China's "Ding Zi Hu", U.S.'s Kelo and Singapore's En-bloc Process: A New Model For Economic Development Eminent Domain From a Giving's Perspective

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CHINA’S DING ZI HU, THE UNITED STATES’S KELO, AND SINGAPORE’S EN-BLOC PROCESS: A NEW MODEL FOR ECONOMIC DEVELOPMENT EMINENT DOMAIN FROM A GIVINGS PERSPECTIVE

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I. INTRODUCTION

Legal issues concerning property rights have been in the spotlight recently. In the United States, the Supreme Court’s decision in *Kelo v. City of New London*1 allowed the use of the government’s eminent domain power for economic development by a private developer. This decision “has spawned a swarm of federal and state legislative initiatives [attempting] to curtail [such] condemnation for transfer to private parties.”2 On the other side of the Pacific, the enactment and implementation of the long awaited Property Law3 in China coincided with the dramatic ding zi hu4 holdout

4. Ding zi hu literally translates to “nail household.” The origin of this term is unclear. However, it figuratively describes the situation where a citizen holdout is like a stuck
against government sanctioned land acquisition by private developers in Chongqing.\(^5\) Further down the globe, Singapore passed an amendment in September 2007 to regulate and refine the country’s en-bloc process.\(^6\) Under this en-bloc process, private developers wanting to buy a strata-title development, such as a flat or a condominium, may compulsorily acquire the property of those who object to the sale if a certain majority percentage\(^7\) of the owners in the strata-title development agree to the sale. The government’s purpose is to allow plots of land “to reali[z]e their full development potential” and to allow rejuvenation of urban development.\(^8\)

There is a recurring theme in the legal issues faced by these three jurisdictions. Should there be a circumvention of the sacred notion of private property rights (in particular the right of alienation of others) for the benefit of another private party, such as a private developer, in the name of economic development? Criticisms abound for such takings of private property, especially in China and the United States.\(^9\) Common considerations in this discussion include undercompensation of the owners of acquired property\(^10\) and rent-seeking by the would-be beneficiaries of the takings under public choice theory.\(^11\) There are numerous reform proposals about restricting such perceived abuse of the eminent domain power.\(^12\) However, this predominant focus on the taking aspect of the problem is misplaced and incomplete. It is also somewhat surprising that, having identified the danger of rent-seeking as “a mobilized, well-connected minority [that] can exert more political influence than a numerically superior but

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\(^5\) Zhang Zhi Zhong, Bu jie shou fa ting pan jue gua qi he biao yu Chongqing ding zi hu gei zheng fu chu nan ti [Refused to Obey Court’s Order, Hoisting Flag and Banner – Ding Zi Hu in Chongqing Giving Government a Difficult Problem], LIANHE ZAOBAO (Sing.), Mar. 23, 2007.


\(^7\) There must be an 80% or 90% majority depending on the age of the property. Land Titles (Strata) Act, 1999, ch. 158, § 84A(1) (Sing.).

\(^8\) Land Titles (Strata) (Amendment ) Bill, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, col. 601 (July 31, 1998) (Sing.) [hereinafter Land Titles (Strata) Amendment Debate 1998] (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).

\(^9\) See infra Parts II.C.5, III.A.


\(^12\) See, e.g., Cohen, supra note 10, at 559-60; Sandefur, supra note 2, at 757, 766.
unorganized or apathetic majority,”13 little is said to tackle this aspect of the problem. Merely increasing the cost or difficulty of the exercise of eminent domain only decreases the attractiveness of eminent domain as a tool of rent-seeking. It neither eliminates the incentive for abuse when the benefit sufficiently outweighs the increased cost nor does anything to reduce the rent-seeking behavior.14 The givings jurisprudence conceived by Abraham Bell and Gideon Parchomovsky15 and developed and applied by Wallace Wang and the author in the context of China’s split share reform16 provides a more complete perspective of eminent domain for the economic development issue. Givings jurisprudence focuses on the giving aspect of the equation: it advocates that the beneficiary of the government’s actions shall pay for the benefits and that the victims of the government’s actions shall be entitled to compensation.17 Similarly, not only shall care be taken to ensure proper compensation for owners whose properties are compulsorily acquired, but equal emphasis shall be placed on ensuring that private developers are not unjustly enriched in the process. It is only through ensuring that private developers are not unjustly enriched by government actions that rent-seeking behavior and manipulation can be eliminated. Moreover, where takings and givings are intimately linked, as in the case of economic development through eminent domain by private developers, “a requirement of efficiency principles and a demand of corrective justice [would dictate] that the compensation or charge should be made directly between the parties.”18 Yet, as the application of the givings jurisprudence in the context of China’s split share reform demonstrates, the objectives of efficiency and corrective justice require a novel departure from the traditional takings and givings jurisprudence through the injection of “property rule protection for the right to compensation,” and thus the “incorporation of the private bargaining condi-

14. Rent-seeking is where power-holders utilize such power to create artificial property rights that generate flow of income to themselves; arguably legal, this process can be regulated and authorized by law. Howard Dick, Why Law Reform Fails – Indonesia’s Anti-Corruption Reforms, in LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES 42, 46-47 (Tim Lindsey ed., 2007). Another way of conceptualizing rent-seeking is where politicians accept gifts or benefits in exchange for exercising the power to benefit the provider of the gifts or benefits. Bruce L. Benson & Fred S. McChesney, Corruption, in THE ELGAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHTS 328, 335 (Enrico Colmbatto ed., 2004).
17. See infra Part III.C.
tion infuses an element of private law into the essentially public nature" of government takings.\textsuperscript{19} Under this refined givings doctrine, the givings beneficiaries (private developers) would be required to obtain majority consent from the takings victims (owners of acquired property) before eminent domain may be exercised.\textsuperscript{20}

Armed with this givings perspective, this Article engages in a comparative study of the controversial exercise of eminent domain power for economic development in China, the United States, and Singapore, and it proposes a new model that seeks to achieve better compensation for takings victims and eliminate the incentive for private developers to abuse the eminent domain process. The Singapore en-bloc process is visited as an example of a fresh approach towards economic development eminent domain, as it not only adheres to the givings jurisprudence alluded to above but also offers a novel solution towards charging for givings in situations where takings and givings are intimately linked.

Part II discusses the social background and the current legal framework of China’s land acquisition process. The rampant undercompensation and corruption that contribute to the \textit{ding zi hu} phenomenon are identified. Part III proceeds to examine economic development eminent domain in the United States. The \textit{Kelo} decision is discussed together with the public choice theory and issues of undercompensation. The deficiencies in the current academic discussions, which focus only on the takings aspect of the equation, are also highlighted. Lastly, tackling the unaddressed issue of rent-seeking by takings beneficiaries, the givings jurisprudence is introduced and its merits are analyzed. Part IV examines the Singapore en-bloc process and highlights its novel approach. This process includes private developers directly covering the entire cost of the land acquisition, the conditional nature of the eminent domain process, and the injection of some property rule protection into the otherwise liability rule protection of eminent domain. The deficiencies of the Singapore en-bloc process are also identified, and in particular, the issue of who should bear the transaction costs of a failed en-bloc process is thoroughly discussed.

Part V explains the merits of Singapore’s novel approach. First, judgment of whether to pursue an economic development project is now placed on private developers and property owners instead of legislators. Second, since the cost of land acquisition is borne by private developers, a more comprehensive internalization of cost and a reduction in rent-seeking is achieved. Third, the problem of undercompensation is reduced because the property rule protection


\textsuperscript{20} \textit{Id.}
allows a substantial portion of the property’s subjective value to be captured. Fourth, various procedural safeguards and checks by an administrative intermediary help ensure a more structured and transparent process. Indeed, economic analysis confirms that the Singapore en-bloc process is an efficient method of facilitating socially efficient transactions.

Currently, the Singapore en-bloc process is only applicable to strata-title property. In Part VI, a new model, drawing on the merits of the Singapore en-bloc process with necessary improvements and modifications, is proposed for general economic development eminent domain. Under this model, the acquiring party has to negotiate with the property owners and secure majority consent before eminent domain may be exercised over the dissenting owners. A third-party government body ensures proper conduct in the negotiation process and possesses the power to order additional compensation for any peculiar circumstances of the dissenting owners. The transaction cost issue highlighted in Part IV is resolved with the requirement that the acquiring party pay the transaction costs of the property owner regardless of the outcome of the eminent domain process. A step-by-step table is included to provide a framework for the practical application of this model. While this new model is designed with China in mind, given China’s more compelling need for economic development, its applicability to the United States is noted as well.

II. CHINA: THE DING ZI HU SAGA AND THE PROPERTY LAW

A. Background

The use of eminent domain for economic development is rampant in China. Compelled by the rapidly developing economy, there is an impetus to undertake “large-scale urban renewal project[s] with the aim of encouraging private development and new infrastructure.”21 “Due to unmanageable rapid growth, however, the State must prioritize economic expansion at the expense of many citizens displaced by the necessary development.”22 This trend is reinforced by the Chinese government’s belief that the country’s developing nature necessitates more state intervention “to ensure rapid industrialization and catch up with the advanced

22. Wang, supra note 21, at 616.
The result is massive urban renewal and countless displaced residents.\textsuperscript{24}

\textbf{B. Legal Framework}

In 2004, Article 13 of the Chinese Constitution was amended to give constitutional protection to private property rights.\textsuperscript{25} It provides that “[t]he state may, for the public interest, expropriate or take over private property of citizens for public use, and pay compensation in accordance with the law.”\textsuperscript{26} This protection is also echoed in Article 2 of the Land Administration Law, which was amended after the aforementioned constitutional amendment.\textsuperscript{27} A comparison with the language of the Fifth Amendment of the United States Constitution, “nor shall private property be taken for public use, without just compensation,”\textsuperscript{28} immediately reveals the distinction between the more broadly defined “public interest” under Chinese law vis-à-vis the United States’s “public use.”\textsuperscript{29} More glaringly, however, the Chinese Constitution merely mentions compensation without any requirement that it be just. This ambiguity with regard to compensation is somewhat alleviated by the 2007 enactment and implementation of the Property Law, which provides in Article 42 that

it is necessary to make compensation for demolishment and relocation according to law and safeguard the legitimate rights and interests of the owners of the real properties expropriated; as for the expropriation of the individuals’ residential houses, it is necessary to safeguard the housing conditions of the owners of the houses expropriated.\textsuperscript{30}

However, there is still room to argue whether just compensation is legally required.

