THE TROUBLE WITH EMINENT DOMAIN IN NEW YORK

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New York eminent domain law is in need of reform. Between vague statutory terms and the limited review provided by the Eminent Domain Procedure Law (EDPL), New York law, as currently written and interpreted, enables the execution of policy not authorized by law, and encourages the fabrication of pretextual purposes to evade public accountability. In this article, we look at the traditional public purpose of redeveloping blighted areas, and the latitude that is created by the interaction of authorizing statutes and limited judicial review to use blight removal as a pretext for private purposes, and thereby evade constitutional safeguards and public accountability. As a result, effective legal control over the exercise of eminent domain is frustrated; communities and businesses are made vulnerable to any well connected developer interested in taking over the land. Therefore, confidence in government is eroded, as secret and deceptive policy decisions result in the appearance, if not the actuality, of impermissible favoritism and pretext.

I. THE ENCROACHMENT OF ECONOMIC DEVELOPMENT POLICY ON URBAN RENEWAL STATUTES

Traditionally, property could be taken by eminent domain to create a particular public good, such as a public park, a public school or a public road, or to avoid a particular public evil, such as derelict property bringing down the value of a neighborhood, or slum areas that fostered disease or delinquency, threatening broader society and creating a burden on public services.[1] In recent decades, however, public policy has moved on from the infrastructure improvements and slum clearance policies of the mid-twentieth century to a new use of eminent domain—as a tool of government policy to promote economic growth. By taking property from one private party and giving it to another who will make more profitable use of the land, the public is purported to reap a net-benefit of increased jobs and tax revenues.[2]

A classic example of the use of eminent domain for economic development was famously endorsed in 1981 by the Michigan Supreme Court in *Poletown Neighborhood Council v. City of*

[1] *See, e.g.,* Kelo v. City of New London, 545 U.S. 469, 512 (2005) (Thomas, J., dissenting) ("States employed the eminent domain power to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks." (internal citations omitted)).

[2] *See, e.g., id.* at 483 (majority opinion).

Detroit in which a healthy working class neighborhood was condemned to enable General Motors to build a manufacturing plant.[3] Twenty-three years later, with that plant shuttered and the promised jobs and taxes gone, the Michigan court overturned *Poletown* in *County of Wayne v. Hathcock*, reverting to an older jurisprudence requiring a showing of public necessity, future public control, or facts about the land of public significance independent of any future use.[4] Nonetheless, the U.S. Supreme Court, in its controversial 2005 decision, *Kelo v. City of New London*, upheld economic development as a valid "public use" under the Fifth Amendment to the U.S. Constitution.[5]

In New York State, the use of eminent domain for the purpose of creating or retaining jobs and taxes has for a long time been an element of municipal and state policy. The Urban Development Corporation Law (UDCL) cites the creation of jobs and increasing tax revenues as a public purpose,[6] and it created the New York State Urban Development Corporation, now doing business as the Empire State Development Corporation (ESDC).[7] Creating jobs and increasing tax revenues are also purposes endorsed by the New York State Urban Renewal Law,[8] the New York State Industrial Development Agency Act,[9] and the New York State Municipal Redevelopment Law.[10] Economic development,

[3] 304 N.W.2d 455, 457, 459 (Mich. 1981), *overruled by* Cnty of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004).

[4] 684 N.W.2d at 783, 787.

[5] 545 U.S. at 489–90.

[6] N.Y. UNCONSOL. LAW § 6251 (McKinney 2000). Section 6252 of the New York Unconsolidated Law states:

> It is hereby declared to be the policy of the state to promote a vigorous and growing economy, to prevent economic stagnation and to encourage the creation of new job opportunities in order to protect against the hazards of unemployment, reduce the level of public assistance to now indigent individuals and families, increase revenues to the state and to its municipalities and to achieve stable and diversified local economies.

[7] *Id.* § 6254 (McKinney Supp. 2010).

[8] N.Y. GEN. MUN. LAW §§ 500–501 (McKinney 1999) (stating that the purpose of promoting the "sound growth and development" of communities is to avoid impairment of economic soundness, stability, and threats to public revenues).

[9] *See id.* §§ 850, 858 (McKinney 1999 & Supp. 2010) (explaining that by empowering local industrial development agencies to use eminent domain power, they can "advance the job opportunities, health, general prosperity and economic welfare of the people of the state of New York and . . . improve their recreation opportunities, prosperity and standard of living").

[10] *Id.* §§ 970-a–970-b (stating that a purpose of remedying blight conditions is "to facilitate commercial and industrial development, to maintain and expand

creating jobs, and increasing tax revenues have been repeatedly endorsed by New York courts as a public purpose in support of condemnation.[11] While economic development qualifies as a constitutional "public purpose," its legislative authorization under most statutes remains limited by specific findings requirements. Among these statutes, a common limiting term is the requirement that the area where a project is to be located is "substandard or insanitary," or a "blighted" area.[12] This article focuses particularly on the UDCL, but the pursuit of predominantly economic development objectives has also been alleged in cases involving municipalities' urban renewal and redevelopment authority.[13]

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the supply of low and moderate-income housing and to maintain and expand employment opportunities for jobless, underemployed and low income persons").

[11] Kaufmann's Carousel, Inc. v. Syracuse Indus. Dev. Agency, 750 N.Y.S.2d 212, 215, 221 (App. Div. 2002) (finding that tripling the size of a project originally undertaken in part for blight reduction but now for purposes only described as "'including, without limitation, advancing job opportunities, general prosperity and public welfare of the People of the State of New York and the City of Syracuse and . . . advancing economic development and promoting tourism'" to be a "legitimate public purpose"); Bendo v. Jamestown Urban Renewal Agency, 738 N.Y.S.2d 615, 616 (App. Div. 2002) (explaining that "the creation of the economic development stimulus to influence redevelopment of the central business district," in addition to redevelopment of the West End District, established that a property condemned will serve a public use, benefit, or purpose); Vitucci v. N.Y. City Sch. Constr. Auth., 735 N.Y.S.2d 560, 562 (App. Div. 2001) (discussing that enabling an employer to expand and create jobs is an adequate public purpose for re-allocation of land first condemned for school construction); *In re* Fisher, 730 N.Y.S.2d 516, 517 (App. Div. 2001) (stating that preventing the New York Stock Exchange from relocating is a sufficient public use because it "will result in substantial public benefits, among them increased tax revenues, economic development and job opportunities"); Sun Co. v. City of Syracuse Indus. Dev. Agency, 625 N.Y.S.2d 371, 377–78 (App. Div. 1995) (stating that purposes of expanding employment opportunities, increasing the tax base and sales tax revenues, and promoting the "identification" of an area as a tourist destination in addition to reducing physical blight and alleviating environmental problems constitute a "legitimate public purpose"); Sunrise Props., Inc. v. Jamestown Urban Renewal Agency, 614 N.Y.S.2d 841, 842 (App. Div. 1994) (holding that the condemnation "serves a public benefit" because it "would create jobs, provide infrastructure, and possibly stimulate new private sector economic development"); Ne. Parent & Child Soc'y, Inc. v. City of Schenectady Indus. Dev. Agency, 494 N.Y.S.2d 503, 504 (App. Div. 1985) (deciding that a condemnation designed "to increase Schenectady's tax base and diversify its economy . . . in accordance with its statutory responsibility to promote the City's economic welfare" is a permissible public use).

[12] *See, e.g.,* N.Y. GEN. MUN. LAW §§ 502(3), (4); 970-c(a), (g); N.Y. UNCONSOL. LAW §§ 6253(6)(c), 6260(b)(1), (c)(1), (e)(4), (f)(1) (McKinney Supp. 2010).

