Boston College Law Review

Volume 36
Issue 5 *Symposium - Struggling For A Future: Juvenile Violence, Juvenile Justice*
Article 8

9-1-1995

The Dudley Street Neighborhood Inititative and the Power of Eminent Domain

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NOTES

THE DUDLEY STREET NEIGHBORHOOD INITIATIVE AND THE POWER OF EMINENT DOMAIN

I. INTRODUCTION

The use of eminent domain for urban redevelopment is not a new phenomenon.[1] Although governments originally exercised eminent domain for projects that would be of actual use to the public, this power has evolved into one that governments use or delegate to private entities for projects that merely benefit the public in some manner.[2] Under this broad formulation of public benefit, governments and private corporations use the power of eminent domain to attack the problem of urban decay.[3]

The Dudley Street Neighborhood Initiative ("Initiative") is the first grass-roots community organization in the country to gain eminent domain authority over parcels of private land.[4] Its use of eminent domain would likely satisfy the broad public use requirement.[5] Nevertheless, the exercise of eminent domain by a private corporation raises issues regarding who may exercise this traditionally government-based power.

This Note provides an overview of traditional and modern uses of the power of eminent domain and argues that its use by the Dudley Street Neighborhood Initiative is proper. Section II examines the development of eminent domain doctrine generally.[6] Section III describes

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[1] The Massachusetts and Missouri Urban Redevelopment Corporations statutes were originally enacted in the 1940s. *See* MASS. GEN. L. ch. 121A, § 1 (1988); MO. REV. STAT. § 353.010 (1991).

[2] *See* Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 606 (1948).

[3] *See* Berman v. Parker, 348 U.S. 26, 32 (1954).

[4] Elizabeth Levitan Spaid, *A Neighborhood Starts to Recover from Decline*, CHRISTIAN SCI. MONITOR, June 21, 1994, at 10.

[5] *See Berman*, 348 U.S. at 33.

[6] *See infra* notes 10–40 and accompanying text.

the use of eminent domain in urban redevelopment, discussing Supreme Court cases, issues of delegation, and two state statutes authorizing urban redevelopment corporations to use eminent domain.[7] Section IV provides an overview of the history and purpose of the Dudley Street Neighborhood Initiative.[8] Section V analyzes the constitutionality of the Initiative's exercise of the power of eminent domain in light of concerns regarding public benefit and delegation.[9] This Note concludes that a court examining the Initiative's use of eminent domain would likely find it constitutional, although the court might be uneasy with setting a precedent for the widespread use of this power by private entities.

II. Eminent Domain in General

The roots of modern eminent domain power can be traced back at least to the early Roman Empire.[10] Although there is little direct evidence of its use, scholars have pointed to the construction of the Roman roads, extending in a straight line from one end of the Empire to the other, as an indication of the power of the state to take private property.[11] Likewise, early English law contains indirect evidence of practices that resemble eminent domain takings.[12]

In the United States, colonial governments utilized eminent domain powers to a limited extent.[13] For example, a 1639 Massachusetts statute authorized county courts to appoint local citizens to lay out a highway upon a complaint stating that one was needed.[14] The statute prohibited destroying houses, gardens or orchards, but allowed compensation for damage to other "improved ground."[15] In addition to this common exercise of eminent domain for public road building, most colonies also used eminent domain to take land for private rights-of-way.[16] In general, however, colonial governments did not need to ex-

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[7] *See infra* notes 41–175 and accompanying text.

[8] *See infra* notes 176–215 and accompanying text.

[9] *See infra* notes 216–58 and accompanying text.

[10] *See* Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 Envtl. L. 1, 7 (1980).

[11] *Id.* at 7; William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 553–54 (1972).

[12] *See* Meidinger, *supra* note 10, at 8–9. Meidinger notes that well into the eighteenth century, the English law of takings consisted of a variety of loosely related arrangements, generally reflecting the relative powers of the King, the Parliament and the land owners when the arrangements were made. *Id.* at 9.

[13] *See id.* at 13.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 14.

ercise eminent domain because there were vast tracts of government-controlled land available in the public domain and governmental activities were relatively limited.[17]

The requirement of just compensation imposed a significant limitation on the exercise of eminent domain during the colonial period.[18] Although the federal and many state constitutions explicitly included this requirement, it was accepted widely as a principle of natural law. Consequently, a number of early state constitutions omitted the requirement.[19]

The public use requirement also developed as a principle of natural law.[20] Natural law justified eminent domain as being for the public good, the public necessity or the public utility.[21] As courts turned away from natural law in favor of constitutional interpretation in other fields, they looked to the Fifth Amendment of the United States Constitution when deciding eminent domain cases.[22]

In general, courts have taken either a broad or narrow view of the public use requirement.[23] In an 1832 case, a New Jersey court, applying the broad view of the public use requirement, upheld legislation allowing a private corporation to take land for seventy mill sites along the Delaware River.[24] The court rejected the argument that the legislation took private property for private use, intimating that the statute should be upheld because the community generally benefitted from it.[25]

In reaction to this broad view that a taking met the public use test if it contributed to the overall benefit of the community, a number of courts developed the view that public use meant literally "use by the public."[26] These courts found insufficient the justification that a use made an indirect contribution to the prosperity of the entire community by allowing a few individuals to profit.[27] Instead, the public had to

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[17] *The Public Use Limitation of Eminent Domain*, *supra* note 2, at 600.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 601.

[21] *Id.*

[22] *See The Public Use Limitation of Eminent Domain*, *supra* note 2, at 602–03. The Fifth Amendment states, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[23] *See* Meidinger, *supra* note 10, at 24; Amy E. Kellogg, Case Comment, Hawaii Housing Authority v. Midkiff: *The Continued Validity of the Public Use Doctrine*, 47 OHIO STATE L.J. 521, 523 (1986).

[24] Meidinger, *supra* note 10, at 23–24 (citing Scudder v. Trenton Delaware Falls Co., 1 N.J. Eq. 694 (1832)).

[25] Meidinger, *supra* note 10, at 24.

[26] *See* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 208 (1978); Meidinger, *supra* note 10, at 24.

[27] *The Public Use Limitation on Eminent Domain*, *supra* note 2, at 603.

possess a right to use the facility or service for which the property was desired before a court would deem the use public.[28]

Despite the seeming clarity that this articulation of the public use requirement provided, courts had difficulty applying it.[29] On the one hand, a court would have to decide what proportion of the public must have a right of use for a purpose to justify the exercise of eminent domain.[30] On the other hand, this narrow test might permit a taking for the construction of theaters and hotels, which the public would use but had never before been thought to justify eminent domain.[31] Courts also had difficulty with the narrow test because they had been sanctioning the use of eminent domain to further certain private activities, such as railroad construction, for too long to declare such uses inappropriate.[32] To escape these difficulties, courts used evasive and awkward rationales, or created exceptions to the narrow test.[33] By the beginning of the twentieth century, the exceptions became so wide and so numerous that courts rarely invoked the narrow "use by the public" test.[34]

Although courts now read the public use requirement broadly, they will impose limits on takings that they regard as "going too far."[35] Lawrence Berger, in his article, *The Public Use Requirement of Eminent Domain*, posits that courts now look at two issues besides public use when determining the propriety of a nongovernmental taking: (1) Does the condemner's need for the taking outweigh the harm to the condemnee? and (2) Is it necessary that eminent domain be used to carry out the project, or could a purchase in the open market practicably be made?[36] Courts have used the first test when permitting one private individual to condemn a right of way over a neighbor's land.[37] In this situation, the condemnor's need for access to the property greatly outweighs the slight harm to the condemnee.[38] Berger finds support for the existence of the second test in the tendency of courts to limit nongovernmental takings to those instances where purchase is not feasible.[39] Purchase is not feasible where one party holds land for

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[28] *Id.*

[29] *See id.*

[30] *Id.*

[31] *Id.* at 604; *see* Berger, *supra* note 26, at 208.

