Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1 (2006), where I expand on this point.

ing by setting aside requirements for all new developments in the city.[39] Subsidized units have to be *blended* into a project regardless of location or market focus. Several other jurisdictions have adopted inclusionary zoning ordinances.[40] The result of recent grassroots initiatives adopting mandatory inclusionary zoning can be seen as having implications for the public accountability of the public-private partnership. In effect, the legislation defines in advance what a public benefit should look like in terms of inclusion and economic diversity. The proponents of the legislation have worked closely with developers to create a compromise ordinance intended to be win-win—inclusion and profit. The difficulty for the ordinance may arise in upscale projects in a hot market. A hot market will make it difficult to protect the developer's profit expectation. Moreover, exclusion is part of the upscale formula so some developers may resist inclusionary units within their projects. While it is questionable whether inclusionary zoning will benefit the lower-income population, such measures are still very important as the new inner city develops.

The judicial approach to what is arguably an indirect inclusion-based approach has taken the form of restricting the city's ability to use eminent domain by narrowing the definition of public use as advocated by the dissenters in *Kelo* and paralleled by the Michigan Supreme Court in *County of Wayne v. Hathcock*.[41] At issue was the Wayne County Department of Jobs and Economic Development's plan for a 1300-acre business and technology park with a conference center, hotel accommodations, and a recreational facility at the airport as a hub of future economic activity.[42]

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39. *See* Jill Rosen, *Affordable Housing Bill Passes: Developers Who Receive City Aid Must Provide Low-Cost Options*, BALT. SUN, June 12, 2007, at 1A, *available at* 2007 WLNR 10945348 (Westlaw) (inclusionary housing legislation, adopted after lobbying by a "coalition of city religious groups, urban advocacy organizations and unions," requires builders to reserve twenty percent of units in new developments for low- to moderate-income residents).

40. *See* David Rusk, *Inclusionary Zoning: A Key Tool in the Search for Workable Affordable Housing Programs*, PUB. MGMT., Apr. 1, 2006, at 18, 20 (inclusionary zoning ordinances have been adopted by 107 local governments in California, and other communities in Chicago, Illinois; Denver, Colorado; Washington, D.C.; Madison, Wisconsin; and in the state of Illinois).

41. County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). *See generally* Symposium, *Foreword: The Death of* Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock, 2004 MICH. ST. L. REV. 837 (discussing the *Hathcock* decision).

42. *Hathcock*, 684 N.W.2d at 765.

City development has historically taken place around nodes of transportation such as canals, ports, trains, highways, and now airports. The airport project at issue in *Hathcock* can be seen as a manifestation of the newest stage of transportation inspired development, referred to as aerotransport.[43] The Pinnacle Project was projected to create "[30,000] jobs and [$350 million] in tax revenue, while broadening the County's tax base from predominately industrial to a mixture of industrial, service and technology."[44] It was also aimed at "enhanc[ing the] image of the County in the development community, aiding in its transformation [to] an arena ready to meet the needs of the 21st century."[45] Property for the project was obtained through a combination of condemnation and voluntary purchase. Owners of nineteen parcels objected on the basis of a lack of necessity and public purpose under the Michigan Constitution.[46]

The Michigan Supreme Court agreed, overruling the broad interpretation of public use in the infamous *Poletown* case.[47] According to the court, there was nothing about the County's decision to exercise eminent domain that served the public good. The only public benefits would occur after the property had been acquired and private activity occurred. Thus, the role of the government in carrying out a public purpose was not enough to render the efforts of this particular public-private effort sufficiently *public*. The court's approach to putting the interests of the public in the economic development equation was to create a very narrow standard for public use when the exercise of power involves: (1) a "'*public*

43. *See* JOEL GARREAU, EDGE CITY: LIFE ON THE NEW FRONTIER 39 (1991) (highways and airports are important for development); John D. Kasarda, *Aerotropolis: Airport-Driven Commercial Development*, *in* URB. LAND INST., THE FUTURE OF CITIES 32 (Terry J. Lasser ed., 2000); John D. Kasarda, *Logistics and the Rise of the Aerotropolis*, 25 REAL EST. ISSUES 43 (2001); Greg Lindsay, *Rise of the Aerotropolis*, FASTCOMPANY.COM, July-Aug. 2006, at 76, *available at* http://www.fastcompany.com/magazine/107/aerotropolis.html ("[C]ities are always shaped by the state-of-the-art transportation devices present at the time of their founding. . . . The state of the art today is the automobile, the jet plane, and the networked computer."); Stephen J. Appold, Visitor, & John D. Kasarda, Director, Frank Hawkins Kenan Inst. of Private Enter., Paper Presented at the Annual Meeting of the American Sociological Association: Airports as the New Urban Anchors (Aug. 10, 2006), *available at* http://www.unc.edu/~appolds/research/progress/RegionalAnchorsMay.pdf.