\textsuperscript{23} Phan, \textit{supra} note 21, at 613.
\textsuperscript{24} Wu Xin Hui, \textit{Dong qian hu dong nu le [Displaced Household Gets Angry]}, LIANHE ZAOBAO (Sing.), Apr. 9, 2007.
\textsuperscript{26} \textit{Id}.
\textsuperscript{28} U.S. CONST. amend. V.
\textsuperscript{29} See infra Part I.I.C.2.
For urban housing, the legal requirement is that the acquiring party must negotiate with the property owner to reach an agreement as to the amount of compensation, location of replacement housing, and other relevant matters. This may give the appearance of a property rule protection for the property owner. However, this notion is easily dispelled by the provision, which allows the acquiring party to simply apply for an administrative determination regarding the acquisition and then proceed with the acquisition when no private agreement can be reached with the property owner. What is revealing is that after the administrative determination has been made, the property owner's appeal to a people's court does not suspend or even temporarily halt the acquisition process. In truth, “[t]here is no way . . . to challenge the underlying eviction ex ante, only the compensation amount ex post.”

C. The Current State of Takings

1. Improper Procedures and Limited Judicial Redress

The process by which land is actually acquired frequently leaves much to be desired. There is often very little notice before the date of the eviction. Forceful and abusive methods of eviction are also not uncommon. These methods can include using violence, shutting off electricity or water, dangerous demolition practices, and surprise demolition while the owners are not at home. Indeed, the most common complaint by the owners of acquired property is not the acquisition per se, but rather the process of acquisition.

Judicial recourse is limited. People’s Courts only allow an appeal after all “the proscribed adjudication remedies are exhausted.” In practice, this effectively limits the availability of judicial recourse since “[m]ost complaints and negotiations are already stifled in the administrative stage . . . and usually with massive disappointment on the part of the [property owner].” Indeed,
attempts to seek redress with the central government in Beijing have sometimes been forcefully obstructed at the local level. In addition, there is “a general reluctance by Chinese courts to exercise jurisdiction . . . due to pressures from local officials.” A serious institutional defect exists whereby the local courts depend “on local governments for funding and control . . . in staffing.” The new constitutional protection provides little practical recourse since “[t]he Chinese judiciary has yet to recognize a claim based on constitutionally based rights.”

2. A Broad Definition of Public Interest

In practice, land acquired through the eminent domain process in China is often allocated to private developers for development into commercial property. Public interest has been given a wide meaning, allowing acquired land to be built into “new luxury condominiums, shopping malls, and commercial office buildings.” It appears that the public interest requirement is satisfied as long as the acquisition is within the scope of the government’s urban planning. Indeed, prior to the 2004 amendments, the original Law of Land Administration did not even include a public interest requirement. Chinese legal scholar Zhu Yan commented that while the new Property Law does not provide a clear definition of public interest, construction of commercial buildings by private developers is unlikely to satisfy this requirement. Wang Quan Di opined that the key is not to formulate a substantive definition but rather to regulate the manner in which government authorities define public interest.

40. See, e.g., Phan, supra note 21, at 608; Wang, supra note 21, at 610.
41. Phan, supra note 21, at 634.
44. Wang, supra note 21, at 600; Li Xiao-yu, Wo guo ji ti du di zheng shuo zhi du de fa le si kao [Legal Speculation on Collective Land Expropriation System in Our Country], 139 GUANGDONG DIANSHI DAXUE XUEBAO (ZHEXUE SHEHUI KEKUE BAN) [J. RADIO & TV U. (PHIL. & SOC. SCI.)] 82, 83 (2006) (P.R.C.).
45. Wang, supra note 21, at 607.
46. Li Xiao-yu, supra note 44, at 83.
an acquisition project conforms to public interest should be determined by public opinion.50

The issue should not be whether economic development by private developers qualifies as public interest but rather whether public interest has been manipulated to advance a solely private interest. It is worth noting that in the United States “[e]minent domain was an important nineteenth-century economic development tool, used to redistribute economic and political power and wealth.”51 During the same period, “the creation of an infrastructure for a growing national economy intensified the taking of land for canals, private mills and railroads”52 as “the ‘public interest’ of economic prosperity overrode individual rights.”53 “American government [attempted] to ‘release energy’ by encouraging private developers to make the best use of land.”54 China’s economy is at a similar stage of development. There remains a very strong public interest in economic development because the standard of living remains low for much of China’s population. The focus should be on preventing abuse and corruption by private developers and not on a blanket stipulation that commercial projects by private developers do not qualify as a public interest.

3. Severe Undercompensation and Ding Zi Hu

In China, prior to the implementation of the Property Law, there was no express provision that addressed whether compensation had to be just. Although the Property Law suggests just compensation be paid, in actual practice, undercompensation is still severe since owners often receive only a small portion of the resale market price from the government.55 Compensation is calculated based on the actual value of the house without including the value of the underlying land, which is often greater given that its prime location is the reason for the acquisition.56

The lack of any legal provision for just compensation is made worse by the lack of proper judicial recourse,57 which means that administrative authorities and local governments become their

50. Id.; Wu Xin Hui, supra note 24.
52. Kelly, Jr., supra note 2, at 934.
53. Wang, supra note 21, at 611.
54. Id. at 612.
56. Wu Xin Hui, supra note 24.
57. See supra Part II.C.1.
own judges on the level of appropriate compensation. Given the practice of local governments to reap huge profits by acquiring land at a low cost and then selling at a high price,\textsuperscript{58} there is a strong incentive for undercompensation absent any countervailing forces. Indeed, compensation is often awarded at either extreme in China. In most cases, the acquisition authorities have the necessary administrative power and media control to achieve compulsory evictions without any redress for the property owner. On the other hand, if a property owner somehow remains persistent and possesses or acquires the capability to hold out—thereby becoming a \textit{ding zi hu}—a high level of compensation can be demanded.\textsuperscript{59}

This holdout capability is closely linked with the extent of media's limelight and may allow extremely high levels of compensation to be obtained.\textsuperscript{60} Indeed, there is an increasing awareness by \textit{ding zi hu} on how to utilize and manipulate the media to achieve their aim.\textsuperscript{61} The Chongqing \textit{ding zi hu}, who have captured nationwide and international media attention, have a propensity for the theatrical.\textsuperscript{62} While there are sometimes attempts by the government to impose media blackouts,\textsuperscript{63} these attempts are increasingly circumvented by the internet media.\textsuperscript{64}

It may be tempting to view these \textit{ding zi hu} sympathetically as citizens fighting for their rights in the face of an oppressive government abusing its powers. However, it is also worth noting that \textit{ding zi hu} demands border on unreasonable at times.\textsuperscript{65} The fact that those owners who move out later often get more compensation than those who move out earlier has provided a strong incentive for owners to attempt to hold out as \textit{ding zi hu}.\textsuperscript{66} A more struc-

\textsuperscript{58} Chen Ping, \textit{supra} note 55, at 73.


\textsuperscript{60} Shou li zhong guo “zui gui ding zi hu” huo pei qian wuan yuan ren min bi [First Case of “Most Expensive ‘Dingzi Hu’ ” in China Gets Over Ten Million RMB as Compensation], \textit{Lianhe Zaobao}, Oct. 1, 2007 (Sing.) [hereinafter \textit{Most Expensive Dingzi Hu}] (indicating that the owner who held out got an estimate of 12 million RMB in compensation in the end and then bought replacement housing nearby for slightly over 1 million RMB).

\textsuperscript{61} Wu Xin Hui, \textit{supra} note 24.

\textsuperscript{62} See Zhang Zhi Zhong, \textit{supra} note 5 (describing how one \textit{ding zi hu} hoisted a flag, put up a banner with a quote from the Constitution, and performed martial arts).

\textsuperscript{63} Phan, \textit{supra} note 21, at 634.

\textsuperscript{64} Zhang Zhi Zhong, \textit{supra} note 5 (noting that a \textit{ding zi hu} demanded over six million RMB in addition to a replacement house that was in same location, had the same floor area, and faced the same direction as the old house); \textit{Bao dao “ding zi hu” gong ming ji zhe shou qu chou lao bei cao feng [Civilian Reporter of “Dingzihu’ Mocked for Accepting Payment]}, \textit{Lianhe Zaobao}, Nov. 13, 2007 (Sing.).

\textsuperscript{65} Ye Peng Fei, \textit{Hu qingtao: yao an wu quan fa wei hu ming zai quan [Hu Qing Tao: Uphold Rights of Residential Property in Accordance with Property Rights Law]}, \textit{Lianhe Zaobao}, Mar. 26, 2007 (Sing.).

\textsuperscript{66} Wu Xin Hui, \textit{supra} note 24. In an acquisition in Shanghai during 2006, those who
tured and transparent acquisition process is necessary to tackle this ding zi hu phenomenon. This is the greatest problem currently facing China, as explained in the next section.

4. Corruption and Lack of Transparency

Corruption in the land acquisition process in China is rampant. “As the beneficiaries of fees and other costs paid by developers, these [administrative] boards are often biased” in favor of private developers in determining the level of compensation. 67 Local governments are often driven by strong financial and political reasons to liberally acquire land in order to attract non-public investments for economic development. 68 This gives rise to a disturbing and unhealthy partnership between these local governments and “business interest groups such as real estate developers.” 69 Private developers satisfy the government’s quest for gross domestic product (GDP) growth while obtaining huge profits from cheap land, all at the expense of the residents whose land is acquired at a bargain value. 70 Developers are not willing to negotiate deals with residents since, as developers, they have the ability to manipulate administrative and governmental bodies into getting the land at a low cost. 71

There is a lack of transparency in the eminent domain process, with many behind-the-scenes illegal transactions taking place. 72 In order to obtain land, developers must often bribe authorities at all relevant levels of government. 73 Under the current structure, many levels and organs of government have the power to acquire land, which provides many possible avenues for rent-seeking behavior and the abuse of power. 74 There has been “little progress to address this crippling issue” of corruption, notwithstanding that it “has been a problem in all transitional governments.” 75 Efforts and directions by top-level officials often have little effect, with prob-

moved out earlier were compensated 104,000 RMB, while those who moved out later received 150,000 RMB. Id.
67. Wang, supra note 21, at 609.
68. Phan, supra note 21, at 616-18.
69. Id. at 619.
70. Li Xiao-yu, supra note 44, at 83.
71. Phan, supra note 21, at 619.
72. Chen Ping, supra note 55, at 72.
73. Guo jia tu di fu zong du cha gan changchun: tu di ying fa de fu hai shi dang qian fu bai zhong diang [National Land Vice-Commissioner Gan Changchun: Corruption Arising from Land Is the Currently the Predominant Corruption], LIANHE ZAOBAO, Sept. 18, 2007 (Sing.) [hereinafter Land Corruption].
74. Chen Ping, supra note 55, at 72.
75. Wang, supra note 21, at 622.
lems of corruption rampant at the lower levels. Indeed, China’s National Land Vice-Commissioner recently commented that corruption relating to land acquisition is currently China’s most prominent corruption problem.