[32] *See The Public Use Limitation on Eminent Domain*, *supra* note 2, at 604.

[33] *See id.*

[34] *Id.* at 606.

[35] Berger, *supra* note 26, at 223.

[36] *Id.* at 223–24.

[37] *Id.* at 224.

[38] *Id.* at 223–24.

[39] *See id.* at 224–25.

speculation and does not want to sell at or even above the fair market value.[40]

III. Eminent Domain and Urban Redevelopment

A. *Supreme Court Decisions*

The United States Supreme Court, in 1954, in *Berman v. Parker*, adopted the broad view of the public use requirement, upholding the constitutionality of the District of Columbia Redevelopment Act of 1945 (the "Act").[41] Section 2 of the Act contained a congressional determination that blighted housing conditions in the District of Columbia threatened public health and safety.[42] Acquisition of property was one of the means Section 2 declared necessary to eliminate these housing conditions.[43]

The first project that the Planning Commission pursued under the Act was in Southwest Washington, D.C.[44] The plan for this neighborhood specified the boundaries and allocated the land for various purposes, making detailed provisions for types of dwelling units and setting maximum rental fees for certain units.[45] Section 4 of the Act granted the District of Columbia Land Agency (the "Agency") powers to acquire and assemble property by eminent domain and charged it with implementing the plan.[46]

The owners of the targeted property on which a department store was located brought suit to enjoin the appropriation of their property.[47] They argued that because their property was not slum housing, the government was not justified in condemning it as part of a project to eradicate slum housing.[48] The government could not take their property, the owners argued, merely to develop a better balanced, more attractive community.[49] The owners also objected to the fact that the property ultimately would be redeveloped for private, not public, use.[50]

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[40] Berger, *supra* note 26, at 225.
[41] 348 U.S. 26, 33 (1954).
[42] *Id.* at 28.
[43] *Id.*
[44] *Id.* at 30.
[45] *Id.* at 30–31.
[46] *Berman*, 348 U.S. at 29.
[47] *Id.* at 31.
[48] *Id.*
[49] *Id.*
[50] *Id.*

The Supreme Court viewed eminent domain as a vehicle used by states to exercise their traditional police powers.[51] The Court construed as extremely narrow the role of the judiciary in determining whether eminent domain is being exercised for a public purpose.[52] It reasoned that the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.[53] The Court stated that once Congress and its agencies have made determinations that take into account a wide variety of values, it is not the Court's role to reappraise them.[54] The authors of the redevelopment plan concluded that in order to be healthy and not revert to a slum area, the neighborhood must be planned as a whole.[55] The Court thus reasoned that it could not permit a single landowner to resist the redevelopment plan on the ground that his or her particular property was not being used for the public interest.[56] The Court determined that the redevelopment plan served the public purpose and, therefore, the Court would leave to legislative discretion the amount and character of land to be used for the project and the need for a particular tract to complete the integrated plan.[57]

The Supreme Court revisited the public use issue in the 1984 case *Hawaii Housing Authority v. Midkiff* and held that the Land Reform Act of 1967 does not violate the public use requirement.[58] In *Hawaii Housing Authority,* landowners challenged the Land Reform Act of 1967, which created a mechanism for condemning residential tracts and transferring ownership of the condemned fees simple to existing lessees.[59] Hawaii needed such a drastic measure to redress its unique problem of extremely concentrated land ownership.[60]

This concentration grew out of the feudal land tenure system in which one island high chief controlled all land and assigned it for development to certain subchiefs.[61] Although Hawaiian leaders and American settlers, beginning in the early 1800s, attempted to divide the lands of the kingdom, these efforts proved largely unsuccessful, and the land remained in the hands of a few.[62] After conducting

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[51] *Berman*, 348 U.S. at 32.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 33.
[55] *Id.* at 34.
[56] *Berman*, 348 U.S. at 35.
[57] *Id.* at 35–36.
[58] 467 U.S. 229, 241 (1984).
[59] *Id.* at 233–34.
[60] *Id.* at 233.
[61] *Id.* at 232.
[62] *Id.*

extensive hearings in the mid-1960s, the Hawaii legislature concluded that concentrated land ownership skewed the state's residential fee simple market, inflating land prices and injuring the public tranquility and welfare.[63]

The legislature considered requiring large landowners to sell lands that they were leasing to homeowners, but the landowners strongly resisted this scheme, pointing out the significant federal tax liabilities they would incur.[64] In response, the legislature enacted the Land Reform Act of 1967 (the "Act").[65] By condemning the land in question, the Hawaii legislature intended to make the land sales involuntary, thereby making the federal tax consequences less severe while still facilitating the redistribution of fees simple.[66]

Under the Act, the Hawaii Housing Authority (the "Authority") can institute a condemnation proceeding when a certain percentage of the residential lease lots within a development tract have applied to the Authority for condemnation.[67] The Authority followed this procedure to condemn some land belonging to the plaintiffs in the instant case.[68] When the Authority directed the plaintiffs to negotiate with their lessees concerning the sale of designated properties, they refused and instead filed suit in United States district court.[69] The district court held that the Act's goals were within the state's police powers and that the means the legislature had chosen were not arbitrary, capricious or selected in bad faith.[70] The Court of Appeals for the Ninth Circuit reversed the district court and held that the transfers of property authorized under the Act did not meet the public use requirement of the Fifth Amendment.[71]

The Supreme Court in *Hawaii Housing Authority* followed its decision in *Berman v. Parker* and stated that the public use requirement is coterminous with the scope of a sovereign's police powers.[72] The only role left to the courts is to review a legislature's judgment of what constitutes a proper exercise of its police power, and as the *Berman* court made clear, this is an extremely narrow role.[73] The Court stated

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[63] *Hawaii Hous. Auth.*, 467 U.S. at 233.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Kellogg, *supra* note 23, at 528.

[68] *See Hawaii Hous. Auth.*, 467 U.S. at 234.

[69] *Id.* at 234–35.

[70] *Id.* at 235.

[71] *Id.* The Ninth Circuit reasoned that *Berman* required that the government possess and use the property at some point during a taking. *Id.* at 243.

[72] *Hawaii Hous. Auth.*, 467 U.S. at 240.