[13] Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 331 (N.Y. 1975) (holding that the area was appropriate for urban renewal despite allegations that the actual purpose was to induce a major area employer to remain in

The UDCL is rooted in the concerns of 1968 (when it was enacted): depressed urban centers and dying rust belt industries. Though the UDCL explicitly states that job creation and increasing tax revenue are public purposes, and uses the term "development" in the title of the public benefit corporation it creates, the development it envisages appears not to be affirmative economic development in the abstract, as would be represented by any successful business activity helping lift the broader New York gross domestic product.[14] The statute's statement of legislative findings and purposes gives equal space and weight to addressing "substandard or insanitary" areas, and to the essentially remedial programs to redevelop such areas.[15] The findings requirements limited projects to "substandard or insanitary," "blighted" areas, or to meeting a housing or civic need.[16] While the UDCL may endorse policies to promote economic development and the creation of jobs generally, its findings requirements limit it well within the scope of traditional public purposes for the use of eminent domain: removing the specific public nuisance of blight or creating the specific public goods of civic facilities or low income housing.[17]

Yonkers); *Bendo*, 738 N.Y.S.2d at 616 (economic stimulus to broader central business district sought from the redevelopment of West End District, likely in connection with section 970-c(g) of the General Municipal Law); *Vitucci*, 735 N.Y.S.2d at 561 (property condemned for school construction redesignated an urban renewal area); *Sunrise Props., Inc.*, 614 N.Y.S.2d at 842 (subject property found "underutilized," likely in connection with General Municipal Law section 970-c(a)).

[14] N.Y. UNCONSOL. LAW § 6252 (McKinney Supp. 2010).

[15] Only two of the six types of projects authorized under the UDCL do not require a blight (substandard or unsanitary) finding. *See id.* § 6260. Though a "civic project" is defined as either a standalone project or part of another project, such civic projects are described in the statement of legislative purposes as part of "programs" to revitalize blighted areas. *Id.* §§ 6252, 6253(6)(d), 6260(d) (McKinney Supp. 2010). "Residential projects" also do not require a blight finding, but this was no doubt deliberate in light of parallel concerns at the time to promote racial integration. *See id.* §§ 6253(6)(a), 6260(a) (McKinney Supp. 2010).

[16] *See id.* § 6253(6)–(12) (McKinney Supp. 2010).

[17] Almost all of the eminent domain cases, in which economic development was affirmed as a legitimate public purpose, cited traditional bases for exercising eminent domain power. *See* Jackson v. N.Y. State Urban Dev. Corp., 494 N.E.2d 429, 433 (N.Y. 1986) (finding that the project would stimulate economic development of an area blighted by pornography, as well as "have substantial economic, commercial and social benefits for residents of the city as a whole"); *Bendo*, 738 N.Y.S.2d at 616 (stating that the public purpose served by the taking is the redevelopment of the West End District of the City, which is authorized under section 970-c(g) of the General Municipal Law); *Sunrise*

This discrepancy between the broad statutory mandate and the narrower findings requirement creates a tension. With the shift in public policy over the last thirty-years away from activist government addressing local urban problems and towards looking to the private sector as the engine for general prosperity, policy makers have looked to indefinite economic growth as the way to balance budgets without having to resort to general taxation. Policy makers wanting to exercise government power towards this end have found the use of eminent domain a convenient option. Leveraging private investment, in the right circumstances, can generate jobs and keep tax revenues up, with the price being paid by a relatively small and usually marginal part of the electorate that suffers displacement. Using eminent domain to foster economic growth is easier to accomplish politically than raising taxes.[18]

One effect of the shift from remediating blighted urban areas towards affirmative general economic development has been to reallocate ESDC's activity from where there is the greatest blight, or the most persistent unemployment, to where there is the greatest absolute potential for growth. Areas with advantages, such as location and conditions already interesting to developers that make them most likely to grow, even without governmental intervention, become the focus of development agency attention, not areas that need governmental intervention to grow and in which investors are not currently interested. ESDC's recent

Props., Inc., 614 N.Y.S.2d at 842 (finding that the property at issue was "underutilized" (constituting a "blighted area" under section 970-c(a) of the General Municipal Law), and therefore, the "condemnation of the property and subsequent development will serve a public purpose"). Even under the Industrial Development Act, blight remediation has also been relied upon as a public purpose in support of the condemnation. Sun Co. v. City of Syracuse Indus. Dev. Agency, 625 N.Y.S.2d 371, 377 (App. Div. 1995). Only in *In re Fisher*, involving the expansion of the New York Stock Exchange to prevent it from leaving New York City, was no blight finding cited by the court. 730 N.Y.S.2d 516, 516–17 (App. Div. 2001). In *In re Fisher*, the First Department cited as public purposes the importance of the stock exchange to the New York City economy, upon which many jobs and tax revenues depended. *Id.* at 517. No blight finding was required, because in that case the legislature had granted special authorization in separate legislation. *Id.*

[18] *See* Constance N. DeSena, Note, *What The Legislature Giveth the Judiciary Taketh Away: The Power to Take Private Property for Redevelopment in New Jersey and* Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 33 SETON HALL LEGIS. J. 289, 311 n.108 (2008) (stating that many constituents pressure politicians to lower taxes, and that redevelopment projects can provide tax income for local governments, which can help tax rates remain low).

projects in gentrifying Brooklyn and Manhattan clearly show this calculation.[19] If economic growth is a goal, it makes more sense to back winners, not losers.

In pursuing this new policy direction, development agencies have also relegated the initiative to private developers, relying on developer interest to identify possible projects with the greatest growth potential. They have let private developers dictate the size and configuration of projects so as to maximize that growth potential.[20]

Where eminent domain has been used in areas of high real estate value and high demand, agencies have stretched the definition of blight to fit conditions where no common sense understanding of blight would apply. Whether the area taken is blighted has been a key issue in the Columbia University expansion project in Manhattanville, West Harlem[21] and Brooklyn.[22] In this article, we look closely at the UDCL limiting term "substandard or insanitary." This term's vagueness, as applied by the ESDC, allows an even broader possible application—making more areas subject to condemnation on the grounds of being found "blighted," and facilitating large scale developer-driven projects undertaken for economic development purposes with favoritism towards a project initiating and project-driving developer.

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[19] *See* David King, *Eminent Domain Changes Seek to Limit State's Power to Seize Property*, GOTHAM GAZETTE, Feb. 4, 2010, http://www.gothamgazette.com/article//20100204/204/3170.

[20] *See id.*

[21] Kaur v. N.Y. State Urban Dev. Corp., 892 N.Y.S.2d 8, 11, 21 (App. Div. 2009), *rev'd*, 933 N.E.2d 721, 737 (N.Y. 2010), *petition for cert. filed sub nom.* Tuck-It-Away v. N.Y. State Urban Dev. Corp., 2010 WL 3722066, at *8–9, *18 (U.S. Sept. 21, 2010) (No. 10-402) (challenging blight findings as pretextual and made in reliance on the developer's consultant relying on conditions in buildings under interested developer's control, and relying on methodologically biased blight studies), *cert. denied*, 2010 WL 3712673, at *1 (U.S. Dec. 13, 2010) (No. 10-402).

[22] Goldstein v. Pataki, No. 06 CV 5827(NGG)(RML), 2007 WL 1695573, at *1 (E.D.N.Y. Feb. 23, 2007); Goldstein v. N.Y. State Urban Dev. Corp., 879 N.Y.S.2d 524, 533 (App. Div. 2009), *aff'd*, 921 N.E.2d 164, 175 (N.Y. 2009) (challenging the necessity of inclusion of a non-blighted neighborhood to remedy rail-yard blight condition). Whether the area could properly be called blighted was also challenged in the Times Square redevelopment and at the Coliseum on Columbus Circle. *See* W. 41st St. Realty LLC v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121, 123 (App. Div. 2002); Jo & Wo Realty Corp. v. City of N.Y., 555 N.Y.S.2d 271, 277–78 (App. Div. 1990) (involving what the same court later described in *Develop Don't Destroy (Brooklyn) v. New York State Urban Development Corp.* as having "indisputable potential for private development").

