FULLY ANNOTATED CHAPTER
VACANT AND PROBLEM PROPERTIES: A GUIDE TO LEGAL STRATEGIES AND REMEDIES, (Mallach, Bacher, & Williams, eds., American Bar Association, 2019).

Chapter 1: The Power of Local Government to Address Problem-Property Issues

C. Tyler Mulligan[†]

Introduction

As discussed in the introduction to this book, the problem of vacant and abandoned properties is far-reaching, and local governments find themselves on the front lines in addressing the issue. There are a host of local government powers that can be brought to bear on vacant and abandoned properties. However, problem properties are often owned by private actors whose rights are protected by law. A local government that desires to affect problem properties must understand the legal landscape in which it operates. This chapter provides a broad overview of the substantial powers that a local government may employ to address problem properties and of the limitations imposed by law. Later chapters will explore these powers in greater detail.

Part I of this chapter provides background on the legal authority for local government activities, starting with the foundation of all government activity, the United States Constitution, and tracing the delegation of authority from the federal government, to state governments, and finally to local governments. Typical delegation frameworks, such as home rule and Dillon's rule, are explained and compared.

Part II explores local government powers related to vacant and abandoned properties by placing them into a framework to help the practitioner understand the range of powers at a local government's disposal.

Part I: Local Government Authority to Act

A local government's authority to address problem properties is largely defined by two legal concepts. First, the local government must have legal authority to act in the manner it wishes to act. This requires a positive delegation of authority that can be traced back to the powers reserved to the states under the U.S. Constitution, as explained in Section A of this Part. Second, the local government must act in a manner that is consistent with key legal principles enshrined in the federal constitution—specifically, due process and equal protection. Section B of this Part provides a brief explanation of how those constitutional protections are relevant in the context of vacant and abandoned properties.

Section A: Delegation of Authority to Local Governments

The power of a local government to act can be traced back to the powers reserved to the states by the U.S. Constitution. Under the Tenth Amendment, all powers not granted to the federal government are reserved to the states and the people. This allocation of power to the states includes the plenary power to create units of local governments within state boundaries. As such, local governments are creatures and subdivisions of the state, meaning they possess no

---

[†] Professor of Public Law and Government, School of Government, University of North Carolina at Chapel Hill, and Director of the Development Finance Initiative (DFI), which has provided local governments with predevelopment and financial feasibility analysis for redevelopment projects in multiple states since 2011. The research assistance of Rebecca Badgett is gratefully acknowledged.

inherent right to their existence, structure, or scope of power.[1] Instead, it is the state legislature that breathes life into local governments and can ultimately elect to discontinue them.[2]

This legal concept—that local governments are created by the state and derive all their powers by delegation from it—means that each state is entitled to structure its local governments differently. However, most states fall into one of two categories: "home rule" or "non-home rule." The guiding principle of home rule is the right of local self-governance over local affairs. However, home rule represents an evolution from non-home rule, so it is appropriate to begin by describing non-home rule states.

In a non-home rule state, local government authority to act depends on the state legislature as described by "Dillon's rule." Dillon's rule explains that local governments are vested with authority to act only when such authority has been expressly granted by law or may be necessarily implied by a legislative or constitutional grant of authority.[3] Absent such an express or implied legislative or constitutional grant of authority to a local government, the presumption is that a local government has no authority to act. Any doubt as to the existence of a power is to be resolved against the municipality.[4]

When Dillon's rule was first created, its goal was to ensure that states maintained control over municipal activities.[5] At the turn of the twentieth century, however, municipal leaders across the country began to lobby for an alternative to Dillon's rule that would grant local governments increased control and authority over matters of purely local concern.[6] The proposed alternative was called "home rule," which is "the power of local governments to deal with matters of local concern without having to turn to the state legislature for approval, as long as their actions do not contravene already defined state policies."[7] Home rule authority is delegated

---

[1] Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907) ("Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be [e]ntrusted to them. . . .The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. . . . The state, therefore, at its pleasure, may modify or withdraw all such powers[.]").

[2] *Id*.

[3] JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237, at 448–50 (5th ed. 1911) ("It is a general and undisputed proposition of law that a *municipal corporation possesses and can exercise the following powers, and no others*: First, those granted in *express words*; second, those *necessarily* or *fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation,--not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.").

[4] *Id. See also* Rick Su*, Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181, 190 (2017) ("Under Dillon's rule, a city should not undertake actions, nor enact any regulations, without first securing enabling legislation from the state. If ambiguity exists as to whether the state has given such authorization, Dillon's rule instructs courts to rule against the locality.").

[5] *See* Su, *supra* note 4, at 190.

[6] *Id*. at 191.

[7] DALE KRANE, PLATOON N. RIGOS & MELVIN B. HILL, JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 495 (2000).

to local governments in the state constitution or by statute (or some combination thereof).[8] Today nearly all states have granted some form of home rule to their local governments.[9]

On the surface, home rule appears to afford local governments an inherent power to act, allowing them swiftly and effectively to address matters of local concern without interference from state legislation.[10] However, whether interference from state legislation is actually limited, and to what extent, varies based on the language contained in the grant of home rule authority.[11] For example, a typical constitutional grant of home rule power may afford a municipality the authority to "exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as *are not in conflict with general laws*."[12] Other similar constitutional delegations grant authority over local matters "not expressly denied by general law or charter."[13] Thus, even under home rule, general state laws still override local enactments.

Only a handful of home rule states go so far as to mandate that local ordinances preempt conflicting state laws on matters of local concern.[14] However, even in those strong home rule states, the power is debatable, because "[t]here is no clear or workable test separating local from general concerns."[15] Judicial interpretations about which issues are state-wide and which are local can have a limiting effect on home rule authority,[16] and the question is further complicated by the fact that home rule states commonly employ Dillon's rule to analyze these issues,

---

[8] Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 72 POPULAR GOV'T (Fall 2006), at 15, 16, http://sogpubs.unc.edu/electronicversions/pg/pgfal06/article2.pdf.

[9] Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10–11 (1990) (noting that forty-one states have granted some form of home rule authority to their respective local governments).

[10] 1 ANTIEAU ON LOCAL GOVERNMENT LAW § 22.05, at 21-22 (Sandra M. Stevenson ed., 2d ed. 2017). ("[H]ome rule serves two purposes. It is a delegation of power to local governments and it also protects local governments from state legislative interference with the exercise of local authority.").

[11] Bluestein, *supra* note 8, at 16 ("Examination of the specific language of home rule delegations reveals that many of them actually reserve to the state substantial authority to legislate through general laws.").

[12] *Id.* (citing IDAHO CONST. art. XII, § 2); *see, e.g.*, CAL. CONST. art. IX, § 7 ("A county . . . may make and enforce within its limits all local, police, sanitary, and other regulations not in conflict with general laws.").

[13] Bluestein, *supra* note 8, at 16; *see also* PA. CONST. art. IX, § 2 ("A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time"); N.M. CONST. art. XI, § 6 ("A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter"); IOWA CONST. art. III, § 38A ("Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly.").

[14] Bluestein, *supra* note 8, at 16 ("The Colorado Constitution is one of only a few specifically providing that local ordinances on matters of local concern override conflicting state law"); *see* COLO. CONST. art. XX, § 6 ("The people of each city or town of this state, having a population of two thousand inhabitants . . . are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.").

[15] 1 ANTIEAU, *supra* note 10, § 21.05; *see also* Adler v. Deegan, 251 N.Y. 467, 504 (1929) (recognizing that it is almost invariable that municipal affairs overlap the affairs of state government).

[16] Bluestein, *supra* note 8, at 16.

suggesting that the judiciary will construe home rule authority narrowly.[17] Thus, it has been argued that local governments in some non-home rule states, where legislatures have enacted broad enabling laws, may enjoy equal or greater authority than their counterparts in home rule states.[18]

In the context of vacant and abandoned properties, local governments often seek to employ a wide range of powers to address problem properties. Practitioners should be aware that in most states—whether home rule or non-home rule—local government powers are considerable but can be constrained by state legislation, and therefore the state policy environment will be relevant to practitioners working at the local level.

Section B: Constitutional Protections for Owners

Local government actions to address vacant and abandoned properties necessarily impose constraints on an owner's right to do with property what the owner wishes. Private property rights are not unlimited under the federal constitution. Local governments may lawfully exercise powers over privately-owned property (as discussed *infra* Part II), subject to constitutional protections bestowed on owners. The three most relevant protections for owners in the context of problem properties are (1) the prohibition against the taking of private property without just compensation, (2) the requirements of due process, and (3) equal protection under the law. The first—takings law—will be discussed later in Part II as one of the allowable actions of local governments in addressing problem properties. The other two protections, due process and equal protection, are discussed in turn below.

1. Due Process

The Fourteenth Amendment to the United States Constitution applies Fifth Amendment due process protections to the states when it provides, in part, that "[n]o state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law."[19] Property owners can make two kinds of due process claims: substantive due process, which focuses on the justification for governmental action, and procedural due process, which requires adequate procedures before individuals are deprived of a significant interest in their property.

Substantive Due Process

The doctrine of substantive due process prohibits states from engaging in arbitrary and unreasonable government actions. The threshold question in a substantive due process analysis involving property is whether the alleged property right infringed upon is a fundamental right, such as those contained in the Bill of Rights.[20] If so, the court applies a strict scrutiny review, meaning the challenged regulation must be narrowly tailored to achieve a compelling state interest.[21] However, most property regulations do not involve fundamental rights and are reviewable under the less stringent rational basis standard. Under rational basis, a property

---

[17] JESSE J. RICHARDSON, JR., MEGHAN ZIMMERMAN GOUGH & ROBERT PUENTES, IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON'S RULE ON GROWTH MANAGEMENT 17 (2003) ("39 states use Dillon's Rule with respect to at least some municipalities."), https://www.brookings.edu/wp-content/uploads/2016/06/dillonsrule.pdf.

[18] Bluestein, *supra* note 8, at 17.

[19] U.S. CONST. amend. XIV.

[20] *See e.g.,* Palko v. Connecticut, 302 U.S. 319, 325–27 (1937) (describing what makes a right fundamental).

[21] *See e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997).

regulation will survive so long as it is not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[22]

Procedural Due Process

Any adjudicative process established by an ordinance must comply with due process. As a threshold matter, procedural due process requires some form of hearing before an individual is deprived of a property interest, although the process required depends on the individual circumstances of each case.[23] State law and local ordinances typically play a key role in delineating procedural requirements.

For a private land owner plaintiff to succeed against the government in a procedural due process complaint, the plaintiff must establish that he or she had a protectable property interest and was deprived of that interest by state action without constitutionally adequate process.[24] In the context of problem properties, where local governments regularly enact property regulations and take code enforcement actions, state law and local ordinances typically impose detailed procedural requirements that, if followed, should survive a procedural due process claim.[25] The practitioner should be aware that the validity of a local government action against a vacant or abandoned structure could turn on adherence to procedural requirements.

2. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides, "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws."[26] This clause "is essentially a direction that all persons similarly situated should be treated alike."[27] An equal protection claim generally involves two steps. First, plaintiffs must show that they have been treated differently from other similarly-situated persons and that the unequal treatment was the result of an intentional government decision; second, if a plaintiff has met this burden, then the court decides whether the disparity in treatment is justifiable under the requisite level of scrutiny.[28]

---

[22] Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

[23] *See, e.g.*, Neighbors for a Healthy Gold Fork v. Valley Cty., 145 Idaho 121, 127 (2007) ("Procedural due process requires some process to ensure that the individual is not arbitrarily deprived of his or her rights in violation of the state or federal constitutions.").

[24] Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 172 (4th Cir. 1988) ("Unless there has been a 'deprivation' by 'state action,' the question of what process is required and whether any provided could be adequate in the particular factual context is irrelevant, for the constitutional right to 'due process' is simply not implicated.").

[25] City of Rapid City v. Boland, 271 N.W.2d 60, 65 (S.D. 1978) ("The abatement of a public nuisance does not entitle the owner of the property to compensation; however, he is normally entitled to due process, i.e., formal notice and a hearing, to determine whether the property is in fact a nuisance in most instances."); 6A MCQUILLIN MUN. CORPS. § 24:81, at 336–37 (3d ed. 2015) ("Notice may also constitutionally be required to be given to lienholders of the property.").

[26] U.S. CONST. amend. XIV, § 1.

[27] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

[28] Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir.2001).