[73] *Id.*

that it will overrule a legislature's judgment of what constitutes a public use only if the use is palpably without reasonable foundation.[74]

The Court concluded that the Hawaii legislature had a reasonable foundation for determining that the high concentration of land ownership produced social and economic evil.[76] Thus, the legislature could exercise its police powers, including eminent domain, to alleviate it.[77]

The Supreme Court noted that the Ninth Circuit read cases such as *Berman* too narrowly.[78] The Court indicated that the Ninth Circuit misinterpreted *Berman* as requiring that the government possess and use the property at some point during a taking.[79] To clarify its position, the Court stated that the mere fact that property is taken outright by eminent domain and transferred immediately to private beneficiaries does not mean that taking has only a private purpose.[80] The Court further stated that it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause of the Fifth Amendment.[81]

In 1992, in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, the Supreme Court followed its decision in *Hawaii Housing Authority*, upholding a statute allowing condemnation of an interest in a railroad track.[82] The Rail Passenger Service Act of 1970 (the "Act") created the National Railroad Passenger Corporation ("Amtrak"), a quasi-public corporation.[83] The Act allowed Amtrak to ask the Interstate Commerce Commission (the "ICC") to condemn railroad property required for inter-city rail passenger service if Amtrak and the railroad could not agree upon sale terms.[84] Amtrak had a trackage rights agreement with the Boston and Maine Corporation ("B & M") to operate its trains between Washington, D.C., and Montreal.[85] Amtrak claimed that B & M's neglect of track maintenance forced Amtrak to discontinue its service to Montreal.[86] Amtrak then requested the ICC to compel conveyance of the tracks to Amtrak, which would reconvey

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[74] *Id.* at 241.
[75] *Id.*
[76] *See id.* at 242.
[77] *Hawaii Hous. Auth.*, 467 U.S. at 242.
[78] *Id.* at 243.
[79] *Id.*
[80] *Id.* at 243–44.
[81] *Id.* at 244.
[82] 503 U.S. 407, 419 (1992).
[83] *Id.* at 410.
[84] *Id.* at 411.
[85] *Id.*
[86] *Id.* at 412.

them to another corporation that agreed to provide funds to upgrade the track, to maintain the track for twenty years in a suitable condition, to grant Amtrak trackage rights for twenty years, and to grant B & M trackage rights to serve its existing customers.[87]

B & M argued, *inter alia*, that this condemnation followed by reconveyance violated the public use requirement of the Fifth Amendment.[88] The Supreme Court rejected this argument, citing its decisions in *Hawaii Housing Authority* and *Berman*.[89] The Court noted that, in both earlier cases and the present case, condemnation resulted in the transfer of ownership from one private party to another.[90] The Court reiterated its holdings in *Hawaii Housing Authority* and *Berman*, stating that this exercise of the eminent domain power was constitutional as long as the condemning authorities were rational in their positions that some public purpose was served.[91] It found no reason to doubt that the ICC was rational in determining that the condemnation in the instant case would serve a public purpose.[92] Thus, the Court held that the public use requirement of the Fifth Amendment was met by the condemnation of these tracks, despite the subsequent reconveyance to a private party.[93]

B. *Delegation Doctrine and Eminent Domain*

The above Supreme Court cases involve governmental agencies exercising the power of eminent domain.[94] The focus of these decisions is on the use to which the condemned land will be put, rather than on who is doing the condemning.[95] In the area of urban redevelopment, statutes in several states authorize private redevelopment corporations to exercise the power of eminent domain.[96] This raises delegation

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[87] *National R.R. Passenger Corp.*, 503 U.S. at 412. The Court specifically rejected the plaintiff's argument that this exercise of eminent domain by the ICC on behalf of Amtrak represented an improper delegation of eminent domain power to a private entity. *Id.* at 419. The Court noted that the statute gives the power to the ICC, a government agency, which must assess the impact of any condemnation and make a determination as to just compensation. *Id.*

[88] *Id.* at 422.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *National R.R. Passenger Corp.*, 503 U.S. at 422.

[93] *Id.*

[94] *See id.* at 419; Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 231–32 (1984); Berman v. Parker, 348 U.S. 26, 33 (1954).

[95] *See National R.R. Passenger Corp.*, 503 U.S. at 421–22.

[96] *See, e.g.*, 315 ILCS 20/1 to –44 (1993); MASS. GEN. L. ch. 121A, §§ 1–19 (1988); MO. REV. STAT. §§ 353.010–.180 (1991).

issues similar to when an administrative agency exercises legislative power.[97] Although the law is well settled in allowing the transfer of land to private parties following the exercise of eminent domain by a government body,[98] the issue of whether a wholly private corporation may itself exercise this power without violating "nondelegation doctrine" is less clear.[99]

Nondelegation doctrine on the federal level refers to a principle restricting Congress in its delegation of its legislative powers to others.[100] The United States Constitution clearly embodies a system of separation of powers, vesting legislative, executive and judicial powers in separate institutions.[101] The document, however, is unclear about how rigidly these powers must be separated and, consequently, it is vague concerning the application of separation of powers doctrine to the delegation of powers.[102]

Given the ambiguity in the Constitution itself, nondelegation doctrine has been largely a Supreme Court creation.[103] In examining a particular delegation of legislative power, the Court looks at the scope of the power and discretion involved.[104] The Court articulated the standard that delegations of legislative power would be sustained whenever Congress dictated an "intelligible principle" to which an agency must conform.[105] Using this standard, the Court, prior to the New Deal, upheld sweeping regulatory delegations of broad legislative powers.[106] With the enactment of the National Industrial Recovery Act in 1933, which gave the President almost total control of the economy, the Court backed away from its permissive stance toward delegation.[107] Three New Deal-era cases, however, in which the Court invalidated delegations of legislative power for want of sufficient standards, were the last instances in which the Court applied nondelegation doctrine to overturn federal legislation.[108]

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[97] *See* David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 658–59 (1986).

[98] *See Berman*, 348 U.S. at 33.

[99] *See id.*

[100] Mary H. Strobel, Note, *Delegation and Individual Rights*, 57 S. CAL. L. REV. 1321, 1322 (1983).

[101] Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 2 (1982).

[102] *See id.*

[103] *See id.* at 7.

[104] *See id.* at 8.

[105] *See id.*; Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 662.

[106] *See* Aranson et al., *supra* note 101, at 8.

[107] *See id.*

[108] *See id.* at 10.