44. *Hathcock*, 684 N.W.2d at 770.

45. *Id.* at 770-71.

46. *Id.* at 787.

47. *Id.* (overruling Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981)).

necessity of the extreme sort otherwise impracticable' ";[48] (2) transfer to those enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone can accomplish, e.g., instrumentalities of commerce such as highways, railroads, and canals;[49] (3) the "private entity remains accountable to the public in its use of the property";[50] and (4) selection of land is based on "'*facts of independent public significance*.'"[51] In the court's view, this meant that the underlying purposes of condemnation rather than subsequent use of condemned land must satisfy the public use requirement, i.e., blight.[52] Thus, the *Hathcock* court severely curtailed the reasons that could be offered and, by so limiting governmental discretion, and in particular by requiring public control of the taken property, indirectly increased public accountability. According to Marc B. Mihaly, however, and as the *Hathcock* decision reflects, a common problem is that the redevelopment process is thoroughly misunderstood in the courts.[53] His critique is also useful for understanding the limits of the debate as framed by the Supreme Court in *Kelo*.[54] My discussion is focused, instead, on the significance of courts being willing to intervene in the economic-development project on behalf of the public.

Another decision reflects an increased willingness of state courts to intervene in the economic development process on behalf of the public, this time with respect to how decisions about economic development should be made. The Maryland Court of Appeals answered this question by adopting a principle of public accountability, signaling a dramatic departure from its prior, consistently deferential, approach.[55] In *Baltimore Development Corp.*

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48. *Id.* at 781 (emphasis added) (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).

49. *Id.*

50. *Id.* at 782.

51. *Id.* at 783 (emphasis added) (quoting *Poletown*, 304 N.W.2d at 480 (Ryan, J., dissenting)).

52. *Id.*

53. *See* Marc B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court:* Kelo v. City of New London, *in* THE SUPREME COURT AND TAKINGS: FOUR ESSAYS 41 (2006), *available at* http://it.vermontlaw.edu/VJEL/Takings/6-Mihaly.pdf.

54. *Id.*

55. Maryland has long upheld the exercise of eminent domain for economic development. *See, e.g.*, Prince George's County v. Collington Crossroads, Inc., 339 A.2d 278, 287 (Md. 1975). In *Mayor and City Council of Baltimore City v. Valsamaki*, 916 A.2d 324 (Md. 2007), the court recently reined in the use of Maryland's statutory scheme for quick-take condemnations. Though the decision, like *Carmel Realty*, was

v. Carmel Realty Associates, the court required the city's chief independent economic development arm to comply with the Maryland's Public Information Act mandating disclosure in open meetings and disclosure of public information by city and state entities.[56] Carmel Realty Associates and other property owners in a major downtown redevelopment area, known as the Westside Redevelopment, responded to a request for proposals from an independent quasi-governmental economic development agency, the Baltimore Development Corporation (BDC).[57] The owners had a plan to redevelop their parcels to avoid having to relocate and to participate in the rejuvenation of the area. In a closed meeting, the BDC Board of Directors selected a developer to handle the project.[58] Seeking information about how the selection had been made, the owners argued that the Board should be subject to Maryland's Open Meetings and Public Information Act.[59]

The court held that that "the City of Baltimore Development Corporation is, in essence, a public body for the purposes of the Open Meetings Act and it is, in essence, an instrumentality of Baltimore City for the purposes of Maryland's Public Information Act."[60] The *Kelo* decision seems to have provided new impetus for the Court to begin scrutinizing the accepted structure of the public-private partnership—the quasi-private redevelopment agency. The court discussed the debate sparked by *Kelo*, and echoed Justice O'Connor's dissent: "An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning."[61] Even though the BDC did not have the power of eminent domain itself, the court found that the agency "function[ed] as part of the City's powers of eminent domain."[62] It appears that in Maryland, *Kelo*

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statutory and not constitutional, it nevertheless signals a significant and noteworthy change to blind deference to any and all justifications falling under the rubric of "economic development."