5. The Need for Reform

The problems of undercompensation and corruption have resulted in a lack of trust between the government and the people. Protests and social strife over land acquisitions have become increasingly common, indicating the compelling need for reform. Moreover, international pressure on China to advance property rights is mounting. China has ratified the International Covenant on Economic, Social and Cultural Rights, which frowns upon forced eviction, especially without due process and adequate compensation. There is a reform proposal that suggests the use of people’s jurors in eminent domain procedures to ensure “a more transparent, equitable legal system.” There are also suggestions “to strengthen ‘organizational-based’ rules” to counter “pro-growth coalitions” of local governments and developers. There is reform in the Zhejiang Province, where property valuation is based on a value chosen by the parties or from an official board. However, the common deficiency found in these reform suggestions and proposals is their failure to deal with the givings aspect of the problem: namely, there exists a huge incentive driving private developers to abuse the land acquisition process. Given the existence of severe corruption, the failure to address this aspect of the problem is telling and will be elaborated below.

76. Li Qi Hong, Guangdong li “he xie she hui” you duo yuan? [How Far Is Guangdong from “Harmonious Society”?], LIANHE ZAOBAO, Jan. 1, 2007 (Sing.) (indicating that strict requirements directed by top-level officials failed to prevent the numerous disputes arising out of land acquisition).
77. Land Corruption, supra note 73.
78. Guangdong foshan zheng di nao jiu fen qian ming jing cha jin chun qi zhong tu [Land Acquisition Dispute at Guangdong Foshan – Conflict When Thousands of Police Entered Village], LIANHE ZAOBAO, Jan 20, 2007 (Sing.).
79. See, e.g., id. (describing how villagers banded together to protect their land in Guangdong).
80. Wang, supra note 21, at 625.
81. Id. at 623-24.
82. Phan, supra note 21, at 637.
83. Wang, supra note 21, at 625-26.
84. Phan, supra note 21, at 646.
85. Wu Xin Hui, supra note 24.
86. See infra Part III.C.1.
III. THE UNITED STATES: KELO AND ECONOMIC DEVELOPMENT EMINENT DOMAIN

A. The Kelo Decision and Economic Development Eminent Domain in the United States

Given the existing extensive academic discussion of the facts and holding of Kelo v. City of New London, a brief summary will suffice here. The case is a typical example of the use of eminent domain for economic development. The City of New London was targeted for economic redevelopment in light of years of economic decline and increased unemployment rates. Unemployment in New London was almost twice that of the state rate. The city’s poverty rate was also double the rate of the State of Connecticut. A redevelopment plan, which included a hotel, restaurants, shopping, marinas, new residences, “research and development office space,” and park support, was proposed by the private nonprofit entity New London Development Corporation (NLDC) and approved by the city council. The purpose of the plan was to create jobs, generate tax revenue, provide recreational destinations, and revitalize downtown New London. Authority to acquire the necessary land in the city’s name through the use of eminent domain was granted to the NLDC. Given the nature of the redevelopment plan, some of the acquired land was to be leased to private developers. A small fraction of owners whose land was within the designated development site (the nine petitioners in Kelo owned fifteen out of the 115 private parcels to be acquired) opposed the sale. The United States Supreme Court, by a bare five-to-four majority, held that the use of eminent domain to take unblighted property pursuant to a development plan for economic rejuvenation was not contrary to the Takings Clause of the Fifth Amendment. The existence of a comprehensive development plan de-

89. Id.
90. Nolon, supra note 87, at 277.
91. Kelo, 545 U.S. at 473-75.
92. Id. at 474-75.
93. Id. at 475.
94. Id. at 476 n.4.
95. Id. at 474-75.
96. Id. at 470.
97. Id. at 475.
98. Id. at 489-90.
signed to enhance public welfare\textsuperscript{99} distinguished this case from the prohibited scenarios where private land is taken to confer “a private benefit on a particular private party” or where public purpose is as a mere pretext “to bestow a private benefit.”\textsuperscript{100}

There was a strong public response after the decision.\textsuperscript{101} The possible glimmer of hope in the decision’s emphasis on comprehensive development plans\textsuperscript{102} failed to avert the public outrage. “[A]lmost ninety percent of Americans express[ed] disapproval of the [type of] governmental takings . . . permitted by . . . Kelo.”\textsuperscript{103} The post-\textit{Kelo} “political momentum clearly favors the widespread adoption of the substantive restrictions on eminent domain that the Supreme Court refused to endorse,”\textsuperscript{104} “spawn[ing] a swarm of federal and state legislative initiatives to curtail condemnation for transfer to private parties.”\textsuperscript{105} \textit{Kelo} was also heavily criticized by scholars,\textsuperscript{106} with only scant support for the majority decision.\textsuperscript{107} Nonetheless, an examination of jurisprudential history reveals that economic development was already an accepted goal of the use of eminent domain power prior to \textit{Kelo}.\textsuperscript{108} Truthfully, the result in \textit{Kelo} was almost inevitable given prior case law,\textsuperscript{109} and the “decision was correct as a matter of law.”\textsuperscript{110} Indeed, because of the relaxation of the public use test by courts in past cases, “municipalities [had] become increasingly bold in their use of eminent domain.”\textsuperscript{111} In fact, there have even been instances where municipal governments noticeably appeared to favor a particular private party through the use of eminent domain.\textsuperscript{112} Moreover, eminent domain has also been exercised “under the guise of clearing away

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99. \textit{Id.} at 484.
100. \textit{Id.} at 477-78.
101. Baron, \textit{supra} note 2, at 630-32; Nolon, \textit{supra} note 87, at 278-79; Sandefur, \textit{supra} note 2, at 711.
102. \textit{Kelo}, 545 U.S. at 484-89; see Schultz, \textit{supra} note 51, at 223.
103. Michels, \textit{supra} note 87, at 553.
104. Garnett, \textit{supra} note 2, at 149.
105. Kelly, Jr., \textit{supra} note 2, at 926; see Baron, \textit{supra} note 2, at 630-31; Sandefur, \textit{supra} note 2, at 711-12.
106. See Baron, \textit{supra} note 2, at 615-16; Cohen, \textit{supra} note 10, at 498; Sandefur, \textit{supra} note 2, at 777.
107. See Michels, \textit{supra} note 87, at 558-60 (opining that the surge of legislative responses may too harshly restrict eminent domain, which is an essential power of the government and may be necessary for some economic development); Schultz, \textit{supra} note 51, at 234 (discussing the existence of a new test of comprehensive plan as saving grace).
108. Schultz, \textit{supra} note 51, at 197.
109. Baron, \textit{supra} note 2, at 621; Sandefur, \textit{supra} note 2, at 726.
110. Cohen, \textit{supra} note 10, at 496.
‘blight.’ ”113 It is fair to say that the abuses of eminent domain power to benefit private parties are rife in the United States.114

B. Criticisms of Economic Development Eminent Domain

1. Public Choice Theory

The first of the two main criticisms of eminent domain for economic development rests upon public choice theory. “According to public choice theory, a mobilized, well-connected minority can exert more political influence than a numerically superior but unorganized or apathetic majority . . . .”115 This “breakdown of the democratic process [is] among the most potent criticisms of . . . economic development takings.”116 The use of eminent domain to acquire land for development is highly beneficial to private developers because it dispenses with the need to negotiate with land owners thus lowering transaction costs.117 There is also “an incentive for the legislative body to seek favor from organized interest groups in order to raise money and gain votes.”118 The government also obtains the right to brag about redevelopment and renewal while “redevelopment officials benefit from projects through increased funding and the opportunity to be involved in future projects.”119 All this comes, unfortunately, at the expense of the owners of the acquired property and the general public.120

“The economically rational taxpayer will have little incentive to combat any one piece of legislation” or government expenditure.121 Even if a private property owner is directly affected, “the existence of compensation . . . decreases his incentive to invest in fighting the condemnation.”122 In any case, the private property owner is inevitably dwarfed by the more politically influential and powerful special interests.123 “[I]nterest groups are also quite effective at controlling the flow of information . . . , thereby encouraging positive reaction . . . [and] deterring opposition.”124 Given that the compensation paid for a condemnation is usually borne by the taxpayers generally, the special interest groups’ influence is actually

113. Cramer, supra note 111, at 417.
114. Falls, supra note 112, at 356; see Sandefur, supra note 2, at 725.
115. Serkin, supra note 13, at 1637.
117. Cramer, supra note 111, at 418.
118. Id. at 419.
119. Sandefur, supra note 2, at 770.
120. Cramer, supra note 111, at 419.
121. Kochan, supra note 11, at 81.
122. Id. at 82; see Serkin, supra note 13, at 1639.
123. Kochan, supra note 11, at 82.
124. Id. at 81; see Sandefur, supra note 2, at 771.
increased. Moreover, the concentrated nature of the benefit to the private developer means that the interest group has a much higher incentive to lobby the government for the benefit in comparison to the private property owner’s incentive to fight it. This incentive is exacerbated by the fact that the interest groups often bear little or none of the cost of the acquisition, which can lead to over-reliance on such measures. “[T]he redistributive nature of [this] rent-seeking behavior [may] be regarded as immoral, [but] it is also unproductive and inefficient.”

2. Undercompensation

The provision for just compensation is sometimes used to justify the taking of property. However, U.S. “courts have not pretended that fair market value” will compensate “for all losses [suffered] as a result of the taking.” Indeed, undercompensation is often cited as an important criticism of the eminent domain process. Undercompensation causes inefficiency where the full cost of the taking is not internalized.

Undercompensation occurs because “relocation expenses, goodwill associated with a business’s location, or the cost of replacing the condemned property” are not factored into the fair market value. “[T]he amount of money that the landowner will need to purchase a comparable property as a replacement” is not factored into the current market value. Significant losses result when displaced residents “are unable to secure comparably affordable replacement housing.” This will “work to the particular detriment of small business owners,” who may not be able to reopen at all or fail at their new location. Also, the current market value may not account for “[s]urpluses . . . from an owner’s singular appreciation from his property.” While “[s]ome owners’ valuation may be so idiosyncratic as to be unintelligible,” others may reflect

125. Serkin, supra note 13, at 1639.
128. Kochan, supra note 11, at 83 (footnote omitted).
129. Cohen, supra note 10, at 536.
130. Kelly, Jr., supra note 2, at 940.
131. Garnett, supra note 2, at 104; see, e.g., Cohen, supra note 10, at 536-40.
132. Cohen, supra note 10, at 541-42; see Serkin, supra note 13, at 1634.
133. Garnett, supra note 2, at 106; see Cohen, supra note 10, at 538.
134. Cramer, supra note 111, at 430.
135. Garnett, supra note 2, at 106.
136. Id.
137. Kelly, Jr., supra note 2, at 952.
actual “unique needs,” such as a wheelchair-bound owner with an easily accessible home.\footnote{138} “[T]he market price will not reflect” these surpluses given that “less sensitive buyers are so much more numerous.”\footnote{139} Another aspect of loss arises from the fact that eminent domain prevents an owner from benefiting from any potential value of the property that is likely to incur after the transfer.\footnote{140}