II. THE "HIGHLY MALLEABLE AND ELASTIC CONCEPT" OF BLIGHT

Under the UDCL, in four out of the six types of projects the agency is authorized to undertake, a finding must be made that the area in which the project is to be located is "substandard or insanitary."[23] The term is inherently vague. "Substandard" specifies no standard below which the designation is merited. "Insanitary" only imposes an emotive dichotomy between "healthy" and "unhealthy," without any rational accounting of actual risks of harm, or even rational pathways of exposure.

In *Develop Don't Destroy (Brooklyn) v. New York State Urban Development Corp.*, the Appellate Division, First Department declared blight to be a "highly malleable and elastic concept" that is "more facilitative than limiting."[24]

The idea of a "highly malleable and elastic" limitation on governmental authority is troublesome. It offends the constitutional value that a statute must have sufficient specificity to give adequate notice to citizens. In the criminal context, vagrancy and loitering statutes have been held void for vagueness,[25] but also in the civil context, New York as well as federal courts, have held that the citizen must be given adequate notice of how the government will enforce regulatory statutes.[26] The constitutional issue of due process relies upon the citizen receiving adequate notice of what the law requires so the citizen can conform their behavior accordingly.

In *City of Norwood v. Horney*, the Ohio Supreme Court ruled that the term "deteriorating area" was unconstitutionally void for vagueness. The court reasoned that this term did not give homeowners (in a well maintained neighborhood) notice that their property was liable to be taken by eminent domain for being part of a neighborhood that was "deteriorating" as a residential area through the encroachment of commercial development.[27]

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[23] N.Y. UNCONSOL. LAW § 6260 (McKinney 2000).

[24] 874 N.Y.S.2d 414, 424 (App. Div. 2009).

[25] *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 170–71 (1972).

[26] Ashton v. Kentucky, 384 U.S. 195, 200 (1966) (noting that the U.S. Supreme Court has stated clearly: "Vague laws in any area suffer a constitutional infirmity."); ABN 51st St. Partners v. City of N.Y., 724 F. Supp. 1142, 1147 (S.D.N.Y. 1989) (applying a stringent test for vagueness to statutes affecting the fundamental constitutional right to acquire, use, enjoy, and dispose of property); People v. N.Y. Trap Rock Corp., 442 N.E.2d 1222, 1225 (N.Y. 1982) (holding noise ordinance void for vagueness).

[27] City of Norwood v. Horney, 853 N.E.2d 1115, 1123 (Ohio 2006).

Without adequate notice, a citizen may invest in property maintenance or improvement with the expectation that keeping up the property will ensure that it will not be condemned, only to find the property condemned nonetheless. In criminal law, such uncertainty results in an unnecessary forfeiture of liberty. Vague limitations on authorization to use eminent domain power can lead to unnecessary forfeiture of property through frustrated investment in improvement or maintenance.

Equally emphasized in the doctrine of "void for vagueness" is the effect vague laws have on those who administer them. Vague laws encourage "arbitrary and discriminatory enforcement."[28] In *Papachristou v. City of Jacksonville*, the discriminatory nature of the arrest related to the circumstance that the plaintiff, a white woman, was at the time talking with some black men.[29] Beyond the issue of racial discrimination, the issue that concerned the court was the arbitrariness by which enforcement officials were enabled to substitute an unauthorized law of their own for the legitimately constituted law on the books.[30] In the context of eminent domain, the temptation of vague limiting terms is that it encourages arbitrary action of those administering the law by enabling the pursuit of unauthorized policy (*i.e.*, favoring one developer's project over other potential developers or granting a project sponsor public resources or private property that is not necessary to attain the alleged public benefit). In this context, the notion that the limiting term "blight" is "highly malleable" and "more facilitative than limiting" is especially troublesome, because if an overly wide latitude of conditions can be called "blighted," then the designation can be invoked to authorize the use of eminent domain on the basis of a favored developer's interest instead of the inherent condition of the area.

It is not that the term "substandard and insanitary" or "blighted," as used in various New York authorizing statutes, has no meaning.[31] It does. A survey of statutes and case law across all states shows that blight is overwhelmingly defined as a liability, burdening neighboring property, or placing a burden on

[28] *Papachristou*, 405 U.S. at 170.

[29] *Id.* at 158.

[30] *Id.* at 162–63, 170.

[31] The term used in New York eminent domain law "substandard or insanitary," is defined as synonymous with "blight." N.Y. UNCONSOL. LAW § 6253(12) (McKinney Supp. 2010).

public services.[32] The New Jersey Supreme Court has specified that blight, in any case, requires harm to neighboring property.[33]

The term "blight" was first invoked in reference to residential slums, the target of large nineteenth century reform efforts to extend police powers into building codes, sanitation, and public health.[34] Slums were seen to be sources of contagious disease or delinquency, affecting the rest of the city. The concentrations of low income immigrant or ethnic minorities in so-called "blighted" areas were also seen as a threat to the value of neighboring property and a deterrent to investment.

By the mid-twentieth century, with the establishment of zoning and development rapidly spreading, the concern for proper urban planning invoked another set of concerns that could impede the sound growth of municipalities. Topographical features or major infrastructure installations can have a negative effect on neighboring property, making an area unattractive to investors. Faulty planning, including incompatible uses, or a dearth of public amenities and services such as a lack of parks, parking, or convenient shopping in a residential area, or limited access in a commercial or industrial area, can similarly depress an area's potential for development and growth.[35]

By the 1960s or early 1970s, a new reality of suburban flight and old industries collapsing in the face of southern and foreign competition posed a new set of challenges to municipalities. By this last period of concerns, represented in the UDCL's legislative findings, blight is understood in terms of vacancy and abandonment, with low demand for real estate and high public costs.[36] A substantial presence of vacant or dilapidated property

[32] *See* Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 403 (2000).

[33] Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 459 (N.J. 2007).

[34] N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153, 154–55 (N.Y. 1936) (citing the failure of taxation and police power regulatory regimes to eliminate "[t]he menace of the slums" as warranting application of a third sovereign power, eminent domain, to protect public health, safety, and welfare through slum clearance).

[35] *Cf.* Berman v. Parker, 348 U.S. 26, 34–35 (1954) (finding need for "blighted area" designation regardless of inclusion of non-blighted properties, as opposed to "piecemeal approach" on the basis of requirements of "balanced, integrated" urban planning).

[36] *Cf.* Cannata v. City of N.Y., 182 N.E.2d 395, 397 (N.Y. 1962) (holding for the first time that underutilized vacant land constituted blight); Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 330–32 (N.Y. 1975) (finding that Otis Elevator's threat to leave Yonkers and the city's desire to keep Otis in Yonkers

is seen to have a negative effect on an area, scaring off buyers, bringing in lower income renters, and deterring investment in new businesses and property improvement. Abandoned neighborhoods are associated with high crime and social dysfunction. These neighborhoods pose a burden on health, social, and police services.[37]

The common element in all these different areas of concern, reflected in the UDCL's legislative findings, and that warrants the use of the epidemiological term "blight," is not just the withering, but the contagion. Blight is everyone's problem, because it can spread and pose a burden society. New York authorizing statutes suggest a definition of "blight" that presupposes a liability. The New York Economic Redevelopment Law provides a definition of "blight" that is clear in describing not just the condition in question, but the threshold of actual harm it must cause:

> "Blighted area" means an area within a municipality in which one or more of the following conditions exist: (i) a predominance of buildings and structures which are deteriorated or unfit or unsafe for use or occupancy; or (ii) a predominance of economically unproductive lands, buildings or structures, the redevelopment of which is needed to prevent further deterioration which would jeopardize the economic well being of the people.[38]

Even the UDCL, in its legislative findings and purposes, describing a variety of conditions found in blighted areas, says that they "hamper or impede proper and economic development of such areas and which impair or arrest the sound growth of the area, community or municipality, and the state as a whole."[39]

In urban planning literature and case law, blight is universally understood as harmful because of its tendency to reproduce and spread.[40] Abandoned or otherwise impaired property fails to attract investment, leading to low rents and consequently, low reinvestment in maintenance. The concentration of low income residents in such areas, in addition to lowering demand for goods and services, leads to high crime which further deters investment. A vicious circle is created by a combination of economic and social dynamics, such that an area becomes incapable of "sound growth" and its development becomes

did not invalidate a plan to redevelop a blighted area).