56. Baltimore Dev. Corp. v. Carmel Realty Assocs., 910 A.2d 406, 410 (Md. 2006) (discussing MD. CODE ANN., STATE GOV'T §§ 10-501-10-512, -601-10-628 (LexisNexis 2004)).

57. *Id.* at 414.

58. Editorial, *It's About Time*, BALT. SUN, Nov. 8, 2006, at 22A.

59. *Carmel Realty*, 910 A.2d at 414-15.

60. *Id.* at 425, 428.

61. *Id.* at 417 (quoting Kelo v. City of New London, 545 U.S. 469, 496-97 (2005) (O'Connor, J., dissenting)).

62. *Id.*

> The BDC, among other indicia of the exercise of part of the City's powers, is charged by the ordinance, the contracts with the City, and by its Charter to

reinforced that *Berman v. Parker*[63] did not merely stand for the proposition that eminent domain was to be used solely in blighted areas. Instead, the power could be used for economic development anywhere.[64] *Kelo* thus crystallized the enormity of the substantively unchecked eminent domain power, in a way that was no longer limited to inner-city ghetto areas by focusing on blight, but could be used more broadly potentially in any neighborhood. Thus, the *Carmel Realty* court was inspired to disregard the traditional deferential fiction of the unquestioned benefits of economic development and acknowledge the reality of the threat of unchecked power granted to the private developer through the public-private partnership. This was also made particularly easy in the case of the *Carmel Realty* because of the relatively sloppy separation of public and private functions between the BDC and Baltimore City. This inartful division empowered the court to refuse to give cognizance to (i.e., pretend not to see) the relationship between the mayor and the agency.[65] The post-hoc attempt to recharacterize city actions as private and immune was patent.[66]

After this decision, what is the public entitled to receive in terms of accountability? According to the court, "the Act does not afford the public any right to participate in the meetings, [but] it does assure the public right to observe the deliberative process and the making of decisions by the public body at open meetings."[67] Of course, as limited as this observation sounds in the realm of desirable community participation mechanisms, even this level of access could have a dramatic impact on the substantive nature and direction of economic development decisions. One factual question, to which the answer is yet to be determined, concerns which parts of the economic development decision process needs to take place behind closed doors. On the one hand, "financial deal-making that is [traditionally] hidden from view" is likely to become more accessi-

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> coordinate public functions such as the preparation and adoption of urban renewal plans, and is thus a part of the apparatus used by the City in the exercise of its urban renewal powers.

Id. at n.13.

63. Berman v. Parker, 348 U.S. 26 (1954).

64. *See Carmel Realty*, 910 A.2d at 417.

65. *Id.* at 428.

66. *See id.* at 411 n.6 (noting that when the BDC was formed, some board members "may have been affiliated with the City of Baltimore . . . and . . . at least three members of the Board of Directors were part of then-mayor Kurt L. Schmoke's staff").

67. *Id.* at 419 (quoting City of New Carrollton v. Rogers, 410 A.2d 1070, 1078 (Md. 1980)).

ble through disclosure.[68] Disclosure may subject deals to scrutiny but, will it scare off other potentially lucrative deals?[69]

> Public exposure varies at PPD [public/private development] project milestones, including RFQ/RFP [request for qualification/request for proposal], developer selection, disposition and financing agreements, and deal approval. PPD projects are most open to scrutiny and political debate when they come to public attention: announcement (site selection, determination of development program, potential public benefits), approvals (legislative or voter referenda, if required), and implementation (construction; cost overruns; conflicts, setbacks and collapsed expectations; successful completion). At each such point, community groups and local officials must strategically defend their interests, which they do publicly, using the press and other means.[70]

On the other hand, according to one public comment by the president of an independent development entity, the Greater Baltimore Committee, the BDC's new status could complicate development:

> "Private companies are not going to want to have all of their books opened up just because they are looking to explore a development opportunity," Fry said. "The reality is that economic development authorities do have to have some level of being able to protect proprietary information." "I think that there certainly is a public interest in having transparency," he added. "But at the same time though there needs to be protection so that not everything from the private companies is an open book."[71]

Therefore, what remains to be seen is the extent to which the ruling makes a difference and the impact it has on deal making. The issue remains, can city concessions in a negotiation be examined via public hearing in a vacuum, without understanding the course, context, and dynamics leading to the deal or transaction, or possible incrementally cumulative tangible and intangible benefits? Ideally, the decision should cause a city that is poor at negotiation to engage in critical self-examination. This is so because prior unre-

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68. Sagalyn, *supra* note 18, at 13.