The level of scrutiny is either rational basis or strict scrutiny.[29] If the law involves a "suspect classification" such as race, or restricts certain "fundamental interests" or a "basic constitutional freedom," a court will take the strict scrutiny approach and require the law to be narrowly tailored to meet a compelling state interest.[30] However, most property and land use decisions do not involve either suspect classifications or fundamental interests, and courts have shown reluctance to apply strict scrutiny in land use cases.[31] In most instances a court will apply the rational basis standard, which requires only that the law be rationally related to a legitimate government interest and that any distinction it makes between groups be justified.[32] It should be noted that federal and state legislation, such as the federal Fair Housing Act, may expand protections in this area.[33]

Part II: The Continuum of Local Government Powers to Address Problem Properties

Having established in Part I how local governments are granted authority and some overarching constitutional constraints, Part II explores the range of powers that local governments can employ to address problem properties. At a high level, local government powers related to property fall along a continuum, from the most coercive, such as government takings of property through the exercise of eminent domain, to least coercive, such as voluntary exchanges (acquisition or sale of property) in which the government acts as any other market participant. The more coercive the power being exercised by the government, the more procedural protections are afforded to the property owner, as illustrated in Figure 1, below.

Figure 1.1. Continuum of Local Government Powers to Address Problem Properties

Degree of Coercion	Highly coercive activities (e.g., eminent domain)	Regulatory activities (e.g., code enforcement)	Noncoercive activities (e.g., voluntary exchanges)

[29] Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (reaffirming that equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right, otherwise a rational basis test is sufficient).

[30] *See* Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250, 254 (1974).

[31] Associated Home Builders, Inc. v. City of Livermore, 18 Cal. 3d 582, 603 (1976) ("[T]o insist that such zoning laws are invalid unless the interests supporting the exclusion are compelling in character, and cannot be achieved by an alternative method, would result in wholesale invalidation of land use controls and endanger the validity of city and regional planning."); Missere v. Gross, 826 F. Supp. 2d 542 (S.D.N.Y. 2011) (finding owner was not deprived of equal protection after evaluating enforcement of village's zoning code).

[32] City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.").

[33] *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015) (holding that disparate impact claims are cognizable under the Fair Housing Act).

Owner Protections	High procedural hurdles and owner protections	Interference with property rights must be "reasonable in degree"	Fewer procedural hurdles and no owner protections
Where Discussed in Chapter 1	Section II.A	Section II.B	Section II.C

This continuum forms the organizing framework for the discussion in Part II. Section A of Part II describes one of the more coercive powers a local government may exercise over property, eminent domain, which involves a government taking of private property. Subsequent sections proceed through categories of government activities that could be considered incrementally less coercive. Accordingly, Section B addresses regulatory powers that fall short of a taking of property, such as nuisance abatement and code enforcement. Section C describes the power of local government to act as a market participant through voluntary exchanges, such as acquiring property, conveying property with conditions, and offering financing to encourage private development.

Section A: Local Government Exercise of Eminent Domain

Eminent domain is the inherent power of a governmental entity to take private property without the owner's consent.[34] However, this power is limited by the Fifth Amendment, which provides that "private property shall not be taken for public use, without just compensation."[35] Thus, the United States Constitution places two conditions on the government's exercise of its eminent domain power: (1) private property may be taken only for a *public use*; and (2) the property owner must receive *just compensation* for the taking. The legislative branch of government makes the initial determination of whether a proposed taking is for a public use, and when those determinations are challenged, the judicial branch resolves the question.[36]

The power of eminent domain is reserved to the states through the Tenth Amendment. State governments can, and often do, delegate this power to municipal governments through the state constitution, statute, or municipal charter.[37]

The bases for property owners to challenge a government taking fall into three general categories: physical takings, regulatory takings, and land use exactions.[38] The first category, physical takings, is very narrow and involves the permanent physical invasion of private property

[34] Kohl v. United States, 91 U.S. 367, 372 (1875).

[35] U.S. CONST. amend. V. The Fifth Amendment is made applicable to the states by the Fourteenth Amendment. Kelo v. City of New London, 545 U.S. 469, 472 n.1 (2005).

[36] City of Cincinnati v. Vester, 281 U.S. 439, 446 (1930) ("It is well established that, in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.").

[37] OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW 129 (4th ed. 2015) ("The power of eminent domain is not inherent in municipalities and exists in them only to the extent it has been delegated by the state. . . .").

[38] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005) ("[A] plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of [several] theories . . . by alleging a 'physical' taking, a *Lucas*-type 'total regulatory taking,' a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.").

by the government.[39] A permanent physical invasion of property is considered a *per se* taking, because it always requires the government to provide compensation, even with a minimal occupation.[40] The second category, regulatory takings, involves an allegation that government regulation of property has gone so far that the government has effectively deprived the owner of economic use of the property.[41] Once a regulation goes too far, it may be deemed the equivalent of a taking even if the government never officially exercises its eminent domain power.[42] The third category, exactions, is related to land use regulations and will be discussed later in Section B of this Part in the context of local government zoning powers.

Ultimately, the question of whether a local government has properly exercised the power of eminent domain comes down to the definition of "public use" as interpreted by the courts. The precise meaning of "public use" has shifted over time. In the mid-1800s and early 1900s, courts adopted a strict view of public use and interpreted it to mean, quite literally, actual use by the public.[43] However, a more liberal interpretation began to evolve in the 1930s, and today a taking will be upheld as consistent with the public use clause if the government articulates a rational public purpose for the taking.[44] Under this more liberal interpretation, the owner's rights are protected, not by preventing the taking, but by paying just compensation to the owner.[45]

To frame this chapter's discussion of takings law, it is helpful to classify government takings into three categories of public use that have arisen over time: (1) government facilities, (2) urban redevelopment, and (3) economic development. The exploration of these use categories serves a dual purpose. First, takings law evolved over time through each of these use categories in sequential order, thereby providing a logical frame for the discussion. Second, takings case law serves as the foundation for "public purpose" analysis for many government activities related to addressing problem properties—discussed in Section C of this Part—and therefore will be relevant again later in the chapter.

---

[39] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, even though the facilities occupied at most only 1-½ cubic feet of the landlords' property).

[40] *See id.*; *see also* United States v. Causby*,* 328 U.S. 256, 265 (1946) (physical invasion of airspace is a *per se* taking).

[41] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.").

[42] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (finding that zoning effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of the land).

[43] REYNOLDS, *supra* note 37, at 129 (" . . . by the mid-1800's, many courts, worried that the eminent domain power was being abused, required actual use by the public"); *see e.g.,* Gravelly Ford Canal Co. v. Pope & Talbot Land Co., 36 Cal. App. 556, 565 (1918) (court "unwilling to sanction a construction of the term[] 'public use,' [to mean 'public advantage'] which would be so radical a departure from the construction uniformly given them where elsewhere found in the Constitution and laws of the state").

[44] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240–41 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers. . . . In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' " (citing United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)).

[45] Berman v. Parker, 348 U.S. 26, 36 (1954) ("The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.").

1. Government Facilities

In *Kohl v. United States*,[46] the leading case on the federal power of eminent domain from 1875, the Supreme Court recognized the federal government's authority to use eminent domain to take land for the direct use and benefit of the government—specifically, "for its own public uses, and not for those of another."[47] This represents the Court's initial, narrow interpretation of public use, in which actual use of the condemned property by the public was required.

Examples in this use category include the exercise of eminent domain to acquire land for the construction of roads and highways,[48] government buildings,[49] schools,[50] parks,[51] and power plants.[52] It is not strictly necessary for the facility to be owned and operated by the government. In some situations, the government may lease, license, or sell a facility to a private entity to allow the private entity to operate it.[53]

2. Urban Redevelopment and Low-Income Housing

After World War II, federal, state and local governments began to undertake redevelopment efforts in an effort to eliminate blight and revitalize slum areas by providing safe and sanitary housing.[54] "Urban redevelopment" (also known as "urban renewal") was promoted as a mechanism to stop city decline by utilizing the modern principles of city planning.[55] However, because it proved financially infeasible to acquire all properties within a dedicated slum area through individual negotiation, governments quickly realized they would need to exercise their condemnation power to gain control over properties in the designated area and

---

[46] 91 U.S. 367 (1875).

[47] *Id.* at 374.

[48] Rindge Co. v. Los Angeles Cty., 262 U.S. 700, 706 (1923) ("That a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial.").

[49] *Kohl*, 91 U.S. at 368 (government may use eminent domain to acquire land for the construction government buildings such as a post office).

[50] Comm'rs of D.C. v. Shannon & Luchs Constr. Co., 17 F.2d 219, 221 (D.C. Cir. 1927) (holding that a high school athletic field is part of an "educational institution" and authorizing condemnation to secure land on which to build it).

[51] United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 547 (1946) (land may be condemned for conveyance to a national park); Shoemaker v. United States, 147 U.S. 282, 289 (1893) (condemnation of land for a public park is a taking of property for public uses within the meaning of the constitution).

[52] Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 32 (1916) ("But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established.").

[53] Cty. of Wayne v. Hathcock, 471 Mich. 445, 474 (2004) ("[T]his Court has found that the transfer of condemned property to a private entity is consistent with the constitution's 'public use' requirement when the private entity remains accountable to the public in its use of that property."). Public utilities fall into this category, and a utility corporation itself may be vested with the authority to use eminent domain to ensure that service may be provided to its members. *See, e.g.*, Condemnation by Valley Rural Elec. Coop., Inc. v. Shanholtzer, 982 A.2d 566, 571 (2009) ("Therefore, a legitimate purpose for the exercise of the eminent domain power by an electric cooperative corporation is to provide electric service to its members.").

[54] *See* THEODORE C. TAUB, THE CHANGING LANDSCAPE OF CONDEMNATION AND REDEVELOPMENT 693, 698 (2005).

[55] *See* Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URB. LAW. 423, 437–38 (2010).

repurpose them. When these eminent domain actions were challenged, courts began to construe the public use requirement more broadly to include any "public purpose" or "public benefit."[56] For example, in 1936, a New York appellate court sustained a legislative grant of eminent domain to local public housing authorities after concluding that slum clearance in order to construct new housing for low-income persons constituted a valid public purpose.[57] Other jurisdictions followed suit.[58]

Once the clearance of blighted neighborhoods was held to constitute a valid public purpose, governments began to use eminent domain to condemn one person's private property and subsequently sell it to another private party for redevelopment. In 1943, in the case of *Murray v. La Guardia*,[59] the New York Court of Appeals held that it was, in fact, constitutional for the government to condemn eighteen city blocks in an area found to be "substandard and insanitary," and then sell the property to a private entity that would finance the construction of residential housing for profit.[60]

The United States Supreme Court went further in its landmark decision, *Berman v. Parker*,[61] by recognizing the constitutionality of eminent domain for urban renewal purposes and offering state courts a framework for urban renewal cases. In *Berman*, the plaintiff owners of a non-blighted department store located within a blighted area in the District of Columbia questioned whether it was constitutional for non-blighted property to be taken and used for private redevelopment.

The Court upheld the government's authority to condemn private land, including non-blighted properties located within a larger blighted area, provided the taking was for a public use as defined by the legislature. The Court employed a liberal interpretation of public use to include any public purpose that served to promote the "public welfare," a concept which is "broad and inclusive" and rooted in the police power.[62] The Court reasoned that it "is within the

---

[56] Ashley J. Fuhrmeister, *In the Name of Economic Development: Reviving "Public Use" As A Limitation on the Eminent Domain Power in the Wake of Kelo v. City of New London*, 54 DRAKE L. REV. 171, 176 (2005) ("It was not until the early twentieth century when the boundaries of public use began to erode and the concept was construed more broadly to encompass the notions of "public purpose" or "public benefit." This new interpretation permitted a greater variety of situations to fulfill the public use mandate of the Takings Clause. A familiar example is urban renewal, which permitted condemnation of slums and substandard property in order to benefit the public welfare.").

[57] N.Y.C. Hous. Auth. v. Muller, 270 N.Y. 333, 341–43 (1936) (holding that "menace of the slums in New York [C]ity has been long recognized as serious enough to warrant public action" and that taking property to allow the construction of new low-income housing serves "a public benefit and, therefore, at least as far as this case is concerned, a public use").

[58] *See, e.g.*, Mumpower v. Hous. Auth. of Bristol, 176 Va. 426, 426 (1940) (holding that promoting low cost housing projects in furtherance of slum elimination serves a public purpose and is authorized under the state's police powers); Keyes v. United States, 119 F.2d 444, 448 (D.C. Cir. 1941), *cert. denied* 314 U.S. 636 (1941) ("there can be no doubt that a state legislature may validly provide for low rent housing projects and authorize the condemnation of land for that purpose").

[59] 291 N.Y. 320 (1943).

[60] *See also* Kaskel v. Impellitteri, 306 N.Y. 73, 93 (1953) ("[T]he slum area may be cleared, replanted, reconstructed and rehabilitated according to any design and for any purpose which renders the area no longer substandard or insanitary.").

[61] 348 U.S. 26 (1954).