[37] N.Y. UNCONSOL. LAW § 6252 (McKinney Supp. 2010).

[38] N.Y. GEN. MUN. LAW § 970-c(a) (McKinney 1999).

[39] N.Y. UNCONSOL. LAW § 6252.

[40] *See* N.Y. GEN. MUN. LAW § 970-c(a); *Berman*, 348 U.S. at 35.

"impair[ed]."[41] The only solution is for the government to step in and, by use of eminent domain, clear the whole area, compensate for inherent limiting factors, such as lack of infrastructure or access, and by offering it to a developer under favorable terms, to redevelop the area as a clean slate.

Despite this broadly attested understanding of blight as a dynamic process with an injurious impact, in practical application in New York State, agencies are not required to show that conditions cause actual harm, nor do they have to identify any source of harm.[42] The causal links of any proposed blight syndrome are not required to be indentified and this makes it possible to distort the significance of supposed indicators of blight.[43] This also creates a false narrative of an area driven more by the desire to find the area blighted than by comprehensive evidence of actual economic factions and relationships.[44] Interested parties with unclean hands, such as a developer controlling substantial portions of the area sought to be condemned, can be rewarded for strategic behavior in vacating or running down property.[45] Without an explicit statutory

[41] *See* N.Y. UNCONSOL. LAW § 6252.

[42] In *Kaur v. N. Y. State Urban Development Corp.,* a plurality of the Appellate Division, First Department found ESDC's blight finding in the case of Columbia University's expansion into West Harlem to be "mere sophistry." 892 N.Y.S.2d 8, 16 (App. Div. 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at *1 (U.S. Dec. 13, 2010) (No. 10-402). The lack of prior history of blight in the area, the overlooking of Columbia's responsibility for conditions in its own buildings as it bought up most of the area, the explicit commissioning of a blight study to "highlight" such blight conditions as could be found, resulting in a "preposterous" summary effectively exaggerating defects that could similarly be "captured . . . in close-up technicolor" in any neighborhood in New York, and the exclusion of contraindicative economic data such as trends of real estate values and rental demands constituted substantial evidence of pretext. *Id*. at 20–22. Bolstering this selective evidence with an arbitrary standard of "underutilization" was similarly found improper, and was evidence of intentional bias. *Id.* at 22–23. The concurrence saw evidence raising questions of bad faith and pretext leading to the conclusion that petitioners' due process rights had been violated. *Id.* at 28–32. The Court of Appeals reversed, however, rejecting the Appellate Division's consideration of record evidence of methodological bias in the blight studies for the Columbia University Manhattanville project as improper "de novo" review where the agency's findings were owed deference. *Kaur,* N.E.2d at 731.

[43] In *Kaur*, the exaggeration of building condition evidence and its cause of those conditions were precisely at issue. *See supra* note 42 and commentary.

[44] In *Kaur,* the blight studies were found by the plurality of the Appellate Division to have excluded contraindicative economic evidence. 892 N.Y.S.2d at 22.

[45] In *Kaur,* the plurality of the Appellate Division found that the project

requirement that, for an area to be found "substandard or insanitary," actual harm must be shown, there is no check upon loose conjectures based on selective evidence.

By their policy of deference to agencies, moreover, New York courts have tolerated the finding of blight where only selected symptoms could be identified.[46] In authorizing statutes, a "substandard and insanitary" area is described by a lengthy list of conditions. The UDCL, for example, in its legislative findings and purposes, lists, in addition to, "substandard, insanitary, deteriorated or deteriorating conditions" making an area blighted:

> [O]bsolete and dilapidated buildings and structures, defective construction, outmoded design, lack of proper sanitary facilities or adequate fire or safety protection, excessive land coverage, insufficient light and ventilation, excessive population density, illegal uses and conversions, inadequate maintenance, buildings abandoned or not utilized in whole or substantial part, obsolete systems of utilities, poorly or improperly designed street patterns and intersections, inadequate access to areas, traffic congestion hazardous to the public safety, lack of suitable off-street parking, inadequate loading and unloading facilities, impractical street widths, sizes and shapes, blocks and lots of irregular form, shape or insufficient size, width or depth, unsuitable topography, subsoil or other physical conditions . . . .[47]

This can be approached as a list of symptoms. The New York Court of Appeals in *Yonkers Community Development Agency v. Morris*, cited a substantially similar list as "factors" indicating the presence of blight, but when the court is addressing the process of finding blight, factors are indicators to be measured in an evaluative process, not necessarily the *causes* of blight.[48] In

sponsor, Columbia University, had engaged in such behavior, *Id.* at 22. As a result, "the ultimate private beneficiary of the scheme for the private annexation of Manhattanville was the progenitor of its own benefit." *Id.* at 20.

[46] *See supra* note 42 and commentary.

[47] N.Y. UNCONSOL. LAW § 6252.

[48] The following is a list of factors cited by the New York Court of Appeals:

> Many factors and interrelationships of factors may be significant. These may include such diverse matters as irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property difficult, incompatibility of the existing mixture of residential and industrial property, overcrowding, the incidence of crime, lack of sanitation, the drain an area makes on municipal services, fire hazards, traffic congestion, and pollution. It can encompass areas in the process of deterioration or threatened with it as well as ones already rendered useless, prevention being an

the UDCL's statement of legislative findings, these conditions are said to all cause impaired development as well as being descriptors of blighted areas, though how they cause blight, under what circumstances they do so, and in what incidence or concentration they do so is all unstated.[49] The UDCL's list of symptoms provides no quantitative thresholds or even gradations of severity, so minor instances suffice to count the symptom as present.

The causal connections between these symptoms can only be properly reconstructed by reference to historical blight conditions out of which this list of symptoms has accrued. The initial set of conditions, including "obsolete and dilapidated buildings and structures, defective construction, outmoded design, lack of proper sanitary facilities or adequate fire or safety protection, excessive land coverage, insufficient light and ventilation, excessive population density, illegal uses and conversions," describes the concerns of early twentieth century reformers seeking to clear slums and impose new regimes of building code, sanitation, and health regulations.[50] A second group of conditions reflects a later mid-twentieth century set of urban planning concerns:

> [O]bsolete systems of utilities, poorly or improperly designed street patterns and intersections, inadequate access to areas, traffic congestion hazardous to the public safety, lack of suitable off-street parking, inadequate loading and unloading facilities, impractical street widths, sizes and shapes, blocks and lots of irregular form, shape or insufficient size, width or depth, unsuitable topography, subsoil or other physical conditions . . . .[51]

A third group of symptoms, "inadequate maintenance,

important purpose. It is "something more than deteriorated structures. It involves improper land use. Therefore its causes, originating many years ago, include not only outmoded and deteriorated structures, but unwise planning and zoning, poor regulatory code provisions, and inadequate provisions for the flow of traffic."

Yonkers Cmty. Dev. Agency, 335 N.E.2d at 332 (quoting John F. Cook, *The Battle Against Blight*, 43 MARQ. L. REV. 444, 445 (1959–1960)). For the public safety, public health, and public welfare, all legitimate objects of the police power are broad and inclusive. *Berman*, 348 U.S. at 32. It may even include vacant land and air rights. Cannata v. City of N.Y., 182 N.E.2d 395, 396 (N.Y. 1962); Prop. Owner's Protective Ass'n v. City Council of Jersey City, 259 A.2d 698, 704 (N.J. 1969).