A sentimental attachment to the property may also cause the subjective value of that property to be higher than its fair market value.\footnote{141} This sentimental value includes the way property “becomes inextricably intertwined with an owner’s personhood.”\footnote{142} There is also a subjective loss arising out of the separation from neighbors and community support.\footnote{143} “[C]ommunities are valuable to people,” as “vast ethnographic literature” and “common experience” show.\footnote{144} “[N]o cash award can qualify as ‘just compensation’ ” for the deprivation of one’s home and community.\footnote{145} “Empirical research in the fields of cognitive psychology and behavioral economics has shown widespread tendencies among all sorts of property owners to hold on to their entitlements.”\footnote{146} “[S]tudies have explored both the [negative] physiological and psychological effects of the sudden loss of home and community due to condemnation.”\footnote{147}

The sudden removal from one’s neighborhood is seen as “a threat to the community member’s sense of self” and personal “emotional ecosystem.”\footnote{148}

The eminent domain process also causes “dignitary harms,” whereby property “[o]wners may feel unsettled and vulnerable.”\footnote{149} Because these dignitary harms result “from the nature of the government’s action, rather than from the owner’s subjective attachment,” they are exacerbated where eminent domain is used to advance economic development.\footnote{150} “First, owners may be offended by the government’s implicit suggestion that the current use of their property is less than socially optimal and that some other private owner would put it to a ‘better’ use.”\footnote{151} “Second, property owners
also may feel that the government has treated them unfairly vis-à-vis others whose property was not taken.”\textsuperscript{152} “The very regulations that produce social goods can impose hugely inefficient demoralization costs on individuals.”\textsuperscript{153}

It is worth noting that takers of property operate in ways that “may minimize . . . the risk of undercompensation.”\textsuperscript{154} “Takers are most likely to avoid a property” which has “a high subjective value, [is] important to a cohesive community,” or has “politically powerful owners.”\textsuperscript{155} The fear of unwanted and potentially damaging political opposition reduces the risk of undercompensation.\textsuperscript{156} However, echoing the rent-seeking abuse in the public choice theory, “political outsiders, including racial minorities and the poor, who are not attached to cohesive communities,” remain particularly vulnerable.\textsuperscript{157} Indeed, “some [socially weak] groups are disproportionately targets of ‘redevelopment’ efforts.”\textsuperscript{158}

3. Reform Proposals

Reform proposals abound in an attempt to tackle the perceived inadequacies of the current regime. “Some commentators have noted that the [suggested] payment of cash premiums can deter government from overusing condemnation against owners who suffer uncompensatable losses.”\textsuperscript{159} However, more money may not be the answer to reducing the risk of abuse of the eminent domain power\textsuperscript{160} given that government actors are motivated by political as well as monetary costs.\textsuperscript{161} It is also inconsistent with the language of the Fifth Amendment because “just compensation without a public use limitation” does not satisfy its requirements.\textsuperscript{162}

Several state legislatures, in response to \textit{Kelo}, have enacted restrictions on use of eminent domain for subsequent transfers to or acquisitions by private parties.\textsuperscript{163} Charles Cohen has suggested banning eminent domain for economic development altogether.\textsuperscript{164}

\textsuperscript{152} Id.
\textsuperscript{153} Baron, supra note 2, at 647.
\textsuperscript{154} Garnett, supra note 2, at 121.
\textsuperscript{155} Id. at 118.
\textsuperscript{156} Id. at 111.
\textsuperscript{157} Id. at 120.
\textsuperscript{158} Baron, supra note 2, at 631; see also Garnett, supra note 2, at 107 (explaining that African Americans are “frequently targeted for displacement”).
\textsuperscript{159} Kelly, Jr., supra note 2, at 941.
\textsuperscript{160} Garnett, supra note 2, at 137.
\textsuperscript{161} See Serkin, supra note 13, at 1640.
\textsuperscript{162} Cramer, supra note 111, at 430.
\textsuperscript{163} See generally Sandefur, supra note 2, at 757, 760, 763 (discussing state reform laws that have enacted such restrictions).
\textsuperscript{164} Cohen, supra note 10, at 498.
His main justifications are that abusive captures by interest groups may lead to injustice and that inefficiency results when the failure to internalize costs leads to undercompensation.\(^{165}\)

However, a complete ban ignores the necessity of economic development domain, especially in a developing or ailing economy.\(^{166}\)

Eminent domain has also proved indispensable “throughout history to clean up ‘miserable and disreputable housing conditions’ which may ‘suffocate the spirit by reducing the people who live there to the status of cattle.’ ”\(^{167}\)

Donald Kochan suggests allowing the marketplace to “craft[ ] private-order solutions to the problem of holdouts” because overusing the power of eminent domain will stifle such innovation aimed at reducing transaction costs.\(^{168}\)

Echoing the spirit of a private-order solution is Daniel Kelly, who has suggested “using secret buying agents . . . to avoid the holdout problem” and thus render eminent domain unnecessary for private transfers.\(^{169}\)

The use of a private buying agent serves as “a market test that prevents . . . socially undesirable projects”\(^{170}\)—projects that are possible under eminent domain due to the overestimation of the project’s benefits or the underestimation of the costs of the taking.\(^{171}\)

Therefore, eminent domain may have to remain as a fall-back option if the identity of the true principal is leaked out. James Kelly has suggested that “community members’ legal rights of long-term residency in their current homes should not be subject to eminent domain pursuant to a required redevelopment plan until the majority of them have approved the plan.”\(^{173}\)

C. Dealing with Rent-Seeking and Undercompensation:
A Givings Perspective

1. An Overlooked Aspect of the Equation:
(Unjust) Benefits to Private Developers

The proposed reforms discussed in the previous section all seek to protect private property owners from abuses of the eminent domain process. These proposed reforms also try to increase the cost

\(^{165}\) Id. at 546-47.

\(^{166}\) See supra Part II.C.2.

\(^{167}\) Michels, supra note 87, at 558 (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)).

\(^{168}\) Kochan, supra note 11, at 88-89.

\(^{169}\) Kelly, supra note 126, at 20-21.

\(^{170}\) Id. at 30.

\(^{171}\) Id. at 28.

\(^{172}\) Id. at 47.

\(^{173}\) Kelly, Jr., supra note 2, at 929.
or difficulty of using eminent domain, which will help deter the abuse of eminent domain by rent-seeking interest groups. However, given the widespread acknowledgement of the danger of rent-seeking by interest groups, it is surprising that little Chinese and United States academic discussion is directed at tackling this problem, which is arguably at the root of eminent domain abuse. Merely increasing the cost or difficulty of the exercise of eminent domain only decreases the attractiveness of eminent domain as a tool of rent-seeking. It neither eliminates the incentive for abuse when the benefit sufficiently outweighs the increased cost nor does anything to prevent the rent-seeking behavior. Only through ensuring that private developers are not unjustly enriched by government action—in this instance, eminent domain—can rent-seeking behavior and manipulation be eliminated. This is where the givings jurisprudence becomes notable.

2. The Importance and Relevance of Givings

“[T]he takings doctrine . . . focuses on identifying those diminutions of property caused by the government action that must be compensated . . . .” On the other hand, the “givings doctrine seeks to determine under what circumstances beneficiaries of government actions must be charged for received benefits.” Compared to the extensive and in-depth literature on takings doctrine, givings has only recently been given the attention it deserves. It was not until December 2001 that the first attempt to present a coherent theory was attempted by Abraham Bell and Gideon Parchomovsky. It was then developed and applied by Wallace Wang and the author in the context of China’s split share reform. In spite of this lack of scholarly attention, the importance of the doctrine is not diminished.

“First, there is an inextricable relationship between takings and givings. This is not only relevant in the context of developing a coherent takings doctrine but also in the practical world where government givings or takings are likely to be accompanied by some other corresponding takings or givings.” Having used the power of eminent domain to take private property from private

175. Id.
176. Id.
177. See id.
178. Id. at 327.
179. Id. at 327-28 (footnotes omitted); see Bell & Parchomovsky, supra note 15, at 552, 565.
owners in the name of economic development, the government generally transfers that property to a private developer—the taker.\textsuperscript{180}

Second, relative wealth is affected by both givings and takings. The sole focus on the diminutions of absolute wealth under the current takings doctrine fails to take into account the importance and relevance of relative wealth. “Both affect the poverty gap, which should be an important social and economical consideration in any government action.”\textsuperscript{181}

“Third, the risk of abuse and other political vices such as corruption and favoritism from unfettered takings applies equally, if not more, to unfettered givings. This is because ‘givings may produce winners without identifiable losers, making it an attractive policy tool.’”\textsuperscript{182} Even if a private property owner is directly affected by the taking, there is still an imbalance of actual power and influence, which severely limits opposition towards rent-seeking behavior.\textsuperscript{183} Moreover, the presence of compensation means that the burden is dispersedly distributed among taxpayers, allowing private developers’ interest groups greater leverage in abusing eminent domain for huge benefits.

“Fourth, givings, like takings, raise great concerns of fairness and efficiency.”\textsuperscript{184} Just as undercompensation causes inefficiency where the full cost of a taking is not internalized,\textsuperscript{185} “[u]naccounted givings result in positive externalities that would, if not internalized, create fiscal illusion.”\textsuperscript{186} In addition, “it is inequitable to bestow a benefit upon some people that, in all fairness and justice, should be given to the public as a whole.”\textsuperscript{187} It is clearly unfair for the government to discriminatorily “allocate benefits on the basis of one’s ability to exploit the political system.”\textsuperscript{188}

3. Charging Givings (I): Should a Charge Be Imposed?

The previous section explains the importance of the givings jurisprudence. However, not every giving by the government should be levied with a charge. Four criteria have been proposed by Bell &

\textsuperscript{180} See supra Parts II.C.2., III.A.
\textsuperscript{181} Wallace Wen-Yeu Wang & Jian-Lin Chen, supra note 16, at 328 (footnote omitted); see Bell & Parchomovsky, supra note 15, at 552.
\textsuperscript{183} See supra Part III.B.1.
\textsuperscript{184} Wallace Wen-Yeu Wang & Jian-Lin Chen, supra note 16, at 330 (footnote omitted); see also Bell & Parchomovsky, supra note 14, at 553.
\textsuperscript{185} See supra Part III.B.2.
\textsuperscript{187} Bell & Parchomovsky, supra note 15, at 554.
\textsuperscript{188} Id. at 578.
Parchomovsky to identify whether a chargeable giving has occurred and, if one is found, what the appropriate form of charge collection should be for that giving. The first two criteria are reversibility of the act and the identifiability of the recipients; they help identify situations where a charge should be imposed on the benefit’s recipients. The final two criteria are proximity of the act to a taking and the refusability of the benefit; both are relevant in determining the appropriate manner to levy the charge.