The same justifications for broad delegations of powers by Congress can be made for delegations by state and local governments.[109] These include pluralism and interest representation as well as flexibility, expertise and cost effectiveness of private agencies.[110] Although private exercise of federally delegated power is no longer an issue,[111] state courts have been increasingly likely to find violations of the nondelegation doctrine.[112]

Despite their willingness to find such violations, state courts have not constructed a consistent body of case law.[113] David M. Lawrence suggests that this is due to the lack of any clear constitutional source for rules against delegations.[114] Although state courts cite the clause in their respective constitutions vesting legislative power in the state legislature, Lawrence stresses that this is an inadequate source for the nondelegation doctrine.[115] Instead, he suggests utilizing due process analysis to review delegations of legislative power to private actors.[116]

Due process requires that decisionmakers must not be personally biased, that they must make their decisions according to established standards or a disinterested view of the public interest.[117] Without this requirement, some person or group will be worse off because the officials who made the decisions allowed personal concerns to dictate their actions.[118] If the official is publicly elected, the political process will serve as a check on this type of self-interested action.[119] If it is a private party exercising delegated powers, however, the public may have no similar recourse.[120] In the latter instance, Lawrence would have a court apply due process analysis to ensure that private actors are held publicly accountable to the same degree as public officials.[121]

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[109] *See* Lawrence, *supra* note 97, at 651–59.

[110] *See id.* at 651–57; Strobel, *supra* note 100, at 1328–29.

[111] Lawrence, *supra* note 97, at 649.

[112] *Id.* at 650.

[113] *See id.* at 651.

[114] *Id.* at 650.

[115] *Id.* at 651.

[116] *See* Lawrence, *supra* note 97, at 658–59.

[117] *Id.* at 661.

[118] *Id.*

[119] *Id.* at 660.

[120] *Id.* Similar objections are raised when the government takes land and then transfers it to a private party. *See* Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 369 (1988). These objections include: that private-transferee takings are more likely to result from an improper motivation; that private-transferee takings do not provide the continuing public accountability that exists following an ordinary taking; that the societal perception of private-transferee takings as unfair may dissuade people from investing in property; and that this type of taking creates an undesirable precedent against the application of the public use doctrine. *See id.* at 369–70.

[121] Lawrence, *supra* note 97, at 661.

This approach would engage the court in a two-part analysis.[122] First, the court would analyze to what degree the delegation creates a risk of conflict between public and private interests.[123] Second, the court would determine, given the particular degree of public-private conflict, whether safeguards must accompany the delegation, and, if so, what type of safeguards.[124]

The most common safeguards for a delegation of governmental power would be a lack of any private interest in the party to whom the power was delegated, a parallel interest between the delegate and the public, and for the delegate to include all those affected by the decision.[125] Other safeguards include state agency review, liability in damages to those harmed by a misuse of the delegated power and the requirement that the delegate be specially qualified to act pursuant to basically fair procedures.[126]

Lawrence points out two limitations on the use of due process to protect against abuses of private delegations.[127] First, state and federal due process clauses only protect against arbitrary government or private delegate action that infringes on a person's life, liberty or property.[128] Second, some delegations might not be reviewed because no appropriate challenger exists.[129] Lawrence dismisses these potential limitations by stating that most delegations clearly affect property interests or liberty, and therefore appropriate challengers will always be available.[130]

Courts in only two states have examined the constitutionality of delegating the eminent domain power to private corporations in the redevelopment context.[131] The Illinois Supreme Court, in 1945, in *Zurn v. City of Chicago*, upheld the constitutionality of the Neighborhood Redevelopment Corporations Law against a challenge that the exercise of eminent domain power by a private corporation did not satisfy the public use requirement.[132] In 1965, the Missouri Supreme Court, in *Annbar Associates v. West Side Redevelopment Corp.*, held that

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[122] *Id.* at 685.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 695.

[126] *See* Lawrence, *supra* note 97, at 695.

[127] *Id.* at 676.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *See* Zurn v. City of Chicago, 59 N.E.2d 18, 25 (Ill. 1945); Annbar Assocs. v. West Side Redev. Corp., 397 S.W.2d 635, 648 (Mo. 1965).

[132] 59 N.E.2d at 25.

a taking by a private body under the Urban Redevelopment Corporations Law satisfied the public use requirement.[133]

In *Zurn*, a citizen of Chicago sought to enjoin the city from using public funds in carrying out the provisions of the Neighborhood Redevelopment Corporations Law (the "Act").[134] The citizen challenged the constitutionality of the Act based on the provisions granting private Neighborhood Redevelopment Corporations the power of eminent domain.[135] The controlling question was whether the use to be made of the condemned property was public or private.[136] The court reasoned that because the legislature had found the rehabilitation and rebuilding of slum areas to be a public use, the court would only review whether the Act's delegation of eminent domain to private corporations achieved this public purpose.[137]

The court concluded that the taking of property by the private corporation served the public purpose of eliminating slum conditions; it rejected the plaintiff's contention that the taking did not satisfy the public use requirement because the continued use of the property for public purposes after redevelopment could not be assured.[138] The court held that the achievement of the redevelopment of slum and blighted areas, as defined in the Act, constitutes a public use, regardless of the use that may be made of the property after the redevelopment has been achieved.[139]

Similarly, the Missouri Supreme Court, in *Annbar Associates*, upheld the constitutionality of the Missouri Urban Redevelopment Corporations Law ("Chapter 353").[140] West Side Redevelopment Corporation was an urban redevelopment corporation organized under Chapter 353 for the purpose of redeveloping a blighted area of Kansas City by building a Hilton Hotel complex and convention facility.[141] The plaintiffs were owners of hotels outside the blighted area but within such proximity to the proposed hotel as to be competing with it for business.[142] Both parties agreed that the area was "blighted" within the meaning of Chapter 353.[143] The plaintiffs argued, however, that the

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[133] 397 S.W.2d at 648.
[134] 59 N.E.2d at 19.
[135] *Id.* at 22.
[136] *Id.*
[137] *See id.*
[138] *Id.* at 25.
[139] *Zurn*, 59 N.E.2d at 25.
[140] 397 S.W.2d at 648.
[141] *Id.* at 638.
[142] *Id.*
[143] *Id.* at 641.

taking was in fact a taking of private property by a private corporation for private use without the consent of the owner, a violation of the Missouri and United States Constitutions.[144]

The court rejected the distinction between a taking of private property by a public body and a taking by a private corporation.[145] The court reasoned that if authority exists to empower a public body to acquire private property by eminent domain and sell it to private enterprise for redevelopment, then such authority exists to empower a private corporation to acquire property by such means for a public purpose.[146] The court stated that it would not second-guess the legislature's decision to vest certain bodies with eminent domain power.[147] Quoting *Berman*, the court noted that "once the object is within the authority of [the legislature], the means by which it will be attained is also for [the legislature] to determine."[148]

Thus, the only question for the court was whether the taking was for a public purpose.[149] The court held that a legislative finding of a public purpose is conclusive evidence that the contemplated use of the property is public, unless it appears that the legislative finding was arbitrary or was induced by fraud, collusion or bad faith.[150] With no evidence of arbitrariness, fraud, collusion or bad faith before it, the court deferred to the Missouri legislature's finding that eminent domain under Chapter 353 served a public purpose, and held the statute constitutional.[151]

Both the Illinois and the Missouri Supreme Courts examined the delegation of eminent domain power to private corporations as part of the public use issue.[152] The courts reasoned that if the use satisfied the requirements of the public use doctrine, then it did not matter whether the body doing the condemning is public or private.[153]

C. *The Massachusetts Urban Redevelopment Corporations Statute*

Massachusetts General Laws, Chapter 121A, recognizes that the existence of blighted open, decadent or substandard areas in cities

