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Constitutional Limitations on Governmental Participation in Downtown Development Projects

*David M. Lawrence**

I. INTRODUCTION

The decline and decay of the downtown areas of American cities is well known and widespread. Over the years, inner city residents have moved to the suburbs and have been followed by downtown retailers who have relocated their businesses in suburban shopping malls. Changing industrial technology has caused factories to move from inner city lofts to single-level suburban sites, and modern communications systems have permitted company headquarters and professional firms to locate away from the downtown area. Throughout this process, central city governments have sought to halt and reverse the trend and to return the downtown areas to their former vitality. Initially local governments tried to encourage private investors to participate in downtown development projects by improving the downtown area's public infrastructure.[1] Under this approach, the government would improve and widen downtown streets and sidewalks, provide alternate traffic routes, and open new shopping malls and parking garages with the expectation that private investors would develop the particular area even further.

A second approach that city governments have employed is to encourage downtown development in the private sector by reduc-

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1. Green, *The City's Role in CBD Revitalization*, in GUIDELINES FOR BUSINESS LEADERS AND CITY OFFICIALS TO A NEW CBD 131 (R. Mace ed. 1961).

ing the burdens of taxation and regulation on the participants in downtown development projects.[2] For example, a new private developer might receive a complete or partial abatement of property taxes for several years or, in exchange for promising to provide various public amenities such as a plaza at ground level, be placed in a special zoning classification that permits the construction of a taller building.

Because infrastructure improvement and tax and zoning incentives attempt only to encourage development generally, some local governments recently have begun to use a third approach, which envisions promoting *specific* development projects — especially projects that might trigger further private development.[3] These ventures require active cooperation between the public and private sectors, with each sector responsible for specific components of the entire project. For example, a single project might include a large parking facility with a convention center, a hotel, and one or more retail or office structures located in the air space above the facility. In such a project, the city might acquire the land and construct the parking garage and convention center, and the private developer might lease the air space from the city and construct the other buildings. The city would build the parking facility as a part of this particular project, rather than as part of a program to improve the general downtown infrastructure. The Urban Development Action Grant program,[4] which provides federal financial support to job-creating economic development projects, has encouraged this approach by giving funding preference to projects in which both the public and private sectors of the community participate.[5]

A continuing concern for attorneys who advise public participants in these public/private projects has been the extent to which a city constitutionally may participate in a downtown development scheme. Most state constitutions contain one or more limitations

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2. For a discussion on tax incentives, see URBAN LAND INSTITUTE, DOWNTOWN DEVELOPMENT HANDBOOK 161-68 (1980). For a discussion on incentive zoning, see 2 R. ANDERSON, AMERICAN LAW OF ZONING (SECOND) § 9.23 (1976).

3. Recent literature has discussed the emerging use of this third approach of a puhlic/private partnership. *See, e.g.*, URBAN LAND INSTITUTE, *supra* note 2; Madonna, *Public/Private Partnership for Downtown Development*, URB. LAND, Feb. 1980, at 12.

4. The statutory authority for the Urban Development Action Grant program is codified at 42 U.S.C. § 5318 (Supp. III 1979 & West Supp. 1981).

5. 24 C.F.R. § 570.458 (1981); Cordish, *Overview of UDAG*, in THE URBAN DEVELOPMENT ACTION GRANT PROGRAM 7 (R. Nathan & J. Webman eds. 1980).

on public assistance to private enterprise,[6] which were enacted in the aftermath of the painful lessons that were learned from the pervasive public assistance to railroads in the nineteenth century.[7] These express constitutional provisions, together with the comparable case law doctrines of public use and public purpose,[8] clearly prohibit some—though not all—forms of public participation in downtown development projects. The purpose of this Article is to investigate the constitutional boundaries that surround the most common forms of governmental participation.

Part II of the Article discusses the constitutional limitations on property transactions in which the government either uses its power of eminent domain to condemn land for private downtown development, acquires land for the same purpose through a voluntary sale by the owner of the land, or subsidizes private development by its method of conveying property to the developer. Part III of the Article then discusses the problems that arise when a downtown project includes both public and private facilities, and the public facilities arguably benefit the private facilities far more than they do the general public. Finally, the Article concludes by briefly summarizing the actual or probable resolution of the major legal issues in each of the topic areas.

II. PROPERTY TRANSACTIONS

A local government often will acquire land for downtown development and subsequently will sell or lease that land to a private developer. These types of property transactions might benefit a developer in several ways, some or all of which might be present in a

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6. *See, e.g.*, FLA. CONST. art. 7, § 10; MINN. CONST. art. 11, § 2; N.M. CONST. art. IX, § 14; OR. CONST. art. XI §§ 7, 9.

7. For an excellent discussion of these limitations, see Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265 (1963).

8. The doctrine of public use is a limitation on the power of eminent domain. The state courts uniformly hold that public and private agencies which enjoy the power of eminent domain may take property for public uses only. The limitation usually is not set out explicitly in state constitutions, but rather has been created by judicial decision. The courts are not as uniform in determining what constitutes a public use, however. See 2A P. NICHOLS, THE LAW OF EMINENT DOMAIN ch. 7 (J. Sackman 3d ed. 1980), for an extended discussion of the doctrine.

The doctrine of public purpose, on the other hand, limits governmental expenditure. If an activity is not for a public purpose, the government may not expend public funds on it. As with the doctrine of public use, the public purpose limitation is uniformly accepted but differently applied by the states and usually is created by judicial decision rather than express constitutional provision. See 2 C. ANTIEAU, MUNICIPAL CORPORATION LAW §§ 15A.06-.23 (1979), for an exhaustive discussion of the doctrine.

particular instance. Through the use of its eminent domain power,[9] for example, a government can facilitate—or render possible—the assembly of land currently divided into a number of small separately held lots. Moreover, by writing-down[10] the cost of acquiring and clearing the land, a government can provide cleared land at a cost that is well below what it would have cost the developer to purchase and clear it; this procedure in turn reduces the developer's equity and increases the return on his investment. In addition, through simply buying the land and selling it at cost — perhaps in staged installments—or leasing it to a developer, a government might enable the developer to resolve cash flow problems or reduce equity requirements. This part of the Article, therefore, discusses the constitutionality of the following governmental activities: The use of eminent domain to purchase land for private downtown development;[11] the voluntary purchase of land for the same purpose;[12] and the government's use of subsidized conveyances[13] to encourage private participation in downtown development projects.[14]

A. Acquisition by Eminent Domain

A local government's exercise of its power of eminent domain

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9. Eminent domain—or condemnation—is, of course, the power of the sovereign or its agent to take private property for public use without the owner's consent. Both the federal and the various state constitutions require that the condemnor pay just compensation to the former owner of the property. See 2A P. NICHOLS, *supra* note 8, at ch. 1, for a basic discussion of the power of eminent domain.

The power of eminent domain frequently is contrasted to the police power. The latter is the power to regulate property (and persons), and no compensation is required. The line between the two sovereign powers is often dim, and a lively literature has developed that attempts to delineate it. *See, e.g.*, Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

10. *See infra* note 104 and accompanying text.

11. *See infra* notes 15-82 and accompanying text.

12. *See infra* notes 83-93 and accompanying text.

13. *See infra* notes 94-120 and accompanying text.

14. Another form of government assistance is the sale or lease of land that the government already owns, but which it does not need for corporate purposes—that is, surplus land. If this land is conveyed at market value, constitutional issues usually do not surface. 10 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 28.38a (3d ed. rev. 1981). If the land was acquired by dedication, however, the government may not be free to dispose of it, even if the land is no longer needed for the dedicated purpose. 11 *id.* § 33.76. Sales of surplus land often are required by statute to be made by competitive methods, 10 *id.* § 28.45, and such a requirement may create inconveniences in the downtown development context. Statutory problems, however, are relatively easy to cure.

One special form of surplus property—rights to air space over public facilities—is discussed in more detail below. *See infra* text accompanying notes 152-56.

to acquire property for subsequent resale to a private developer raises the constitutional question whether this use of the government's condemnation power is indeed a public one. The raising of this issue, of course, assumes that the public use requirement remains a viable limitation on the power of eminent domain; this assumption, however, is not universally accepted.[15] Nevertheless, in one set of circumstances the requirement does seem to have retained some vitality. This situation occurs when the government arguably is condemning one private party's property for the purpose of conveying that property to another private party,[16] which is one way that a government's actions in a downtown development condemnation can be characterized. Therefore, because the public use requirement retains its vitality when such a characterization is possible, the public use requirement for a government's exercise of its eminent domain power is assumed to be a viable limitation on that power.

The discussion below considers three possible bases for a government's use of its eminent domain power to support a downtown development project. The first justification stems from cases that have approved various forms of governmental assistance to industrial development. The second relies on decisions that have upheld local participation in the federally funded urban renewal program. The final justification maintains that downtown development, in and of itself, constitutes a public use.

1. The Industrial Development Cases

In the last thirty years state and local governments have developed a variety of programs either to encourage or to subsidize industrial development. These programs include industrial development bonds, industrial development loans and loan guarantees, loan repayment subsidies, and the actual contribution of equity capital.[17] Not surprisingly—considering bond counsel's need for certainty about whether the government's purpose in issuing the

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15. *See, e.g.*, Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

16. *See, e.g.*, Rudee Inlet Auth. v. Bastian, 206 Va. 906, 147 S.E.2d 131 (1966). The court in *Bastian* held that since the Authority's enabling legislation permitted it to sell or lease property which it had acquired through condemnation without placing in the deed restrictions on its use, any governmental attempt to condemn land under that legislation would be for a private use and would thus be invalid.

17. For a discussion of the range of these programs, see L. LITVAK & B. DANIELS, INNOVATIONS IN DEVELOPMENT FINANCE (1979).

bond is constitutionally permissible—the litigation challenging these programs has tended to focus on the constitutionality of industrial development revenue bonds.[18] Most courts have validated programs that utilize these bonds, notwithstanding arguments that the bonds unconstitutionally "loan" the public credit, that the public is making an unconstitutional donation to a private party, and that the programs do not serve a public purpose.[19] In upholding these programs courts often speak broadly about the appropriateness of government support of economic development. The Supreme Court of Kentucky, for example, using language that courts in subsequent industrial development bond cases have quoted frequently, stated that

> [t]he consensus of modern legislative and judicial thinking is to broaden the scope of activities which may be classed as involving a public purpose. . . . It reaches perhaps its broadest extent under the view that economic welfare is one of the main concerns of the city, state and the federal governments.[20]

The Kentucky court then analogized economic development programs, which provide jobs and thereby reduce poverty, to welfare programs, which also reduce the burdens of unemployment and poverty.[21]

The above mentioned cases uphold a variety of spending programs that allow direct governmental assistance to private concerns for the purpose of encouraging economic development. Downtown development may be viewed as one form of economic development, since it clearly provides jobs and increases the particular locality's tax base. Nevertheless, the economic development cases do not provide strong support for a local government's use of eminent domain to support downtown development. Simply because a government constitutionally may exercise its spending power to foster economic development does not automatically authorize that government to use its power of eminent domain to reach the same end. Although some authority exists for the proposition that once a particular goal is accepted as a legitimate one

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18. In order to be marketable, municipal bonds must be accompanied by an opinion of bond counsel stating that the bonds are valid obligations of the issuing unit and that the interest on the bonds is exempt from federal income tax. For an explanation of how industrial development revenue bonds function, see *infra* notes 33-35 and accompanying text.

19. *See* Mitchell v. North Carolina Indus. Dev. Fin. Auth., 273 N.C. 137, 159 S.E.2d 745 (1968). The court in *Mitchell* made a comprehensive survey of the case law on this issue through 1967. For a more recent, supplemental list, see City of Pipestone v. Madsen, 287 Minn. 357, 178 N.W.2d 594 (1970).