69. Although "financial deal making is essentially hidden from view, . . . an informed media and public watchdog groups can heighten awareness." *Id.* (discussing how politics are often characterized not by broad public posturing but the shrewd tactical maneuverings of insiders).

70. *Id.* at 12-13.

71. Jen DeGregorio, *Court Ruling Could Change How Baltimore Development Corp. Works*, DAILY REC. (Balt.), Nov. 6, 2006, *available at* http://findarticles.com/p/articles/mi_qn4183/is_20061106/ai_n16823382 (quoting remarks made by Donald C. Fry, President of the Greater Baltimore Committee, following the *Carmel Realty* decision).

viewed decisions will have to be justified convincingly to the public. Thus, the impact of *Carmel Realty*'s increasing the points of entry for participation is likely to be highly beneficial. The tradeoff is likely to be that increased public involvement will be messy and will slow down time-sensitive projects by adding new uncertainty in an arena whose costs are measured by investors looking for quick, secure returns.[72] The time value of money is a significant constraint.

C. *Public-Private Partnership and Bargaining with the Community: Community Benefits Agreements*

The final response to public-private partnership can be found in so-called community benefits agreements (CBAs). CBAs can be valuable mechanisms for adding the public interest or the "use" values of development; values that are often left out of the development process.[73] Values such as inclusiveness, transparency, coalition building, and clarity of outcomes (by providing quantifiable measures) are often lacking in economic development assessment.[74] The benefits-agreements approach presumes that development inevitably will take place, but that it is possible to either lessen the negative impact on existing communities or at least ensure that the development produces tangible benefits for existing residents. The inspiration for CBAs was that local governments ideally would seek to get commitments on behalf of communities from developers,[75] but these arrangements were rarely fulfilled. This was often because the incentive to comply with the agreement on the part of the developer would likely be strongest while approv-

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72. *See* CHRISTOPHER B. LEINBERGER, BROOKINGS INST., BACK TO THE FUTURE: THE NEED FOR PATIENT EQUITY IN REAL ESTATE DEVELOPMENT FINANCE 6 (2007) (noting that real estate finance no longer regards real estate as a forty-year, long-term asset, but instead as a short-term asset with a seven- to ten-year horizon).

73. *See* John J. Costonis, *Tinker to Evers to Chance: Community Groups as the Third Player in the Development Game*, *in* CITY DEAL MAKING, *supra* note 30, at 155 (stating how a community turns the public-private partnership into a "trilateral relationship"). "Use" values refers to the value residents place on the benefits of using their neighborhoods. These contrast with "exchange" values, which are the values that developers or real estate speculators place on the economic benefits to be extracted from a community. *See generally* David Gray Carlson, *Secured Creditors and the Eely Character of Bankruptcy Valuations*, 41 AM. U. L. REV. 63, 90-91 (1991) (discussing the difference between use and exchange values).

74. JULIAN GROSS, GREG LEROY & MADELINE JANIS-APARICIO, GOOD JOBS FIRST, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 21-22 (2005), *available at* http://www.communitybenefits.org/downloads/CBA%20Handbook%202005%20final.pdf.

75. *Id.* at 10.

als were needed.[76] "CBAs are an attempt to address this problem, both by memorializing developer commitments in writing and by enabling community groups to enforce them, rather than having to rely on local governments."[77]

In the contractual agreement between representatives of communities in which a development project will take place and the developer, the project's developer promises to provide a variety of amenities (for example, open space or physical upgrades to existing buildings or roads) or to take certain beneficial actions (such as first hire agreements, low-income tenant set-asides, or to provide cash). In return, the community gives two things: First, it agrees to publicly support the development project, sometimes a prerequisite for developers getting regulatory approvals. Second, it promises to refrain from entering into litigation against the developer.[78]