[49] *See* N.Y. UNCONSOL. LAW § 6252.

[50] *Id.*

[51] *Id.*

buildings abandoned or not utilized in whole or substantial part," reflects the later twentieth century issues of suburban flight and industrial decline leaving boarded up cities with depressed demand, high vacancy, and a high incidence of tax foreclosure.[52] Each of these clusters of conditions thus refers to a specific historically experienced condition of perceived harm, identified as "blight." If individual conditions are removed from their historical context and found on their own, they do not necessarily indicate anything resembling blight. "Excessive population density" meant one thing in the Lower East Side of New York City at the turn of the century,[53] but the far higher population density of today's Upper East Side of New York City, absent the sanitation concerns and lack of light and air, does not on its own indicate blight. Similarly, "blocks and lots of irregular form"[54] can be found in some of New York City's most prized lower Manhattan or Greenwich Village neighborhoods, and they do not indicate any impediment or harm apart from a planning context designating an area for larger scale development.

In *Yonkers Community Development*, the New York Court of Appeals admitted that: "[T]he combination and effects of such things are highly variable. These matters call for the exercise of a considerable degree of practical judgment, common sense and sound discretion."[55] Trusting development agencies to exercise practical judgment, common sense, and sound discretion, however, is wishful thinking. Such faith is particularly misplaced when agencies are implementing policies more focused on maximizing economic development or favoring particular developers, and not on the goal of identifying and remediating blight.

Treating the UDCL's and similar cumulative lists of blight symptoms as a set of disassociated indices invites cherry-picking of selected facts that favor desired outcomes, and this permits the exclusion of data that contraindicate the existence of any actual syndrome of blight. An agency contractor can document physical building conditions to imply abandonment or "disinvestment," and infer from such conditions the existence of some impediment

[52] *Id.*

[53] *See* William E. Nelson & Norman R. Williams, *Suburbanization and Market Failure: An Analysis of Government Policies Promoting Suburban Growth and Ethnic Assimilation*, 27 FORDHAM URB. L.J. 197, 200 (1999).

[54] *See* N.Y. UNCONSOL. LAW § 6252.

[55] 335 N.E.2d 327, 332 (N.Y. 1975) (internal citations omitted).

of economic activity.[56] An agency can exclude evidence of far more obvious causes of deteriorated building conditions, such as the private project sponsor's control of the area, and its interest in having the area found blighted. All the agency needs to show are photographs of water damage from leaky roofs, without regard to actual impact on the building's use or economic feasibility of repair, and it can designate a portion of lots in an area to be "deteriorated," or rate them in "poor" condition, and so, "substandard [and] insanitary." If it can reach the magic number of fifty-one percent of lots displaying "substandard [and] insanitary" conditions, it can describe the area as "characterized" by the substandard and insanitary conditions.[57]

A development agency can also exclude readily available evidence that contraindicates blight, such as full occupancy, growing numbers of businesses and employment, absence of any tax delinquency, rising real estate values and strong rental demand, and evidence of current investor interest.[58] It can ignore area features that are attractive to investment, obviating any need for public intervention, such as superior access to transport and mass transit, or imminent or even enacted zoning changes.[59] By narrowly drawing project area lines to exclude surrounding open space and parks, a few blocks can be described as lacking open space.[60]

One item from the list of blight symptoms that is particularly problematic is "underutilization."[61] In ESDC's recent blight studies, "underutilization" has been defined as construction of only sixty percent or less of the maximum development permitted under existing zoning.[62]

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[56] In *Kaur,* the agency blight studies inferred "disinvestment" from the existence of deteriorated building conditions, and despite evidence of Columbia ownership and control. 892 N.Y.S.2d 8, 16 (App. Div. 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at *1 (U.S. Dec. 13, 2010) (No. 10-402).

[57] *See, e.g.,* AKRF, INC., ATLANTIC YARDS ARENA AND REDEVELOPMENT PROJECT: BLIGHT STUDY, at B-5 (2006) [hereinafter BLIGHT STUDY], *available at* http://www.empire.state.ny.us/Subsidiaries_Projects/Data/AtlanticYards/Blight_Study/Blight_Study_07_11_06.pdf.

[58] Each of these was alleged and supported in the record in *Kaur*. *See supra* note 42 and commentary.

[59] *See id.*

[60] *See id.*

[61] *See* The plurality of the Appellate Division in *Kaur,* gave special attention to the issue of "underutilization" as a criterion of "blight." 892 N.Y.S.2d at 22–23.

[62] *See, e.g.,* BLIGHT STUDY, *supra* note 57, at A-1.

Underutilization is one of the most problematic "factors" by which the presence of blight is determined. In *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, the New Jersey Supreme Court rejected the use of underutilization as a criterion for finding blight altogether under the New Jersey Constitution, because it is impossible to show how owners, opting to build less than their rights allow, cause harm to anyone else.[63] Lower density development cannot normally be shown as a burden on municipal services. In fact, the light and air that it leaves may, in many instances, be counted as a distinct benefit to neighbors. In other states, underutilization appears never to qualify on its own as a basis for finding blight, but only in conjunction with other conditions.[64] In New York, it should be noted that underutilization, thus defined, is not even included in the UDCL's list of conditions in its legislative findings. What the UDCL describes as "underutilization of buildings" is a very different condition, amounting to vacancy.[65]

In treating underutilization as a symptom of blight, an assumption is made that the owner lacks incentive to build as large as possible, and so there must be some blight condition present impairing sound growth and proper development. The mere incidence of the use of less than sixty percent of maximum development rights does not, however, show that development has been impaired.[66] It could just show that the area is over zoned, as a result of ill placed bets on economic or industry trends. As the overall level of the zoning is reduced in size to a low rise area, the arbitrariness of the sixty percent threshold becomes apparent. Uses for area zoned "low rise," such as wholesale distribution, big box retail, service or industrial uses requiring automobile access, like gas stations or off-street loading docks, may all favor a single-story structure. By the sixty percent standard, such use is "underutilized," even though it is precisely a use for which the area was zoned in the first place.

The further problem with treating underdevelopment as a

[63] 924 A.2d 447, 460 (N.J. 2007).

[64] *See* Luce, *supra* note 32, at 464–65.

[65] *Contrast* N.Y. UNCONSOL. LAW § 6252 (McKinney Supp. 2010) (describing underutilized buildings as those which are "vacated" or "not utilized in whole or substantial part"), *with* BLIGHT STUDY, *supra* note 57, at C-5 ("A property utilization rate was calculated for each lot by comparing the actual square feet of the built space on the property (gross square feet) to the built square feet allowable under applicable zoning (zoning square feet).").

[66] *See Kaur*, 892 N.Y.S.2d at 22–23.

symptomatic condition is that by defining blight as less than maximum development, it erases the distinction between blight remediation and affirmative economic development. This imposes an unauthorized policy requiring all property holders to maximize the use of their land. In *Kelo*, Justice O'Connor warned of the implications of a policy whereby any property was liable to be taken and given to anyone else who could use it to make greater profits.[67] Calling an area blighted because it could be developed more, opens a dangerous path, exposing vast swaths of America to being labeled as blighted. This increases the risk that these "vast swaths" will be taken and given to developers who will build something larger or more profitable. While such a policy may be justifiable on the theory that perpetual economic growth is the only way to fund the current cost of government, it is nonetheless profoundly threatening to existing communities and smaller businesses. It is doubtful that such a policy of predatory development would pass the test of the ballot box. Less intrusive tools of public intervention exist to encourage larger scale development, notably, zoning laws. The ability of agencies to define properties as "underutilized" on the basis of arbitrary and inappropriate thresholds, and thereby supplement other "blight factors" they have been able to highlight, so as to reach the fifty-one percent of the properties necessary to describe the area "characterized" by substandard or insanitary conditions, simply enables agencies to avoid the more open and politically accountable process of a zoning amendment.[68]

A fourth set of symptoms ripe for abuse are purported "health and safety" concerns. The disassociated tabulative approach practiced by ESDC's contractors makes it possible to elevate minute issues that in fact pose negligible health risks, and label properties as "insanitary" in ways that defy common sense. Every minute fire code violation can be counted, even when such violations are merely technical, pose little or no risk, and are under the effective control of the project sponsor who has an interest in the blight finding and can be easily remedied by

[67] 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting) (noting that "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory").