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[144] *Id.* at 643.
[145] *Annbar Assocs.*, 397 S.W.2d at 647.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *See id.* at 646.
[150] *Annbar Assocs.*, 397 S.W.2d at 646.
[151] *Id.* at 648.
[152] *See Zurn*, 59 N.E.2d at 25; *Annbar Assocs.*, 397 S.W.2d at 645.
[153] *See Zurn*, 59 N.E.2d at 25; *Annbar Assocs.*, 397 S.W.2d at 645.

threatens public safety, health and welfare and constitutes an economic and social liability.[154] It declares the development of property for the purpose of eliminating these conditions a public use and purpose for which the state may expend public money, and bodies may exercise the power of eminent domain.[155] It also states that the provisions of the chapter will stimulate the investment of private capital in blighted areas that in turn will assist in eliminating existing slums.[156]

Under Chapter 121A, the Boston Redevelopment Authority (the "BRA") may delegate the exercise of eminent domain by urban redevelopment corporations for certain projects.[157] The statute defines these projects as:

> any undertaking consisting of the construction in a blighted open, decadent or sub-standard area of decent, safe and sanitary residential, commercial, industrial, institutional, recreational or governmental buildings and such appurtenant or incidental facilities as shall be in the public interest, and the operation and maintenance of such buildings and facilities after construction.[158]

An urban redevelopment corporation consists of three or more persons who form a corporation for the purpose of undertaking and carrying out a project authorized and approved by the BRA.[159] Such a corporation may not undertake more than one project or engage in any other type of activity.[160] Chapter 121A also allows a charitable corporation to act as an urban redevelopment corporation.[161]

Under Chapter 121A, any corporation authorized to undertake or acquire projects under the chapter may lease land, or acquire land by gift, purchase or exchange, or with approval of the housing board, may take land by eminent domain.[162] Individuals, joint ventures, partnerships, limited partnerships, trusts or charitable corporations, however, are not allowed to take land by eminent domain.[163]

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[154] MASS. GEN. L. ch. 121A, § 2 (1988).
[155] *Id.*
[156] *Id.*
[157] MASS. GEN. L. ch. 121A, § 3 (1988).
[158] *Id.* § 1.
[159] *Id.* § 3.
[160] *Id.*
[161] *Id.*
[162] MASS. GEN. L. ch. 121A, § 11 (1988).
[163] *Id.* § 18C.

To obtain approval from the BRA for a project under this statute, an urban redevelopment corporation must submit an application and go before the planning board and city council jointly.[164] Following this hearing, the planning board and city council determine whether blighted open, decadent or sub-standard conditions exist within the proposed project area, whether the project is in accord with all applicable ordinances and by-laws, whether the project would at least be non-detrimental to the best interests of the public or the city, and whether the proposed project will constitute a public use.[165] If so, the council and board may approve of the plan and issue a certificate to the BRA; the BRA then makes its own determination of whether conditions exist that warrant carrying out the project.[166]

The Massachusetts Supreme Judicial Court has held that urban redevelopment corporations, although in a sense private corporations, perform functions for the public benefit analogous to those performed by various other types of corporations commonly called "public service corporations."[167] In a 1960 *Opinion of the Justices,* the court held constitutional a revised version of Chapter 121A, which extended the scope of the definitions of projects to include the erection of commercial, industrial and other types of buildings.[168] The court addressed questions posed by the Massachusetts legislature regarding the constitutionality of several revisions and amendments to Chapter 121A.[169] The legislature was specifically concerned with the status of commercial urban redevelopment projects.[170] The court concluded that there is no constitutional requirement that a blight, if removed in the course of urban redevelopment, must be replaced by residential buildings in order to satisfy the public purpose requirement.[171] The court used the example of the Prudential Center, a commercial and residential urban redevelopment project, to illustrate the balancing test it would apply to determine whether a project were primarily public or private.[172] The public advantages of the project included elimination of grave doubts as to the future use of a vast area, largely vacant or occupied by a nearly obsolete, unsightly railroad freight yard; covering over a railroad right

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[164] *Id.* § 6.

[165] *Id.*

[166] *Id.*

[167] *See* Opinion of the Justices, 135 N.E.2d 665, 667 (Mass. 1956).

[168] 168 N.E.2d 858, 868 (Mass. 1960). The earlier version of Chapter 121A referred solely to the erection of "dwellings." *Id.* at 862.

[169] *See id.* at 865.

[170] *See id.*

[171] *Id.* at 868.

[172] *See id.* at 869.

of way; improvement to neighboring properties; encouragement of prompt action unlikely to be undertaken by private enterprise in the foreseeable future; stimulation of other building; and new facilities available for public use.[173] The court considered on the private side of the equation the loss of tax revenue, the use and possible gain accruing to private interests from a completed project, and other factors showing a private character.[174] The court concluded that the public advantages in this situation would outweigh the accompanying advantages to private interests.[175]

IV. THE DUDLEY STREET NEIGHBORHOOD INITIATIVE

Although located less than two miles from downtown Boston, the Dudley Street neighborhood seems like another world.[176] Once a thriving neighborhood with many family-owned businesses and a vital community spirit, Dudley Street gradually turned into a wasteland as disinvestment, abandonment and arson took their toll.[177] By 1981, one-third of Dudley's land was vacant, and it became a dumping ground for trash from around the city and state.[178]

Through the process of "redlining," Greater Boston's banks rejected blacks throughout the city for mortgages more than three times as often as they did whites with similar incomes.[179] In the Dudley neighborhood, banks denied qualified minority residents the mortgages, insurance, home-improvement and home-equity loans that aid successful homeownership.[180] In a similar manner, banks also denied local businesses the loans and insurance they needed for start-up, expansion and protection of their enterprises.[181] Redlining contributed

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[173] *Opinion of the Justices*, 168 N.E.2d at 869.

[174] *Id.*

[175] *See id.*

[176] *See* Usha Lee McFarling, *Turning Back a Toxic Tide on Dudley Street*, BOSTON GLOBE, Nov. 13, 1994, at 1.

[177] *See* Spaid, *supra* note 4, at 10.

[178] *See id.*; *see also* Scott Allen, *Environmental Lawyers Unite to Help Low-Income Communities*, BOSTON GLOBE, Dec. 1, 1994, at 36.

[179] Michael Zuckoff & Peter G. Gosselin, *Fed Finds a Racial Gulf in Mortgages*, BOSTON GLOBE, Oct. 22, 1991, at 1.

[180] PETER MEDOFF & HOLLY SKLAR, STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD 24 (1994); *see* Peter S. Canellos, *A Problem that Won't Go Away: Activists Plan New Initiatives*, BOSTON GLOBE, Oct. 22, 1991, at 45. "Redlining" is the practice by which lenders and insurers brand certain neighborhoods as areas where they will not lend or supply the necessary insurance, or will do so only at exorbitant interest rates or premiums. MEDOFF & SKLAR, *supra*, at 24.