The scenario of a private developer getting land from the government, whether through eminent domain or otherwise, satisfies the first two criteria and thus a charge should be imposed on the private developer. “Under the reversibility of the act criterion, bestowing a benefit is more likely to be considered a chargeable giving when it could be characterized as a taking if reversed.” Since the taking of land demands compensation, developers should not be able to acquire land for free. Similarly, there can be no issue with the identifiability of the recipients because private developers are clearly beneficiaries of the land transfer. Thus, common logic would dictate that a fair charge should be imposed on private developers. However, occasions where private developers acquire land through eminent domain practically for free are unfortunately common. This discussion on the importance of charging givings only reinforces the fundamental failure of the traditional takings approach in dealing with the issue of uncompensated givings and the resulting corruption and rent-seeking behavior.

The fourth criterion, refusability of the benefit, represents “a straightforward and commonly accepted principle of law that one should not be forced to accept benefits against their will.” Thus, it poses no conceptual difficulty for imposing a charge on private developers since they would merely be paying for the land they wish to acquire.

193. See Kelly, supra note 126, at 39; Phan, supra note 21, at 623-24, 640.
4. Charging Givings (II): How Should It Be Charged?

The third criterion is particularly interesting. Having concluded that a charge should be imposed on a private developer for the benefit arising out of the land acquisition, “[t]he proximity of the giving to a taking is relevant in deciding when and how to assess” and impose the charge.\(^{195}\) Given that a giving is usually associated with a taking, especially so in the present context of land acquisition for the benefit of private developers, the assessment of a charge should “take into account any takings simultaneously incurred by the benefit recipients” to “fully capture the benefits of efficiency and fairness” of charging the giving.\(^{196}\)

Also, there are situations where “the taking or giving may be so intimately linked that it is both a requirement of efficiency principles and a demand of corrective justice that the compensation or charge should be made directly between the parties.”\(^{197}\) Greater efficiency is achieved when transaction costs are reduced as “the largely unnecessary intermediary role of the government” is done away with.\(^{198}\) Corruption arising out of this intermediary role is also reduced.\(^{199}\) Corrective justice is also better served where the persons who benefit from the taking directly compensate the victims of the taking.\(^{200}\) Indeed, “dignitary harms” arising out of takings are aggravated by the nature of the private taking.\(^{201}\) Additional dignitary harm arises “because the private beneficiaries frequently receive a windfall from the transaction,” with the owner not receiving a share since “the fair market value determination is made before the condemnation.”\(^ {202}\) Likewise, takings victims may not benefit from the economic development because of their displacement, unlike with the more traditional takings for public benefit and use.\(^ {203}\) A sense of injustice is further exacerbated by the perception that it is the “rich and powerful interests profiting at the expense of ordinary property owners.”\(^ {204}\) For example, in

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199. See supra Part II.C.4.
201. Garnett, supra note 2, at 109 (internal quotation marks omitted).
202. Id. at 145.
203. Id.
204. Cohen, supra note 10, at 549.
Kansas, despite receiving 125% of the market value as compensation, homeowners were nevertheless angered by the sale because “the government took their property to build a privately owned racetrack.”

Thus, in our context of land acquisition for private developers, there is a strong case for arguing that private developers should pay directly to the land owners whose lands they are forcefully acquiring. However, Bell and Parchomovsky “only provided the example of government-mediated private takings” to show how “the charge should be made directly between the parties.” A government-mediated private taking occurs where when a private party forcefully acquires property from a private owner by paying the latter compensation in an amount determined by a government intermediary. This process would be an improvement from the current takings regime since the money used to compensate the takings victims would come from the private developers instead of taxpayers. Paying from their own pocket reduces private developers’ incentive for rent-seeking and helps internalize the cost of a taking. However, since a government intermediary is needed to assess the charge under this model, efficiency, corruption and rent-seeking problems associated with such an intermediary are still present.

This private-bargaining model is currently employed in China, but it does little to prevent corruption relating to land acquisition from being the most serious corruption problem in China.

Next, the Singapore en-bloc process is examined as an example of a fresh approach towards economic development eminent domain that not only adheres to the givings jurisprudence alluded to above but also provides a novel solution towards charging of givings in situations where takings and givings are intimately linked.

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205. Falls, supra note 112, at 364.
209. Regulation on the Dismantlement of Urban Houses (promulgated by St. Council, June 13, 2001, effective Nov. 1, 2001), art. 13, translated in LAWINFOCHINA (last visited Feb. 24, 2009) (P.R.C); see also Most Expensive Dingzi Hu, supra note 60 (indicating that it is the private developers who are paying the compensation).
210. Land Corruption, supra note 73.
IV. SINGAPORE: THE EN-BLOC PROCESS

A. Background

En-bloc sale is where owners of a strata-title development—namely a flat or condominium—collectively sell their entire property development (hence the term “en-bloc sale”). The first en-bloc sale took place in 1994.\textsuperscript{211} It was the result of a re-zoning exercise by Singapore’s Urban Redevelopment Authority in 1993 to optimize land use.\textsuperscript{212} Higher plot ratio—an increase in the allowable density of strata developments—was granted to locations near mass transit stations or prime downtown areas to maximize land usage.\textsuperscript{213} This type of rezoning to a higher plot ratio is often deemed as hitting a jackpot since the potential value of land increases significantly as more units with larger areas are allowed to be built on the same plot of land.\textsuperscript{214} However, the high profits can only materialize when the owners band together and sell the property as a whole to a developer, who can then redevelop the land for more intensive use.\textsuperscript{215} At times, the increase in land use may be more than 100%.\textsuperscript{216} The owners are able to capture a significant portion of the benefit of this redevelopment. A minimum of 50% above market value is necessary to tempt the owner, with anything less than a 30% premium providing no interest to sell.\textsuperscript{217}

Given the nature of the transaction, which requires the unanimous consent of the owners to sell the property en-bloc, holdout is inevitably a common problem. The success rate of en-bloc sales is low, with only three out of ten en-bloc sales succeeding.\textsuperscript{218} Owners may

\textsuperscript{211} Lea Wee, Owners Sign Deal for Collective Sale of Cosy Mansions, STRAITSTIMES (Sing.), Sept. 23, 1994, at 3.

\textsuperscript{212} Tan Hsueh Yun, Have En-bloc Sales Lost Original Aim and Become a Money Game?, STRAITSTIMES (Sing.), Sept. 20, 1997, at 60; Tan Hsueh Yun & Pang Gek Choo, Analysts Feel Developers May Not Bite and Owners May Still Not Sell, STRAITSTIMES (Sing.), Nov. 21, 2007, at 56.

\textsuperscript{213} Tan Su Yen, Hitting the En Bloc Jackpot, BUS. TIMES (Sing.), Oct. 3, 1995, at 8.

\textsuperscript{214} Id.

\textsuperscript{215} Tan Hsueh Yun & Pang Gek Choo, supra note 212.

\textsuperscript{216} Uma Shankari, Heiwa Court Sold for $11 Million; Elmira Heights Also up for Collective Sale for $326m, BUS. TIMES (Sing.), Feb. 22, 2007 (increasing from twelve to twenty-seven units); Uma Shankari, Hot Hup Buys Killiney Rd En Bloc Site for $115m; It Can Develop a Condo With 75 Units of 1,500 sq ft Each, BUS. TIMES (Sing.), Apr. 25, 2007 (increasing from forty-four to seventy-five units); Tan Dawn Wei, They Don’t Even Own the Land They’re Fighting Over, STRAITSTIMES (Sing.), May 20, 2007 (increasing the number of units by more than double).

\textsuperscript{217} Tan Su Yen, Getting to the Nitty-Gritty of an En Bloc Sale, BUS. TIMES (Sing.), Oct. 3, 1995, at 8.

\textsuperscript{218} Why Some Say No to Million-Dollar Windfall, STRAITSTIMES (Sing.), Sept. 20, 1997, at 60; Tan Su Yen, supra note 217.
hold out for a variety of reasons, but it is hard to dispel the suspicion that strategic holdout for more money is common.\textsuperscript{219}

The failure of en-bloc sales to go through clearly defeats the original government’s intention of re-zoning to allow for more intensive land use. Individual owners of a strata-title development are clearly unable to increase the intensity of land use on their own while developers cannot tear down the existing building and redevelop if there is just one owner who refuses to sell. Given that Singapore is an extremely compact island,\textsuperscript{220} a land economist has opined the necessity of Singapore redeveloping.\textsuperscript{221} Indeed, Singapore’s high population density of 6,369 people per square kilometer\textsuperscript{222} dictates the compelling need for land use optimization.

\textbf{B. Legislative Debate}

In 1997, four years after the re-zoning exercise took place and in light of the appeals from frustrated owners whose en-bloc sale efforts were thwarted by a very small minority,\textsuperscript{223} the relevant law was amended to facilitate en-bloc sale. The primary purpose is to help plots of land realize their full development potential and to create more housing units on these prime lands.\textsuperscript{224} This facilitation is pursuant to an overall development plan to facilitate the redevelopment of land for more intensified use.\textsuperscript{225} There is also the secondary benefit of allowing rejuvenation of urban development.\textsuperscript{226} All these benefits are particularly necessary in Singapore where land is scarce.\textsuperscript{227}

The key amendment to facilitate en-bloc sale is the dispensation of unanimous consent. After the amendments, the private developers can compel the objecting owners to sell if the private developers have obtained a certain level of consent from the other owners. If the property is less than ten years old, 90% approval of

\textsuperscript{219} Tan Sai Siong, \textit{Iron Out the Wrinkles First}, STRAITS TIMES (Sing.), Dec. 8, 1997, at 51. Two property owners held out and received and additional $1 million. \textit{Id.}
\textsuperscript{220} SING. DEPT OF STATISTICS, YEARBOOK OF STATISTICS SINGAPORE 2007, at 9 (2007) (on file with author) (noting that Singapore has a land area of only 704 square kilometers).
\textsuperscript{221} Tan Hsueh Yun, \textit{supra} note 212.
\textsuperscript{222} SING. DEPT OF STATISTICS, \textit{supra} note 220, at 9.
\textsuperscript{223} En-Bloc Sales in Private Condominiums, Parliament No. 9, Sess. No. 1, Vol. No. 68, Sitting No: 3, col. 1829-30 (Feb. 19, 1997) (Sing.) (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).
\textsuperscript{224} Land Titles (Strata) Amendment Debate 1998, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, col. 610 (July 31, 1998) (Sing.) (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).
\textsuperscript{225} \textit{Id.} at col. 614 (testimony of Mr. Chuang Shaw Peng).
\textsuperscript{226} \textit{Id.} at col. 631 (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).
\textsuperscript{227} \textit{Id.}
the owners is required. Conversely, if the property is more than ten years old, only 80% approval is needed.

This is clearly an erosion of the absolute nature of property rights. Indeed, there were concerns about property rights during the parliamentary debate. It was also raised in Parliament that this proposed compulsory acquisition of the minority objecting owners’ property is unlike the traditional land acquisition for public interest—such as the building of infrastructural facilities like roads, airports, and rail lines—but only on economic grounds. There were concerns that minority owners may not be adequately compensated due to subjective value and relocation costs.