20. Faulconer v. City of Danville, 313 Ky. 468, 472, 232 S.W.2d 80, 83 (1950).

21. *Id.*

for governmental action, the government may use any of its basic powers—taxing, spending, regulating, and condemning—to reach that goal,[22] at least one commentator has propounded the opposite—and better reasoned—viewpoint.[23] Under state law, both the police power[24] and the taxing power[25] are broader than the spending power. For example, a city might require by ordinance that all owners of private residential swimming pools fence in their pools;[26] if, however, the city chose to grant money outright to those owners, the city's actions probably would not survive a public purpose challenge. Similarly, the universal property tax exemption for church properties does not support cash grants to churches,[27] and state income tax deductions for mortgage interest do not support comparable grants to all homeowners.[28]

The power of eminent domain, as limited by the doctrine of public use, is even more narrow than the spending power, which is limited by the doctrine of public purpose.[29] A county, for example, clearly serves a public purpose by operating a library and, presumably, by purchasing a rare literary work such as a Gutenberg Bible to be included in that library. In contrast, a court probably would not allow the county to acquire the Bible forcibly from an owner who happened to live within the county's jurisdiction. Condemnation of property for a public project clearly affects the owners of that property much more directly than the levy of a tax for the project affects the average taxpayer. One commentator, however, has suggested that the compensation requirement counterbalances

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22. *See* New York City Hous. Auth. v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

23. *See* 2A P. NICHOLS, *supra* note 8, § 7.225[3].

24. "The police power is an inherent power of the sovereign states which was possessed by them before the adoption of the United States Constitution and which has been reserved to them under the Tenth Amendment to the United States Constitution." C. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 19.1, at 447 (1980).

25. "[T]he power to tax is considered a right inherent in the state and an attribute of sovereignty." *Id.* § 28.1, at 952. The taxing power is used both to raise revenues and to pursue nonrevenue purposes through tax legislation. *See generally id.* § 28.15, at 980.

26. *See, e.g.*, Palangio v. City of Chicago, 23 Ill. 2d 570, 179 N.E.2d 663 (1962).

27. The Supreme Court in Walz v. Tax Comm'n, 397 U.S. 664 (1970), upheld church property tax exemptions.

28. Courts have upheld state and local subsidies of middle-income housing either as a support to low-income housing or because of private market failures. *See, e.g.*, Minnesota Hous. Fin. Agency v. Hatfield, 297 Minn. 155, 210 N.W.2d 298 (1973); Infants v. Virginia Hous. Dev. Auth., 221 Va. 659, 272 S.E.2d 649 (1980). These cases, however, would not support the subsidization of all homeowners—i.e., upper-income owners as well as middle- and lower-income owners.

29. *See supra* note 8.

the direct impact of condemnation on the property owner.[30] This proposition is questionable at best. A property owner who forces a government to exercise its eminent domain power to acquire his property might do so for one or more of several reasons, but more often than not one principal reason is that he simply does not want to sell at all—or at least not at a price that is even remotely equivalent to the "market" price. The homeowner might have a sentimental attachment to his home or neighborhood, or he might not want to undergo the burdens of moving. These personal values are noncompensable, and, therefore, the compensation requirement does not counterbalance completely the direct and narrow impact of a condemnation. In fact, a condemnation could leave the condemnee less well off than he was before the taking, even if he does not have a special personal attachment to the property. A small businessman whose store is condemned, for example, might lose the local clientele that he has built up over many years. If he is unable to relocate in the same neighborhood, or if the neighborhood itself has been dispersed, the businessman may lose a sizable portion of his patronage even though the value of his goodwill is noncompensable.[31] These points suggest that courts should not validate a particular application of eminent domain solely because other decisions have held spending programs seeking the same end to be constitutional on the ground that they serve a public purpose.[32]

This proposition is particularly true in cases that uphold industrial development revenue bonds. The proceeds of such a bond issue typically are used to construct an industrial facility according to the specifications of a particular business enterprise. The bond issuer—a state or local government—then contracts with the enterprise to enable the latter to occupy the industrial facility during the period in which the bonds remain outstanding. Under the contract, the enterprise's payments are fixed to meet debt service on the bonds plus any other expenses of the issuing agency that are related to the transaction. Once the bonds are retired, the facility

30. Stoebuck, *supra* note 22, at 596.

31. 2 P. NICHOLS, *supra* note 8, § 5.76.

32. *See* Shizas v. City of Detroit, 333 Mich. 44, 52 N.W.2d 589 (1952). *Shizas* suggests judicial support for the distinction that is drawn in the text. The court in *Shizas* held the government's condemnation of land for a parking garage to be invalid because some of the space would be leased to private, commercial tenants. The court distinguished a similar New York case in part on the ground that in the New York case the public agency already owned the land, and, therefore, condemnation was not an issue.

is conveyed to the enterprise for a nominal sum. Because the only security for the bonds is the issuer's contract with the enterprise, the bonds are sold on the credit of the enterprise, not the issuing government. The chief reason for the government's involvement, of course, is that the interest on the bonds is exempt from federal income tax if a state or local government is the issuer.[33]

With industrial development revenue bonds, then, neither the revenues nor the credit of the issuing government is actually risked in aiding industrial development.[34] This fact certainly must have influenced the attitudes of those state courts that have ruled on the constitutionality of state and local government bond programs. As one Pennsylvania judge noted, "Fundamentally, [industrial development revenue bond] programs involve no more than the creation of an atmosphere conducive to industrial and economic growth by providing the mechanism for the realization of permissible tax benefits. No public property is devoted, nor credit lent to the industrial lessee."[35] If industrial development bonds had been general obligations on the government, or if the government's role in these schemes was otherwise more active, it is unlikely that the courts would have taken such a relaxed view of the permissible range of governmental activities. Indeed, some of the decisions that have invalidated these bond programs indicate that the courts may not have fully understood the reason for the government's issuance of the bonds.[36]

Both courts and legislatures have indicated their belief that judicial approval of industrial development revenue bond programs does not provide persuasive authority for the constitutionality of invoking eminent domain powers for the purpose of industrial development. Most industrial development revenue bond statutes do

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33. I.R.C. § 103(c) (1976 & Supp. III 1979).

34. In a few instances governments have issued, and courts have approved, general obligation issues for industrial projects. *See, e.g.*, Wright v. City of Palmer, 468 P.2d 326 (Alaska 1970).

35. Basehore v. Hampden Indus. Dev. Auth., 433 Pa. 40, 67, 248 A.2d 212, 225 (1968) (Roberts, J., concurring).

36. *See, e.g.*, Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 345, 353 P.2d 767, 772 (1960) ("It is obvious that one of the prime purposes of having the necessary bonds issued by and in the name of a municipality is to make them more readily salable on the market."); State v. City of York, 164 Neb. 223, 227, 82 N.W.2d 269, 272 (1957):

> If evidences of indebtedness by interested private persons are inadequate and revenue bonds of the city are sufficient, either the credit of the city has been extended or their purchasers are victims of a base delusion. . . . The use of the city as the payer of the bonds is intended to give respectability to them because of the general acceptability of cities as a source of bond issues in financial markets.

not grant eminent domain authority to the agencies issuing the bonds,[37] and some even expressly deny this authority.[38] In addition, a majority of the courts which have confronted the issue directly have held that condemnation for economic development alone—for example, for a factory site or an industrial park — does not meet the public use requirement and, therefore, is unconstitutional.[39]

In sum, the case law upholding various industrial development assistance programs should not automatically be extended to permit governmental assistance in the form of eminent domain. Furthermore, the underlying rationales for approval of these existing assistance programs do not support condemnations for the same purpose, particularly in the downtown area. Perhaps the two most common rationales that are used to justify industrial development assistance programs are the creation of jobs—especially in times or areas of high unemployment—and the diversification of the community's economic base, both of which are said to help cushion the effects of economic downturns.[40] Almost all the programs that have been tested in the courts have been industrial development programs, and several of the courts in these cases have made special reference to the multiplier effect of industrial jobs,[41] an effect that is not inherent in retail or other commercial employment. Most downtown developments that create jobs create commercial jobs—for example, in hotels, office buildings, or retail establishments—and the public benefit of manufacturing jobs is rarely present. Other downtown development projects provide housing, and

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37. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 9-1151 to -1196 (1977); N.D. CENT. CODE §§ 40-57-01 to -20 (1968 & Supp. 1981).

38. *See, e.g.*, ILL. ANN. STAT. ch. 48, ¶ 850.07, § 7(e) (Smith-Hurd Supp. 1981-1982); IOWA CODE ANN. § 419.14 (West 1976). In the usual case the private company owns the land initially, and, therefore, eminent domain is unnecessary.

39. *See, e.g.*, City of Little Rock v. Raines, 241 Ark. 1071, 411 S.W.2d 486 (1967); City of Owensboro v. McCormick, 581 S.W.2d 3 (Ky. 1979); Opinion of the Justices, 152 Me. 440, 131 A.2d 904 (1957); Opinion to the Governor, 79 R.I. 305, 88 A.2d 167 (1952) (dicta); Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959). *Contra* Prince George's County v. Collington Crossroads, Inc., 275 Md. 171, 339 A.2d 278 (1975); Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981).

40. *See* DeArmond v. Alaska State Dev. Corp., 376 P.2d 717 (Alaska 1962); Roan v. Connecticut Indus. Bldg. Comm'n, 150 Conn. 333, 189 A.2d 399 (1963).

41. *See, e.g.*, City of Gaylord v. Gaylord City Clerk, 378 Mich. 273, 144 N.W.2d 460 (1966); City of Pipestone v. Madsen, 287 Minn. 357, 178 N.W.2d 594 (1970); State v. La Plante, 58 Wis. 2d 32, 205 N.W.2d 784 (1973). Although manufacturing plants typically produce goods that are sold outside the region, part of the resulting income is spent within the region and creates further jobs. This phenomenon is known as the multiplier effect of industrial jobs. *See* W. HIRSCH, URBAN ECONOMIC ANALYSIS 186-94 (1973).

housing projects create very few permanent jobs of any sort. Thus, the multiplier effect rationale that supports governmental assistance to industrial development loses much of its force when governments use it to justify downtown development.[42]

The diversification rationale also fails to provide support for invoking eminent domain to assist downtown development projects. In the industrial development context, a community that is seeking to diversify is trying to lessen its dependence on one or a few plants or industries. The community, therefore, would be justified in attempting to attract new manufacturers to the area. For the diversification analogy to be viable in the downtown development context, the local government would have to be seeking to bring categories of businesses to its downtown area that did not then exist in the entire region—not merely in the downtown area. A local economy is area-wide, not downtown-wide, and a community would enjoy the benefits of diversity from the opening of new businesses anywhere in its metropolitan region. Downtown development, however, does not necessarily attract *new* development to the region; it may direct development toward the downtown area as opposed to the suburbs. The hotel, the office space, and the retailing space could be constructed anywhere in the metropolitan area. Consequently, downtown development usually does not further the goal of metropolitan economic diversification.

Thus, the industrial development cases do not support the use of eminent domain for downtown development projects. As noted above, the major rationales that governments use to justify exercising their other basic constitutional powers to encourage or assist industrial development simply do not provide sufficient justification for the exercise of eminent domain powers to subsidize downtown development. A second doctrinal base, however—urban renewal—provides a more promising justification for a government's use of this power.