[68] *Cf.* Harvard Law Review Ass'n, Note, *Governmental Immunity from Local Zoning Ordinances*, 84 HARV. L. REV. 869, 874 (1971) (arguing reliance on extraneous policy considerations to circumvent zoning restrictions "serves only to muddle thorough consideration of the issues, confuse the litigants, and provide inadequate precedent for future cases").

simply enforcing lease terms. Instances that are counted as evidence of deteriorated building conditions, such as water damage from a leaking roof, can be double counted as a health risk because of the resulting minor and easily remedied instance of mold. Garbage and debris kept in buildings owned by the interested project sponsor can be tabulated as further instances of health risks.

By tabulating each minor instance of any blight symptom from the canonical list, with no requirement that these symptoms be correlated in a plausible demonstration of causality, and with no requirement that these symptoms are either the cause of harm or the result of harm caused by some other positively identified area condition, it is possible to create out of selected evidence a false picture of an area in which there is no actual blight. By adding up a crack in a sidewalk here, an imperfectly mounted sign there, and neglected maintenance and repair in buildings owned by interested project sponsors, it is possible for a determined agency contractor to find, in a wide variety of thriving areas that no one ever thought of as blighted before, a basis in fifty-one percent of the property that the area is substandard or insanitary.

New York law recognizes that methodological bias in a factual study, upon which findings are based, renders the finding without rational basis.[69] Evidence of manipulation of the blight findings, or permitting the benefitting developer to manipulate the conditions on which the finding of blight is based, should be considered both in evaluating the statutory compliance of the agency's determination, and in determining whether the agency's findings have a rational basis. However, if New York courts refuse to give findings of blight adequate scrutiny to ascertain the

[69] *See* Cnty. of Orange v. Vill. of Kiryas Joel, 844 N.Y.S.2d 57, 61 (App. Div. 2007) ("Where an agency fails or refuses to undertake necessary analyses, improperly defers or delays a full and complete consideration of relevant areas of environmental concern, or does not support its conclusions with rationally-based assumptions and studies, the SEQRA [State Environmental Quality Review Act] findings statement approving the FEIS [Final Environmental Impact Statement] must be vacated as arbitrary and irrational . . . ." (internal citations omitted)); Allen v. Comm'r of Soc. Servs. of N.Y., 500 N.Y.S.2d 204, 205–06 (App. Div. 1986) (stating that the agency determination that a physician had overcharged Medicaid was rejected because the sampling method was arbitrary and capricious when adequate records for the total audit period were available, but not reviewed); Fresh Meadows Assocs. v. N.Y. City Conciliation & Appeals Bd., 400 N.Y.S.2d 976, 978 (Sup. Ct. 1977) (explaining rent guidelines found to have no rational basis where comparability sample was arbitrarily narrowed in underlying studies).

presence of bias, it is possible for condemning agencies to substantially stretch the definition of blight, unmooring it from any requirement that the allegedly blighted area poses harm to anyone, and highlight selected symptoms of blight removed from their economic or historical context, while ignoring other data that contraindicate the existence of any blight. Agencies can tabulate minute instances of physical building deterioration, count "underutilization" relative to arbitrary and meaningless thresholds, exaggerate alleged threats to health and safety, and count an area as blighted that, in fact, is in full occupancy, providing jobs and housing in which a vibrant local economy and community thrives showing no sign of "blight" to the naked eye. Above all, by ignoring the actual causal history of how buildings came to be in a particular condition, and ignoring the effects of recent planning efforts and the direct actions and responsibilities of a developer designated as the beneficiary of the finding that the area is blighted, agencies can give a favored developer *carte-blanche* to manipulate to its advantage the very conditions on which the finding is based—benefitting a party with unclean hands.

III. THE PRECLUSION OF INQUIRY INTO PRETEXT

A "highly malleable and elastic concept" [70] of blight, tolerating the selective use of symptomatic blight "factors," and the exclusion of causal analysis, makes it possible for development agencies to "shoe horn" into a vague definition a wide variety of projects whose origin, design, and purpose is unrelated to any blight conditions or what is required to remedy such conditions at minimum cost to the local community or to the rights of local businesses and owners. At a certain point, the definition of the limiting term is simply stretched to the breaking point, such that the legislative intent of the authorizing statute to limit economic development projects to actually blighted areas is frustrated. If the ESDC is conducting economic development projects in areas that are not actually blighted, then the policy is clearly contrary to the intent of the legislature in enacting the UDCL in 1968. But equally important, the ability to stretch a definition to fit a given project, after the fact, results in the toleration of projects

[70] Develop Don't Destroy (Brooklyn) v. N.Y. State Urban Dev. Corp., 874 N.Y.S.2d 414, 424 (App. Div. 2009).

undertaken for or shaped by improper purposes, including the essentially private purposes when favor is shown to a project sponsor that is not rationally and proportionally necessary to achieve the stated public purpose of the project.

The traditionally proscribed purpose in eminent domain has been the "private purpose." In only one case in New York law was a dominant private purpose ever found. In 1951, in *Denihan Enterprises v. O'Dwyer*, the New York Court of Appeals found a private purpose in a project consisting of a low rise parking garage with a roof-top park that was specified in such a way as to make it inherently uneconomical for a private investor to build. The only interest in this project came from the owner of the neighboring apartment complex who could recoup their investment through the value added to the complex.[71] In another recent case, *49 WB, LLC v. Village of Haverstraw*, the Appellate Division, Second Department found a project lacked a public purpose, as the developer was under an already existing obligation to build the affordable housing units the project promised; therefore, the project would result in no new affordable housing units.[72] Beyond these two cases, no petitioner has ever been able to establish that a private purpose was dominant. Apart from *Denihan*, courts have simply never found evidence of private purposes motivating or directing the use of eminent domain in the record.[73]

One reason why evidence of a private purpose is absent from the record is simply procedural. The EDPL, established precisely to "cut through red tape," provides for as little as ten-days notice of the hearing, and limits judicial review to the administrative record established at an EDPL section 203 hearing.[74] The EDPL provides for no discovery or cross examination of witnesses, so petitioners are afforded no opportunity to develop evidence. New York courts have refused to consider evidence that was not before the agency at the time of its determination.[75]

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[71] *See* Denihan Enters., Inc. v. O'Dwyer, 99 N.E.2d 235, 239 (N.Y. 1951).

[72] 839 N.Y.S.2d 127, 140–41 (App. Div. 2007).

[73] *See* Vill. Auto Body Works, Inc. v. Inc. Vill. of Westbury, 454 N.Y.S.2d 741, 742 (App. Div. 1982) (declining to attribute one member's interest to the motivation of the whole body, when evidence was introduced to show a council member's business would benefit from a planned parking lot).

[74] N.Y. EM. DOM. PROC. LAW §§ 202, 203, 207 (McKinney 2003).

[75] *See, e.g.*, Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Dev. Agency, 750 N.Y.S.2d 212, 222 (App. Div. 2002) (rejecting evidence of a proposal to include a golf course in the project submitted after the closing of the record).