In the end, these reservations were counter-veiled by the public interest element in en-bloc sale given the need for redevelopment in land-scarce Singapore. Whatever the reason for remaining in a home, there was a need to ensure that the overriding interests of society at large were met. It was not possible to accommodate all the reasons for not wanting to sell, especially if the reasons were sentimental or subjective. Moreover, the principle of majority rule is evident in other areas of shared social and corporate life in Singapore, where sociocultural values place society above self. This ostensibly less individualistic outlook of society is considered to be a key survival value for Singapore.

228. Land Titles (Strata) Act, 1999, ch. 158, § 84A(1)(a) (Sing.).
229. Id. § 84A(1)(b).
230. E.g., Land Titles (Strata) Amendment Debate 1998, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, cols. 608-11 (July 31, 1998) (Sing.) (on file with author) (testimony of Associate Professor Chin Tet Yung); id. at cols. 614-16 (testimony of Mr. Simon S.C. Tay).
231. Id. at col. 608 (testimony of Associate Professor Chin Tet Yung); Land Titles (Strata) (Amendment) Bill (As reported from Select Committee), Parliament No. 9, Sess. No. 1, Vol. No. 70, Sitting No: 12, col. 1336 (May 4, 1999) (Sing.) (on file with author) (testimony of Mr. Simon S.C. Tay).
232. E.g., Land Titles (Strata) Amendment Debate 1998, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, cols. 608-11 (July 31, 1998) (Sing.) (on file with author) (testimony of Associate Professor Chin Tet Yung); id. at cols. 616-19 (testimony of Mr. Zulkifli Bin Baharudin); id. at cols. 624-28 (testimony of Mr. Simon S.C. Tay); id. at cols. 614-16 (testimony of Mr. Chuang Shaw Peng).
233. Id. (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).
234. Id. (testimony of Mr. Chng Hee Kok).
236. Land Titles (Strata) Amendment Debate 1998, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, cols. 608-11 (July 31, 1998) (Sing.) (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).
237. Id. at 611-13 (testimony of Mr. Lew Syn Pau).
238. See Michael Hill & Lian Wen, The Politics of Nation Building and Citizenship in Singapore 217 (1995) (“In January 1991 the government’s White Paper on Shared Values was issued, containing five components: 1) Nation before community and society above self; 2) Family as the basic unit of society; 3) Regard and community support for the individual; 4) Consensus instead of contention; and 5) Racial and religious harmony.”).
C. Legal Framework

The chief characteristic of the Singapore en-bloc process is that a private developer can acquire the whole property without seeking the unanimous consent of the existing property owners. In line with the parliamentary objective of urban renewal, the level of consent required is pegged to the age of the property. If the property is less than ten years old, owner approval must not be “less than 90% of the share values and not less than 90% of the total area of all the lots.”\(^{239}\) If the property is more than ten years, then only 80% approval is needed.\(^{240}\)

Whether a property is ripe for en-bloc sale and redevelopment is not a decision of the government. Rather, it is up to the owners to decide after taking into account numerous factors.\(^{241}\) The en-bloc process is initiated through the formation of collective sale committee by the owners to facilitate the approval seeking and sale process. To ensure transparency and proper conduct, there are various procedural requirements to which the en-bloc process must adhere.\(^{242}\) Procedural safeguards include the following: a statutory declaration of interest and relationship between the purchaser and owners;\(^{243}\) a valuation report by an independent valuer on the valuation of the property and the proposed method of distributing proceeds;\(^{244}\) a time limit of one year to complete the process, starting when the agreement is first signed by an owner;\(^{245}\) a requirement that the owners sign in the presence of a lawyer;\(^{246}\) a five-day cooling-off period;\(^{247}\) the appointment of the sale committee through a general meeting;\(^{248}\) a declaration of interest of the members of the sale committee with the property developer, property consultant, marketing agent or legal firm;\(^{249}\) and a requirement that the sale committee keep records of the proceedings.\(^{250}\)

\(^{239}\) Land Titles (Strata) Act, 1999, ch. 158, § 84A(1)(a) (Sing.).
\(^{240}\) Id. § 84A(1)(b).
\(^{241}\) Land Titles (Strata) Amendment Debate 1998, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, cols. 601-02 (July 31, 1998) (Sing.) (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).
\(^{242}\) See Land Titles (Strata) Act, First, Second & Third Schedules (Sing.).
\(^{243}\) Id. at First Schedule § 1(d)(iii).
\(^{244}\) Id. at First Schedule §§ 1(d)(vi), 1(d)(vii).
\(^{245}\) Id. at First Schedule § 1A.
\(^{246}\) Id. at First Schedule § 1C. Sections 1C-G explain the legal terms and liabilities to address the concerns of the owner. Land Titles (Strata) Amendment Debate 2007, supra note 6, at col. 1994 (testimony of Deputy Prime Minister and Minister for Law, Professor S. Jayakumar).
\(^{247}\) Land Titles (Strata) Act, First Schedule § 1E (Sing.).
\(^{248}\) Id. § 84A(1A)(a).
\(^{249}\) Id. at Third Schedule § 2.
\(^{250}\) Id. at Third Schedule § 9.
An owner who does not wish to sell, despite the requisite majority having agreed, is not left without remedy. An objecting owner has twenty-one days to file an objection to the Strata Titles Board. No fee is required and lawyer representation is not required. The Strata Titles Board, an administrative body set pursuant to the Building Maintenance and Strata Management Act 2004, has various significant powers. These powers include mediating any matter arising from the application to invoke collective sale, calling for a valuation report or other report, and imposing such conditions as it may be deemed fair and reasonable in approving the sale. Acting as mediator is an important role of the Strata Titles Board, which is expected to resolve many of the objections.

“The Strata Titles Board is not a mere rubber stamp which approves” the sale when the required majority is attained. The Strata Titles Board cannot approve the sale if any objector will incur a financial loss. Financial loss is defined as a situation where the proceeds of a sale for his property are less than the price the owner paid for the property. However, financial loss does not include situations where the owner’s net gain from the sale of his lot will be less than the other owners. Non-compliance with the procedural requirements is a ground for rejecting the application if the non-compliance prejudiced the interest of any person. The Strata Titles Board can block the sale if the transaction is not in good faith after considering the sale price, the method of distributing the proceeds of sale, and the relationship of the purchaser with any of the subsidiary owners.

251. Id. § 84A(4).
254. Land Titles (Strata) Act § 84A(5)(a).
255. Id. § 84A(5)(b).
256. Id. § 84A(5)(c).
257. Land Titles (Strata) Amendment Debate 1998, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, cols. 604-05 (July 31, 1998) (Sing.) (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).
258. En-Bloc Property Sale Committees (Measures to Ensure Transparency), Parliament No. 11, Sess. No. 1, Vol. No. 83, Sitting No: 6, col. 875 (May 22, 2007) (Sing.) (on file with author) (testimony of Senior Minister of State for Law, Associate Professor Ho Peng Kee).
259. Land Titles (Strata) Act § 84A(7).
260. Id. § 84A(8)(a).
261. Id. § 84A(8)(b).
262. Id. § 84A(7C).
263. Id. § 84A(9)(a)(i)(A)-(C).
The Strata Titles Board may also, with the consent of the collective sale committee, include an order that the proceeds of the sale for any lot be increased if it would be just and equitable to do so.264 This sum shall not exceed the aggregate sum of 0.25% of the proceeds of the sale for each lot or $2,000, whichever is higher.265 If the collective sale committee refuses, the Strata Titles Board can refuse to approve the sale.266

Once the Strata Titles Board approves the sale after dismissing any objections, the objecting owners must produce their certificates of title to the selling party.267 Appeal to the court is possible, but only on points of law or where there is alleged irregularity in the process.268

D. En-Bloc in Practice

Since the implementation of these amendments, the success rate of the en-bloc sales has increased from less than 33% to the present 65% to 75%.269 The fact that the private developers have to directly bargain with the property owners has resulted in solutions to cater to special needs. These include unit-to-unit exchange in new development270 or simply offering substantially more money after failure of the first round.271 A premium between 60% and 100% above market value remains common.272

264. Id. § 84A(7A).
265. Id. § 84A(7B).
266. Id. § 84A(9)(b).
267. Id. § 84B(4).
268. Building Maintenance and Strata Management Act 2004 (Act 47 of 2004), 2004, ch. 30C, §98(1) (Sing.) (“No appeal shall lie to the High Court against an order made by a Board under this Part or the Land Titles (Strata) Act (Cap. 158) except on a point of law.”). The Singapore courts have given “error of law” a wide interpretation that includes answering oneself and answering the wrong question, taking irrelevant considerations into account, or committing an error in admitting evidence. Ng Swee Lang v. Sassoon Samuel Bernard, [2007] SGHC 190, ¶18, ¶27 (Sing.); Land Titles (Strata)Amendment Debate 1998, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, col. 605 (July 31, 1998) (Sing.) (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).
269. Arthur Sim, Failure Rate Hits 25-35% for En Bloc Deals: Some Think the Rising Price of Replacement Homes Could Be One Reason for the Figures Last Year, BUS. TIMES (Sing.), Feb. 22, 2007; Tan Dawn Wei, supra note 216.
270. Tan Dawn Wei, supra note 216.
271. See, e.g., Nur Dianah Suhaimi, $550k Extra Lure for Second En-Bloc Attempt; Two Months After First Try, It Is Estimated That Largest Pine Grove Unit Will Get a Minimum $1.75 Million, STRAITS TIMES (Sing.), May 13, 2007 (extra $550,000 offered above initial offer of $1.2 million when only 50% of owners agreed in the first round).
272. Fiona Chan, $835M: Condo in Holland Road Area Sets New En Bloc Sale Record, STRAITS TIMES (Sing.), Apr. 28, 2007 (premium of more than double); Carolyn Quek, 140-Unit Estate Sold but One Won’t Move; Buyer City Developments Planning Legal Action Against 63-Year-Old Who Is Uncontactable Now, STRAITS TIMES (Sing.), June 4, 2007 (60% to 90% premium); Kalpana Rashihwala, Sing Hldgs Inks Deal to Buy Hillecourt Apts for $361m, BUS. TIMES (Sing.), Mar. 23, 2007 (60% premium); Uma Shankari, supra note 216 (70% premium); Joyce Teo, Anderson 18 Owners to Get $6.75m Each from Condo Sale,
The en-bloc process in Singapore is not without its costs and critics. Undercompensation remains a big concern, notwithstanding the substantial premium over market price. Relocation costs are key issues and sometimes account for a sale not going through despite the huge profit potential. Historical values are also not factored into the commercial value. Precious architectural heritage and memories are also at risk of being ignored and lost in the en-bloc fever. There is the disruption of community, especially for the elderly. There is also the greater effect on society as a whole through reinforcing the notion of Singapore being “a society in perpetual motion.”

Criticisms are directed at the possible abuses by serial “en-blocers” who buy property with an en-bloc mentality and then push hard for it. Ugly scenes between neighbors who want to sell and those who do not are not uncommon. Objections to the Strata Title Board have also increased recently. Fortunately, the reliance on and adherence to legal recourses has so far averted the dramatic and violent ding zi hu holdout experienced in China.