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42. Quite recently, a few courts have upheld the constitutionality of industrial revenue bonds for commercial purposes. *See, e.g.*, Marshall Field & Co. v. Village of South Barrington, 92 Ill. App. 3d 360, 415 N.E.2d 1277 (1981); State *ex rel.* Ohio County Comm'n v. Samol, 275 S.E.2d 2 (W. Va. 1980). The court in *Samol* expressly stated that it could see no distinction between industrial and commercial projects. *Id.* at 4. The South Carolina Supreme Court, on the other hand, held a government's authorization to use these bonds for computer and office facilities and shopping centers to be unconstitutional. State *ex rel.* McLeod v. Riley, 278 S.E.2d 612 (S.C. 1981). The court expressly noted that commercial projects do not provide very many new jobs.

2. The Urban Renewal Cases

Congress initiated the federal urban renewal program with the Housing Act of 1949.[43] Although a number of amendments to the program were enacted during its existence, the original plan, which continued throughout the life of urban renewal, envisioned an initial acquisition of land by a local redevelopment agency—by eminent domain if necessary—followed by clearance of the land by the agency, installation of public improvements, and sale of the land to private developers. The proceeds from the sale typically were well below the cost of acquisition and clearance. Under the program, the primary role of the federal government was to finance the major share of this "net project cost."[44] The local government's role in urban renewal is strikingly similar to the part which local governments play in the downtown development projects that are the focus of this Article.

Under the urban renewal program, only certain property could be acquired for a development project. The property had to be part of either a slum or a blighted area (an area in danger of becoming a slum);[45] thus, the public use that justified the condemnation was slum elimination or prevention. Each of the courts that upheld condemnation for urban renewal addressed the constitutional problems that arose because the government was condemning private property and frequently selling it to another private user.[46] In each case the court characterized the program as one designed to eliminate existing or incipient slums and justified the ultimate sale of the property to a private developer by stating either that the sale was incidental to this basic purpose[47] or, more positively, that the condemnation was a crucial component of the program and was necessary to ensure that the properties did not

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43. Ch. 338, § 2, 63 Stat. 413 (1949) (codified as amended in scattered sections of 42 U.S.C.). Under the Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 101, 88 Stat. 633 (1974) (codified as amended in scattered sections of 12, 42 U.S.C.), urban renewal was one of the categorical programs merged into the Community Development Block Grant program.

44. For a description of the urban renewal program, see Slayton, *The Operation and Achievements of the Urban Renewal Program*, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 189 (J. Wilson ed. 1966).

45. 2A P. NICHOLS, *supra* noto 8, § 7.51561 to .51561[1].

46. All but three states—Florida, Georgia, and South Carolina—have upheld the constitutionality of local participation in the urban renewal program. The Georgia decision was nullified by constitutional amendment, and later Florida decisions seriously undercut that state's initial decision. For a collection of these cases, see 2A P. NICHOLS, *supra* note 8, § 7.51561 n.1.

47. *See* Housing & Redev. Auth. v. Greenman, 255 Minn. 396, 96 N.W.2d 673 (1959).

revert to their former substandard condition.[48]

Although the primary federal concern throughout the life of the urban renewal program was improving the housing conditions of the poor—either through clearance or rehabilitation of substandard dwellings or through redevelopment of the project areas with new low-income housing—the cases that upheld local participation in these programs were not limited to residential development schemes.[49] Local governments constitutionally could condemn property that was in a blighted area regardless of whether the area was residential or commercial and regardless of the intended subsequent reuse of the property.[50] Thus, if a downtown development project is planned for an area that meets the state's statutory definition of blight, the existing statutory procedures and validating case law arguably could support the government's acquisition of the necessary property by eminent domain.

This proposition, of course, raises the issue of when an area for which a downtown project is proposed will be considered blighted. In addressing this question, one should first realize that one of several possible dominant land use patterns might characterize a particular project area.[51] These areas typically are characterized by a number of small two and three story buildings that are at least a generation old. In all likelihood, most businesses, if they exist at all, occupy these buildings as tenants rather than as owners, and many of the owners are absentees. The variations between areas arise from the different uses that owners or occupants make of the buildings. The existing structures, for example, might be empty and deteriorating, or they might be vacant but only marginally maintained at or just above code requirements. Alternatively, small enterprises may be operating in the area with businesses that, although perhaps not flourishing, are at least surviving. These businesses might be considered innocuous—for example, grocers, printing shops, or insurance agencies. Conversely, the businesses might be considered the precursors of blight themselves if, for example, they are operating as pawnshops or as bail bondsmen.

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48. *See* Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 104 A.2d 365 (1954).

49. 2A P. NICHOLS, *supra* note 8, § 7.51561[2]-[3].

50. *Id.*

51. The condition of the individual property to be condemned is not the crucial factor to a finding of blight; rather, the condition of the area as a whole is the determinative consideration. Thus, if the entire area is blighted, then sound buildings that house flourishing businesses may, without question, be condemned as part of a redevelopment project. *See* Berman v. Parker, 348 U.S. 26 (1954).

Although the statutory definitions of the terms "slum" and "blight" are not uniform throughout the fifty states, and although in some states they scarcely can be characterized as definitions at all,[52] one set of definitions recurs frequently enough to be considered the norm.[53] The Arizona statute, which provides a relatively typical example, defines "slum area"[54] rather narrowly, but gives a much broader definition of a "blighted area."[55] Arizona's definition of slum area is largely concerned with the conditions of existing structures, the degree of crowding in those structures, and the effects of these conditions and the crowding on the public health and safety. Rigorously applied, the statute probably would extend at most to the first of the land use patterns which were posited above, namely, that of empty and deteriorating buildings. The definition of blighted area under the Arizona statute, however, is entirely different. This definition is not concerned so much with the conditions of the buildings themselves, but with a variety of external factors, such as poor platting, diversity of ownership, and title problems, that could either affect the uses to which the buildings are put or create obstacles to private redevelopment. The definition, therefore, is very broad and seems to include not only all the

52. Connecticut, for example, defines a "redevelopment area" as "an area within the state which is deteriorated, deteriorating, substandard or detrimental to the safety, health, morals or welfare of the community." CONN. GEN. STAT. § 8-125(b) (1979).

53. *See, e.g.*, GA. CODE ANN. § 69-1119 (1976); IOWA CODE ANN. § 403.17 (West 1976); ME. REV. STAT. ANN. tit. 30, § 4801 (1978); WYO. STAT. § 15-10-101 (1980).

54. According to the Arizona statute, a "slum area" is an area in which
> a majority of the structures are residential, or an area in which there is a predominance of buildings or improvements, whether residential or nonresidential, and which, by reason of dilapidation, deterioration, age or obsolescense, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property by fire or other causes, or any combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime, and is detrimental to the public health, safety, morals, or welfare.

ARIZ. REV. STAT. ANN. § 36-1471(18) (1974).

55. A "blighted area" is an area
> other than a slum area, which by reason of the predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire or other causes, or any combination of such factors, substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use.

Id. § 36-1471(2).

possible land use patterns described above, but also any other aging downtown area that someone might think is in need of redevelopment.

Even though all but three states have upheld urban renewal programs—and, consequently, something similar to the definition of blight described above—against constitutional attacks,[56] courts have rarely been confronted with proposed actions that carry the definition to its limit and, for example, seek to condemn property simply because the lots are small and the ownership is diverse. The various state legislatures wrote the urban renewal statutes to enable local governments to participate in a federal program; under these statutory schemes, therefore, an area probably would not he designated as blighted unless it met both federal standards and those of the state enabling act. The federal standards, however, were more similar to the states' statutory definition of slum than to their definition of blight.[57] These federal urban renewal standards centered on the condition and use of buildings; they made no mention of factors such as obsolete platting, diversified ownership, and substantial tax delinquency. To qualify as a federally funded urban renewal area, at least twenty percent of the area's buildings had to suffer from one or more "building deficiencies."[58] In addition, the entire area had to contain at least two "environmental deficiencies," which are factors that are concerned with overcrowding, incompatible or detrimental land uses, or deficient public facilities.[59] Furthermore, if the area was to be cleared rather

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56. *See supra* note 46.

57. *See* U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, URBAN RENEWAL HANDBOOK, RHA 7205.1, ch. 1 (1968).

58. *Id.* at 1. The listed building deficiencies were the following:

(1) Defects to a point warranting clearance.

(2) Deteriorating condition because of a defect not correctable by normal maintenance.

(3) Extensive minor repairs which, taken collectively, are causing the building to have a deteriorating effect on the surrounding area.

(4) Inadequate original construction or alterations.

(5) Inadequate or unsafe plumbing, heating, or electrical facilities.

(6) Other equally significant building deficiencies.

Id. at 1-2.

59. *Id.* at 1. The listed environmental deficiencies were the following:

(1) Overcrowding or improper location of structures on the land.

(2) Excessive dwelling unit density.

(3) Conversions to incompatible types of uses, such as rooming houses among family dwellings.

(4) Obsolete building types, such as large residences or other buildings which through lack of use or maintenance have a blighting influence.

than rehabilitated, the federal standards required that the area meet one of two additional tests: (1) more than fifty percent of the area's buildings had to be so structurally substandard that they required clearance; or (2) more than twenty percent of the buildings had to meet the first test and an additional number—at least thirty percent—had to be removed to eliminate "blighting influences" that were very much like environmental deficiencies.[60] Thus, the federal requirements made it unlikely that a court would have occasion to discuss the more questionable elements of the blighted area definition; consequently, using the urban renewal cases as authority for the appropriateness of exercising eminent domain in areas that meet only this broad definition is questionable.

Indeed, a few of the courts that have upheld the urban renewal process against constitutional attack—in cases in which the area concerned clearly was a slum—expressed their concern about the government's use of eminent domain under the broad blighted area definition. The Maine Supreme Judicial Court, for example, after upholding the constitutionality of slum clearance, noted that "[s]everal of the conditions [in the blighted area definition] do not in our view touch upon a public use. Examples are found in 'faulty lot layout,' 'deterioration of site,' 'diversity of ownership,' 'defective or unusual conditions of title,' 'improper subdivisions or obsolete platting,' or 'mixture of incompatible uses.' "[61] Similarly, the Delaware Supreme Court indicated that it had the "very gravest doubt" about the constitutionality of eminent domain in an area that met only the blighted area definition.[62]

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(5) Detrimental land uses or conditions, such as incompatible uses, structures in mixed use, or adverse influences from noise, smoke, or fumes.
(6) Unsafe, congested, poorly designed, or otherwise deficient streets.
(7) Inadequate public utilities or community facilities contributing to unsatisfactory living conditions or economic decline.
(8) Other equally significant environmental deficiencies.

Id. at 2.

60. *Id.* RHA 7207.1, ch. 1, at 3-4. The listed influences were the following:
(a) Inadequate street layout.
(b) Incompatible uses or land use relationships.
(c) Overcrowding of buildings on the land.
(d) Excessive dwelling unit density.
(e) Obsolete buildings not suitable for improvement or conversion.
(f) Other identified hazards to health and safety and to the general well-being of the community.

Id. at 4.

61. Crommett v. City of Portland, 150 Me. 217, 235, 107 A.2d 841, 851 (1954).

62. Randolph v. Wilmington Hous. Auth., 37 Del. Ch. 202, 218, 139 A.2d 476, 485

Other courts, however, have been more receptive to condemnations based only upon a finding of blight. The New Jersey Supreme Court in *Levin v. Township Committee of Bridgewater*,[63] for example, expressly upheld the use of eminent domain in a blighted area. The court based its decision upon the following statutory standard:

> [A]n area is blighted where there exists "[a] growing or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein and other conditions, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety, and welfare."[64]

Moreover, the Minnesota Supreme Court in a remarkable case accepted without question the government's condemnation of land for purposes of clearance and redevelopment in an area that was not blighted, but simply evidenced a "trend toward decreasing utility and tax base."[65]

Notwithstanding these decisions, most courts have not had an occasion to review the blighted area definition. The near-complete acceptance of urban renewal, however, clearly does not guarantee an equally broad acceptance of condemnation in areas that are defined as blighted simply because more productive use might be made of the land. Thus, although the urban renewal cases are more promising as authority for the government's use of eminent domain in downtown development projects than are the industrial bond cases, they nevertheless do not provide as strong a basis for support as initially appears. One further potential justification, however, does exist; this rationale is that downtown redevelopment, in and of itself, is a public use that warrants a local government's invocation of eminent domain without reference to any other persuasive authority.