[62] *Id.* at 33; *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240–41 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers.").

power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[63] The Court cautioned that its decision should not be interpreted to allow every condemnation—each case should turn on its own facts. After the *Berman* decision, nearly all states had urban renewal laws upheld in their courts.[64]

3. Economic Development

Economic development takings represented the next frontier. Governments began to extend the *Berman* decision to justify the use of eminent domain to facilitate development in areas that had not been designated as blighted.[65] Economic development takings, like slum clearance condemnations, involve private property being condemned and then transferred to a private entity for redevelopment. The distinguishing factor is that, when the condemned property is not in a blighted area, it raises anew the question of whether a public purpose is served.

The exercise of eminent domain for economic development first gained real traction in the Michigan Supreme Court's landmark decision, *Poletown Neighborhood Council v. City of Detroit*.[66] There, the city of Detroit was facing high unemployment when General Motors (GM), a major employer for the city, announced it would be shutting down two of its aging plants and relocating outside of Michigan—unless the city could find a suitable location for GM's new manufacturing facility.[67] In an effort to keep GM from pulling its business out of Detroit, the city used its eminent domain power to seize a portion of Poletown to make way for the facility's construction. The city argued that the taking served a public purpose because it would be alleviating unemployment "and revitalizing the economic base of the community."[68] Drawing on *Berman*, the Michigan Court afforded great deference to the legislature's determination of a public need and recognized that the definition of public use "changes with the changing conditions of society."[69] It ultimately concluded that, when the public benefits of elevated tax revenues, job creation, and a general contribution to the economy is "clear and significant," then the legislature's determination of a public purpose must be upheld.[70]

Poletown became the landmark case for economic development takings until 2004, when the Michigan Supreme Court reversed itself in *County of Wayne v. Hathcock*.[71] In *Hathcock,* the county argued that the use of eminent domain for the construction of a private office park

---

[63] *Berman*, 348 U.S. at 33.

[64] Eugene Morris, *The Quiet Legal Revolution: Eminent Domain and Urban Redevelopment*, 52 A.B.A. J., no. 4, 355, 358 (1966) ("Under the *Berman v. Parker* definition of public use, forty-five states have had urban redevelopment laws upheld by their courts, while only three state laws were declared unconstitutional. A rapid expansion of the use of eminent domain has followed . . . to serve the public welfare in the destruction of slums.").

[65] Fuhrmeister, *supra* note 56, at 187 (describing the evolution of eminent domain law as allowing governments to omit the step of declaring an area blighted and to use economic development as a basis for eminent domain).

[66] Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616 (1981), *overruled by* Cty. of Wayne v. Hathcock, 471 Mich. 445 (2004).

[67] *Id*. at 648.

[68] *Id*. at 459.

[69] *Id*. at 457.

[70] *Id.* at 459–60 ("If the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project.").

[71] 648 N.W.2d 765 (2004).

constituted a public use, as it would benefit the public by creating thousands of jobs and increasing tax revenue. Although the public benefits cited were similar to those in *Poletown*, this time the Michigan court was not convinced that the public use requirement was satisfied, holding: "These entities will be under no obligation to let the public in their doors or even on their lands. There is no way to characterize the county's transfer of dominion over these properties as accommodating public use."[72]

In 2005, shortly after the Michigan Supreme Court reversed *Poletown*, the United States Supreme Court decided the controversial *Kelo v. City of New London* case, in which it upheld the city's use of eminent domain in support of an economic rejuvenation plan.[73] The city had determined that the geographic area included in the plan was financially distressed, and the New London Development Corporation (NLDC) was designated to oversee revitalization of the area. When a large drug manufacturer announced its plan to construct a $300 million research facility in New London, NLDC proposed an economic development plan involving the construction of commercial properties adjacent to the facility in an effort to capitalize on new businesses that the facility would attract to the area. NLDC successfully negotiated the purchase of most of the real estate necessary for the project's completion and then resorted to eminent domain to take the remaining properties. The owners brought suit to challenge the use of eminent domain.

The Supreme Court ultimately upheld NLDC's use of eminent domain for economic development purposes in a five-to-four decision. The majority reaffirmed the need for a deferential approach to legislative judgments on the question of what constitutes a public use.[74] The dissent argued that the justification for public use in *Berman* hinged on removing a public harm before transferring the property to another private owner; in *Kelo*, there was no public harm to remove, and therefore the condemnation and transfer of property to another private owner, merely to achieve some preferred private use with secondary benefits to the public, was not consistent with the Court's precedent on public use.[75]

The *Kelo* decision served as a catalyst for eminent domain reform at the state level; at least forty-two states have introduced legislation or enacted constitutional amendments in reaction to the decision.[76] Most of the reforms focused on limiting the definition of "public use"

---

[72] *Id*. at 796.

[73] 545 U.S. 469 (2005).

[74] *Id.* at 482 ("Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs.").

[75] *Id*. at 500.

[76] REYNOLDS, *supra* note 37, at 129 ("at least 42 states, have limited, or outright prevented, the use of condemnation to acquire property for economic development, and many have also redefined what constitutes 'blight' for purposes of condemning property for urban renewal").

to exclude economic development projects aimed at increasing tax revenue[77]—and many reaffirmed the use of eminent domain for blight removal.[78]

The legacy of takings jurisprudence in the modern era is three-fold. First, the term "public use" equates to "public purpose" and is coterminous with the state's police powers.[79] Second, private entities may be transferees of condemned land.[80] Third, the courts will show great deference to the legislature's determination of public purpose for takings.[81]

Practitioners should be aware that eminent domain remains a powerful tool for addressing vacant and abandoned properties and that takings of property for blight removal purposes is still generally permitted across the nation. The delegation of eminent domain authority to local governments—and the procedural requirements imposed on such actions—will vary from state to state. Eminent domain is discussed again in Chapter 6 as a tool for gaining control of problem properties.

Section B: Local Government Police Power and Regulatory Activities

Local governments typically employ a variety of land use regulations, such as nuisance abatement and code enforcement, to address vacant and abandoned properties. The foundation of

[77] *See, e.g.*, Act effective Aug. 3, 2005, No. 313, 2005 Ala. Laws 643, 645–46 (codified as amended at ALA. CODE § 18-1B-2 (LexisNexis Supp. 2006)) (disallowing condemnation for development, except for blighted areas); Act of June 6, 2006, ch. 349, 2006 Colo. Sess. Laws 1749, 1749 (codified as amended at COLO. REV. STAT. § 38-1-101 (2006)) (disallowing condemnation for economic enhancement or increasing tax revenue); Landowner's Bill of Rights and Private Property Protection Act, No. 444, 2006 Ga. Laws 39, 41 (codified as amended at GA. CODE ANN. § 22-1-1 (Supp. 2006)) (disallowing condemnation by transfer to private entity for economic development); Act effective Aug. 23, 2006, ch. 579, 2005 Me. Laws 1561, 1561 (codified at ME. REV. STAT. ANN. tit. 1, § 816 (West Supp. 2006)) (disallowing condemnation for economic enhancement or primarily for increasing tax revenue); Act of Apr. 13, 2006, LB 924, sec. 2, 2006 Neb. Laws 341, 341 (codified as amended at NEB. REV. STAT. § 76-710.04 (Supp. 2006)) (same).

[78] *See, e.g.*, Act effective Aug. 3, 2005, No. 313, 2005 Ala. Laws 643, 645–46 (codified as amended at ALA. CODE § 18-1B-2 (LexisNexis Supp. 2006)) ("[T]he . . . provisions of this subsection [restricting takings] shall not apply to the exercise of the powers of eminent domain . . . based upon a finding of blight in an area. . . ."); Landowner's Bill of Rights and Private Property Protection Act, No. 444, 2006 Ga. Laws 39, 41 (codified as amended at GA. CODE ANN. § 22-1-1 (Supp. 2006)) (prohibiting condemnation for economic development but allowing use of eminent domain in blighted areas); Act effective Aug. 23, 2006, ch. 579, 2005 Me. Laws 1561, 1561 (codified at ME. REV. STAT. ANN. tit. 1, § 816 (West Supp. 2006)) (excepting blighted areas from eminent domain reforms); Act of Apr. 13, 2006, LB 924, sec. 2, 2006 Neb. Laws 341, 341 (codified as amended at NEB. REV. STAT. § 76-710.04 (Supp. 2006)) (same). *But cf.* Act of May 11, 2006, ch. 2006-11, sec. 2, § 73.014, 2006 Fla. Laws 1, 4 (codified as amended at FLA. STAT. § 73.014 (2006)) (prohibiting use of eminent domain to remedy blight).

[79] *See supra* note 62.

[80] Berman v. Parker, 348 U.S. 26, 33–34 (1954) (recognizing that the "public end may be as well or better served through an agency of private enterprise than through a department of government"); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 243–44 (1984) ("The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose.").

[81] *Berman*, 348 U.S. at 32; Kelo v. City of New London, 545 U.S. 469, 482 (2005).

almost all land use regulation is the police power,[82] which is a government's inherent authority to enact regulations over persons and property for the public good.[83]

The police power is reserved to the states under the Tenth Amendment of the U.S. Constitution.[84] Each state's legislature exercises the power through legislation and often delegates the power to local governments.[85] The different means of delegation are described above in Section A of Part I of this chapter.

The boundaries of the police power are difficult to define. As explained by the United States Supreme Court in the eminent domain case *Berman v. Parker*, the definition of the police power "is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition."[86] Those purposes, the Court went on to say, include "[p]ublic safety, public health, morality, peace and quiet, law and order" as some of "the more conspicuous examples," but "they merely illustrate the scope of the power and do not delimit it."[87] Accordingly, the boundaries of the police power are elastic and can be altered to meet the changing conditions of society.[88]

A police power regulation must be reasonably designed to accomplish a legitimate public purpose.[89] Courts have generally granted wide latitude to state legislatures in determining what

---

[82] JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 3.5, at 43 (3d ed. 2013) ("Public land use controls, including zoning, subdivision regulation, building codes and growth controls, are exercises of the police power.").

[83] Munn v. Illinois, 94 U.S. 113, 125 (1876) (internal quotation marks omitted) (citation omitted) ("[P]olice powers . . . are nothing more or less than the powers of government inherent in every sovereignty. . . . Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good."); Alexander Co. v. City of Owatonna, 222 Minn. 312, 322 (1946) (explaining that the "police power" generally refers to the power of the state and its political subdivisions "to impose such restraints upon private rights as are necessary for the general welfare.").

[84] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[85] *See* BARLOW BURKE, THE LAW OF ZONING AND LAND USE CONTROLS 4 (3d ed. 2013) (observing that the police power is "often delegated by the states to local government or municipalities").

[86] 348 U.S. at 32 ("An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. . . . The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.").

[87] *Id.*; Boston Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1877) ("Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals.").

[88] Euclid v. Amber Realty Co., 272 U.S. 365, 387 (1926); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[89] *See, e.g.*, Chicago, Burlington, & Quincy Ry. Co. v. Illinois, 200 U.S. 561, 592 (1906) ("And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose."); TGB, Inc. v. City of St. Louis Bd. of Bldg. Appeals, 154 S.W.3d 353, 356 (Mo. Ct. App. 2004) (internal quotation marks omitted) (citations omitted) ("The test used to decide the validity of a state's police power is one of reasonableness. The exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed afford support for it.").

activities serve the public welfare.[90] The conservation of property values is a legitimate basis for regulations enacted pursuant to the police power.[91] Even aesthetic considerations alone can form the basis of a police power regulation.[92] However, the interference with a private property owner's rights must be reasonable in degree.[93]

The legitimate exercise of the police power does not create a taking of private property. Accordingly, a private owner affected by a police power regulation has no right to compensation arising out of the regulatory activity.[94] However, when regulations go so far as to deny a private owner all economic use of property[95] or to constitute the permanent physical occupation of property,[96] a court may characterize the regulatory activity as a taking and require the payment of compensation to the owner.

As the police power serves as the foundation for all land use regulation, practitioners attempting to address vacant and abandoned properties should seek a good understanding of the breadth and limits of police power authority. In communities where comprehensive statutory regimes to address problem properties are not available, the police power can serve as the basis for enacting new regulations to address the condition of problem properties.[97]

Many state and local governments have already relied upon their police power to enact regulatory regimes for addressing problem properties. The remainder of this section will briefly

---

[90] *Berman*, 348 U.S. at 33 ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.").

[91] 6A MCQUILLIN, *supra* note 25, § 24:14, at 65 ("The conservation of property values is a very common consideration in comprehensive zoning, ordinarily required by state zoning acts, incorporated in ordinances and sustained by the courts.").