This is a tenuous and limited form of inserting the public into the public-private partnership for a number of reasons. To begin with, though the community ostensibly is brought into the deal-making process, it is often a tangential participant. The massive redevelopment planned in Brooklyn, New York, called Atlantic Yards, illustrates the problem with coalition-building. "[B]uilding and maintaining coalitions is difficult, especially if the developer is seeking to peel off some groups."[79] Also, inadequate organizing could mean that the community's agreement is actually not ideal and thus sets poor precedent for future projects.[80] From the developer's perspective, the role of the community is less than positive because the community's power comes from the ability to provide conflict and opposition.[81] Julian Gross, who has negotiated many of these CBAs, readily admits that from the community's perspective, there are significant difficulties with these agreements, particularly that of monitoring them.[82] The greater problem, however, is the inherent limitations of negotiating project-by-project and the

76. *See id.* at 69 (discussing how commitments to provide community benefits often go unfulfilled and difficulties in monitoring and enforcement are a widespread problem).

77. *Id.*

78. Sagalyn, *supra* note 18, at 12.

79. GROSS, LEROY & JANIS-APARICIO, *supra* note 74, at 22-23.

80. *Id.* at 22-23 ("Community groups want to use past commitments as a 'floor,' but developers will want to use them as a 'ceiling.'").

81. *See* Sagalyn, *supra* note 18, at 12 (describing urban neighborhoods as the epitome of negative pluralism).

82. GROSS, LEROY & JANIS-APARICIO, *supra* note 74, at 70 ("Community groups should consider how each benefit in a CBA will be monitored. Financial commitments and other one-time benefits are probably the easiest aspects of a CBA to monitor.

burdens such negotiations place on grassroots, poorly funded, volunteer-based community groups. This means that the reality is that such resources can only be deployed or marshaled for the large development projects that have a broader impact, leaving the no-less-important smaller projects unmonitored by community participation.[83] According to Gross,

> The goal of the community benefits movement is to avoid this situation by changing the paradigm of land use planning for large, publicly-subsidized projects or those requiring major land use approvals. Results of this change will take many concrete forms: citywide policies providing minimum standards for certain projects; changes in land use planning documents, like general plans, to require analysis of economic effects of land use decisions; ordinances requiring close scrutiny of high-impact big-box stores; and an expectation that certain large, prominent, heavily subsidized projects will have a CBA.[84]

Possibly the biggest problem for the CBA approach is that the realized benefits of the agreement will depend on how the project develops and whether the phases of development come to pass. This all depends on the market, unexpected expenses, and a variety of factors subject to unanticipated, but to be expected, change. Overall, while this type of agreement would benefit from more empirical research, it illustrates an attempt to assert the concerns of local residents—that is, the public, in the public-private partnership.

CONCLUSION

The new response to the public-private partnership is still evolving. While participatory mechanisms are probably providing a role for the public, they are not the only procedural elements that are missing from the development process. Real substantive standards about the desirable public outcomes for development are just as, if not more, important. Substantive legislative input would be most helpful, but there is a conflict of interest at the state and city level of government that prevents this from happening—cities and states have a real motivation (some would say it is imperative) to conduct economic development and a high disincentive to put what

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Much more challenging are ongoing tenant commitments, such as living wage and local hiring requirements.").

83. *Id.* at 75.

84. *Id.*

appear to be obstacles in the path of this important endeavor. Because economic development is so broad and can justify anything, there is a role for the courts to monitor the development process. In order to keep the public in the public-private process, it is up to the courts to give true meaning and application to the array of constitutional and statutory checks on the privatization of public power and protect the public interest in the public-private partnership.

The difficulty is that each of these mandates for "publicness" is subject to interpretation, and economic development will appear in an incalculable number of shapes and sizes. Therefore, just as with the evolution of the regulatory takings doctrine, for example, the analysis will often be case-by-case and fact specific. With judicial intervention likely to increase, wherever the specter of eminent domain looms, it will still be important for legislatures to begin considering substantive mandates that specifically define the public interest to be protected. Mandatory inclusionary zoning ordinances and community benefits agreements are excellent examples of approaches for getting the "public" back into public-private partnerships, each of which provides steps towards establishing clear substantive standards of public benefit for these projects. Though it is difficult to scrutinize economic development, it is worthwhile.