3. Downtown Redevelopment as an Independent Public Use

At least two courts have suggested that the redevelopment of downtown areas, in and of itself, is a public use or public purpose in the same way that the renewal of slums is a public use. In *State*

(1958); *see also* Miller v. City of Tacoma, 61 Wash. 2d 374, 378 P.2d 464 (1963) (failure to meet "blighted area" definition will not necessarily defeat constitutionality).

63. 57 N.J. 506, 274 A.2d 1 (1971).

64. *Id.* at 510, 274 A.2d at 3 (quoting N.J. STAT. ANN. 40:55-21. 1(e) (West 1967); *accord* Romeo v. Cranston Redev. Agency, 105 R.I. 651, 254 A.2d 1 (1971).

65. City of Minneapolis v. Wurtele, 291 N.W.2d 386, 388 (Minn. 1980).

v. Coghill[66] the Supreme Court of West Virginia upheld the city of Charlestown's plan to lease private commercial space in a publicly owned parking garage and expressly noted that revitalization of the city's downtown was a public purpose.[67] The court stated,

> Certainly the creation of aesthetically appealing, convenient, and efficient downtown urban centers is a public purpose and may be considered in determining the validity of a particular parking facility. The development of modern urban centers with open spaces, fountains, and malls in which people may gather and enjoy an enhanced social and intellectual life is a public purpose.[68]

More recently, the Illinois Supreme Court in *People v. Paley*[69] upheld a local government's issuance of bonds to be used to acquire property—by condemnation if necessary—for resale to private downtown developers. The target area was blighted, and, therefore, the court relied on earlier cases upholding urban renewal in reaching its decision. The Illinois court, however, did not end its analysis with an analogy to the urban renewal cases; rather, the court went on to express its belief that redevelopment of the downtown area was justified because downtown redevelopment itself is a public purpose:

> [T]he city's determination to promote the commercial rebirth of its downtown area is a public purpose. . . . In so holding, today's decision notes that the application of the public-purpose doctrine to sanction urban redevelopment can no longer be restricted to areas where crime, vacancy, or physical decay produce undesirable living conditions or imperil public health. Stimulation of commercial growth and removal of economic stagnation are also objectives which enhance the public weal.[70]

Unfortunately, neither the West Virginia nor the Illinois court articulated any of the rationales underlying its suggestion that redeveloping the downtown area is an independent justification for exercising the power of eminent domain. The balance of this subsection, therefore, examines various rationales that perhaps could support such a proposition.

As mentioned above,[71] downtown redevelopment efforts do not generate jobs as effectively as the industrial development efforts that are at issue in the industrial revenue bond cases. Downtown projects generally are commercial in nature; new jobs, therefore,

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66. 156 W. Va. 877, 207 S.E.2d 113 (1973).
67. *Id.* at 884, 207 S.E.2d at 118.
68. *Id.*
69. 68 Ill. 2d 62, 368 N.E.2d 915 (1977).
70. *Id.* at 74-75, 368 N.E.2d at 920-21.
71. *See supra* notes 40-42 and accompanying text.

are unlikely to become part of the city's export base. Moreover, these projects arguably may not create new jobs at all, since they merely locate in the downtown region projects that might be developed somewhere else in the metropolitan area. Indeed, when considered from this perspective, local governmental support of downtown development arguably subsidizes the downtown businessman at the expense of his suburban competitor.

Another argument concerning the creation of jobs, however, which is often not available to support industrial development, can be made for downtown projects. Many of the new jobs that downtown development creates—for example, work in hotels, retail shops, and office buildings—are relatively unskilled and thus may provide employment opportunities for people who lack the skills for industrial work. Moreover, many of these potential workers live near the downtown area and might be able to reach downtown jobs more easily than they could commute to comparable jobs in the suburbs. While industrial development projects do seek indirectly to produce jobs for the working poor under the multiplier effect associated with manufacturing jobs, downtown projects can be used to provide these jobs outright.

Job creation, however, is not the only—perhaps not even the major—goal of downtown development efforts,[72] and the strength of these other goals will determine the constitutional strength of downtown development as a public use. One objective of these projects is to ease the financial burden of city government. New downtown development, of course, will add to the tax base; the same value, however, also would be added if the development occurred on the city's fringe, as long as it was still within the city limits. More important, the city's service infrastructure, especially the streets and utilities, is already in place in the downtown area; the same may not be true, however, for a new development elsewhere in the city, and thus the city government might have to build new streets or extend utility lines to the areas where the development is occurring. Downtown development, then, encourages the use of existing city facilities rather than requiring construction of new ones. Thus, a city's encouragement of downtown projects at least to some extent reflects only its careful stewardship of limited public resources. The situation confronting the city is comparable to the state government that constructs a large port facility and

72. Some downtown projects—for example, middle- and upper-income housing—will create very few jobs for the unskilled.

then must either build highways from producing areas to the port or adopt tax policies that encourage the public to use the port.[73]

A second goal of downtown development is to assist in society's efforts to conserve energy. If gasoline prices increase further, the use of public transportation undoubtedly will become an increasingly important conservation strategy. Downtown development uniquely supports this strategy because the downtown area is the hub of existing public transportation systems and will continue to occupy that position if these systems expand because of shortages of energy supply. Indeed, one definitional characteristic of a "downtown" may be that it lies at the center of the city's public transportation system. Furthermore, high density, large-scale developments—which characterize the typical downtown project—are more energy-efficient than smaller, detached buildings that house the same activities. Moreover, if downtown development draws developers to the inner city and away from its fringes, the city perhaps could avoid losing some of the producing farmland at the city's edge to other uses.[74]

A third goal of downtown development is to enhance the capacity of a particular municipality to generate those attributes that make cities exciting to their citizens and valuable to the community at large. These attributes—cultural institutions, highly specialized commercial enterprises, and the capacity to generate the new small businesses that are the primary source of new jobs in our economy—are the things that distinguish cities from other forms of community organization.[75] Most scholars would agree that cultural institutions and specialized commercial enterprises will prosper only in cities of significant size and density.[76] Moreover, considerable evidence supports the proposition that cities are more effective as settings for new, job-creating enterprises when they are large and development is dense.[77] Thus, as cities decentralize, they are less likely to perform this characteristic community role.

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73. *See also* State Highway Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970). The court in *Asheville School* upheld the government's condemnation of land that was needed to provide a driveway to a tract which was otherwise landlocked because of a highway project. The condemnation reduced the cost of the highway project by making the acquisition of the entire landlocked tract unnecessary.

74. The United States is losing approximately three million acres of rural land a year, one million of which is prime farmland, to urban uses. U.S. DEP'T OF AGRICULTURE SOIL CONSERVATION SERVICE, AMERICA'S SOIL AND WATER: CONDITIONS AND TRENDS 5 (1980).

75. Birch, *Who Creates Jobs?*, PUB. INTEREST, Fall 1981, at 3.

76. J. ROTHENBERG, ECONOMIC EVALUATION OF URBAN RENEWAL 71 (1967).

77. *See* J. JACOBS, THE ECONOMY OF CITIES 180-202 (1969).

Downtown redevelopment will not itself reverse decentralization, of course, but it clearly is a necessary component of such a reversal.

In sum, downtown development projects can provide jobs to low-income persons who live near the downtown area; they are able to take advantage of the existing public infrastructure; they promote energy conservation by making public transportation more attractive; they can reduce the loss of productive farmland; and they can enhance a city's capacity to provide those activities that are unique to large and densely developed communities. The advantages from a large-scale downtown project, however, create public benefits that do not necessarily accrue to the private developers; consequently, many private developers might not undertake the project without some sort of public subsidy. Thus, another justification for public participation in these schemes is the failure of the private sector to engage in activities that produce important public benefits.[78] Having thus identified the primary rationales for a local government's taking some form of action in support of downtown development, it is now possible to examine precisely what kinds of public activities are warranted and whether public exigencies are sufficiently strong to justify condemnation as one of those activities.

The potential public benefits from downtown development clearly support some kinds of public activities. A local government's desire to protect public investment in the existing infrastructure and to encourage energy conservation, for example, would both easily justify certain forms of regulation. Similarly, government spending programs that are designed to provide jobs for the unskilled rarely run afoul of constitutional limitations. When the government wishes to exercise eminent domain to support a downtown development project, however, it must show something more; the question, of course, is how much more. One characteristic of some public uses that seems to have been useful in helping them survive constitutional attack is that the specific location sought for acquisition is vital to the success of the public project involved. In these situations the government's capacity—through the use of eminent domain—to coerce an unwilling seller often is necessary to the acquisition of the site, and that very

78. *See* Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970) (discussing state housing loans to developers). The underlying rationale for the urban renewal program, of course, was the inability of the private sector to accomplish renewal itself. Slayton, *supra* note 44, at 195.

necessity strengthens the argument that the use is a public one. Nichols recognized this point in his treatise on eminent domain when he stated that

> [courts] have been more ready to uphold a particular use of land as public when, from the nature of the undertaking, it was impossible or difficult to carry it out without the aid of eminent domain than in situations where a particular site was not essential, and a suitable one could be secured equally well by purchase.[79]

Industrial location is normally a matter of selecting a community, rather than a specific site that is uniquely suitable for a new plant; therefore, the relative antagonism of courts to the use of eminent domain for industrial development is not surprising.[80] On the other hand, urban renewal's avowed purpose was the removal of existing slums and blight, and that purpose could only be realized by condemning specific properties. These two lines of cases lead to the question of how important location is to major downtown development projects.

Under most downtown development schemes, one specific location will rarely be crucial to the commercial success of the various private components of the project. Hotels, office buildings, and middle- and upper-income housing often might be located at any one of several downtown sites and do equally well. These developments would require parking within close proximity, of course, but that could be an integral part of the project. The situation might be different, however, with large-scale commercial projects such as Philadelphia's Gallery or Baltimore's Harborplace, since attracting foot traffic is crucial to the success of these projects, and being located a block away from, rather than at, a pedestrian crossroad could make the difference in a business' decision to invest or go

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79. 2A P. NICHOLS, *supra* note 8, § 7.211.

80. Indeed, some of the cases in which courts have been generous in permitting condemnation for industrial development or expansion have concerned projects in which the specific site sought was unusually important. In a case before the Michigan Supreme Court, for example, the City of Detroit argued that its extensive condemnations were necessary to save 6000 jobs in the Detroit area and that the site involved was the only one acceptable to the General Motors Corporation. Poletown Neighborhood Council v. Detroit, 401 Mich. 616, 304 N.W.2d 455 (1981). The city argued that if the plant was not built at the desired site, the company would not remain in the Detroit area. *Id.* at 630-31, 304 N.W.2d at 458. Similarly, the court in Yonkers Community Dev. Agency v. Morris, 37 N.Y.2d 478, 335 N.E.2d 327, 373 N.Y.S.2d 112 (1975), found that the City of Yonkers' condemnation of land that suffered from "economic underdevelopment and stagnation" was in fact necessary to expand the existing, adjacent Otis Elevator plant. The company had threatened to leave the community if it could not expand, and the land bordering the plant was the only place in the area where the company could move. *Id.* at 482, 483, 335 N.E.2d at 331, 373 N.Y.S.2d at 117, 118.

elsewhere. Nevertheless, if one looks only at the needs of the private developer, eminent domain will only occasionally be justifiable from a constitutional standpoint for downtown development projects.