The Freedom of Information Law (FOIL) remains available to potential condemnees seeking evidence of improper purposes, but the FOIL process is slow and cumbersome, with agencies allowed great discretion in limiting their searches for responsive records and many of the most relevant intra and inter agency pre-decisional records are exempt from disclosure. Litigation under Article 78 of the New York's Civil Practice Law and Rules (CPLR) has proven effective to some extent, but it is expensive.[76] Even then, agencies have ample opportunity for delay. For example, under section 5519 of the CPLR, government agencies receive an automatic stay of judgment upon appeal or a motion for re-argument, giving them incentive to seek further proceedings, even if on dubious grounds, for the sake of keeping records out of the hands of condemnees until after the EDPL record is closed.[77]

A second reason private purpose has not been found dominant since *Denihan* is that since *Murray v. Laguardia*,[78] New York courts have recognized that public purposes can be achieved through private actors' unregulated pursuit of their own interest. In *Murray*, Metropolitan Life's Stuyvesant town project was the first non-regulated privately sponsored housing renewal project.[79] So long as a public purpose is achieved, the existence or size of an incidental private benefit has been held to be irrelevant.[80]

With the use of eminent domain for "economic development," however, the private benefit is not merely "incidental" to the achievement of a public good. The public purpose of increased economic activity, jobs, and tax revenue is so closely intertwined with the private interest that they become inseparable. As Justice O'Connor in her dissent in *Kelo* noted, with the use of eminent domain for "economic development," the traditional distinction between private and public purposes breaks down.[81] The public agency wants precisely whatever is good for the private developer because the benefit of jobs and tax revenues is generated as a byproduct of the private developer's pursuit of its own profit or private purposes. Justice O'Connor concluded that because the distinction could no longer be maintained, use of

[76] *See* N.Y. C.P.L.R. 7801 (McKinney 2008).

[77] *Id.* § 5519.

[78] 52 N.E.2d 884 (N.Y. 1943).

[79] *See id.* at 885.

[80] *See, e.g.*, W. 41st St. Realty LLC v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121, 125 (App. Div. 2002) (acknowledging that a private entity would benefit "substantially" from its involvement in the project).

[81] 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting).

eminent domain for economic development should be prohibited.[82]

Nonetheless, even with economic development projects, deals can be reached that are more or less generous towards the developer. Not every demand of the developer necessarily contributes equally to the generation of promised jobs and tax revenues. The balance of costs and benefits of the project can be so favorable towards the developer so as to constitute a give-away of public resources and private property taken by eminent domain—a surplus gift to a private beneficiary for which there is no rational basis.

Both Justice Stevens, in the majority opinion in *Kelo*, and Justice Kennedy, in his concurring opinion, accounted for the possibility of "favoritism" in an economic development project.[83] Favoritism would presumably include, not just arbitrarily choosing one developer over another or over another plan that could yield a comparable benefit to the public, but also arbitrarily ceding more to the developer than necessary to accomplish the project's purposes, with no attempt to rationally measure the marginal benefit to the public.

Though Justice Kennedy joined in the majority, he was concerned enough about the possibility of favoritism that he made clear that his concurrence in *Kelo* was limited to the facts of that case.[84] He spelled out the procedural steps taken in New London to ensure that no favoritism was present, and he found that these steps adequately safeguarded the public interest ensuring that no favoritism was present.[85] These procedural steps included: (1) prior determination of the public purpose of the condemnation independently from the interests of any particular private beneficiary, (2) legislative approval of such a plan to the extent of a substantial appropriation of public funds, (3) the formulation of the plan before most of the beneficiaries were known, (4) the selection of both the development plan and the private development partners from a number of alternatives, and (5) "elaborate procedural requirements [to] facilitate review of the record and inquiry into the city's purposes."[86] By describing the process that he felt effectively precluded the possibility of favoritism, Justice Kennedy indicated the protections needed in

[82] *Id.* at 494, 505.
[83] *Id.* at 485–87 (majority opinion); *id.* at 491–93 (Kennedy, J., concurring).
[84] *Id.* at 493 (Kennedy, J., concurring).
[85] *Id.* at 491–93.
[86] *Id.* at 493.

other cases to ensure that they are free from favoritism.

Neither the UDCL, nor New York's EDPL, however, provides for such procedural safeguards against favoritism. Public review of projects is limited to the expedited hearing at the last stage of planning, before the final determination and findings. New York courts have upheld developer financing of planning and acquisition, avoiding the need for early legislative commitment.[87]

In *Kelo*, moreover, both Justice Stevens' majority opinion, and Justice Kennedy in his concurrence, relied on the extensive judicial review which Connecticut provided in that case, which included a seven day trial for further assurance that the possibility of favoritism had been excluded.[88] Justice Kennedy, in fact, specified that where favoritism is plausibly alleged when eminent domain is used to transfer property from one private party to another, the risk of favoritism is sufficient to require closer scrutiny than mere agency deference and rational basis.[89] Under the EDPL, however, such close scrutiny is not available. By limiting jurisdiction exclusively to an appellate court, petitioners are confined to page limits and brief argument time with no discovery nor right to cross examination of the developer's representations concerning projected jobs and tax revenues, for example, nor the right to a jury trial.

In New York State, moreover, in reviewing the question of what constitutes a "public use" or a "public purpose" justifying the use of eminent domain, courts have universally adhered to the doctrine of legislative deference.[90] The determination of whether there is a public purpose or not, New York courts have held, is a matter of legislative policy simply beyond the competence of the courts.[91] Accordingly, New York courts have narrowed their analysis to preclude *de novo* review of the facts, so long as the determination is made "not corruptly or irrationally or

[87] *See* Waldo's Inc. v. Vill. of Johnson City, 543 N.E.2d 74, 75–76 (N.Y. 1989); Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 331 (N.Y. 1975) (finding that the selection of Otis Elevator as a sponsor prior to hearings and entering an agreement with Otis prior to condemnation of the land were "mere irregularities cured by the fact that the hearings were actually held").

[88] 545 U.S. at 491–93 (Kennedy, J., concurring).

[89] *Id.* at 493.

[90] *See* Jackson v. N.Y. State Urban Dev. Corp., 494 N.E.2d 429, 437 (N.Y. 1986); Uptown Holdings, LLC v. City of N.Y., 908 N.Y.S.2d 657, 661 (App. Div. 2010) (Catterson, J., concurring) ("[T]he recent rulings of the Court of Appeals . . . have made plain that there is no longer any judicial oversight of eminent domain proceedings." (internal citations omitted)).

[91] Kaskel v. Impellitteri, 115 N.E.2d 659, 662 (N.Y. 1953).

baselessly."[92] Showing that a determination was made "corruptly," however, is a high threshold to reach, particularly because of the unavailability of discovery in New York, the difficulty of developing evidence, and the limitations of the FOIL. Proving that a determination was made "corruptly" requires a showing of fraud, and suggests the misappropriation of public resources or public action as a quid pro quo for some direct personal enrichment on the part of public officials.

New York courts, however, have also allowed for lifting the veil of deference if the determination is made in "bad faith."[93] Bad faith, however, is a poorly defined standard in New York eminent domain law, and in any case courts have repeatedly specified that a "clear showing" must be made.[94] In only one case, *Saso v. State*, has "bad faith" been found.[95] There, the Supreme Court, Westchester County, found that the condemnation of land for an access road to a private business, whose former access was cut off by the construction of a limited access thruway, was undertaken for the purpose of avoiding liability, and not within the Thruway Authority's authorization to take land to build a thruway.[96] "Bad faith," under *Saso*, appears barely distinguishable from or exceeding the statutory authorization, consisting of merely representing an undertaking of an action for one purpose when it is in fact for another.[97] The Appellate Division, Second Department, however, in *49 WB, LLC*, distinguished bad faith from pretext, relegating bad faith only to procedural concerns, where the substantive determination of public purpose could only be examined for pretext.[98] To show pretext, the court relied on a rational basis analysis to find that the stated public purpose of creating low income housing was groundless.[99] Without a

[92] *Id.* at 661; *see Jackson*, 494 N.E.2d at 437.