[181] MEDOFF & SKLAR, *supra* note 180, at 25.

to neighborhood stagnation, with official poverty and unemployment rates nearly twice the Boston average.[182]

Although Dudley residents recognized the need for redevelopment of their neighborhood, they were skeptical of any government-sponsored efforts to do so.[183] They had witnessed the "urban renewal/urban removal" phenomenon in other Boston neighborhoods and feared a similar outcome in their own.[184] To be successful, organizers of what is now the Dudley Street Neighborhood Initiative had to recognize and respond to this fear.[185]

In 1984, La Alianza Hispana, a multiservice agency located on Dudley Street, approached the Riley Foundation, a Massachusetts charitable trust known for innovation and risk-taking, for a grant to renovate its facilities.[186] By coincidence, the Riley Foundation was looking actively at that time for a new project initiative to support.[187] The Riley Foundation had made many grants in Boston's poorest neighborhoods, but its trustees felt it could make more of a difference by providing long-term support to one organization, freeing that organization from major financial concerns and allowing it to concentrate on programs rather than fund raising.[188] After several months of research, the Riley Foundation decided to focus its efforts on the Dudley Street neighborhood.[189]

Initially, the Riley Foundation worked through existing organizations in the Dudley Neighborhood, forming the Dudley Advisory Group.[190] This group voted unanimously to establish an organization, to set up a committee to define its structure and to define the organization's

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[182] *See id.* at 3. The official poverty rate for the Dudley neighborhood is greater than one out of three residents. *Id.*

[183] *See id.* at 17.

[184] *Id.* Redevelopment efforts in the West End and South End of Boston provide the most notorious examples of urban renewal accompanied by displacement of urban residents. *See id.* at 17–22. The working-class West End neighborhood was demolished to make room, in part, for luxury housing overlooking the Charles River. *Id.* Before urban renewal, the South End was one of Boston's only multiracial, multiethnic neighborhoods and also its densest and poorest. *Id.* Through urban renewal, the decaying tree-shaded brownstones were converted into "yuppy" condominiums, out of reach of most former South End residents. *Id.*

[185] *See id.* at 19.

[186] MEDOFF & SKLAR, *supra* note 180, at 39.

[187] Spaid, *supra* note 4, at 10.

[188] MEDOFF & SKLAR, *supra* note 180, at 43; *see* Spaid, *supra* note 4, at 10.

[189] *See* MEDOFF & SKLAR, *supra* note 180, at 43–44; Spaid, *supra* note 4, at 10.

[190] MEDOFF & SKLAR, *supra* note 180, at 46. As of January 1985, the Dudley Advisory Group participants included, among others, representatives of La Alianza Hispana; Boston Urban Gardeners; Cape Verdean Community House; Casa Esperanza; Community Training and Assistance

geographic area.[191] On February 23, 1985, about 200 people attended the first community meeting of the newly created Dudley Street Neighborhood Initiative ("DSNI").[192] Dudley residents reacted negatively to the structure of DSNI's governing board, in which only a minority of seats (four out of twenty-three) were specifically designated for residents.[193] Consequently, DSNI organizers held another community meeting to create a new governance structure that would give the community ultimate control.[194]

From its inception, DSNI pursued short-term projects with immediate results to sustain the community spirit necessary for successful long-range development.[195] DSNI leaders realized community willpower would be essential to developing the political power necessary to get the city involved in DSNI's plans.[196] DSNI's first organizing campaign focused on cleaning up the neighborhood.[197] The success of this campaign in bringing the community together caught the attention of Boston Mayor Ray Flynn, who offered the city's support in this effort.[198]

In developing a long-term plan for the neighborhood, DSNI focused on the notion of an "urban village."[199] The village would have a town common with a park, retail shops and community center, as well as housing that would be both affordable and high quality.[200] In addition to neighborhood control, the concept of "critical mass" was a key element of the plan.[201] "Critical mass" refers to the process of aggregating sufficient square footage of new or rehabilitated space to affect the existing market or create a market of its own.[202]

Center; Roxbury Multi-Service Center; St. Patrick's Church; and Uphams Corner Health Center. *Id.* at 46 n.10.

[191] *Id.* at 46.

[192] *Id.* at 52.

[193] *Id.* at 53; *see* Spaid, *supra* note 4, at 10.

[194] MEDOFF & SKLAR, *supra* note 180, at 56. Instead of a 23-member governing board with only four designated community slots, the new board would have 31 members, with a resident majority. *Id.* at 57. The neighborhood's four major cultures—Black, Cape Verdean, Latino and White—would have equal minimum representation rather than representation based simply on population ratios. *Id.*; *see* Spaid, *supra* note 4, at 10.

[195] MEDOFF & SKLAR, *supra* note 180, at 67.

[196] *Id.*

[197] *See* Spaid, *supra* note 4, at 10.

[198] *See* MEDOFF & SKLAR, *supra* note 180, at 72.

[199] *See id.* at 108.

[200] *Id.*

[201] *Id.*

[202] *Id.* To meet critical mass, the plan recommended between 800 and 1000 units of new construction and a rehabilitation program of over 1000 units. *Id.* It recommended a mix ranging from one- and two-family homes and town houses to mid-rise apartment buildings. *Id.* The plan

To gather the land necessary to achieve critical mass, DSNI needed to consolidate ownership of the vacant land in the Triangle area at the heart of the neighborhood.[203] In 1988, of the thirty acres of vacant land in the sixty-four-acre Triangle, fifteen were owned by the city of Boston and fifteen were privately owned.[204] Unfortunately, the fifteen acres of city-owned land, which the city was willing to give to DSNI, were scattered amongst the privately owned land.[205] Although most of the private holdings were tax delinquent, foreclosing on them one by one would be complicated and time-consuming.[206] Developing only the city-owned land would defeat the goals of critical mass and community-controlled neighborhood redevelopment.[207] Thus, taking the privately owned land by eminent domain seemed to DSNI to be the only way to acquire a coherent area of land on which to implement its plan.[208]

In the words of one city official,

> part of what made [DSNI's proposal to use eminent domain] appealing was the fact that this was a group of people who had come together with a thoughtful, reasonable, potentially doable plan that would create critical mass where there was emptiness . . . part of what gave [DSNI] legitimacy was the vision itself . . . ."[209]

Thus, after forming Dudley Neighbors, Inc., the urban redevelopment corporation required under Chapter 121A, DSNI persuaded the city to authorize its use of eminent domain.[210]

In 1991, DSNI opened the first eight of 296 units of new housing in the Dudley neighborhood.[211] Originally, DSNI hoped to construct 500 units, but it reduced this goal when some sites were found physically unsuitable for housing and other lots were removed from the plan

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targeted most of the projected units for households with incomes of $10,000 to $20,000 (1987 figures). *Id.*

[203] *See* MEDOFF & SKLAR, *supra* note 180, at 117.

[204] *Id.*; *see* Teresa M. Hanafin & John King, *Preening the Plaza: Lots & Blocks*, BOSTON GLOBE, Aug. 6, 1989, at A33.

[205] MEDOFF & SKLAR, *supra* note 180, at 117.