The private developer's interest, however, clearly is not the only interest that must be considered in these determinations. A single development project does not in itself revive a downtown area; rather, such a project is expected to stimulate others to return to or remain in the downtown, and this stimulative effect is the real justification for public assistance to the project. The site of a single major project, therefore, may be crucial to the success of overall downtown development. An office building/apartment complex placed along a downtown river, for example, is unlikely to stimulate further development if it is separated from the rest of downtown by a major highway.[81] Similarly, a hotel/commercial center that is located several blocks from existing downtown activity—a distance that the new project is not strong enough to bridge with secondary development—may create two weak downtown clusters, rather than one strong section. Thus, location can be a crucial factor for major projects in reaching the public benefits that are sought, and, therefore, the government's condemnation of land in a particular location may serve a public use.

This proposition, however, does not authorize a city to condemn property for every person who wishes to replace a watch repair shop with a fashionable boutique. On the contrary condemnation should be permitted only in the cases of the very large projects—hotels, office buildings, apartments, condominiums, department stores, or shopping centers—that will have the stimulative effect which creates the public use. The courts, however, should not be required to make case by case determinations whether a particular project is sufficiently major to warrant condemnation. This task is more appropriately reserved for the legislature. Any legislation that authorizes the use of eminent domain for downtown development should limit this use to major projects and should require that the condemning agency find sufficient evidence that the particular project in question will significantly stimulate further private development. This finding would then be reviewable in the courts only on the question whether the finding was reasonable—in other words, not arbitrary or capricious. This

81. Jane Jacobs has pointed out how borders such as highways discourage urban growth. J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 257-69 (1961).

division of responsibility is comparable to the requirement of a finding of blight in urban renewal law: the basic responsibility for the condemnation rests with the local agency; the court simply reviews the finding of blight to determine whether it was arbitrary or capricious.[82]

B. *Voluntary Acquisition*

If the government's purchase of land is voluntarily agreed to by the owner, rather than forced upon him through the use of eminent domain, the nature of the constitutional inquiry changes. The appropriate test shifts from requiring a public use to requiring a public purpose—which, as discussed above,[83] entails a slightly different test from the former. The public use test is the more difficult standard to meet because of its especially direct impact on the condemnee, as opposed to the more dispersed impact of raising general resources. Thus, if a particular governmental activity meets the public use test, it usually also will meet the public purpose test. The converse is not necessarily true, however, since an activity may not constitute a public use even though it serves a public purpose. This section of the Article examines the same three doctrinal bases that were discussed under the eminent domain analysis and attempts to determine whether these bases support governmental involvement in a voluntary acquisition.[84]

1. Urban Renewal

To the extent that the urban renewal cases support the use of eminent domain, they also support voluntary acquisitions. Similarly, to the extent that the broader elements of the definition of blighted area fail to support eminent domain, they also probably fail to support voluntary acquisitions. As was noted above,[85] the

82. *See, e.g.*, Apostle v. City of Seattle, 70 Wash. 2d 59, 422 P.2d 289 (1966).

83. *See supra* notes 29-32 and accompanying text.

84. One other possible basis of support is available for a government's acquisition and resale of downtown property. If the property is architecturally or historically significant, e.g., listed in the National Register of Historic Places or located in a registered historic district, the property's importance as an architectural or historical landmark may justify governmental action to protect it. Often the government purchases the property, perhaps repairs or renovates it, and then sells it to private interests subject to covenants that are designed to protect the architectural or historical integrity of the property. The constitutionality of this type of property transaction is not disputed. *See* Flaccomio v. Mayor of Baltimore, 194 Md. 275, 71 A.2d 12 (1950). For a description of such a project, see 38 J. Hous. 165 (1981).

85. *See supra* note 55 and accompanying text.

statutory definition of blighted area in urban renewal law is suspect as authority for a government's use of eminent domain when it relies on characteristics such as "faulty lot layout," "diversity of ownership," "excessive tax or special assessment delinquency," "defective or unusual conditions of title," or "improper subdivision or platting." Each of these characteristics impedes private redevelopment by making site assembly difficult; the definition, therefore, seems to have been written primarily to justify use of eminent domain. Once it fails in that effort, the definition can be recognized as an otherwise artificial characterization of blight. That being so there is no assurance that the government would be eliminating blight by purchasing and clearing property in an area meeting the definition. Thus, the definition offers no support for an unforced acquisition.

2. Downtown Redevelopment

The analysis for using the argument that downtown redevelopment is itself a public use to support a government's unforced acquisition of property is similar to that which was applied in the previous subsection. To the extent that the concept of downtown redevelopment as a public use is persuasive, the proposition that redevelopment serves a public purpose also should be persuasive. If the public use argument is unpersuasive, however, it remains true that the benefits cited to support that argument[86] do support some sorts of governmental action. The question then is whether they will support a government expenditure to acquire property in a voluntary transaction.

One benefit of downtown redevelopment is that the project can take advantage of the existing public infrastructure instead of requiring the government to install new streets and utility lines. This practice protects existing public investment and reduces the demands on limited public resources. Governments routinely produce this benefit through regulatory vehicles such as zoning, but they also do so by managing their expenditures. Local governments, for example, may extend water and sewer lines or locate facilities such as parks or schools in a pattern that guides or encourages development in specific directions, and one factor underlying a government's decision about which direction to favor is the relative cost of providing services to development in one area as opposed to another. Perhaps even more closely analogous to the

86. *See supra* notes 71-82 and accompanying text.

downtown question, a state that wishes to encourage the use of a state-owned port certainly may widen highways from other parts of the state that lead to the port, since the improved roads probably would encourage public use of the new facility.

Other benefits that are the result of downtown redevelopment are energy conservation and the protection of farmland.[87] Once again, these benefits can be sought through regulation, but also they may be acquired through expenditure programs. For example, governments may purchase either land or development easements in land as a means of preserving farmland that is located on the city's periphery. Of course, purchasing land for a downtown developer does not preserve farmland as directly as purchasing the farmland or easements outright, but this type of purchase is certainly less costly since the developer must compensate the city for the land, and the city ultimately enhances its tax base.

Thus, some authority supports the proposition that downtown development serves a public purpose that warrants the expenditure of government funds. This authority, however, is neither direct nor particularly strong. Moreover, one of the primary justifications for the use of eminent domain—the importance of location to successful downtown development—is not applicable to an unforced acquisition. If property at the "right" location may be purchased voluntarily, then a private purchaser can acquire the land as easily as the local government. Thus, if proponents of the need for eminent domain for downtown development are unpersuasive in their arguments, then the justification for unforced acquisition also is likely to be unpersuasive.

3. Industrial Development

The third possible doctrinal basis for the government's exercise of its eminent domain power in downtown development cases—the industrial development cases—presents a stronger argument for unforced acquisitions than the first two rationales. Although the industrial development bond cases do not provide strong support for the use of eminent domain,[88] they become relevant when the transaction is voluntary. The typical underlying transaction in industrial financing is the government's acquisition of land, followed by a leasing—and usually an eventual sale—of the property to a private concern. The principal differences be-

87. *See supra* note 74 and accompanying text.

88. *See supra* notes 33-42 and accompanying text.

tween the typical industrial transaction and a comparable downtown transaction concern the nature of the government's financial commitment and the nature of the development of the property.

As discussed above,[89] most industrial development bond cases concern revenue bonds. Courts frequently emphasize the government's limited liability under these obligations, since the bondholder's remedy is against the property rather than against the issuing government, in the event that the leasing enterprise fails.[90] If, in the downtown context, the money that is used to purchase property from a willing seller for reconveyance to a private developer comes from revenue bond proceeds, the situation would parallel that of industrial development bonds. In many cases, of course, the funds will be derived from other sources such as current receipts (including local taxes), federal grant money, or general obligation bonds. Even in these situations, however, a number of parallels can be drawn between industrial development bonds and supporting downtown development through unforced acquisitions. The most important constitutional point about revenue bonds is the relative absence of any risk factor for the government. In most instances of an unforced acquisition for downtown development the acquiring government knows the identity of the developer to whom the property will be conveyed before the government acquires the property. If the government and the developer enter into agreements concerning resale before the property is acquired, the government's risk factor becomes extremely low, perhaps even low enough to justify the analogy to the bond cases.[91]

It also was noted above[92] that most bond cases are concerned with industrial projects, which have an attendant multiplier effect on employment; downtown projects, however, normally are commercial in nature and only rarely create manufacturing jobs. This distinction, together with the lack of support in the industrial development cases themselves, led to the conclusion that these decisions do not support eminent domain for downtown development. The cases do provide authority, however, for the government's

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89. *See supra* notes 33-36 and accompanying text.

90. *See, e.g.*, State v. City of Pittsburg, 188 Kan. 612, 364 P.2d 71 (1961); Carruthers v. Port of Astoria, 249 Or. 329, 438 P.2d 725 (1968).

91. A few of the hond cases have dealt with general obligation bonds rather than revenue bonds. *See supra* note 34. In states that have upheld general ohligation bonds, the government's unforced acquisition of property for downtown development is much more likely to withstand constitutional challenges.

92. *See supra* notes 40-42 and accompanying text.

ability to obtain property through unforced acquisitions, since bonds-supported projects and voluntary sales in effect constitute similar property transactions. The difference between industrial and commercial jobs, therefore, is the only significant distinction between these two types of governmental activity. Moreover, even this distinction loses much of its force because downtown projects often create service jobs that the relatively unskilled can perform. Thus, the difference probably is not sufficiently important to discredit the analogy between industrial development and downtown development through voluntary transactions. The industrial development case law, then, supports unforced acquisitions.[93]

C. *Subsidized Conveyances*

The final set of issues in the area of land transactions to support downtown development concerns the validity of various subsidies that are given in the conveyance of the property from the government to the private developer. This section of the Article examines the validity of three kinds of subsidies. The first of these three subsidies occurs if the government reduces the developer's need for immediate capital either by leasing the property — perhaps with an option to purchase—or by selling it on an installment basis, assuming that a fair consideration is paid for the land under the lease or sales contract. The second way in which the government can subsidize a private developer is to "write-down" or absorb some of the developer's acquisition and clearance costs, or to convey the land for its "use" value, which is the value of the land as determined by the use to which it can be put under any restrictions that the seller may have imposed. The last form of government subsidy occurs when the government in effect gives the land to the developer by conveying it either for a very low monetary consideration or for no consideration at all.

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93. Very little case law exists that directly questions the validity of a government's unforced acquisition and resale of property for downtown development. The cases that have been decided, however, generally have denied the government power to acquire land for this purpose. In Lassila v. City of Wenatchee, 89 Wash. 2d 804, 576 P.2d 54 (1978), for example, the court held that a government's purchase of downtown property for the purpose of resale to the developer of a theatre unconstitutionally lent the city's credit. A theatre, of course, provides almost no jobs, and, therefore, the case does not seriously oppose the conclusion of this Article. Furthermore, Washington courts remain antagonistic to industrial development revenue bonds. *See* Port of Longview v. Taxpayers of the Port of Longview, 85 Wash. 2d 216, 527 P.2d 263 (1974); *see also* Reel v. City of Freeport, 61 Ill. App. 2d 448, 209 N.E.2d 675 (1965) (city's sale of parking lot to defendant and taking of plaintiff's property to replace it did not constitute a public use).