[93] Dowling Coll. v. Flacke, 432 N.Y.S.2d 23, 24 (App. Div. 1980).

[94] Faith Temple Church v. Town of Brighton, 794 N.Y.S.2d 249, 251 (App. Div. 2005); Vill. Auto Body Works, Inc. v. Inc. Vill. of Westbury, 454 N.Y.S.2d 741, 742 (App. Div. 1982).

[95] 194 N.Y.S.2d 789, 793 (Sup. Ct. 1959). In *Kaur,* the plurality of the Appellate Division found that the purposes of blight removal were a pretext and that the underlying blight studies had been fatally biased, and the concurring opinion found evidence, raising questions of bad faith and pretext, leading to the conclusion that a due process violation had occurred, but the Court of Appeals reversed. *See supra* note 42 and commentary.

[96] *See id.* at 794.

[97] *See id.* at 793–94.

[98] 839 N.Y.S.2d 127, 137–38 (App. Div. 2007), *abrogated on other grounds by* Hargett v. Town of Ticonderoga, 918 N.E.2d 933, 934 (N.Y. 2009).

[99] *Id.* at 141.

smoking gun showing procedural error, *49 WB, LLC* thus leaves a petitioner trying to show favoritism with the same high rational basis threshold as previously used.

In *Jackson v. New York State Urban Development Corp.*, the New York Court of Appeals appeared to provide for closer scrutiny for issues other than public purpose.[100] Among the other issues (beyond public purpose) reviewable under EDPL section 207 is whether the agency is acting within its statutory authorization, or the constitutionality of the agency's action.[101] In light of recent rulings, however, where such other issues including bad faith, favoritism, and pretext were pled, the New York Court of Appeals nonetheless appears unwilling to weigh substantial evidence. Rather, the court chooses to sweep all such "other issues" in as predicates to, and so part of, the determination of public purpose, in the review of which the court can maintain its unyielding posture of deference.[102]

It therefore appears that under New York law, or at least how the New York Court of Appeals is interpreting the law, there are not only a lack of procedural safeguards against favoritism in the pre-determination planning process that *Kelo* appears to require, but also no provision for the judicial scrutiny Justice Kennedy, at least, would require. As a result, vague limiting terms can continue to be stretched to create pretextual public purposes, or in fact, to exceed statutory authorization by redefining "malleable" statutory terms to fit a given project. The end result leaves a bad odor of decisions made in private, sham processes of public review long after policy has in fact been determined, and overly generous acquiescence to developer interests—all without public recourse or accountability.

IV. AVOIDING THE CORROSIVE CONSEQUENCES OF CURRENT POLICY AND JURISPRUDENCE

The refusal of New York courts to police the divide between actual policy and statutory limiting language has a number of

[100] 494 N.E.2d 429, 436 (N.Y. 1986).

[101] N.Y. EM. DOM. PROC. LAW § 207(C) (McKinney 2003).

[102] It should be noted that nowhere in its thirty-four page decision in *Kaur* did the Court of Appeals mention *Kelo,* even though the plurality opinion of the Appellate Division in *Kaur* made *Kelo* its framework for analysis. *Contrast* Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721, 730–31 (N.Y. 2010), *with* Kaur v. N.Y. State Urban Dev. Corp., 892 N.Y.S.2d 8, 16 (App. Div. 2009).

negative consequences. First, there is the problem of tolerance of favoritism, resulting in a waste of public resources and unnecessary displacement of communities and local businesses and infringement on the rights of property owners. By ceding control over the planning process to private beneficiaries, and failing to maximize public relative to private benefits, public confidence in government and the courts, already at a low ebb, is eroded further still. Second, by tolerating the fabrication of pretextual purposes and shoehorning projects into existing statutory limitations by stretching those limitations to fit the policy, actual public policy is masked, frank debate over those policies is suppressed, and elected officials are not made accountable. This suppression of public discourse around development deprives the final policy choices of the legitimacy necessary for the public to be willing to shoulder the tax and other consequences of the course chosen, resulting in inconsistent and erratic planning and a public unwilling to make sacrifices for longer term benefits. Third, the habitual manufacturing of pretextual purposes creates a culture of cynicism among policy planners and public officials, leading to further secrecy, deception, and abuse. And fourth, the unpredictable and standard-less designation of areas as "blighted" has a deterrent effect on unassisted private investment in marginal areas, increasing instead of alleviating the incidence and extent of real blight. The pressure to pursue a policy of maximizing development diverts attention and resources from areas that have the most difficulty developing without public intervention.

A number of legislative changes could help avoid these consequences:

First, the procedural safeguards outlined by Justice Kennedy in his concurrence in *Kelo* should be added to the EDPL and/or authorizing statutes such as the UDCL.[103] Designation of areas proposed to be taken by eminent domain, the public purposes for such a taking, and a basic development plan should be required to be administratively determined and legislatively approved prior to the identification of any project sponsors or other private beneficiaries. Multiple plans and project sponsors should be considered by a transparent and competitive RFP process, and the bases for determination as to which best achieves previously determined public purposes at the least public cost should be

[103] 545 U.S. 469, 491 (2005) (Kennedy, J., concurring).

required to be articulated.

Second, statutory language should be added to the UDCL and other authorizing statutes to give adequate certainty to the definition of blight. A showing of actual impairment of development or other harm to neighboring property areas or the public fisc should be required. Consideration of a broad range of factors, including study of economic data and market conditions and trends in proposed project areas, neighboring areas, and comparable areas should required. This requirement will prevent the cherry-picking of evidence without regard to the larger economic and social context. Building conditions and other area conditions should not be used to infer the existence of blight without accounting for the actual historical causes of those conditions. Property owned or controlled by project sponsors or other potential beneficiaries should be excluded from consideration. Health and safety concerns should be quantified, including evaluation of degrees of risk and specification of pathways of exposure. Inconsistent data sources, such as building code violations, should be proscribed. Environmental concerns should similarly be required to be quantified, including the risk of exposure and cost of remediation. Agencies should be required to develop regulations for finding blight and publish standardized methodologies, so as to give owners and communities notice that they are liable to be designated as blighted areas.

Third, the process of measuring and determining blight should be undertaken by disinterested third parties. Agencies should be prohibited from retaining consultants linked to, or paid by, developers.

Fourth, "underutilization" of land should be discontinued as a criterion of blight. Without causing any demonstrable harm in itself, an owner's option to develop property less than the maximum allowed by zoning serves, at best, as an indicator of market demand. Even then, sufficient variation of land uses arises in different zoning contexts such that no single ratio of maximum allowable development can serve reliably as an indicator of market conditions. Better sources of data, such as real estate values, rental prices, and transaction histories should be relied upon to test for depressed economic conditions. New York State should follow New Jersey's lead in rejecting this criterion that does not so much indicate blight, as it indicates the imposition of a new type of zoning—a minimum use requirement.

Such minimum use unreasonably infringes on owners' freedom to determine the use of their property. It also amounts to a policy mandating maximization of development that should properly be made through the same politically accountable legislative process as other zoning policy, and not brought in "through the back door" of essentially unreviewable eminent domain actions.

And fifth, the EDPL should be amended to provide for proper trial-level proceedings—instead of giving exclusive jurisdiction to the appellate division—as currently provided. Upon a showing of likely favoritism, pretext, or bad faith, in any eminent domain taking for transfer to a private party, courts should be empowered to consider evidence beyond the administrative record, including discovery and cross examination of witnesses.

Such reforms would go a long way towards keeping the exercise of eminent domain confined to truly public purposes, and in rebuilding public confidence in the power of government to work for the public good.