[206] *Id.*

[207] *Id.* at 118.

[208] *Id.*

[209] *Id.* at 125 (quoting Lisa Chapnick, Director of Boston Public Facilities Department).

[210] *See* MEDOFF & SKLAR, *supra* note 180, at 141. Dudley Neighbors, Inc. ("DNI") is a nonprofit corporation that acquires and owns land and oversees the development of affordable housing, community facilities, open space and small business on vacant land in Dudley Triangle. *Id.* at 126–27.

[211] *See id.* at 151, 161.

to avoid disputes with owners in the eminent domain process.[212] DSNI plans to finish housing construction before the end of the decade.[213] In the fall of 1994, Boston Mayor Thomas Menino announced $1.2 million in state and city funding for the Dudley town common.[214] Other priorities for the group include creating an economic development plan to provide jobs and attract businesses and improving educational opportunities for children and adults.[215]

V. Analysis of the Legality of DSNI's Use of Eminent Domain

Under general eminent domain doctrine, DSNI's taking of vacant lots in Roxbury for redevelopment is constitutional. DSNI's taking does not satisfy a "use by the public" formulation of the public use test because the housing built on the vacant lots will be sold to private individuals.[216] Courts have, however, moved away from this narrow reading of the public use doctrine and now view it as requiring only that the taking provide a public benefit.[217] In DSNI's case, the public would benefit from having trash-filled vacant lots transformed into new, low-income housing.

Lawrence Berger suggests two other issues to examine when determining the propriety of a nongovernmental taking: (1) the relative weight of the condemnor's need for the taking and the harm to the condemnee and (2) the practicability of purchase in the open market.[218] Under the first test, DSNI's need to attain critical mass through assembling contiguous tracts of land is balanced against the property rights of the vacant lot owners. Critical mass is a key component of DSNI's comprehensive plan for redevelopment, as it provides a method for creating a real estate market in which low-income persons can participate.[219] Without a critical mass of land, DSNI could not implement its plan for the neighborhood as a whole, and redevelopment would be hindered.[220] Although the vacant lot owners have a strong interest in keeping their land as an investment, they are not necessarily interested in these lots as unique pieces of land. In fact, because of tax

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[212] *Id.* at 151.

[213] *See* Spaid, *supra* note 4, at 10.

[214] *Roxbury to Get New Common*, Boston Globe, Nov. 3, 1994, at 37.

[215] Spaid, *supra* note 4, at 10.

[216] *See The Public Use Limitation on Eminent Domain*, *supra* note 2, at 603.

[217] *See id.* at 606.

[218] Berger, *supra* note 26, at 223–24.

[219] *See* Medoff & Skilar, *supra* note 180, at 108.

[220] *See id.* at 117.

delinquency, most of the owners of these lots eventually would lose their property through foreclosure proceedings.[221] Therefore, DSNI's need outweighs potential harm to vacant lot owners.

Under the second test suggested by Berger, DSNI could not practicably purchase these lots on the open market.[222] The owners of the lots presumably would be reluctant to sell to DSNI at a fair price because their land would greatly increase in value after DSNI completed its projects.[223] Furthermore, even if some owners would be willing to sell at a fair price, this would not guarantee that DSNI would attain critical mass. Eminent domain would be the only way to assure that DSNI obtained the land required to implement its redevelopment plan in a comprehensive fashion.[224]

DSNI's taking of vacant lots is constitutional under the standard set out in cases involving the use of eminent domain for urban redevelopment.[225] In *Berman*, the United States Supreme Court construed as narrow the role of the judiciary in determining whether eminent domain was being exercised for a public purpose.[226] The Court stated that it would give deference to a determination by Congress that a taking served the public purpose if that determination took into account a wide variety of values.[227] In *Berman*, once Congress established the public purpose of its redevelopment plan, the Court refused to second-guess the validity of the taking of a particular tract of land.[228]

In *National Railroad Passenger Corp.* and *Hawaii Housing Authority*, the Supreme Court reaffirmed its deference to legislative determinations of public use.[229] The Court will overrule a legislature's judgment of what constitutes a public use only if the use is palpably without reasonable foundation.[230] Furthermore, the Court in *Hawaii Housing Authority* indicated that the mere fact that property is taken by eminent domain and transferred directly to a private party does not transform the taking's purpose from public to private.[231]

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[221] *Id.*

[222] *See* Berger, *supra* note 26, at 224–25.

[223] *See* MEDOFF & SKLAR, *supra* note 180, at 264.

[224] *Id.*

[225] *See, e.g.*, National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 419 (1992); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 231–32 (1984); Berman v. Parker, 348 U.S. 26, 33 (1954).

[226] 348 U.S. at 32.

[227] *Id.* at 33.

[228] *See id.* at 35–36.

[229] *See National R.R. Passenger Corp.*, 503 U.S. at 419; *Hawaii Hous. Auth.*, 467 U.S. at 231–32.

[230] *Hawaii Hous. Auth.*, 467 U.S. at 241.

[231] *See id.* at 243–44.

Leaving aside the question of who is exercising the power, DSNI's taking of the vacant lots is constitutional under the rationale of these Supreme Court cases. DSNI could establish the public purpose of its redevelopment plan as a whole because the Dudley Street neighborhood's very high rates of crime and poverty would decrease following redevelopment.[232] Under *Berman*, once a public purpose in the greater plan is established, one need not examine separately the need for taking each vacant lot.[233] This conclusion would not be changed by the fact that the property would eventually be used by private individuals, because *Hawaii Housing Authority* stated that it is only the taking's purpose, not its mechanics, that must satisfy the public use requirement.[234]

Although the Supreme Court case law thoroughly addresses the public use requirement, it leaves open the question of exactly who may exercise the power of eminent domain.[235] In *Berman*, *Hawaii Housing Authority*, and *National Railroad Passenger Corp.*, governmental bodies or agencies carried out the takings.[236] Historically, courts did allow private corporations, in the form of railroads and public utilities, to exercise eminent domain powers in an effort to encourage industrialization.[237] Courts, however, largely overlooked the private nature of these corporations because they could justify the takings under the narrow definition of public use as literally "use by the public."[238]

These courts failed to address the problem of public accountability, which arises when a private entity exercises a traditional governmental function. Public use doctrine may have operated as a stand-in for public accountability when courts construed it narrowly.[239] If the general public has a right to use the condemned property, the private corporation perforce had the public's interests in mind when it exercised eminent domain power. With the broadening of the public use doctrine, however, that protection has vanished, and courts should

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[232] *See* MEDOFF & SKLAR, *supra* note 180, at 3.

[233] *See Berman*, 348 U.S. at 35–36.

[234] *See* 467 U.S. at 244.

[235] *See National R.R. Passenger Corp.*, 503 U.S. at 419; *Hawaii Hous. Auth.*, 467 U.S. at 241; *Berman*, 348 U.S. at 33.

[236] *See National R.R. Passenger Corp.*, 503 U.S. at 421–22 (condemnation performed by ICC, a government agency); *Hawaii Hous. Auth.*, 467 U.S. at 234 (housing authority, a government agency, granted power of eminent domain); *Berman*, 348 U.S. at 30 (Congress created District of Columbia Redevelopment Land Agency to exercise eminent domain power).