[92] *See, e.g.,* State v. Jones, 305 N.C. 520, 528–31 (1982) (reviewing aesthetic regulations upheld in multiple states and holding that "reasonable regulation based on aesthetic considerations may constitute a valid basis for the exercise of the police power depending on the facts and circumstances of each case"); State v. Smith, 618 S.W.2d 474, 477 (Tenn. 1981) ("[I]n recent years most courts which have considered junkyard regulations similar to those involved here have had no difficulty in sustaining them as a proper exercise of the police power of a state or local government, even if scenic or aesthetic considerations have been found to be the only basis for their enactment."); Buhler v. Stone, 533 P.2d 292, 294 (Utah 1975) ("Surely among the factors which may be considered in the general welfare, is the taking of reasonable measures to minimize discordant, unsightly and offensive surroundings; and to preserve the beauty as well as the usefulness of the environment.").

[93] *See supra* notes 22 and 89 and accompanying text. *See also* A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 214 (1979) (describing the police power reasonableness test as "two-pronged: (1) Is the statute in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?").

[94] *Chicago, Burlington, & Quincy Ry*., 200 U.S. at 593–94 ("If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution.")

[95] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026 (1992) (holding that government must pay just compensation for "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property).

[96] *See supra* notes 39–40 and accompanying text.

[97] *See, e.g.,* C. TYLER MULLIGAN & JENNIFER L. MA, HOUSING CODES FOR REPAIR AND MAINTENANCE: USING THE GENERAL POLICE POWER AND MINIMUM HOUSING STATUTES TO PREVENT DWELLING DETERIORATION 11–20 (2011) (describing the rationale, in the absence of specific statutory authority, for employing a local government's general delegation of authority under the police power to regulate the appearance of vacant and abandoned housing).

explore two of the most common police power activities related to vacant and abandoned properties: nuisance abatement and code enforcement.[98]

1. Nuisance Abatement

Before the use of zoning became widespread, nuisance abatement was the primary means of controlling land use until the late 19th century.[99] The law distinguishes between *private* nuisances and *public* nuisances. In the case of a *private* nuisance, an action in tort can be brought by an owner against an offending party to address an invasion of the owner's private use and enjoyment of land.[100] A *public* nuisance involves unreasonable interference with the health, safety, morals, or comfort of the broader community or the general public.[101] A nuisance may affect a private landowner as well as the community as a whole, so a nuisance can be simultaneously public and private, allowing a private landowner to bring suit to enjoin a private nuisance in parallel with a government action to address the same issue as a public nuisance.[102]

Municipalities generally exercise their power to declare, prevent and abate public nuisances by virtue of local ordinances, which are enacted pursuant to a delegation of police power as described previously.[103] The typical process for addressing a nuisance includes the following:

---

[98] JUERGENSMEYER & ROBERTS, *supra* note 82, § 3.5, at 43 ("Public land use controls, including zoning, subdivision regulation, building codes and growth controls, are exercises of the police power.").

[99] Robert C. Ellickson, *Alternatives to Zoning*, 40 U. CHI. L. REV. 681, 721 (1973) (explaining that the use of nuisance law reached a zenith in the 1920s and 1930s as landowners invoked it to relieve actual or threatened noxious uses in their neighborhoods)

[100] STUART M. SPEISER, 7 AMERICAN LAW OF TORTS § 20:5, at 138 (2017) ("The Restatement divides nuisance into two types: an unreasonable interference with a right common to the general public (public nuisance) and a nontrespassory invasion of another's interest in the private use and enjoyment of land (private nuisance)."); *see also* JUERGENSMEYER & ROBERTS, *supra* note 82, § 14:2, at 575 ("In contrast to a private nuisance, a public nuisance need not involve an invasion of property rights. The injury is to the community, not the individual landowner.").

[101] RESTATEMENT (SECOND) OF TORTS § 821B, at 87 (1979) ("A public nuisance is an unreasonable interference with a right common to the general public. . . . Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."); Knapp v. City of Newport Beach, 9 Cal. Rptr. 90, 98 (Cal. Ct. App. 1960) ("A public nuisance, if found to exist, is a present danger to the public. It can be abated under the police power whenever discovered.").

[102] Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz., 712 P.2d 914, 917 (Ariz. 1985) (citation omitted) ("Thus, a nuisance may be simultaneously public and private when a considerable number of people suffer an interference with their use and enjoyment of land. The torts are not mutually exclusive."); Arriaga v. New Eng. Gas Co., 483 F. Supp. 2d 177 (D.R.I. 2007) (while a public nuisance may consist of an aggregation of private injuries that becomes so great and extensive as to constitute a public annoyance, interference with the private rights of a substantial number of individuals does not, by itself, amount to a public nuisance); Hutt v. Lamont's Serv., Inc., 133 N.W.2d 734, 737 (Wis. 1965) ("[A] nuisance may be both public and private, and a public nuisance may also become a private nuisance as to any person who is especially injured by it to any extent beyond the injury to the public.").

[103] *See supra* note 85 and accompanying text. *See also* 6A MCQUILLIN, *supra* note 25, § 24:74, at 307 ("Abatement of nuisances by a municipal corporation should be by the particular legal steps outlined by charter or statute.").

1. Enactment of a general ordinance that defines what constitutes a nuisance and prescribing means by which to deal with defined nuisances.[104]
2. Lawful inspection of property to determine whether the conditions amount to a nuisance.[105]
3. Passage of a resolution pursuant to the ordinance, declaring a particular condition to be a nuisance and directing its abatement.
4. Filing suit or otherwise following prescribed procedures for appropriate remedies.[106]

Abatement[107] and injunction[108] are the most common remedies for nuisances.[109] A property owner subject to a government abatement action is typically entitled to due process, such as notice, hearing, and an opportunity to make an appeal.[110]

When particularly dangerous conditions are present, summary abatement may be authorized immediately without process or judicial action.[111] In the context of vacant or

[104] Solly v. City of Toledo, 7 Ohio St. 2d 16, 19 (1966) ("[N]o legislation can authorize the destruction of private property as a public nuisance unless such property comes within a valid legislative definition (by statute or ordinance) of a public nuisance or is expressly proscribed by . . . statute or ordinance.")

[105] Camara v. Mun. Ct. of S.F, 387 U.S. 523 (1967) (granting Fourth Amendment protections to owners of residential property and requiring housing inspectors to obtain administrative inspection warrants for inspections).

[106] *See, e.g.,* People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 627 (Cal. 1997) ("A public nuisance is subject to a civil action for abatement, and may, as here, be "brought . . . by the city attorney of any town or city in which such nuisance exist.").

[107] 6A MCQUILLIN, *supra* note 25, § 24:69, at 292 ("Indeed, the power to abate nuisances is a portion of the police power necessarily vested in the corporate authorities."). *See, e.g.,* Copart Indus., Inc. v. Consol. Edison Co. of N.Y., Inc., 362 N.E.2d 968, 971 (N.Y. 1977) ("A public, or as sometimes termed a common, nuisance is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency.").

[108] Hutt v. Lamont's Serv., Inc., 133 N.W.2d 734, 737 (Wis. 1965) (granting injunctive relief and ordering posts in a public alleyway removed because the posts constituted both a public and private nuisance).

[109] Marilyn L. Uzdavines, J.D., *Barking Dogs: Code Enforcement Is All Bark and No Bite (Unless the Inspectors Have Assault Rifles)*, 54 WASHBURN L.J. 161, 163 (2014) ("Today, there are several remedies for redressing nuisances, including suits in courts of equity for injunctions, civil actions in courts of law for damages, and criminal prosecution.").

[110] 6A MCQUILLIN, *supra* note 25, § 24:81, at 334 ("notice, hearing, and a judgment may be required in abatement proceedings, particularly where they are judicial in character"); *see*, *e.g.*, Santana v. City of Tulsa, 359 F.3d 1241, 1244 (10th Cir. 2004) (city properly enforced its nuisance ordinance and therefore did not deprive property owner of due process; city told owner about administrative appeal procedure and warned him that it would abate nuisance "without further notice" if he did not do so himself within ten days; owner failed to both file administrative appeal or abate nuisance); City of Rapid City v. Boland, 271 N.W.2d 60, 65 (S.D. 1978) ("The abatement of a public nuisance does not entitle the owner of the property to compensation; however, he is normally entitled to due process, i.e., formal notice and a hearing, to determine whether the property is in fact a nuisance in most instances.").

[111] 6A MCQUILLIN, *supra* note 25, § 24:75, at 315 ("Summary abatement means to put down or destroy without process, or judicial action); *id.* § 24:76, at 319 ("Summary abatement means that a duly empowered city inspector or other official may effect destruction of property at his or her discretion, subject to a standard imposed by ordinance or statute."); *see, e.g.,* Porter v. City of Lewiston, 238 P. 1014, 1015 (Idaho 1925) (upholding summary abatement without notice and hearing where the "the council had, by resolution, determined that such buildings were dilapidated and dangerous in causing and promoting fires, and that the same should be summarily abated").

abandoned properties, structures that pose a danger to the public may be subject to summary abatement.[112]

The lawful exercise of the police power to abate a public nuisance may result in destruction or damage to property, but the action is not a government taking and therefore does not require compensation to the owner.[113] A warrant is not necessarily required to abate a public nuisance, but the entry on and seizure of property must be reasonable under the Fourth Amendment.[114]

2. Code Enforcement

As already noted in the discussion of public nuisance abatement above, the proliferation of zoning, building codes, and maintenance codes has reduced local government reliance on nuisance abatement proceedings.[115] Many conditions that would have been remedied through nuisance actions decades ago are now addressed as code violations.

As code enforcement and nuisance abatement are all derived from the police power,[116] the procedures and enforcement mechanisms for code violations are similar to those for nuisance abatement.[117] The typical procedures for code enforcement[118] include the following elements:

1. Enactment of a code enforcement program that defines violations of the code and prescribes a process for addressing the violations.
2. Lawful inspection of property to determine whether violations exist on a particular property.

---

[112] *See, e.g.,* Elsmere Park Club, L.P. v. Town of Elsmere, 542 F.3d 412 (3d Cir. 2008) (town did not violate apartment complex owner's procedural due process rights by invoking emergency procedures to condemn complex without pre-deprivation notice or hearing due to presence of mold in complex's basement; mold was found to have posed an immediate threat to residents' health and welfare); *Boland*, 271 N.W.2d at 65 ("A summary abatement is allowed only where (1) the property constitutes a public nuisance that is an imminent hazard to the public health, safety, or welfare, and (2) destruction is the only adequate method eliminating the hazard.").

[113] *See, e.g.,* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) ("[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity."); Mugler v. Kansas, 123 U.S. 623, 669 (1887) ("The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."); *Boland*, 271 N.W.2d at 65 (holding that the abatement of a public nuisance does not entitle a property owner to compensation "based upon the public necessity of preventing an impending hazard which threatens the lives, safety, or health of the general public"). Johnson v. City of Prichard, 771 F. Supp. 2d 1310, 1319–20 (S.D. Ala. 2011) (finding no unconstitutional taking or trespass by the government when a city demolished a structure to abate a nuisance).

[114] *See* Ferreira v. Town of East Hampton, 56 F. Supp. 3d 211, 231 (E.D.N.Y. 2014) ("[A] warrant is not required to abate a public nuisance, the seizure of property considered to be a public nuisance, as well as the entry onto private property to accomplish that seizure, must still be reasonable to comply with the Fourth Amendment.").

[115] *See supra* note 99 and accompanying text.

[116] *See supra* note 98.

[117] *See supra* notes 104–110 and accompanying text.

[118] *See* JUERGENSMEYER & ROBERTS, *supra* note 82, § 8.6 (describing typical code enforcement procedures).

3. Designated procedure for addressing the violation, to include issuing an order to the owner to correct the violation, and a process for government enforcement or effectuation of the order in the event the owner fails to comply.[119]
4. The costs of government effectuation are charged to the private owner, in addition to any criminal penalties or fines that may be levied,[120] and the government's costs become a lien on the property.[121]

In the context of problem properties, practitioners should understand the different types of code enforcement and how each program operates under state law. For this discussion, code enforcement is divided into three broad categories: zoning, which is focused on land and the relationship between structures and land; building and maintenance codes, which pertain to matters of construction and maintenance of buildings; and receivership, which is a relatively recent innovation in code enforcement that involves appointing a receiver to control and repair a private owner's property.[122] This section provides a general overview of each code enforcement tool so that practitioners can better understand how the tools are interrelated and how each tool might be used effectively to address problem properties.

Zoning and Land Use Regulation

Zoning is the process of demarcating land into districts (or zones) and regulating buildings and structures within each district "according to their construction and the nature and extent of their use, or the regulation of land according to its nature and use."[123] The legitimate public interests served by zoning include bringing about the orderly physical development of a community and reducing or eliminating the adverse effects of incompatible land uses in close proximity to each other.[124]

The authority to enact zoning is derived from the police power,[125] and as such is delegated to local governments in the same manner as the police power.[126] The power of local

---

[119] *See* Uzdavines, *supra* note 109, at 163; *see also* MULLIGAN & MA, *supra* note 97, at 35-40 (describing enforcement and effectuation process for minimum housing code in North Carolina).