Those who challenge property conveyances from government to private entities usually rely upon two kinds of constitutional provisions. The most specific type of provision prohibits gifts or donations of public funds or property to private entities. The New Mexico Constitution, for example, directs that "[n]either the state, nor any county, school district or municipality, . . . shall . . . make any donation to or in aid of any person, association or public or private corporation."[94] A less specific but more prevalent kind of constitutional provision prohibits governments from giving or loaning the public credit to private entities. Thus, the Florida Constitution prohibits the legislature from authorizing "any county, city, borough, township or incorporated district . . . to loan its credit to any corporation, association, institution or individual."[95] Although at least one commentator has suggested that loan of credit provisions do not apply when the government neither incurs its own debt nor guarantees private debt, but simply makes an expenditure from current resources,[96] courts seem willing to rely on this type of a provision to uphold challenges to certain public actions when no other provision is available.[97] Whatever the constitutional basis, it is well established that local governments may not give away public property.[98]

1. Lease Agreements or Installment Sales as a Form of Government Subsidy

By leasing property to a developer or selling it on an install-

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94. N.M. CONST. art. IX, § 14.

95. FLA. CONST. of 1885, art. 9, § 10. This provision bas been amended and appears in FLA. CONST. art. 7, § 10. A number of these provisions apply only to the state and make no mention of local governments. *See, e.g.*, MICH. CONST. art. 10, § 2. Despite this language, however, courts nsually have extended these provisions to apply to local governments. *See, e.g.*, Connor v. Herrick, 349 Mich. 201, 84 N.W.2d 427 (1957); State v. York, 164 Neb. 223, 82 N.W.2d 269 (1957); Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967).

96. Pinsky, *supra* note 7, at 279.

97. *See* O'Neill v. Burns, 198 So. 2d 1 (Fla. 1967). Article 9, § 10 of tbe 1885 Florida Constitution prohibited the state from loaning its credit to private organizations and prohibited the state legislature from authorizing local governments to loan their credit or appropriate money to private organizations. Despite the absence of an express prohibition on state appropriations to private organizations, the court in *O'Neill* held that such an appropriation violated § 10. Florida has since amended this constitutional provision. *See* FLA. CONST. art. 7, § 10. *See also* Kaplan v. City of Huntington Woods, 357 Mich. 612, 99 N.W.2d 514 (1959) (municipalities may not give away public property without a consideration). These gifts are proscribed in North Carolina under a constitutional direction that "[n]o person . . . is entitled to exclusive or separate emoluments or privileges from the community." N.C. CONST. art. I, § 32; *see* Brumley v. Baxter, 225 N.C. 691, 36 S.E.2d 281 (1945).

98. 2A C. ANTIEAU, *supra* note 8, § 20.30; C. RHYNE, *supra* note 24, § 31.7.

ment basis, a government reduces the developer's need for either equity capital or borrowed funds. By improving the developer's return on his equity, the government makes downtown investment more attractive. When compared to the developer who must purchase his land immediately, therefore, the lessee or installment buyer has received a slight public subsidy.[99] Thus far, however, no court has found a constitutional problem in this form of indirect subsidy; rather, courts consistently have looked at the total consideration for the lease or installment sale and have upheld the transaction unless the consideration was unreasonable.[100] The courts' generally favorable attitude towards this practice indicates that there might be considerations motivating the government other than simply to entice a developer to invest by offering him a small subsidy—considerations that could cause the government to lease or sell on time rather than sell by immediate payment. By leasing to a developer, for example, the government maintains some control over the property and thus is in a better position to make certain that the property continues to be put to a publicly beneficial use than if it were to convey the fee. In any event, no constitutional impediments constrain this type of governmental assistance to a downtown developer.

2. Write-Downs to Use Value as a Form of Government Subsidy

A more direct and substantial subsidy occurs when a local government sells property to a developer at a price that is below the government's own costs of acquisition, relocation, and clearance. This type of government "write-down" was a standard part of the federal urban renewal program, under which the federal govern-

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99. Another sort of subsidy also might result from leasing—rather than selling—property to a developer. In a number of states government-owned property is exempt from property taxation, regardless of its use. Thus, property leased to a developer might in effect be exempted from the property tax. *See* Wein v. Beame, 43 N.Y.2d 326, 372 N.E.2d 300, 401 N.Y.S.2d 458 (1977).

100. *See, e.g.*, Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952) (lease with an option to purchase); Singer Architectural Servs. Co. v. Doyle, 74 Mich. App. 485, 254 N.W.2d 587 (1977) (sale of land by land contract); City of Clovis v. Southwestern Pub. Serv. Co., 49 N.M. 270, 161 P.2d 878 (1945) (installment sale of utility system with no interest on the unpaid balance). A government lessor or seller also can improve a developer's cash flow position by requiring a smaller rent or installment payment in the first few years of the project, when the developer's cash needs typically are more acute. As long as the government receives a fair rental value or price over the life of the lease or sales contract, the cases cited above would support a system of payments that are graduated over time.

ment met at least two-thirds of the cost/price differential.[101] In the state statutes that authorized local governmental participation in urban renewal the resale price of the property usually was characterized, among other ways, as "use" value, "reuse" value, and "fair" value.[102] This value was lower than the government's investment for two reasons. First, although slum areas were by definition threatening to the public health and safety, they were not necessarily unprofitable to their owners. Indeed, the profitability of slum ownership made the costs of private acquisition and clearance too high to attract private investment; if private investment was going to occur, therefore, some government subsidy was necessary. Second, to assure that the area did not once again become a slum, the redevelopment had to comply with public plans that severely limited the uses which could be made of each parcel of land in the redevelopment area. This use limitation made the land less attractive and depressed the value of the property. State statutes indirectly guaranteed that the property would be sold at a reasonable price—given these restrictions—by requiring either that the redevelopment agency sell the land by some competitive process, which by definition would establish the market value for a parcel of land limited to one or a few specific uses, or that it sell the land only after having the property independently appraised.[103]

The courts had no trouble upholding written-down sales in the urban renewal context against attacks as unconstitutional loans of credit or donations. As long as the buyer was paying what the property was worth for the purpose or purposes to which it might be put, the courts generally have held that no donation or loan of credit had taken place.[104] These cases indicate that a similar write-down would be constitutional for a downtown project as long as the price that the investor paid for the land was roughly equal to the property's "use" value. Of course, such a sale would be even more likely to withstand constitutional attack if it were based on a public plan for the project area and accompanied by specific use restrictions on the parcel.

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101. *See* Slayton, *supra* note 44, at 200-02.

102. *See* DEL. CODE ANN. tit. 31, § 4527(a) (1975) (fair value); N.H. REV. STAT. ANN. § 205.5 (1978) (use value); 1945 N.Y. Laws ch. 887, § 1 (reuse value) (repealed 1961).

103. *See* KY REV. STAT. § 99.450 (1971) (appraisal sale); N.C. GEN. STAT. § 160A-514 (1976) (competitive sale).

104. *See, e.g.*, Velishka v. City of Nashua, 99 N.H. 161, 106 A.2d 571 (1954); 64th St. Residences Inc. v. City of New York, 4 N.Y.2d 268, 150 N.E.2d 396, 174 N.Y.S.2d 1 (1958).

3. Nominal Monetary Consideration

As noted above,[105] a local government may not give away property. The consideration that the government receives for the property, however, does not have to be entirely monetary. One court, for example, has held that a lessor's promise to maintain unneeded city property during the term of the lease was adequate consideration even though the monetary consideration that the lessor paid was only one dollar.[106] Nevertheless, when this premise is applied to transfers of property as part of a downtown development project for nominal or no consideration, the constitutionality of the transaction may come under attack. Two forms of nonmonetary consideration merit discussion in this context: the grantee's promise to use the property for public, as opposed to private, purposes; and the economic benefits that accrue to the community from the grantee's use of the property.

In most states a government, under certain circumstances, may give property to a private agency in return for the agency's commitment to use the property for public activities.[107] Although a downtown development project is under private ownership, it arguably is a public activity. Moreover, if the government involvement is based on the need to renew slums or blighted areas, many courts have upheld the disposition of renewal area property to private developers as a basic part of the renewal effort.[108] These courts have reasoned that the active public purpose or use could not be realized until the property was renewed, and that the government's clearance of the land was only a halfway measure.[109] This reasoning also could be applied to acquisitions and dispositions under the theory that downtown redevelopment is a public use or public purpose, or that these transactions promote industrial development. Under either theory, the private project is a necessary step in reaching the public goal.

Notwithstanding this potential line of reasoning, the thesis of this subsection is that the cases alluded to above do not support gifts of land to a downtown developer on the premise that the developer will undertake public activities on the property and in that

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105. *See supra* note 98 and accompanying text; *see also* Grand Lodge of Ga., Indep. Order of Odd Fellows v. City of Thomasville, 226 Ga. 4, 172 S.E.2d 612 (1970).

106. City of New Orleans v. Disabled Am. Veterans, 223 La. 363, 65 So. 2d 796 (1953).

107. *See infra* notes 110-14 and accompanying text.

108. *See supra* note 48 and accompanying text.

109. State *ex rel.* Allerton Parking Corp. v. City of Cleveland, 4 Ohio App. 2d 57, 211 N.E.2d 203 (1965); *see supra* note 48 and accompanying text.

way offer adequate consideration for the transaction. The cases that have upheld donations of land—or of money—have done so only under very limited circumstances. The public activities that were to be undertaken on the property or with public funds were primarily activities that were not likely to return a commercial profit: museums and art galleries;[110] libraries;[111] volunteer fire departments;[112] hospitals;[113] and social service and mental health programs.[114] Furthermore, in most cases the government had donated the land to a nonprofit organization.[115] When the activity was one that might have been commercially profitable and the recipient was organized for profit, at least one court has rejected the argument that the recipient's commitment to undertake public activities was sufficient consideration for the donation.[116] An investor who is considering investing in a downtown development project is interested only because he sees a potential profit accruing from his investment. Because of this inherent profit motive, the courts are not likely to permit local governments to assist private developers in profiting from a gift of property if the only consideration that the developer furnishes is to perform "public activities" on the land.

The second possible type of nonmonetary consideration is the economic benefits that will accrue to the community from the private use of the land. The South Carolina Supreme Court in *McKinney v. City of Greenville*[117] held that economic benefits of this nature are an acceptable and adequate consideration for government land. The court in *McKinney* validated a series of leases of a one hundred acre tract from a county to a private corporation; the lease agreements provided that the term of the lease would run for a period of ninety-nine years. Although the county had paid $3,500 an acre for the land, the only real consideration that the corporation gave in exchange for the lease was the promise to construct a specified minimum amount of capital improvements on the land—ten million dollars by the end of ten years and twenty-five

110. *See* Furlong v. South Park Comm'rs 340 Ill. 363, 172 N.E. 757 (1930).

111. *See* Raney v. City of Lakeland, 88 So. 2d 148 (Fla. 1956).

112. *See generally* Janusaitis v. Middleburg Volunteer Fire Dep't, 607 F.2d 17 (2d Cir. 1979).

113. *See* Finan v. Mayor of Cumberland, 154 Md. 563, 141 A. 269 (1928).

114. *See* City of Indianapolis v. Indianapolis Home for Friendless Women, 50 Ind. 215 (1875).

115. *See* cases cited *supra* notes 110-14.

116. *See* City of San Francisco v. Ross, 44 Cal. 2d 52, 279 P.2d 529 (1955).