E. Recommendations for the Singapore En-Bloc Process

The various criticisms and complaints of the Singapore en-bloc process prompted the Singapore parliament to amend the relevant law again in September 2007. This was to “address the concerns of owners over the lack of clarity, transparency and safeguards in the current” en-bloc process. Indeed, many of the procedural safe-
guards discussed in Part IV.C., together with the Strata Titles Board's power to grant additional compensation, were initially introduced by this 2007 amendment.

The introduction of these amendments affirmed the validity of the criticisms and need for reform. The transparency and proper conduct of the en-bloc process is crucial to the success of the en-bloc process. The objectives of the en-bloc process may be defeated by the abuse of certain owners who might seek to advance their own interests at the expense of others. The power to order additional compensation is also particularly useful in mitigating any undercompensation that may arise from the peculiar circumstances of individual owners. The short history of these new amendments prevents in-depth evaluation of their actual effectiveness. Nonetheless, while most of the new procedural safeguards help to improve the transparency and proper conduct of the en-bloc process, it is always pertinent to consider the costs associated with these procedural safeguards. In particular, the professional services under the independent valuer and lawyer requirements are likely to be substantial. This raises the crucial problem of who should bear these costs if the en-bloc process does not succeed. Currently, these costs could be borne by a management fund, which in essence means that they are borne by all the owners. This is true regardless of whether the owners are even remotely interested in initiating the en-bloc process in the first place, and therefore, this apportionment of costs provides room for abuse by those owners who are keen to seek out the en-bloc process for their own interest.

Thus, before conducting any en-bloc process, including the appointment of the collective sale committee, there should be an


283. In particular, these procedural safeguards are the need for an independent valuer, the signing of the agreement in the presence of a lawyer, the five-day cooling-off period, and the appointment of a sale committee through general meeting. See supra notes 242-50 and accompanying text.

284. The lawyer fees are set to increase between 50% and 200%, while the valuer report can cost between seventy and two hundred United States dollars per owner. Fiona Chan, Rising Cost of Going En Bloc Adds to Cooler Market, STRAITSTIMES (Sing.), Feb. 9, 2008.

285. Joyce Teo, Selling En Bloc: New Rules will Help Improve Process, STRAITSTIMES (Sing.), Sept. 2, 2007. Teo identifies that there was uncertainty prior to amendment of whether the sale committee can use the management fund. Id. However, careful observation indicates that the issue was not addressed or reflected in the actual amendments and legislative debate.


287. Tan Dawn Wei, supra note 278.

288. The parliamentary intention behind this requirement is that there can be only one sale committee per development at any time; it is not aimed at the possible abuse of the management fund. Parliament No. 11, Sess. No. 1, Vol. No. 83, Sitting No. 13, col. 1994
owners meeting to decide whether there should be an attempt at
an en-bloc process at all. If at least 75% of the owners vote in fa­
vor, then management funds may be used to cover the cost of the
en-bloc process. If less than 75% of the owners are in favor, then
any fees or costs incurred in the subsequent en-bloc process are
borne by the owners who nevertheless voted in favor of the en-bloc.
The incurred fees or costs are reimbursed to these “interested
owners” only if the en-bloc process succeeds in the end. This pre­
vents management funds from being unfairly utilized by a
minority while leaving open the possibility for a potentially good
deal to be explored and pursued. In the new model proposed in
Part VI, this issue of transaction cost is resolved by making the
acquiring party pay.

Another possible deficiency is the presence of externalities. As
discussed in Part V, the en-bloc process allows efficient deals to be
concluded between private developers and property owners. How­
ever, social costs and benefits are inevitably not taken into ac­
count. This includes historical values, which are not factored into
the commercial value. Another significant social cost is that of
environmental pollution arising out of the demolition and con­
struction inherent in the redevelopment process. These costs are
borne by the surrounding owners but do not affect the parties of
the en-bloc process. The increased anxiety for other property own­
ers who want to see their residence as a home and not a mere
commodity is also impossible to quantify, but it is nonetheless
cause for concern. The significance of these social costs is recog­
nizable; Singapore’s compelling need for redevelopment and land
use optimization outweighs these social costs. However, the en-bloc
process should be revised regularly to keep up with changing social
and economic conditions. The en-bloc process should be corre­
spondingly restricted if the social benefits no longer outweigh the
social costs imposed.

(Sept. 20, 2007) (Sing.) (on file with author) (testimony of Deputy Prime Minister and Minis­
ter for Law, Professor S. Jayakumar).

289. Seventy-five percent is the level of consent needed for a special resolution. Build­
ing Maintenance and Strata Management Act 2004 (Act 47 of 2004), 2004, ch. 30C, § 2(3)(b)
(Sing.). It is also necessary for decisions involving major expendi­
tures, such as whether to provide additional facilities or improvements to the common property. Id. § 29(1)(d).

290. Sim, supra note 274.

291. Melissa Sim & Debbie Yong, Storeys of Dust and Noise: Homes and Businesses
Surrounded by En Bloc Constructions Bemoan the Physical Discomfort and Additional Costs
They Bring, STRAITS TIMES (Sing.), Sept. 2, 2007.

292. Linda Lim, Can Money Ease Loss of Memories?, STRAITS TIMES (Sing.), June 21,
2007; Peh Shing Huei & Keith Lin, supra note 276.

293. For example, when the growth rate of Singapore’s population becomes stagnant
and/or aged, the necessity of redevelopment decreases with less demand for new housing,
and the social costs increase since elders are most adversely affected in the en-bloc process.
F. The Nature of the En-Bloc Sale: A Collective Sale or a Disguised Private Taking?

At first blush, the en-bloc process bears little resemblance to economic development eminent domain: property owners decide when to put up their property for redevelopment; the sale process is conducted by a collective sale committee appointed by the property owners; private developers have to bargain directly with the property owners through the collective sale committee to procure their consent; and the price of purchase is determined by both parties and paid for by the private developers. All of these characteristics point toward a traditional private sale and purchase process rather than eminent domain.

However, closer examination reveals that private developers are indeed exercising eminent domain powers. Having obtained the required level of consent, private developers are able to compel the remaining objecting owners to sell their property. Indeed, this characteristic, fundamental to eminent domain (the ability to succumb to the veto nature of property rights), has been recognized during parliamentary debate. Concerns about this departure from traditional public use eminent domain has also been raised in parliamentary debate, though it was overcome by the perceived public interest in the legislative objective of optimal land use and urban renewal. The en-bloc process is still a form of eminent domain whose purpose is no different than the typical economic development eminent domain.

Nonetheless, there are important departures in Singapore’s en-bloc process from traditional economic development eminent domain in the United States and China. First, in accordance with the efficiency and fairness arising from requiring a beneficiary of a government giving to pay a fair charge, 294 private developers in Singapore’s en-bloc process have to foot the bill of the acquisition and cannot acquire the land on the cheap as in China and the United States. 295 Second, Singapore’s en-bloc process brings the acquiring party and the acquired party directly together to negotiate the compensation package. This not only further enhances efficiency, but also accords with corrective justice. 296 More importantly, Singapore’s en-bloc process requires the approval of a certain level of majority consent before eminent domain can be exercised. This is not only a key distinction from the use of traditional

294. See supra Part III.6.2.
295. In fact, the private developers in Singapore almost always have to pay substantially more than the “fair market value” of the property. See Rashiwala, supra note 272; see Teo, supra note 285.
296. See Chan, supra note 272; Tan Dawn Wei supra note 216; supra Part II.C.4.
eminent domain but also represents a significant step forward from the givings jurisprudence proposed by Bell and Parchomovsky. The exercise of the eminent domain in Singapore’s en-bloc process now becomes conditional. The condition of majority consent introduces a property rule protection—the right of veto—into what is essentially the liability rule nature of eminent domain.\textsuperscript{297} Moreover, the amount of compensation to be paid is now decided by negotiations between the purchasing and acquiring parties and not a third party intermediary. In the following Part, the benefits of this novel approach are examined in greater detail.

V. BENEFITS OF THE SINGAPORE MODEL

A. Private Developers Possess Better Economic Judgment than Legislators

One of the criticisms of the \textit{Kelo} decision is the deference given to the legislature in determining whether the public use requirement is satisfied.\textsuperscript{298} The United States Supreme Court played the role of “rubber stamping” the notion advanced by the legislature, that condemnation and redevelopment by private developers is necessary for urban renewal and economic development by the government.\textsuperscript{299} There are good reasons to believe that state and local governments may indeed be better placed to exercise discretion due to their proximity to the action and to the actors affected by land use planning measures.\textsuperscript{300} However, the failure of many economic development efforts strongly suggests that the legislature is not a good evaluator.\textsuperscript{301} \textit{Poletown Neighborhood Council v. City of Detroit}\textsuperscript{302} is illustrative of this point; the actual jobs created by the private developers for which the land was acquired fell well short of projections and may even account for less than the number of jobs destroyed by the acquisition.\textsuperscript{303} The truth of the matter is that the government “[t]akers tend to respond to political incentives rather than economic ones.”\textsuperscript{304} Their acumen in political decisions does not necessarily translate to and often conflicts with good economic decisions.

The en-bloc process prevents this problem by placing the economic decision of whether to commence redevelopment firmly in

\textsuperscript{297} See infra Part V.C.
\textsuperscript{298} Cohen, supra note 10, at 550.
\textsuperscript{299} Phan, supra note 21, at 642.
\textsuperscript{300} Baron, supra note 2, at 628.
\textsuperscript{301} Garnett, supra note 2, at 139-40; Kochan, supra note 11, at 88.
\textsuperscript{302} 304 N.W.2d 455 (Mich. 1981).
\textsuperscript{303} Cohen, supra note 10, at 545.
\textsuperscript{304} Garnett, supra note 2, at 140.
the hands of the current property owners and private developers; the government simply identifies areas of possible land use optimization and then re-zones the relevant plot to allow more intense uses. It is hard to imagine anybody being better placed or having more expertise or resources than the private developers in determining the economic viability of the redevelopment. The property owners are parties at ground zero of the proposed acquisition and are thus perfectly placed to negotiate with private developers to determine whether the proposed redevelopment is more economically efficient than current usage.

B. Better Internalization of Costs and a Reduction in Rent-Seeking

A criticism closely related to the above process is the failure to internalize the cost of eminent domain. The private developers benefiting from the use of eminent domain often bear little or none of the cost of acquisition. This can lead to an inefficient over-reliance on such measures. As the Poletown example demonstrates, there is a huge incentive to be overly optimistic about the success of an economic development project when one does not need to bear the full cost. If private developers have to foot the bill of the land acquisition, as opposed to having the bill distributed among taxpayers, private developers will naturally be more prudent in undertaking any land acquisition.