[120] Courts have been reluctant to enforce criminal penalties for code enforcement violations. JUERGENSMEYER & ROBERTS, *supra* note 82, § 8.6.

[121] Uzdavines, *supra* note 109, at 163 ("States also authorize code enforcement boards to levy fines against those who violate the codes of their jurisdiction."); *see also* FLA. STAT. ANN. § 162.09 (West 2017) (authorizing code inspector to allow for administrative fines, costs of repair, and liens); N.C. GEN. STAT. § 160A-432(b) (2016) ("The amounts incurred by the city in connection with the removal or demolition shall be a lien against the real property upon which the cost was incurred.").

[122] JUERGENSMEYER & ROBERTS, *supra* note 82, § 8.1 (comparing zoning with building and housing codes).

[123] 83 AM. JUR. 2D, *Zoning and Planning* § 2, at 387 (1976); Elaine Marie Tomko-DeLuca, Annotation, *Applicability of zoning regulations to governmental projects or activities*, 53 A.L.R.5th § 2 (1992).

[124] *Id.*

[125] Euclid v. Amber Realty Co., 272 U.S. 365, 387 (1926) (holding that local governments derive from their police powers the authority to enact zoning ordinances which impose land use controls on private property, and that such regulations are valid to the extent they promote the public welfare).

[126] *See supra* note 85 and accompanying text. *See also* 8 MCQUILLIN, *supra* note 25, § 25:38, at 158 (3d ed. 2015) ("It is fundamental that a municipal corporation has no inherent police power, and hence municipal power of zoning must exist, if it does at all, by virtue of delegation from the state. . . . While the power of zoning constitutes a phase of the police power, it usually exists in municipal corporations by virtue of specific delegation ordinarily by a state statute, sometimes by constitutional provision and sometimes by charter authorization."); *see, e.g.,* Riggs v. Twp. Of

governments to zone and control land use is broad but not without limits.[127] When zoning regulations go so far as to restrict all economic use of property, the owner is entitled to just compensation even if the government did not officially exercise its eminent domain power.[128]

Unique to zoning and land use regulations is the concept of an exaction. An exaction is a requirement for a property owner, as a condition of development approval, to dedicate property for the benefit of the public prior to proceeding with development. To be valid, these dedications must possess an "essential nexus"[129] to the government end being sought and must exhibit "rough proportionality"[130] to the impacts of the expected land use.

In many states, prior to adopting zoning regulations, a local government is first required to adopt comprehensive land use plans to guide its zoning-related decisions.[131] Subsequent land use decisions may be tested for conformity with the adopted plans.[132] In urban renewal programs, for example, local governments were required to create redevelopment plans containing specific activities that conformed with the general plan for the locality.[133]

Aesthetic regulations may be embedded within zoning regulations and have been upheld when they are deemed reasonable.[134] Historic preservation is a common aesthetic zoning regulation in which property owners within designated historic districts are required to preserve the appearance of historic structures and to conform with aesthetic requirements.[135]

Long Beach, 538 A.2d 808, 812 (N.J. 1988) ("Municipalities do not possess the inherent power to zone, and they possess that power, which is an exercise of the police power, only insofar as it is delegated to them by the Legislature."); DAVID W. OWENS, INTRODUCTION TO ZONING AND DEVELOPMENT REGULATION 13 (4th ed. 2013) (*"*Most states have chosen to assign zoning and similar development regulations almost exclusively to cities and counties.").

[127] Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928) (holding that a zoning scheme was void because the districts as drawn were not "indispensable to the general plan" and arbitrarily restricted the owner's economic use of the property); BARLOW BURKE, UNDERSTANDING THE LAW OF ZONING AND LAND USE CONTROLS 9 (3d ed. 2013) (explaining that the U.S. Supreme Court held in *Euclid* that there was no due process violation in a municipality's enactment of a zoning ordinance when it was (1) comprehensive in scope; (2) classified various land uses of property (residential, commercial, etc.) with all the land being placed in one classification or another; and (3) created geographic use districts where each land use was permitted).

[128] *See supra* note 42 and accompanying text.

[129] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

[130] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[131] OWENS, *supra* note 126, at 26 ("Many states require local governments to prepare land use plans. . . . While details vary significantly from state to state, in the Southeast alone, Florida, Georgia, Tennessee, South Carolina, and Virginia all have statewide planning mandates.").

[132] *See, e.g.,* N.C. GEN. STAT. § 160A-382(b) (2016) (authorizing municipalities to impose conditions and site-specific standards in specific districts only when they "address the conformance of the development and use of the site to city ordinances and an officially adopted comprehensive or other plan").

[133] REYNOLDS, *supra* note 37, at 518.

[134] *See, e.g.,* State Dep't of Ecology v. Pacesetter Constr. Co., 571 P.2d 196, 199 (Wash. 1977) (upholding height restriction on the basis of aesthetic concerns and noting that the court was required to balance "the public interest in regulating the use of private property against the interests of private landowners not to be encumbered by restrictions on the use of their property").

[135] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (holding that historic landmark laws which embody a comprehensive plan to preserve structures of historic or aesthetic interest are not discriminatory

Building Codes and Housing Maintenance Codes

Practitioners should understand the distinction between building codes and codes for maintenance and habitability (also called "housing codes"). Building codes establish standards for the construction of safe and efficient buildings,[136] whereas maintenance and habitability codes are designed to ensure that existing buildings are well maintained and operated in a manner that is suitable for human use or habitation.[137] Each is introduced below. In addition, a related private right of action—implied warranty of habitability—is available to tenants and is explained briefly.

Building Codes. Building codes provide a set of standards for assessing unsafe structures and in some localities are incorporated by reference into housing codes. In addition, code enforcement personnel who also serve as building inspectors may supervise repairs of problem properties in compliance with building codes. The International Building Code has been widely adopted across the United States, but there is some variability among states and municipalities.[138]

Maintenance and habitability codes. These codes regulate conditions ranging from general property maintenance, to health and sanitation, to standards for boarding up abandoned properties, to fitness for human habitation. Maintenance and habitability codes differ from state to state and from municipality to municipality, though the International Property Maintenance Code is gaining traction as a model code. Maintenance and habitability codes will be discussed in greater detail in Chapter 3.

Implied warranty of habitability. When codes are unavailable or local governments are unwilling to enforce their adopted codes, tenants may still have access to a remedy under a landlord's implied warranty of habitability.[139] Under this implied warranty, a tenant may remain

---

and do not interfere with owners' present use or prevent it from realizing a reasonable rate of return on its investment); JOHN MARTINEZ, 3 LOCAL GOVERNMENT LAW § 16:19, at 16-53 (2d ed. 2017) ("The use of the police power to forbid private property owners from *demolishing* or *altering* historic structures, or even to require such owners to *maintain* such structures has been regularly upheld by the courts provided that the designation process is conducted equitably and the owners are left with some economically viable use."). *See, e.g.*, City of New Orleans v. Levy, 64 So. 2d 798, 801 (La. 1953) (finding that a New Orleans ordinance referring to "architectural and historical value" and "quaint and distinctive character" of a particular historic neighborhood was "readily understandable" and did not suffer from vagueness).

[136] JUERGENSMEYER & ROBERTS, *supra* note 82, § 8.1, at 277 ("Building codes are primarily derived from structural safety standards and are generally enforced against new construction.").

[137] *Id.* ("Housing Codes were originally authorized by environmental health laws, and deal primarily with conditions which must be maintained in existing residential buildings to protect the public health, safety and welfare and the well-being of their occupants.").

[138] *See* Oregon v. City of Troutdale, 576 P.2d 1238 (Or. 1978) (holding that city could adopt building code requirements more stringent than but not incompatible with statewide code); Eric Damian Kelly, *Fair Housing, Good Housing or Expensive Housing? Are Building Codes Part of the Problem or Part of the Solution?*, 29 JOHN MARSHALL L. REV. 349, 350–51 (1996) ("Due to the complexity of building regulation, only the largest jurisdictions attempt to develop their own building codes. Most jurisdictions adopt one or more model codes, in whole or in part, by reference. In a few states, a statewide code has preempted local authority, but those codes depend heavily on the national models. In most states, individual local governments select one of the versions of the model codes.").

[139] 15 WILLISTON ON CONTRACTS § 48:11, at 717–22 (4th ed. 2017) ("[O]ne example of what was an overwhelming trend during the 1960s and 1970s, the Supreme Court of Pennsylvania, in a landmark decision [Pugh v. Holmes, 405 A.2d 897 (Pa. 1979)], abolished the doctrine of caveat emptor in residential leases and judicially adopted the implied warranty of habitability."). The value of the implied warranty of habitability has been hotly debated for decades. For

in possession of the premises and sue the landlord affirmatively for money damages, or make repairs and deduct the costs from future rent, provided some or all of the withheld rent is deposited with the court until the matter is adjudicated.[140] Other approaches for dealing with landlords of problem properties are addressed in Chapter 4.

Receivership

Receivership is the most recent innovation in code enforcement and involves a unique remedy for addressing violations found on problem properties. In general, receivership programs authorize a court-appointed receiver to gain custody of a problem property in order to repair and manage it.[141] The receiver does not take title to the property, but at the conclusion of the receivership, the property may be sold to recover the receiver's expenses.[142]

The purpose of receivership is to preserve and restore vacant or abandoned buildings so that they once again have economic value, thus embodying a positive goal of preservation; whereas, nuisance abatement focuses on the elimination of a negative feature of property.[143]

---

recent treatment, see Paula A. Franzese et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS U. L. REV. 1, 5 (2016) (examining data from cases in which breach of the warranty was asserted).

[140] 5 THOMPSON ON REAL PROPERTY § 41.06(a)(6)(ii) (David A. Thomas ed., 2d ed. 2015).

[141] *See, e.g.,* CAL. HEALTH & SAFETY CODE ANN. §§ 17980.7(4)(A)–(H) (West 2013) ("Any receiver appointed pursuant to this section shall have all of the following powers and duties in the order of priority listed in this paragraph, unless the court otherwise permits: (A) To take full and complete control of the substandard property. (B) To manage the substandard building and pay expenses of the operation of the substandard building and real property upon which the building is located, including taxes, insurance, utilities, general maintenance, and debt secured by an interest in the real property. (C) To secure a cost estimate and construction plan from a licensed contractor for the repairs necessary to correct the conditions cited in the notice of violation. (D) To enter into contracts and employ a licensed contractor as necessary to correct the conditions cited in the notice of violation. (E) To collect all rents and income from the substandard building. (F) To use all rents and income from the substandard building to pay for the cost of rehabilitation and repairs determined by the court as necessary to correct the conditions cited in the notice of violation. (G) To borrow funds to pay for repairs necessary to correct the conditions cited in the notice of violation and to borrow funds to pay for any relocation benefits authorized by paragraph (6) and, with court approval, secure that debt and any moneys owed to the receiver for services performed pursuant to this section with a lien on the real property upon which the substandard building is located. The lien shall be recorded in the county recorder's office in the county within which the building is located. (H) To exercise the powers granted to receivers under Section 568 of the Code of Civil Procedure."); *see also* James Kelly, *Refreshing the Heart of the City: Vacant Building Receivership as a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORD. HOUS. & CMTY. DEV. L. 210, 216 (Winter 2004) ("The receiver had the power to collect rents, make repairs, and even borrow money.")

[142] *See e.g.* PA. STAT. ANN. tit. 68, §§ 1105–1109 (West 2014) (powers and duties of court-appointed conservator); *see also* Melanie B. Lacey, *A National Perspective on Vacant Property Receivership*, 25 J. AFFORD. HOUS. & CMTY. DEV. L., no. 1, 133, 136 (2016) ("Receivership is a legal remedy that becomes available under many types of litigation involving disputes over assets. The remedy entails a court-appointed party who gains custody of the assets-in-controversy in order to preserve and manage them during the course of the lawsuit. The receiver's appointment terminates when the court directs the final disposition of the assets. At termination, a court may direct a receiver to return the assets to the owner or sell them to satisfy debts. In the latter scenario, sale proceeds are distributed to creditors according to their priority.").

[143] *See* ALAN MALACH, RESTORING PROBLEM PROPERTIES: A GUIDE TO NEW JERSEY'S ABANDONED PROPERTY TOOLS 57 (2005), *available at* https://hcdnnj.memberclicks.net/assets/documents/NJToolkitFINAL.pdf.

Receivership laws are derived from the police power and are grounded in nuisance law,[144] so as with nuisance abatement, receivership actions are not considered a government taking.[145] The rights of the owner are defined by statute and protected through procedures such as service of notice[146] and a bench trial.[147] Receivership is discussed in greater detail in Chapters 5 and 6.