117. 262 S.C. 227, 203 S.E.2d 680 (1974).

million dollars by the end of the full period. This promise, however, was sufficient for the South Carolina court, which reaffirmed a state rule that indirect public benefits—such as promotion and diversification of the economy—and an enhanced tax base are sufficient to overcome a lack of monetary consideration in some government contracts.[118]

South Carolina apparently is the only state that accepts economic benefits as adequate consideration for public donations.[119] South Carolina's minority position, however, is not surprising, since its rule is flatly inconsistent with the historical background of donation and loan of credit provisions. These provisions, together with bans on holding stock in private corporations and—to some extent—the public purpose doctrine itself, emerged from the experiences of governmental aid to railroads in the nineteenth century.[120] During this period, local governments often provided assistance to the railroads in the hope—perhaps even the confident expectation—that prosperity would arrive with the trains. When prosperity and, quite often, the railroad itself failed to come, the resulting public outcry led to the restrictive constitutional provisions mentioned above. Since a general economic benefit to the community had been the expected consideration for railroad aid, to characterize a general economic benefit as adequate consideration to support a transfer of governmental property to a private entity would circumvent the constitutional restrictions imposed as a result of the painful lessons of railroad aid. In all likelihood, then, the judiciary will react negatively to an allegedly constitutional donation based solely on a promise of general economic benefit to the community.

4. Summary

Under current law, no constitutional violation should occur when a government leases land or sells it under an installment sales contract. Similarly, a lease or sale for a price that is written-down to use value should encounter no constitutional difficulties. A court, however, would almost certainly hold that a conveyance of land to a downtown developer for only a minimal monetary consideration is unconstitutional.

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118. *Id.* at 245-46, 203 S.E.2d at 689.

119. There is apparently very little case law on point; this scarcity perhaps reflects the peculiarity of the suggestion. For a case that has held contrary to South Carolina's rule, see Southern Ry. Co. v. Hartshorne, 162 Ala. 491, 50 So. 139 (1909).

120. For a brief history of these provisions, see Pinsky, *supra* note 7, at 277-82.

III. Use of Public Facilities

A second category of problems for governments that wish to participate in downtown development projects arises when a downtown project envisions the construction of both public and private facilities. Ideally, of course, each facility will reinforce the other and make its counterpart successful when that success might not have occurred otherwise. A typical combination in these projects is a public parking facility and a public convention center together with a private hotel. The public contribution also might include office buildings, a transportation terminal or transfer point, or recreational facilities, and the private facility within the project might instead be office space or residences.

Legal problems arise if the mutual reinforcement mechanism provides too great a benefit to the private facility; they include questions of public purpose, loan of credit, and the like. The characterization of the problem depends upon the nature of the public role in the project. This part of the Article, therefore, focuses on three recurrent governmental roles. In the first of these roles the public facility is positioned in a location that is particularly beneficial to the private facility— when, for example, a parking garage is placed next door to a hotel. In the second situation the government provides space to private users in a public facility—when, for instance, a public parking garage includes space on the first floor for shops along the street. In the third and final scenario discussed below the government conveys air rights above the public facility to a private developer; the public agency in this role might be acquiring all the land for the project.

A. Beneficial Location

Positioning one or more public facilities in a location where they will be particularly useful to the users of a nearby private facility should withstand constitutional challenge, especially since public facilities normally are located in response to private needs. If a new office building, department store, or hotel creates a need for parking, then a city should be able to respond to that need and finance the construction of a parking facility,[121] just as it is free to

121. After World War II, when cities first began providing public parking on a large scale, the cities had to defend themselves against challenges that these facilities were of particular benefit to nearby businesses and thus served a private rather than a public purpose. The cities, however, won this battle long ago. *See* Annot., 8 A.L.R.2d 373 (1949).

At least one court has suggested that while it is permissible to provide parking which

improve roads to facilitate access to a newly constructed private shopping center.[122] Furthermore, if the proximity of the private facility enhances the success of the public facility—as a hotel might enhance the success of a convention center—then the government's location decision simply represents good management. The case law amply supports these general principles.[123]

If the public and private facilities are located within an urban renewal area and are constructed pursuant to an urban renewal plan, the argument favoring the validity of the public facility's location becomes even stronger, since the location decision gains the added public purpose of furthering the redevelopment of the blighted area.[124] This proposition also would extend to downtown development if the latter is accepted as a public purpose.[125]

B. Provision of Private Space in Public Facilities

By renting space to private users in otherwise public facilities, a government, if it permits rent payments at rates below the private market's rates, can encourage development in a downtown area. Under this type of rental arrangement, the government typically rents first floor, street-front space in a parking facility to private stores. Other possibilities include a government's rental of of-

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will benefit downtown businesses generally, a city should not do so if only a single business will benefit. *See, e.g.*, Goldberg v. City Council of Charleston, 273 S.C. 140, 254 S.E.2d 803 (1979). This decision, however, fails to explain why a city should be permitted to build a 300-space garage if several businesses create the demand, but not if a single business creates it. Moreover, it is more accurate to say that all downtown businesses created the demand, not just those closest to the garage. Ideally, the garage should be located in a place where it will provide the greatest convenience to the greatest number of customers.

122. *See In re* Legislative Route 62214, Section 1-A, 425 Pa. 349, 229 A.2d 1 (1967).

123. *See, e.g., In re* Incorporated Village of Garden City, 15 A.D.2d 513, 222 N.Y.S.2d 413 (1961) (mem.) (parking lot adjacent to hospital); Superior Laundry & Towel Supply Co. v. City of Cincinnati, 11 Ohio Op. 2d 352, 168 N.E.2d 447 (Ct. App.), *appeal dismissed*, 170 Ohio St. 191, 163 N.E.2d 164 (1959) (parking lots near major league baseball stadium); Thunderbird Motel, Inc. v. City of Portland, 40 Or. App. 697, 596 P.2d 994 (1979) (tennis court near hotel and skybridge from hotel to parking lot); Seligsohn v. Philadelphia Parking Auth., 412 Pa. 372, 194 A.2d 606 (1963) (parking garage across the street from two department stores).

A fact situation could arise, of course, in which the benefit to a single private business is so individualized that a court would question the public nature of the city's action. *See* Denihan Enters., Inc. v. O'Dwyer, 302 N.Y. 451, 99 N.E.2d 235 (1951). This kind of case, however, probably would concern more than mere location. In *Denihan*, for example, plaintiff alleged that a large number of spaces in the challenged parking structure were to be set aside for a single apartment house, and that the specifications established for the construction and operation contract were written for the obvious benefit of this apartment house.

124. *See* R.E. Short Co. v. City of Minneapolis, 269 N.W.2d 331 (Minn. 1978).

125. *See supra* notes 66-82 and accompanying text.

fice space in a public office building, or its rental of office or retail space in a public harbor development.

When a local government creates such a leasehold arrangement, it often must defend its actions against challenges that the lease of a portion of the public facility to the private users changes the nature of the entire facility from public to private. The government will prevail if the private use is temporary, since governments clearly may construct facilities that are larger than their current needs demand and lease the excess space to private users until the space is needed.[126] Similarly, a local government can safely proceed if the private use is related to and in fact reinforces the public use. Thus, a parking garage may contain a privately operated filling station or repair shop,[127] public buildings may contain privately operated food services,[128] and an airport may contain a host of private users, from the shops in the terminal building to the office and hanger facilities of the airlines.[129]

Private shops contained in a public parking garage, however, are not related to the public use. Moreover, if one purpose of permitting the shops is to further downtown development, then the shops are not likely to be temporary. Thus, courts that have upheld this type of lease arrangement have relied upon the "incidental" relationship of the shops to the underlying public facility. *Wilmington Parking Authority v. Ranken*[130] illustrates the most common judicial approach to this problem. In *Ranken* the parking authority proposed to erect an eight hundred car parking garage and to incorporate into the garage a department store and other commercial and office space. About thirty-nine percent of the facility was to be commercially leased. The construction of this space would constitute almost sixty percent of the entire cost of the garage, and the leases were expected to provide a return of almost seventy percent of the facility's gross revenues. The court in *Ranken* first found that some incidental leasing by the government was permissible[131] and then sought to delineate the appropriate test to use in determining what constitutes "incidental."[132] The

126. *See, e.g.*, Lerch v. Maryland Port Auth., 240 Md. 438, 214 A.2d 761 (1965).

127. Wilmington Parking Auth. v. Ranken, 34 Del. Ch. 439, 105 A.2d 614 (1954); Gate City Garage v. City of Jacksonville, 66 So. 2d 653 (Fla. 1953).

128. *See* Gate City Garage v. City of Jacksonville, 66 So. 2d 653 (Fla. 1953).

129. State v. County of Dade, 210 So. 2d 200 (Fla. 1968).

130. 34 Del. Ch. 439, 105 A.2d 614 (1954).

131. *Id.* at 449-50, 105 A.2d at 620-21.

132. *Id.* at 452, 105 A.2d at 622.

Delaware court rejected a percentage test, whether based upon the cost of the facility or the amount of the space at issue;[133] instead, the court fashioned a test that would permit incidental leases only to the extent that their revenues were necessary to make the facility self-supporting.[134] Under this test the Delaware court approved the proposed project.

Considering the arbitrariness of any standard that is based on the percentage of cost or space, the *Ranken* court's test seems to be the preferable one, and it appears to represent the majority view not only for parking facilities[135] but also for projects such as harbor developments[136] and freight terminals.[137] Indeed, the principal case invalidating a proposed project that was to include commercial leases also conforms to this view: in that case the court invalidated the proposed project because the lease revenues were not necessary to make the garage in question self-supporting.[138]

This financial necessity test, however, does present some rather difficult problems. First, if commercial leases in a parking facility are permissible when they are necessary to the facility's self-sufficiency, the question arises whether the courts should allow the commercial space to be built next door, across the street, or several miles away. Although the *Ranken* court discussed the interdependency of the public and private uses and suggested that their coexistence in a single structure was part of that interdependency,[139] some artificiality is inherent in the court's distinction. If a parking authority purchases a city block and builds a single structure on it, with forty percent of the space reserved for commercial leases, the authority's actions would be permissible under the *Ranken* decision. On the other hand, if two structures were

133. *Id.* at 460, 105 A.2d at 626-27.

134. *Id.* at 461, 105 A.2d at 627.

135. *See* Jackson Redev. Auth. v. King, Inc., 364 So. 2d 1104 (Miss. 1978); State *ex rel.* City of Charleston v. Coghill, 156 W. Va. 877, 107 S.E.2d 113 (1973).

136. *See* Panama City v. State, 93 So. 2d 608 (Fla. 1957).

137. *See* Bush Terminal Co. v. City of New York, 282 N.Y. 306, 26 N.E.2d 269 (1940). This case demonstrates that "incidental" does not necessarily mean "insignificant." The Port of New York Authority had constructed an "Inland Terminal Building" in Manhattan for unloading certain shipments. The railroads using the terminal needed only the basement and part of the first floor of the building to conduct their business. The remainder of the 16-story structure was leased to various commercial and industrial concerns. The legislation authorizing the construction of the facility required it to be self-supporting. Because of high costs—especially Manhattan land prices—however, the facility could only meet that requirement by extending commercial and industrial leases. The court upheld the project, characterizing as "incidental" uses that required at least 90% of the building space.

138. Shizas v. City of Detroit, 333 Mich. 44, 52 N.W.2d 589 (1952).

139. 34 Del. Ch. at 460, 105 A.2d at 626.

built on the same block, one strictly for parking and the other for commercial leases, and the leases constituted forty percent of the total space of the two structures, the leases—under the *Ranken* test—would not withstand judicial scrutiny. Notwithstanding this artificiality, however, the *Ranken* line of analysis is probably the correct one. A government cannot support its operations by becoming a commercial landlord,[140] and the commercial leases approved in *Ranken* and similar cases are a limited exception to this general rule. The courts must draw a line somewhere, and such a line is more easily supported when it falls between a single structure and two adjoining structures than when it falls between two adjoining structures and two structures that are an undetermined distance apart.

A much more substantial difficulty with the financial necessity test is its assumption that the public facility is supported by revenues rather than taxes. Indeed, in each of the cases that have dealt with the issue the local government financed the facility with revenue bonds. A question arises, therefore, concerning the force that these cases, and their rule regarding commercial leases, have when the facility either is not financed by revenue bonds or is not a revenue-producing facility at all.