[237] *See* Meidinger, *supra* note 10, at 28.

[238] *See id.*

[239] *See id.*

look more closely at the delegation issues involved with the private exercise of eminent domain.

David Lawrence's due process analysis provides a framework for reviewing DSNI's exercise of eminent domain power.[240] The first step involves analyzing the extent to which the delegation creates a risk of conflict between public and private interests.[241] In this situation, the public's interest lies both in the preservation of private property rights and in the redevelopment of blighted neighborhoods. DSNI's private interest is in redevelopment through specific projects such as building low-income housing. Thus, the public's and DSNI's interests converge in having the Dudley Street neighborhood redeveloped but diverge over private property rights.

Given the extent to which decades of neglect and abuse have harmed the Dudley neighborhood, the public could be said to have a stronger interest in redevelopment than it has in private property rights.[242] Unless the entire neighborhood can be included in a comprehensive plan, it will fall victim to the same fate as countless other redeveloped neighborhoods.[243] Consequently, the delegation of eminent domain power to DSNI creates a low risk of conflict between public and private interests.

The second tier of this due process analysis involves determining what type of safeguards should accompany the delegation of eminent domain to DSNI, given the level of conflict between public and private interests.[244] Although this conflict is relatively slight, some limits should be placed on the extent to which DSNI, a private group, can exercise such a powerful tool. Massachusetts General Laws Chapter 121A, the statute under which the BRA granted DSNI the power of eminent domain, provides certain safeguards.[245] Before a redevelopment plan that includes the use of eminent domain can go forward, the city council and planning board must make a determination of the extent to which it serves a public benefit.[246] If they approve of the plan, the council and board then issue a certificate to the BRA, which in turn makes a determination as to whether conditions exist that warrant the carrying out of the project.[247] The statute's use of the public benefit

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[240] *See* Lawrence, *supra* note 97, at 659–62.

[241] *See id.* at 685.

[242] *See* Spaid, *supra* note 4, at 10.

[243] See *supra* note 184 and accompanying text for examples of this phenomenon.

[244] *See* Lawrence, *supra* note 97, at 685.

[245] *See* MASS. GEN. L. ch. 121A, § 6 (1988).

[246] *See id.*

[247] *See id.*

test, however, is not much of a safeguard, given the broad formulations courts have given that phrase.[248]

The inclusive nature of DSNI provides another safeguard against abuse because those likely to be affected by the takings could join the group performing them.[249] Several of the affected land owners are people holding the property for speculation who do not live in the neighborhood and would be unlikely to want to join the grass-roots reform effort.[250] Nevertheless, the fact that the property owners could become DSNI members serves as a due process protection.

Although the case law discussing the constitutionality of takings by private corporations under Massachusetts General Laws Chapter 121A is slim, the Illinois and Missouri courts have discussed more directly the same issue under similar statutes.[251] Both the Missouri and Illinois Supreme Courts have held that they would not second-guess the legislature's decision regarding who should be vested with the power of eminent domain once they found a public purpose for the taking.[252] Thus, the standard under the redevelopment corporations statutes, similar to that developed in eminent domain case law, focuses on the public use.[253]

Although courts have adopted a broad formulation of the public use test for general eminent domain cases, takings by private corporations in the redevelopment context call for a more narrow reading of the public use requirement. In other eminent domain circumstances, courts have interpreted the "public" part of the public use test in very general terms.[254] If taking the condemned property somehow benefitted society at large, then that taking satisfied the public use test.[255]

By contrast, a taking by a private corporation for urban redevelopment should be reviewed under a strict standard to ensure that the taking benefits the residents of the neighborhood in which it occurs. Because the goal of the taking is to aid redevelopment of a particular

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[248] *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239 (1984).

[249] *See* Spaid, *supra* note 4, at 10.

[250] *See id.*

[251] *See, e.g.*, Zurn v. City of Chicago, 59 N.E.2d 18, 29 (Ill. 1945); Annbar Assocs. v. West Side Redev. Corp., 397 S.W.2d 635, 648 (Mo. 1965).

[252] *See Zurn*, 59 N.E.2d at 29; *Annbar Assocs.*, 397 S.W.2d at 648.

[253] *See Zurn*, 59 N.E.2d at 29; *Annbar Assocs.*, 397 S.W.2d at 645.

[254] *See, e.g.*, National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 419 (1992); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 231–32 (1984); Berman v. Parker, 348 U.S. 26, 33 (1954).

[255] *See, e.g., National R.R. Passenger Corp.*, 503 U.S. at 419; *Hawaii Hous. Auth.*, 467 U.S. at 231–32; *Berman*, 348 U.S. at 33.

area, the people benefitting from the use of the condemned property should be the people living in the blighted area. These benefits should include low-income housing, commercial services such as banks and grocery stores, and recreational opportunities.

This stricter formulation of the public use test protects the interests of the blighted area's residents more effectively than the formulations of public benefit under the typical urban redevelopment corporations statute.[256] The statutory requirements for public benefit are often overbroad. Under these statutes, a private corporation can gain approval to take land in a blighted neighborhood to build a large office tower.[257] Although an office tower eliminates blighted conditions to the extent that it eradicates empty, trash-filled lots, it does very little to provide the things such as affordable housing that can end the cyclical poverty that led to the blighted conditions in the first place.

Under this stricter formulation of the public use test, DSNI's taking of vacant lots for implementing its comprehensive plan would be constitutional, but a private corporation's taking of property to build an office tower would not be. DSNI's plan includes constructing affordable housing, building playgrounds, and constructing a town common and community center.[258] These uses of the condemned land will directly benefit the Dudley neighborhood residents by providing them with much-needed facilities. If a private corporation were allowed to construct an office tower in the Dudley neighborhood, the residents would not benefit to nearly the same extent. Although an office tower might provide a few jobs, it would not meet the other needs of the community and thus would not satisfy the stricter formulation of the public use test.

VI. Conclusion

The power of eminent domain has evolved over the centuries away from its original purpose of allowing the government to condemn private land to the extent that it would be used by the public at large. Modern eminent domain law acknowledges this history only fleetingly, as it brushes aside strict requirements of use by the public in favor of a loose public benefit standard. This Note suggests that a stricter public use test should be reinstated in the context of private corporations

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[256] *See, e.g.*, 315 ILCS 20/1 to –44 (1993); Mass. Gen. L. ch. 121A, §§ 1–19 (1988); Mo. Rev. Stat. §§ 353.010–.180 (1991).

[257] *See* Opinion of the Justices, 168 N.E.2d 858, 868 (Mass. 1956).

[258] *See* Spaid, *supra* note 4, at 10.

exercising eminent domain power for urban redevelopment. This new incarnation of the strict test would focus on who would benefit from the use to which the condemned property would be put. This test would address potential concerns about delegating a power traditionally reserved to the state by providing a safeguard against private condemnations for uses that would not ultimately benefit the residents of the blighted neighborhood.

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