Section C: Local Government Development Activities through Voluntary Exchanges

Sections A and B addressed local government powers that involve some degree of coercion; that is, eminent domain involves a taking of private property for public use, and regulatory activities constrain a private owner's rights to use property as the owner wishes. This section explores the legal authority for local governments to participate in development activities as a market participant using voluntary exchanges. Examples of voluntary exchanges include purchasing property, engaging a contractor to perform construction or rehabilitation, selling public property, and offering financing to private developers.

Voluntary exchanges may be preferred over more coercive powers when they can achieve the practitioner's goals more quickly and involve fewer procedural constraints. That is, practitioners may choose to approach a problem property first through a voluntary exchange lens (e.g., can the local government purchase the property from the owner and sell it to a more responsible owner, or can the local government provide financing to facilitate voluntary redevelopment of abandoned properties?), before considering more coercive options such as condemnation or code enforcement that could require a greater investment of government time and resources.

The key legal principles for local governments to follow in voluntary exchanges are enshrined in most state constitutions as (i) public purpose clauses, which require all government spending to be for a public purpose, and (ii) public aid limitation clauses, which prevent governments from placing public funds under private control or making gifts to private entities.[148] Public purpose was discussed at length previously in the context of eminent domain.[149] That discussion is informative here, but it should be noted that a determination of public purpose for government spending is distinct from eminent domain because governments

---

[144] Lacey, *supra* note 142, at 136 ("Therefore, public nuisance is the cause of action, abandonment and housing code violations are the basis for the action, and the property is the asset-in-controversy.").

[145] *Id.* at 137–38; *see also supra* note 113 and accompanying text.

[146] Lacey, *supra* note 142, at 145 (stating that receivership laws "always require service of notice to all parties that have an ownership interest, although the form of service may vary.").

[147] City & Cty. of S.F. v. Daley, 20 Cal. Rptr. 2d 256, 263 (Cal. Ct. App. 1993) (citation omitted) ("The rule is established that the appointment of a receiver rests largely in the discretion of the trial court and that its action in appointing a receiver or its refusal of an application for the appointment of such an officer will not be disturbed in the absence of a showing that the court's discretion has been abused."); *see also* Lacey, *supra* note 142, at 145 ("The forum may be either administrative or trial court; however, all cases are bench trials.").

[148] David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265, 280 (1963) ("At the turn of the century, some form of public aid limitation had been incorporated in the constitutions of a large majority of the states.").

[149] *See infra* Section A of Part II.

must abide by constitutional public aid limitation clauses when engaging in voluntary exchanges.[150]

As stated in a local government law treatise, "*Gifts* of property by local governments—at least to private individuals—are generally banned by statute or as a matter of common law; any transfer of municipal property must be supported by some reasonable compensation or benefit in return."[151] Future tax revenue ordinarily is not adequate consideration for transfer of government property (or funds) to a private entity.[152] Even when there exists a public purpose for the use of eminent domain or for expenditures of government funds—such as urban renewal,[153] affordable housing,[154] and economic development[155]—gifts to private entities are not permitted,[156] and any

[150] REYNOLDS, *supra* note 37, at 522–23 (treating case law determinations about public purpose in the eminent domain context as distinct from cases where "the *spending of government money* is challenged").

[151] REYNOLDS, *supra* note 37, at 515. *See, e.g.*, Solow v. City of New York, 266 N.Y.S.2d 823 (App. Div. 1966), *aff'd*, 20 N.Y.2d 960 (1967); Brumley v. Baxter 225 N.C. 691 (1945) (finding a violation of gift clause where property was granted to a charitable entity without incorporating a reversionary interest to ensure the property was returned to the municipality should the property cease to be used for the original purpose). Transfers to charitable entities and other governments, when the recipient organization agrees to put the property to public use or to provide public service that the government can support with appropriations, are not gifts. *See, e.g.*, Hill v. City of Summit, 166 A.2d 610 (N.J. Super. Ct. Law Div. 1960) (approving grant of municipal property to veterans' organization); N.C. GEN. STAT. §160A-279(a) (2016) ("Whenever a city or county is authorized to appropriate funds to any public or private entity which carries out a public purpose, the city or county may, in lieu of or in addition to the appropriation of funds, convey by private sale to such an entity any real or personal property which it owns.").

[152] Turken v. Gordon, 224 P.3d 158, 166 (Ariz. 2010) (en banc) (opining that the duty "to pay taxes arises from law applicable to all, not out of contract," and therefore tax payments could not serve as consideration flowing to the City under a parking agreement with developer).

[153] REYNOLDS, *supra* note 37, at 522 (stating that slum clearance and affordable housing serve a public purpose for "spending of government money"); *see, e.g.*, Allydonn Realty Corp. v. Holyoke Hous. Auth., 23 N.E.2d 665 (Mass. 1939); Redevelopment Agency of City & Cty. of S.F. v. Hayes, 266 P.2d 105 (Cal. Ct. App. 1954); People *ex rel.* Gutknecht v. City of Chicago, 111 N.E.2d 626 (Ill. 1953).

[154] *See supra* notes 57–58 and accompanying text. *See, e.g.*, Martin v. N.C. Hous. Corp., 277 N.C. 29, 49–50 (1970).

[155] Maready v. City of Winston-Salem, 342 N.C. 708, 727 (1996) (authorizing government payments to private entities as economic development incentives to influence business location decisions when "jobs and tax base" might be "lost to other states."); *see also* C. Tyler Mulligan, *Economic Development Incentives Must Be "Necessary": A Framework for Evaluating the Constitutionality of Public Aid for Private Development Projects*, 11 HARV. L. & POL'Y REV. S13, S19 (2017) (noting that "virtually all state courts have upheld some form of business location subsidies" for economic development in cases where "necessity" or some form of "but for" causation, usually through interstate competition, exists for the subsidy).

[156] *See Turken*, 224 P.3d at 164 (citing Wistuber v. Paradise Valley Unified Sch. Dist., 687 P.2d 354, 357 (Ariz. 1984)) (articulating the principle that an expenditure, *even if for a public purpose*, amounts to an unconstitutional subsidy when "[t]he public benefit to be obtained from the private entity as consideration . . . is far exceeded by the consideration being paid by the public."); Opinion of the Justices, 48 So. 2d 757, 760–61 (Ala. 1950) (explaining that although a grant of public funds to a private enterprise is prohibited, a grant is permitted to a public agency to carry out an activity which it may in its public capacity have undertaken by authority of law). *See also* REYNOLDS, *supra* note 37, at 523–24 ("Even if the redevelopment authority sells the land at less than what it had to pay for acquisition and clearance, this does not amount to a forbidden donation to private parties if the sale was at no less than current 'use value' and the purchaser agrees to redevelop in accord with the [redevelopment] plan.").

payment or transfer of property to a private entity must be "necessary" to accomplish a legitimate public purpose.[157]

In the context of vacant and abandoned properties, there are two broad categories of voluntary exchanges in which local governments participate. The first is direct development, in which a local government performs development activities in order to address problem properties. The second category involves local government participation in an otherwise private development activity, and it is within this category that public aid limitation clauses are most important. The two categories are discussed below.

1. Direct Development by Local Government

Direct development activities involve acquisition, improvement, and disposal of property, to include imposing redevelopment covenants or restrictions upon later buyers of such property.[158] These powers have long been exercised by local governments for urban redevelopment or urban renewal purposes,[159] and they are considered essential for land banking (which is discussed in greater detail in Chapter 7).[160] For discussion purposes, the law surrounding acquisition and improvement of property will be handled first, financing options will be described, and then sale or disposition of property will be addressed.

Acquisition and Improvement of Property

Local governments may acquire real property through voluntary means in several ways, including by purchase, received gift, and lease.[161] The purchase price offered by the local

---

[157] *See* Mulligan, *supra* note 155, at S24 (explaining that direct public aid to private enterprises to accomplish urban redevelopment and affordable housing ends may pass constitutional muster so long as the aid is "necessary" to accomplish the desired purpose, and then proposing a necessity test for courts to follow). *See also* Guidelines and Objectives for Evaluating Project Costs and Financial Requirements, 24 C.F.R. Pt. 570, App. A (Community Development Block Grant underwriting guidelines to ensure public aid is necessary); Tyler Mulligan, *Local Government Support for Privately Constructed Affordable Housing*, COMMUNITY AND ECONOMIC DEVELOPMENT IN NORTH CAROLINA AND BEYOND, UNC School of Government blog (June 21, 2016) (explaining that North Carolina statutory requirements for housing authorities—such as setting rents "at the lowest possible rates consistent with . . . providing decent, safe, and sanitary dwelling accommodations" and not allowing affordable housing to be operated to "provide revenues for other activities"—are consistent with the state's constitutional gift clause), https://ced.sog.unc.edu/local-government-support-for-privately-constructed-affordable-housing/.

[158] Under urban renewal programs, purchasers and lessees had to agree to devote the land to uses specified in the redevelopment plan and had to begin building within a reasonable time. REYNOLDS, *supra* note 37, at 524 ("Contractual provisions—often involving covenants running with the land—can bind the redevelopers and/or purchasers to abide by the plan, thus assuring a degree of continued governmental control; and upon non-performance of the contractual obligations, courts can order a reconveyance of the property to the local government or its redevelopment authority.").

[159] REYNOLDS, *supra* note 37, at 523.

[160] FRANK S. ALEXANDER, LAND BANKS AND LAND BANKING 50 (2d ed. 2015), http://www.communityprogress.net/land-banks-and-land-banking-second-edition-pages-491.php (fill out the form and click submit to download file) ("The core legal authority essential for land bank operations is the power to acquire, manage and dispose of property."); *see also* C. Tyler Mulligan, *How a North Carolina Local Government Can Operate a Land Bank for Redevelopment*, COMMUNITY AND ECONOMIC DEVELOPMENT IN NORTH CAROLINA AND BEYOND, UNC School of Government blog (Mar. 18, 2014) (explaining how a variety of statutes, when aggregated, provide North Carolina local governments with the essential powers of a land bank), https://ced.sog.unc.edu/how-a-north-carolina-local-government-can-operate-a-land-bank-for-redevelopment/.

[161] MARTINEZ, *supra* note 135, § 21:2, at 21-5 ("The power of local governments to acquire property through *negotiation*, involving a voluntary exchange with the property's owner, is relatively unproblematic. In fact, at

government for a voluntary acquisition may be lower than appraised value.[162] Paying an excessive amount for property, however, could amount to an unconstitutional gift to the seller.[163] Local governments must, of course, have been granted appropriate authority by statute or charter; they must substantially comply with any procedures imposed; and expenditures on acquisition must be for a public purpose.[164]

As noted previously in Section A of this Part, courts have granted great deference to legislatures in determining whether a particular activity serves a public purpose. In the context of problem properties, courts have found a public purpose to be served when local governments acquire and improve property for urban redevelopment, affordable housing, historic preservation, and economic development.[165] The process for entering into contracts for direct development activities such as remediation, demolition, and construction may be governed by state or local procurement rules.[166] Environmental remediation is addressed in Chapter 8, and demolition is discussed in Chapter 9.

Financing for Local Government Development Activities

Local governments that engage in direct development must determine how to finance their activities, and in general, they have many financing mechanisms at their disposal. The least expensive form of financing (lowest interest rate) is the general obligation bond, in which a local government pledges its "full faith and credit"—its taxing power—as security for the debt. Most state constitutions require a public referendum in order to approve the issuance of general obligation bonds.[167]

---

common law, one of the implied powers of a municipal corporation was the power to acquire and hold property in order to effectuate delegated powers."); REYNOLDS, *supra* note 37, at 507 (explaining that municipalities may purchase property, on the open market or otherwise, so long as relevant statutory and charter provisions grant authority, subject to three limitations: (1) any procedural requirements of statutes or home-rule charters must be honored, (2) municipal action can be voided by the courts upon strong proof of malicious or capricious conduct by local officials, and (3) the acquisition must be for a public purpose). The greater power to purchase property has been found to implicitly include the lesser power to lease property. *See, e.g.*, Ambrozich v. City of Eveleth, 274 N.W. 635 (Minn. 1937); Rogers v. City of Mobile, 169 So. 2d 282 (Ala. 1964).

[162] Melamed v. City of Long Beach, 18 Cal. Rptr. 2d 729, 734 (Cal. Ct. App. 1993) ("[A] public entity is required to offer the appraisal amount only in connection with an exercise of its *eminent domain power.* Therefore, a public entity is not required to offer the appraisal amount in every acquisition of real property.").

[163] Turken v. Gordon*,* 224 P.3d 158, 164–67 (Ariz. 2010) (en banc) ("When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause.").