Parking garages and harbor developments, to name two examples, need not be financed with revenue bonds. On the contrary, they often are financed either with general obligation bonds or out of current revenues such as general revenue sharing.[141] When a government uses some form of financing other than revenue bonds, the facility has no legal obligation to earn revenues that are sufficient to meet its operations and debt service. When one of these other forms of financing is used, the financial necessity test provides little guidance about whether "incidental" commercial leases should be permitted and, if so, under what standard.

If the facility is one of a type for which revenue bond financing is common—such as a parking garage—then the *Ranken* standard would be appropriate even if general obligation bonds or some other nonrevenue generating means of financing was used. When general obligation bonds are used to finance a revenue producing facility, facility revenues frequently retire the bonds and the government never uses its taxing power. Indeed, voters often

140. Rathbun v. City of Salinas, 30 Cal. App. 3d 199, 106 Cal. Rptr. 154 (1973).

141. *See, e.g.*, North Carolina State Ports Auth. v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955) (harbor development bond); Stanpart Realty Corp. v. City of Norfolk, 199 Va. 716, 101 S.E.2d 527 (1958) (parking facility bond).

are told at the time when they vote upon the bonds in a referendum that the government intends to pay off the bonds in precisely this fashion.[142] The local government in these situations often will use general obligation debt because this type of debt normally is less expensive than revenue debt.[143] Thus, in cases in which the revenues are *intended* to meet operating costs and provide debt service even though they are not *required* to do so, the *Ranken* test is appropriate and should be used.

A more troubling situation arises when the facility is one that does not normally produce revenue—or at least does not produce the amount of revenues that are necessary to meet either operating or capital costs. For example, a city might wish to include small street-front shops in a new downtown library or, in the manner of Yale University's Center for British Art,[144] an art museum. One possible solution to this problem would be to extend the *Ranken* standard to these kinds of facilities and permit a public project to include whatever commercial space is necessary to make the facility pay its own way. The New York courts, at least, probably would accept such an extension by relying on the case of *Hotel Dorset Co. v. Trust for Cultural Resources.*[145] In that case the New York Court of Appeals upheld a scheme for constructing and operating a new wing for the Museum of Modern Art. The government had established a cultural trust with condemnation power, the purpose of which was to construct a fifty-story tower adjoining the museum. The lower six floors of the tower were to be used as a new wing for the museum, but the remainder of the tower was to be developed as condominiums. The condominium owners were to make a tax equivalency payment—the property enjoyed a tax exemption—part of the proceeds of which were to be used to meet operating and debt service costs on the new wing. If this arrangement could be found by a court to be public enough to support giving condemnation power and a tax exemption to a cultural

142. *See* Local Gov't Comm'n of N.C., Official Statement Re: City of Washington, N.C. Electric System Bonds, Sept. 18, 1981, at 12 (stating that electric system profits expected to be sufficient to retire general obligation bonds); Durham Morning Herald, Feb. 17, 1982, at 12A, col. 5 (advertisement for passage of general obligation airport bonds stating that airport revenues will be sufficient to retire the bonds).

143. *See* R. LAMB & S. RAPPAPORT, MUNICIPAL BONDS 39 (1980); L. MOAK, ADMINISTRATION OF LOCAL GOVERNMENT DEBT 58-60 (1970).

144. For a descripion of the Yale Center, which appears to be the only museum to incorporate space for unrelated retail shops, see Dean, *A Legacy of Light,* AIA J., Mid-May 1978, at 80.

145. 46 N.Y.2d 358, 385 N.E.2d 1284, 413 N.Y.S.2d 357 (1978).

trust, then it probably is public enough to provide similar benefits when the owner is a local government.[146]

The thinking of the New York courts, however, may be ahead of other courts in this area of the law.[147] Carried to their logical conclusion, these cases could change the financing base for much of local government from taxes to leaseholds and could mark a fundamental change in our general notions of how government should be financed. Furthermore, to extend the *Ranken* standard to nonrevenue producing facilities distorts the context in which that standard was designed to operate. In the cases in which the *Ranken* standard has been used, the purpose of including commercial space in a public facility was to enable the facility to become self-sufficient. Given that purpose, the standard obviously serves a functional role. In the case of commercial space in a public library, art museum, or other tax-supported facility, however, the purpose of including commercial space probably is not to ensure that the facility will be self-sufficient, but that downtown development somehow will be furthered. For example, the Yale Center mentioned above included shops that were intended to maintain a sense of neighborhood in the Center's area—"to extend the urban neighborhood of Chapel Street's northeast side."[148]

As suggested above,[149] a city has a sufficient interest in the well-being of its downtown to justify some kinds of public action. The city, for example, certainly should be allowed to construct public facilities that contribute to, rather than detract from, the health of the downtown area. Thus, a city might allow shops in a downtown facility to maintain the scale of the street or to provide a visual bridge from one commercial street to another. A related goal might be the city's desire to avoid making a monument out of the public facility[150] and to seek instead to make the facility part

146. The New York Court of Appeals did not have to deal with these implications when it decided *Hotel Dorset*. The New York court, however, based its decision upon *Bush Terminal*, the Manhattan freight terminal case, *see supra* note 137, thus, the connection drawn in the text is by no means attenuated.

147. Another related New York case is Courtesy Sandwich Shop, Inc. v. Port Auth., 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963), in which the New York Court of Appeals upheld the constitutionality of the World Trade Center. The basic public purpose behind the Center was the centralization of New York's world trade function in one place, which was a concept that the dissent clearly proved to be implausible. In addition, trade-related office leases that were not international in nature were permitted as incidental leases to provide revenue to support the basic public use.

148. Dean, *supra* note 144, at 84.

149. *See supra* notes 71-82 and accompanying text.

150. For a discussion of the possible effects of landmark sites, see J. JACOBS, *supra*

of its neighborhood and thereby strengthen the neighborhood itself. If one relies upon the *Ranken* standard and its context as a model, shops that are included in a public facility to further downtown vitalization should be considered "incidental" only to the extent that their inclusion furthers that specific purpose. Thus, a government should be allowed to provide commercial space in a downtown facility only on a very limited basis, and the general rule that governments should not raise revenues by developing and leasing commercial property should maintain its viability. For example, if the purpose of placing shop space in a new library is visually to bridge two adjoining commercial streets, that purpose would permit store fronts only along a single street and only at street level.[151]

C. *Lease or Sale of Air Rights Above a Public Facility*

Similar to the provision of private space in a public facility is the lease or sale of the air space above the facility.[152] Most commonly, the air space above a downtown parking garage is conveyed to the developer of a hotel, an office building, or an apartment or condominium. The developer in turn derives at least two benefits from such an arrangement. First, because he does not have to purchase the underlying fee, his land acquisition costs often are reduced. Second, the public facility frequently provides a direct benefit to his project. If the facility is a parking area, for example,

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note 81, at 385.

151. The Yale Center for British Art, although it is not a government facility, conforms to this suggested standard. The shops were intended to extend the Chapel Street neighborhood and are located only along that street and only at street level. No shops are above the ground floor and none is located along the other street side of the Center.

152. Concern occasionally arises about a government's capacity to sell or lease the space *beneath* a government facility—usually for parking. Such an arrangement in general can be treated as a sale or lease of surplus property, and the only legal problems which arise are that legislative authority for the arrangement must exist and that all required procedures must be followed.

The principal additional problem emerges when the surface facility is a park. Because of the traditional protected status of land in public parks, *see* 10 E. McQUILLIN, *supra* note 14, § 28.52-.52b, the courts will closely review conveyances of park sub-surface rights to ensure that the private development does not unduly interfere with park use. Some interference—from entrances and exits and from ventilation equipment—is unavoidable, but as long as the interference does not absorb more than a small portion of the park, courts probably will uphold the conveyance. *See, e.g.*, City of San Francisco v. Linares, 16 Cal. 2d 441, 106 P.2d 369 (1940) (6% of the public square set aside for garage entrance and exit). The principal case denying such a conveyance concerned a proposal that would have taken away a quarter of the surface of the park. Zachry v. City of San Antonio, 157 Tex. 551, 305 S.W.2d 558 (1957).

the developer may be saved from having to construct his own parking facilities.

In most cases no special concern should be raised about the validity of an air rights conveyance. In some instances the conveyance might not even be part of a combined public/private project; rather, the developer simply may have obtained from the government the air rights over an existing or planned facility. In this situation, therefore, the government merely would be disposing of its surplus property.[153] In other cases the air rights conveyance might be just one aspect of the incidental lease or sale of space by the government in one of its facilities. In *Bush Terminal Co. v. City of New York*,[154] for example, the New York Port Authority constructed a freight terminal in midtown Manhattan. Although the terminal needed only one story of space, the Port Authority constructed a sixteen-story building in which to house the terminal and leased the upper fifteen stories to private concerns. Because the rental income from the building leases was necessary to the financing of the terminal, the court held that the private leases were incidental to the basic public activity—the terminal—and, therefore, were valid. The outcome presumably would have been the same if the Port Authority simply had conveyed the air rights above the first story, rather than building in the air space above the terminal and leasing out the resulting facilities. When an air rights conveyance is a special component of a lease of incidental space, therefore, courts should analyze it as such to determine its validity.

Air rights conveyance problems arise when the public facility would not have been constructed—and, therefore, would not have created any air rights to convey—absent the addition of the private facility.[155] In these cases the goverument arguably is acquiring the land on behalf of the developer—particularly if condemnation is necessary to assemble the site. Thus, the air rights conveyance becomes an acquisition to benefit private development, and courts in such situations should analyze the conveyance according to the standards developed for these transactions earlier in this Article.[156]

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153. *See* Cleveland v. City of Detroit, 322 Mich. 172, 33 N.W.2d 747 (1948).

154. 282 N.Y. 306, 26 N.E.2d 269 (1940).

155. *See, e.g.*, Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451 (Fla. 1975).

156. *See supra* notes 86-93 and accompanying text.

IV. CONCLUSION

The thesis of this Article has been that public participation in downtown development projects is permissible under limited circumstances. As the discussion indicates, different forms of public participation bring into question different constitutional doctrines. A government's acquisition of land through its eminent domain power clearly is proper as a method of urban renewal in "slum" areas. Once local governments try to exercise this power in areas that simply are underdeveloped, however, the governments' use of their power becomes more problematic and the constitutionality of the activity becomes dependent primarily upon the judiciary's acceptance of downtown development itself as a public use. If a local government acquires land from a willing seller, the industrial development financing cases offer additional doctrinal support to legitimize the government's actions. Moreover, the government's subsequent disposition of the land generally will encounter no constitutional difficulty; if, however, the government gives the land to a developer, or if it conveys the property to him for nominal monetary consideration, courts clearly will hold the conveyance unconstitutional. Finally, the government constitutionally may sell land at a written-down price if that price accurately reflects the use value of the land for downtown development.

This Article also has posited that a local government may locate public facilities within a downtown project and may provide commercial space to private developers within a public facility as long as the commercial space is "incidental" to the basic public nature of the facility. The test of what constitutes incidental will depend on the government's purpose in providing the commercial space, which might be either to make the facility self-supporting or to further downtown development. Finally, if a local government leases or sells air rights above a public facility, courts must examine this conveyance closely under the analysis developed in this Article. If the public facility serves a public need that is independent of the commercial sale or lease of the air space, then the government's disposition of the air rights cannot be attacked. If, however, the public facility is built only because of the private development that will use the air rights and, therefore, is in effect dependent upon the private development, the government's acquisition of the land, construction of the facility, and disposition of the air space must meet the same tests for constitutionality as any acquisition of land for private development.