[164] 1 ANTIEAU, *supra* note 10, § 24.12[1], at 24-60 ("Some statutes specify the formalities and procedures to be followed when a local entity purchases property, and there must be substantial compliance with these."); *see supra* notes 148–149 and accompanying text. *See, e.g.,* CAL. GOV'T CODE § 25350 (West 2004) ("No purchase of real property . . . shall be made unless a notice of the intention of the board of supervisors . . . to make the purchase is published in the county pursuant to Section 6063.").

[165] For discussion of public purpose in the context of acquiring property by condemnation, *see supra* notes 60–64 and accompanying text (urban redevelopment), notes 57–58 and accompanying text (affordable housing), and notes 65–73 and accompanying text (economic development). Most states authorize designated local preservation bodies to acquire and maintain historic properties. JUERGENSMEYER & ROBERTS, *supra* note 82, §12:7 (discussing state historic preservation laws and the delegation of regulatory authority).

[166] MARTINEZ, *supra* note 135, § 22:10, at 22-46–22-47 ("The competitive bid system is generally a creature of statute or charter, although the locality is usually free to impose these constraints on its discretion by ordinance.").

[167] *See generally* Peter W. Salsich, Jr., 2 STATE AND LOCAL GOVERNMENT DEBT FINANCING § 12:24 (West 2011).

A public referendum can be avoided so long as the debt is secured by something other than a pledge of the taxing power. Local governments occasionally seek to avoid a public referendum for speed or political expediency, particularly when the financing will be used to support a controversial development project. One popular financing mechanism that does not require a public referendum is issuance of certificates of participation.[168] The referendum is avoided because the local government does not pledge its taxing power; the lender instead receives a security interest in the facility being financed. A mere lien on a facility is less valuable security than a pledge of the taxing power, so this form of financing typically carries a higher interest rate than a general obligation bond.

In blighted areas, local governments may also have access to a controversial financing mechanism called "tax increment financing" or TIF.[169] In a TIF arrangement, the local government assigns tax revenues generated within a delineated "TIF district" into one of two categories: (1) revenues generated from the assessed tax value that existed prior to designation of the TIF district (the base value), and (2) revenues generated from any additional assessed tax value resulting from improvements constructed after designation of the TIF district (the incremental value). Revenues from the first category remain available for general local government expenditures, but revenues from the second category (the increment) are reserved for use in the TIF district alone and therefore cannot be used for general local government needs. The designation of a TIF district is sometimes viewed as an incentive for development because it guarantees that funding will be dedicated and available for public improvements and public services in the TIF district. Controversy arises because a TIF designation deprives the general local government fund of incremental revenue from the district, which may be needed to pay for increased demand for general government services generated by new development in the district.

Sale of Property with Conditions or Restrictions

Local governments possess, as a basic corporate power, general authority to dispose of property by sale or lease. Early in the 20th century, however, courts across the nation held that a local government's general authority to dispose of property did not extend to property being actively used for a *governmental* purpose, such as town halls, public parks, and property acquired through eminent domain.[170] Rather, specific statutory authority was required to dispose of such property.[171] That limitation does not apply when property is held in a government's *proprietary* or *private* capacity, such as surplus property no longer required by the government

---

[168] *Id.* at § 12:8.

[169] For a more detailed description of TIF, its early history as an urban renewal tool, and the emergence of its use outside of blighted areas, see Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65 (2010).

[170] 1 ANTIEAU, *supra* note 11, § 24.12[5], at 24-73; 10 MCQUILLIN, *supra* note 25, § 28:38. *See, e.g.*, Galloway v. Bd. of Comm'rs, 271 S.E.2d 784 (Ga. 1980).

[171] Anderson v. Adams, 283 So. 2d 416, 419 (Ala. 1973) ("While the parcel of real property in the present case was neither the subject of limitation under a trust, nor of statutory or common law dedication, the trial court found that it had been purchased for a public use and was being put to a public use. There is a difference in the law concerning the alienation of property, devoted by a city for public use and property, owned by a city but not held for public use. . . . a municipality may be expressly or impliedly authorized to dispose of property held for a public purpose, but in the absence of clear legislative intent no such implication will be drawn, since any fair, reasonable, or substantial doubt as to the extent of the power given by statute to the municipality is to be determined in favor of the public and against the municipality.").

or property acquired through tax foreclosure.[172] Due to the fact that the law treats disposal of property differently depending on how the property was originally acquired and used, practitioners should seek clarity on the legal authority for each sale of publicly owned property.

Sale price is an important consideration in property disposal. Constitutional gift clauses prohibit local governments from making gifts of property to private entities, and any transfer of municipal property must be supported by some reasonable compensation or benefit in return.[173] Accordingly, as a matter of state constitutional law, government property should be sold for a fair price.

In the context of problem properties, a local government may invest considerably more in acquisition, stabilization, clearance, or rehabilitation costs than it can recoup through a fair market price upon sale. So long as the sale price remains at or above the property's fair value, such sales will not constitute an impermissible gift to the buyer.[174] This issue has been litigated several times in the context of urban redevelopment authorities. Redevelopment authorities are created to acquire and clear blighted property—sometimes at a high cost to the authority—and then sell the formerly-blighted property at its "fair use" or fair market price, subject to conditions requiring the property be redeveloped in accordance with an approved redevelopment plan (which conditions may be considered in the sale price and may have the effect of depressing the price). The "fair use" sale price may be significantly lower than the total cost incurred by the authority for the original acquisition and clearance. In such instances, the authority suffers a loss upon sale. Nonetheless, courts have routinely upheld these sales so long as the authority receives fair value for the property.[175]

Courts will assume a price reflects fair value when it results from a properly conducted competitive bidding process. There are some rare exceptions when property may be sold for less than its fair market value. An important exception in the context of problem properties is affordable housing. A developer's promise to provide affordable housing to persons of low- or moderate-income, backed up by covenants or restrictions on sale, can constitute adequate consideration in return for a below-market sale price to that developer.[176]

Procedural considerations are paramount in property disposal. When certain disposition procedures are required, such as posted notice or competitive bidding, the procedures must be

---

[172] REYNOLDS, *supra* note 37, at 514 ("Express authority is not ordinarily needed for the sale of 'proprietary' properties."). *See, e.g.*, City of Ft. Wayne v. Lake Shore & Mich. S. Ry. Co., 32 N.E. 215, 217 (Ind. 1892) ("The general rule is that the municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute."); McSweeney v. Bazinct, 55 N.Y.S.2d 558 (App. Div. 1945) (foreclosure); Carter v. City of Greenville, 178 S.E. 508 (S.C. 1935) (surplus).

[173] MARTINEZ, *supra* note 135, § 21:7, at 21-25 ("Local government property cannot be conveyed to a private party without adequate consideration, for to do so would constitute an improper gift of public property or the granting of a subsidy contrary to state constitutional constraints."); *See also supra* notes 151–157 and accompanying text.

[174] REYNOLDS, *supra* note 37, at 523–24 ("Even if the redevelopment authority sells the land at less than what it had to pay for acquisition and clearance, this does not amount to a forbidden donation to private parties if the sale was at no less than current 'use value' and the purchaser agrees to redevelop in accord with the [redevelopment] plan.").

[175] *See generally* C. C. Marvel, Annotation, *Validity, Construction and Effect of Statutes Providing for Urban Redevelopment by Private Enterprise*, 44 A.L.R.2d 1414, §16 (1955) (describing case law regarding the value of property transferred to private parties for redevelopment).

[176] *See supra* note 165 and accompanying text. *See also* REYNOLDS, *supra* note 37, at 542–43.

followed with particularity or the sale could be invalidated.[177] As already noted, local governments may seek to impose conditions on the sale of their properties, such as requiring the buyer to redevelop the property in conformance with a redevelopment plan or to construct affordable housing. In the context of problem properties, conditions on sale are often necessary to accomplish the approved public purpose,[178] but the local government should ensure it has legal authority to impose the conditions.[179] Some thought should be given to monitoring and enforcing these conditions following sale—a concept explored further in Chapter 6.

2. Local Government Participation in Private Development Projects

In a relatively healthy real estate market, private buyers will be eager to acquire and redevelop property being disposed by a government agency. However, practitioners dealing with problem properties must occasionally dispose of property in more challenging markets in which private buyers are not motivated to acquire and redevelop the property being sold. In these cases, it may be necessary for the government to participate in some way in the redevelopment of the project in order to make it more appealing to private buyers.

As an illustration, imagine that a local government or redevelopment authority has acquired several contiguous properties in a blighted area and now seeks to sell the aggregated parcels to a single private developer. As a condition of the sale, the developer must develop the property in compliance with the redevelopment plan, which calls for rehabilitation or construction of private dwellings and also requires upgrades to public infrastructure (such as street improvements and utility capacity upgrades) and construction of public facilities (such as a community center). In a healthy real estate market, the authority might expect developers to compete with each other to acquire the property, and the selected developer could be expected to dedicate the public infrastructure and community center to the government at no cost.[180] However, if the real estate market is weak, the government agency may find it difficult to generate private developer interest in the redevelopment opportunity—most likely because private developers themselves are unable to convince their lenders and investors that the project is financially feasible. In such cases, the government or redevelopment agency may seek to participate in the redevelopment project in order to make it more financially feasible—and hence, more attractive—to private development partners. When a government agency attempts to participate in a private development project in this way, even in pursuit of a legitimate public purpose, it must navigate the constraints imposed by constitutional public aid limitations or gift clauses.[181]

The remainder of this chapter describes methods for government participation in private development projects and explains how to employ those methods without running afoul of public aid limitation clauses. A key legal principle at work in public aid limitations is that activities that

---

[177] *See, e.g.*, Bagwell v. Town of Brevard, 267 N.C. 604 (1966) (inadequate notice); Harter v. City of Colome, 310 N.W.2d 165 (S.D. 1981) (notice gave wrong location of property).

[178] *See, e.g.*, Opinion of the Justices, 48 So. 2d 757, 761 (Ala. 1950) (sale of government property acquired for urban renewal does not result in unlawful special privilege to buyers because buyers are required to follow redevelopment plan).

[179] *See, e.g.*, Puett v. Gaston Cty., 19 N.C. App. 231 (1973) (invalidating restrictions imposed by a local government on sale of property because there was no explicit authority to impose the restrictions and they had the effect of reducing the price that might be offered by bidders).

[180] *See supra* notes 129-130 and accompanying text.

[181] *See supra* notes 151–157 and accompanying text.

afford greater public control over public funds and facilities are favored over those that tend to surrender public control.[182] Accordingly, the options listed below are placed roughly in order from those activities that retain more public control to those that retain less:

- Identify public facilities that can be the subject of a prelease or presale arrangement with a private development partner as part of a redevelopment plan
- Provide a loan to facilitate redevelopment by a private party
- Invest equity (obtain ownership) to facilitate redevelopment by a private party, if permitted by law
- Approve tax exemption for classes of property

Taken as a whole, these activities can make a redevelopment project more financially feasible for a private developer without making a constitutionally prohibited gift to the developer.

To the extent that any exchange with the private sector is contemplated by these activities—such as a lease or a loan—the exchange is presumed to occur at fair market value in order to avoid running afoul of public aid limitations. However, even with fair market value exchanges, each successive option represents less public control over public facilities and funds, thereby increasing the public's exposure to private risk and decision-making.[183]

Identify public facilities that can be the subject of a prelease or presale arrangement with a private development partner as part of a redevelopment plan

One method for improving the financial feasibility of a redevelopment project is arranging for prelease or presale of some portion of the project. Prelease or presale of a significant portion of a redevelopment project can bolster the confidence of lenders and improve the private developer's ability to obtain bank financing or investor equity.[184] A local government can therefore improve the feasibility of a project by offering to lease or acquire facilities or space upon completion of redevelopment. In the illustration appearing at the beginning of this section (Section C.2. of Part II), the local government could agree to purchase utility infrastructure and lease a community center from the developer upon completion (rather than expecting those facilities to be dedicated to the government at no cost). Provided those components are leased or purchased for a permissible public purpose at an objectively fair price,[185] the arrangement will

---

[182] David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265, 281 (1963) ("Adequate protection of the public financial interest necessitates public control consonant with public financial risk."); 15 MCQUILLIN, *supra* note 25, § 39:19, at 35 ("Furthermore, while a constitutional restriction prohibiting financial aid toward the construction of enterprises owned or operated by private interests may be violated by contribution of funds to construction of a factory, title to which might devolve upon a private person or entity, funds advanced for the construction of a municipal project does not violate the prohibition where despite incidental advantages to private interests title to the completed facility would devolve upon the municipality.").

[183] Pinsky, *supra* note 183, at 281 ("Adequate protection of the public financial interest necessitates public control consonant with public financial risk.").

[184] STEPHEN P. PECA, REAL ESTATE DEVELOPMENT AND INVESTMENT: A COMPREHENSIVE APPROACH 120–21 (2009) (explaining that arranging for presale of a portion of a project can satisfy common preconditions for debt financing).

[185] Turken v. Gordon, 224 P.3d 158, 164 (Ariz. 2010) (en banc) ("No party questions that payments by the City under the Parking Agreement would serve a public purpose. The parties agree that providing parking is a legitimate public purpose and that the City could have erected a parking structure of its own without violating the Gift Clause.").

not run afoul of public aid limitations.[186] With a government lease or purchase agreement in hand, the project will look more appealing to lenders[187] and may allow the developer to secure a greater amount of low-cost debt as compared to high-cost equity,[188] thus improving the project's feasibility without providing an impermissible subsidy to the project.[189]

Market-Rate Loan (Adequate Security and Risk-adjusted Interest Rate).

Developers typically seek to maximize the amount of low-cost debt capital in development projects because loans—even loans with relatively high interest rates—are still less expensive than equity, thereby reducing the overall cost of capital for a private project.[190] Thus, a government can improve the feasibility of a private development project simply by providing a loan at an appropriate risk-adjusted rate of interest to replace more expensive equity.[191] The meaning of "appropriate risk-adjusted" interest rate is that the loan carries terms that would be expected for comparable loans in the market, such as charging a market rate of interest and requiring appropriate security in the form of a deed of trust or lien on the project.[192] If the

---

[186] Citizens Word v. Canfield Twp., 787 N.E.2d 104, 108 (Ohio Ct. App. 2003) (citation omitted) ("We hold that a governmental entity can improve its own property regardless of whether it will benefit a private developer."); Wilmington Parking Auth. v. Ranken, 105 A.2d 614, 628 (Del. 1954) ("The evil forbidden by the Constitution is not the investment of municipal funds in a public project operated solely by the municipality or other public body. 'It forbids the union of public and private capital or credit in any enterprise whatever.' And the history of the adoption of these or similar constitutional provisions in the various states, following widespread default on railroad securities guaranteed by municipalities, shows that the provision was not intended to prevent a municipality from devoting funds to its own public improvements."). Ampt v. City of Cincinnati, 12 Ohio C.C. 119, (Cir. Ct. 1896), *modified sub nom*. Alter v. City of Cincinnati, 46 N.E. 69 (Ohio 1897) (finding that government prelease of a private facility does not run afoul of public aid limitation). A lease that is merely a disguised loan of the government's credit would be vulnerable to challenge as an impermissible form of public aid. Gallo v. Twp. Comm. of Weehawken, 437 A.2d 738, 742 (N.J. Super. Ct. Law. Div. 1981) ("Under settled principles, therefore, the guarantee of the bonds by Weehawken under the guise of a lease is declared illegal.").

[187] PECA, *supra* note 184, at 120 ("A common condition precedent [for a construction loan] is the prelease or presale of space in the building."); *cf. id.* at 126 (indicating that pre-leasing requirements are relaxed when markets are at or near their peak and banks are competing to make loans to projects); MIKE E. MILES ET AL., REAL ESTATE DEVELOPMENT: PRINCIPLES AND PROCESS 206 (4th ed. 2007) (explaining the value of creditworthy tenants to developers but also noting that "creditworthy tenants know the value they bring to a real estate development and they negotiate lower rents").

[188] RICHARD B. PEISER & DAVID HAMILTON, PROFESSIONAL REAL ESTATE DEVELOPMENT: THE ULI GUIDE TO THE BUSINESS 202 (3d ed. 2012) ("Equity is the most expensive source of funding because equity investors receive returns only after other lenders have been repaid.").

[189] *Turken*, 224 P.3d at 167 (articulating the principle that payment for lease or purchase of public space, if it far exceeds the value of the leased or purchased space, "quite likely violates the Gift Clause").

[190] *See* MILES ET AL., *supra* note 187, at 227 (using an example to illustrate how an investor group sought to "maximize" permanent debt financing because doing so would "provide the cheapest overall financing"); *see also* Guidelines and Objectives for Evaluating Project Costs and Financial Requirements, 24 C.F.R. Pt. 570, App. A (requiring basic financial underwriting for projects receiving Community Development Block Grants and encouraging guidelines to include an assessment of whether private debt financing and equity participation are reasonable).

[191] MILES ET AL., *supra* note 187, at 222 (noting that when the internal rate of return (return for an equity investor) of a project exceeds the interest rate on debt, the use of debt reduces the amount of equity required and magnifies investment returns to the equity investor).

[192] MILES ET AL., *supra* note 187, at 204–05 (explaining that lenders and equity investors consider the "riskiness" of any loans or investments they make and "price" the expected return accordingly).

government receives a second lien that is subordinated to the primary lender's lien, then the interest rate on the government loan should be higher than the rate on the primary loan to reflect the additional risk accepted by the government in providing the loan.[193] A higher interest rate serves another purpose as well: it ensures the government loan is "necessary" by providing an incentive for the developer to maximize less expensive capital from conventional lenders. Practitioners should verify that local government loans do not violate public aid limitations applicable in the state in which a project is located.[194]

Equity Investment (if permitted)

Some private enterprises complain that a project is infeasible due to a financing "gap," and they make requests for gifts or grants of local government funds to make up the so-called gap. There are two major problems with such requests. First, practitioners should be aware that "gap" analysis of this sort suffers from analytical flaws that make such requests inherently misleading.[195] Second, as already discussed, grants by local governments to fill a financing gap would in many cases violate state public aid limitations.[196] Exceptions may be available when a subsidy is necessary for construction of affordable housing for low- and moderate-income persons and for competitive economic development projects.[197] In most other scenarios, however, grants to private enterprises are generally prohibited forms of public aid. Thus, a request for a grant might be more properly interpreted by the government as a request for an equity investment. Care should be exercised, as a number of state constitutions explicitly prohibit governments from making equity investments in private enterprises.[198] Even if not prohibited,

---

[193] *Id.* If the borrower provides security to the government lender that is anything other than the primary (or first) lien on the project—for example, if the government lien is subordinated to some other lender's lien—then the government is accepting higher risk than the primary lender, and the government's higher risk should translate into a higher interest rate for the government-provided loan.

[194] 15 MCQUILLIN, *supra* note 25, § 39:19, at 36 ("The need for development efforts in central city areas is an important public concern and loans to private developers are rationally related to that concern."). *But cf.* Port of Longview v. Taxpayers of Port of Longview, 527 P.2d 263, 271 (Wash. 1974) ("The loan of money or credit by a municipality to a private corporation is a violation of our state constitution regardless of whether or not it serves a laudable public purpose.").

[195] Crude "gap" analysis makes basic assumptions about the availability of private debt and equity to finance a development project and then calculates the difference between the total project costs and the assumed availability of private capital. The difference is then presented as a static financing "gap" that must be filled by a public sector contribution. MILES ET AL., *supra* note 188, at 340. There are at least two problems with utilizing a static "gap" to evaluate necessity. First, it fails to capture what is actually a dynamic and fluid analysis of interdependent capital sources such as equity and debt. Each assumption about a particular capital source affects the other sources and, ultimately, affects investor returns on a project. In reality, gaps are not static, and it is misleading to represent them as such. Second, even if the existence of a so-called "gap" is assumed, it does not help a local government evaluate and compare different legal means of addressing that gap. A gap can be addressed through options ranging from leases to loans, but gap analysis does not inform the important decision about which legally authorized tool is best for addressing the gap. *See* Mulligan, *supra* note 155, at S13 (discussing the weaknesses inherent in gap analysis and proposing an alternative).

[196] *See supra* notes 151–157 and accompanying text.

[197] *See* Mulligan, *supra* note 155, at S16, S24.

[198] *See, e.g.*, S.C. CONST. art. X, § 11 ("Neither the State nor any of its political subdivisions shall become joint owner of or stockholder in any company, association, or corporation."); Neb. League of Sav. & Loan Ass'ns v. Mathes, 266 N.W.2d 720, 721–22 (1978) (describing the state constitution's prohibition against municipalities becoming "a subscriber to the capital stock, or owner of such stock, or any portion or interest therein of any railroad,

equity investments place public funds under private control, so other forms of public participation that provide more government control (already described above) should be considered first. If attempted, equity investments should be made alongside other investors and on the same basis as those other investors; that is, the investment should not crowd out other equity and should earn the same return as other equity investors in the project.[199]

Tax exemptions

It has already been noted that government spending is allowed for public purposes only.[200] Public aid limitations prohibit taxes from being levied on the public generally and then used for the private benefit of a few. However, how taxes are levied and revenues generated is a separate legal question. Some states authorize local governments to establish separate tax classifications or tax exemptions for certain property types.[201] Tax classifications and exemptions are not subject to public purpose and public aid limitation clauses—rather, they are evaluated on the principles of equality and uniformity of taxation enshrined in many state constitutions.[202] Those principles require tax classifications and tax rates to be applied uniformly to all similarly situated properties within the taxing jurisdiction. A common exemption that states have authorized local governments to make is historic landmark status, in which local designation of a structure as a landmark results in favorable tax treatment for the structure.[203] In some states, to make redevelopment of blighted areas more attractive to private developers, entire redevelopment areas may receive a tax exemption for some period of time.

The obvious difficulty posed by tax exemptions is that government revenues are foregone for a fixed time period or in perpetuity. To compensate for the loss of tax revenue, some states allow local governments to assign or negotiate "payments in lieu of taxes," also known as PILOTs, in areas receiving special tax exemptions. PILOTs are considered special assessments, not taxes, and can be pledged by the local government as security for debt financing.[204]

---

or private corporation, or association" and noting that "[a]pproximately 40 states have similar constitutional provisions" with the intent to "keep states and political subdivisions out of private business"); *see also* Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 915 n.42 (2003) ("One nineteenth-century restriction that may have survived the twentieth-century expansion of public purpose is the prohibition on state investment in business corporations."). *But cf.* 2008 Neb. Laws 6 (amending Article XI of the Nebraska constitution to authorize investment of public endowment funds).

[199] MILES ET AL., *supra* note 187, at 340 ("Investment of public dollars requires a return for risk taking *apart from increased collection of property taxes*, based on some form of . . . profit participation in future project revenues." (emphasis added)).

[200] *See supra* notes 151–157 and accompanying text.

[201] *See* REYNOLDS, *supra* note 37, at 375 ("Although taxes may not be levied for private (as opposed to public) benefit, *exemptions* from property taxes may validly be authorized by state law except as such exemptions are prohibited by state constitutions.").

[202] *See* Brian J. McCormick, Jr., *XVI. Taxation*, 27 RUTGERS L.J. 1253, 1253 (1996) ("Uniformity in tax law, within a political subdivision, is accepted, and often mandated, by various state constitutions' Uniformity Clauses and by the Equal Protection Clause of the Fourteenth Amendment.").

[203] MARTINEZ, *supra* note 139, § 12:7 (noting that states have enacted tax laws to aid and promote historic preservation, to include granting localities specific power to reduce tax burdens on historic properties).

[204] *See generally* 14 MCQUILLIN, *supra* note 25, § 38.5.

Are direct subsidies in aid of private enterprise ever permitted?

There are circumstances in which direct subsidies to private enterprise do not run afoul of public aid limitation clauses. First, a direct subsidy will obviously be permissible in a state in which the courts have declined to enforce constitutional public aid limitations, usually by showing an unusual amount of deference to the legislature.[205] Second, there may be rare occasions in which all of the other options described above (which do not involve direct subsidy payments to the developer) have been attempted but nonetheless have failed to make a project feasible. For the most challenging projects, a loan with an extraordinarily long amortization period and a very low interest rate will always make a development project feasible; however, extremely generous loan terms essentially amount to a direct subsidy to the developer. In such cases, provided a legitimate public purpose is being served, a direct government subsidy of this sort to a private enterprise may in fact be necessary to accomplish the desired end.[206] For example, a direct subsidy is often required—and is lawful—to induce a private developer to construct affordable housing for low income persons. Such housing requires significant direct subsidy to make units affordable to households at very low income levels.

Some blight elimination programs, including federal Community Development Block Grants, contemplate the possibility of making generous loans available to private developers who agree to reduce or eliminate blight in designated blighted areas. However, even when authorized, the local government must perform adequate underwriting to determine (1) that the subsidized loan is necessary to make the project go forward, and (2) that the project, which was infeasible without the subsidized loan, will attain long-term feasibility and achieve the approved public purpose after the subsidy is provided.[207]

---

[205] Briffault, *supra* note 198, at 914 (characterizing some courts as assuming that legislative determinations "that a spending, loan, or tax incentive program will promote the public purpose are to be accepted as long as they are 'not . . . irrational.' ").

[206] For a description of a framework for courts to use in determining whether a subsidy is "necessary," see Mulligan, *supra* note 161.

[207] Guidelines and Objectives for Evaluating Project Costs and Financial Requirements, 24 C.F.R. Pt. 570, App. A (describing underwriting considerations in determining whether a project is "financially feasible").