Similarly, as discussed in Part III.B.1, rent-seeking in public choice theory is a major concern in the exercise of eminent domain for economic development. This “breakdown of the democratic process is among the most potent criticisms of . . . economic development takings.” One of the main causes of such rent-seeking behavior is that there is “rent” to be “sought” in the use of eminent domain. The private developers can extract huge benefits from the process at the expense of the government, taxpayers, and property owners. Justice Ryan has commented that “when the private corporation to be aided by eminent domain is as large and influential as General Motors, the power of eminent domain, for all practical purposes, is in the hands of the private corporation. The municipality is merely the conduit.” “Local governments are particularly susceptible to the resources of affluent private developers who promise more jobs and tax revenue,” especially in China.

305. Kelly, supra note 126, at 38; see Phan, supra note 21, at 619.
306. Kelly, supra note 126, at 38.
This is where the Singapore en-bloc process nips the problem in the bud. In both the Singapore en-bloc process and traditional economic development eminent domain, the government relies on private developers to redevelop the land for more optimal land use and urban renewal. The key distinction between these processes is that in the Singapore en-bloc process private developers have to directly foot the bill of the land acquisition, unlike the current use of eminent domain in China and the United States. This ensures that private developers will not initiate any land acquisition in which they are not confident of recouping substantial acquisition costs. Moreover, without the ability to obtain a windfall through the manipulation of the eminent domain process, it is foreseeable that there would be significantly less room for rent-seeking. Indeed, it is telling that, despite not having private property rights enshrined in its constitution,\footnote{See supra note 272 and accompanying text.} Singapore has the lowest corruption rating compared to China and the United States,\footnote{TRANSPARENCY INT’L, GLOBAL CORRUPTION REPORT 2007, at 325-30 (2007). In a worldwide survey of 163 countries where scores range from ten being highly clean and zero being highly corrupt, Singapore comes in fifth with a score of 9.4, and the United States ranks twentieth with a score of 7.3, while China is seventieth with a score of 3.3. \textit{Id.}} which have such constitutional rights.

Singapore’s benefit of better internalization of cost and reduction of rent-seeking is further strengthened by the benefit of better compensation discussed in the next section.

\textbf{C. Better Compensation for the Owners of Acquired Property}

As discussed in Part III.B.2, undercompensation is a key concern in eminent domain. Even compensation at fair market value does not adequately compensate losses such as subjective value, sentimental value, and dignitary harms. The owners of property are also barred from realizing the potential value of their property.

Under the Singapore en-bloc process, the owners of acquired property are able to obtain compensation at a high premium, between 60% and 100% over market value.\footnote{See supra Part II.C.4.} However, the advantage of the Singapore en-bloc process is not simply the higher-than-market value per se. Instead, it is how this higher-than-market value is arrived at that allows a more comprehensive redress of the undercompensation issue.

The Singapore en-bloc process requires a significant majority of consent before eminent domain is utilized. This consent requirement essentially gives a veto power to the property owners to re-
ject any acquisition unless the compensation offered by the private developers is deemed adequate by the property owners. The veto power in turn allows the compensation sum to capture many of the losses that would otherwise not be captured by the use of fair market value. For example, if there is significant sentimental value and community value shared by the property owners, they can then veto the land acquisition unless a sufficiently high price is offered to compensate for this loss. Alternatively, the private developers can simply move on to other properties where owners have less sentimental value attached. Similarly, relocation costs and/or costs of procuring a replacement home are not factored into the fair market value and constitute major uncompensated losses.\textsuperscript{314} In the Singapore en-bloc process, the property owners would inevitably include this factor in their consideration of whether to accept the offer or not. Indeed, the property owners have rejected high above-market value offers on the basis that the premium remains insufficient to compensate their relocation costs.\textsuperscript{315} The property owners are also able to share in the profit that the private developers will enjoy from the redevelopment. Through pooling their resources together, the property owners are able to hire professional independent valuers to assess both the present and potential value of their property. The property owners’ ability to veto the en-bloc process places them in a good position to bargain for some share of the potential value before giving their consent.

While dignitary harms cannot be eliminated where there is compulsion against one’s will, dignitary harms are reduced in the Singapore en-bloc process. The requirement of majority consent helps make the compulsory acquisition more palatable for the objecting owners. Instead of objecting owners feeling as if the government’s powers have been hijacked by a small, powerful, and wealthy interest group, they may take some comfort from the fact that the compulsory acquisition is the result of a democratic decision by their own neighbors, which by implication suggests similar social status and grouping. In the Singapore en-bloc process, there is less sense of grievance from corruption, which is a particular source of objection in the context of China.\textsuperscript{316}

Of course, since only majority and not unanimous consent is required, there remains the possibility that various losses peculiar to the remaining dissenting owners remain uncompensated. This is partly mitigated by the provision of a third-party intermediary,
which can require more compensation be paid to certain objecting owners as a condition for granting the use of eminent domain against them. Moreover, the economic analysis in the following section will demonstrate the overall efficiency.

D. Economic Analysis: An Efficient Hybrid Property-Liability Rule

“The property rule-liability rule dichotomy, first articulated by Guido Calabresi and A. Douglas Melamed provides a useful tool of economic analysis.” Under the property rule, a transfer of entitlement requires the consent of its holder. On the other hand, the removal of entitlement protected by the liability rule only requires payment of an objectively determined value. The difference between these two rules has often been conceived “as the difference between protecting by deterrence and protecting by compensation.”

The requirement of majority consent for the Singapore en-bloc process means that the property owners as a whole can veto the proposed redevelopment plan and land acquisition. This veto power is the departure from the traditional eminent domain in which the property owners have absolutely no say after the government has decided to exercise eminent domain. The property owners can only dispute the level of compensation and/or seek judicial review on whether the exercise of eminent domain is legally justified. Thus, one can view the majority requirement in the Singapore en-bloc process as an injection of property rule protection into an otherwise liability rule protection.

As seen in the previous sections, this use of property rule protection allows the property owners to capture a very significant part of their property’s subjective value which is otherwise not reflected in fair market value compensation. Property rule protection accords a greater respect to personal autonomy—the autonomy that is useful in protecting the subjective value of property. The consequential private bargaining also “achieves a higher degree of efficiency by tapping into the intellectual resources of all the relevant parties.” Similarly, doing away with the government intermediary’s assessment of compensation in the liability rule not

317. See supra Part IV.C.
320. Id.
322. Calabresi & Melamed, supra note 319, at 1108.
only reduces the transaction costs in the form of administrative costs but also reduces the risk of corruption and rent-seeking—a particular concern in China.\textsuperscript{324}

However, total reliance on the property rule is inefficient where unanimous consent is required from a large group of people, given the high costs of bargaining.\textsuperscript{325} In particular, as seen through China’s \textit{ding zi hu} and various U.S. court cases on eminent domain, there is the real problem of holdout. Property owners often hold out by overstating the value of their property such that “the government might offer more than market value . . . to avoid political fallout” or litigation.\textsuperscript{326} It is true that there is distinction between those who hold out for strategic reasons (the holdout arguably being inefficient) and those who hold out because they genuinely have a higher valuation of their property (the holdout arguably being efficient). However, it is often impossible to differentiate between these possibilities in the context of eminent domain.\textsuperscript{327} In addition, owners may also genuinely overestimate the value of their property under the “mistaken belief that the market price would reflect their subjective value to the subconscious realization that their self-valuation may affect the ultimate price offered.”\textsuperscript{328} These holdouts can sometimes impede socially useful projects.\textsuperscript{329} The conventional justification of eminent domain is to overcome the holdout problem among sellers.\textsuperscript{330} Indeed, the Singapore government initially left it entirely on the private parties to decide whether redevelopment should occur. The Singapore government only intervened with the provision of eminent domain powers against the minority objectors after the high failure rate of the en-bloc process threatened to derail the parliamentary objective of optimizing land use.\textsuperscript{331}

Hence, having relied on the property rule protection to capture a substantial part of the property’s subjective value through a majority consent requirement, efficiency is further promoted by switching to the liability rule for the remaining minority where the transaction costs become unacceptably high due to strategic holdouts. While it is inevitable that some subjective value may remain uncompensated for those genuine holdouts, this problem is mitigated by the ability of the third-party intermediary—the

\begin{thebibliography}{9}
\bibitem{324} See supra Part II.C.4.
\bibitem{326} Garnett, supra note 2, at 127.
\bibitem{327} See Kelly, supra note 126, at 19.
\bibitem{328} Garnett, supra note 2, at 127.
\bibitem{329} See Cohen, supra note 10, at 534-35.
\bibitem{330} Kelly, supra note 126, at 20.
\bibitem{331} See supra Part IV.B.
\end{thebibliography}
Singapore Strata Title Board—to take into account the peculiar circumstances of the minority objectors and award higher compensation where necessary.332

More importantly, the public interest and social benefits behind such economic development eminent domain cannot be disregarded. As discussed in Part II.C.2, even the United States heavily relied on eminent domain in the deepening stages of its economy. There is a compelling need for China to rapidly develop its economy to improve the living standards of her vast population. This task cannot be achieved by public investment and development alone.333 Similarly, in the context of Singapore’s en-bloc process, owners very seldom have the resources to redevelop the land for more optimized/intensified uses, which could be highly detrimental to the public interest in Singapore where land is extremely scarce. The hybrid property-liability rule of the Singapore en-bloc process is an efficient method of facilitating socially efficient transactions.

E. A More Structured and Transparent Process

One may point out that the current eminent domain practice in the United States and China already requires private developers to negotiate with the property owners before relying on eminent domain.334 However, this practice is actually much more inefficient and more prone to abuse. Undercompensation remains a significant problem since the negotiation is conducted under the threat of eminent domain. Both the property owner and the private developer are aware that after a fair market value has been offered, any failure of negotiations or agreement has little impact on the exercise of eminent domain unless the objecting owners incur tremendous amounts of time and expense challenging the eminent domain in court. On the other hand, both parties in the Singapore en-bloc process know the importance of property owners’ consent. Once a certain level of the minority has objected to the sale, the entire project is halted. Thus the property owners are able to

332. See supra Part IV.C.
333. Indeed, China’s public sector and state-owned enterprises were inefficient and unprofitable, which is in sharp contrast to the private sector which is doing very well. William I. Friedman, One Country, Two Systems: The Inherent Conflict Between China’s Communist Politics and Capitalist Securities Market, 27 BROOK. J. INT’L L. 477, 477-78 (2002). Chinese reforms since 1978 have aimed to introduce market mechanisms and less state intervention to facilitate economic growth. Id. Hence, the private developers are serving a very crucial role in China’s economic development.
334. See Cohen, supra note 10, at 536 (regarding the United States); supra Part II.B (regarding China).
consistently bargain for above-market-value compensation, which better reflects the subjective value of the property.\footnote{335}{See supra note 272 and accompanying text.}

Moreover, the greatest deficiency of the current practice in the United States and China is the lack of structure and transparency in the process. First, generally, the longer an owner waits to enter into agreement with a private developer the more compensation he will receive.\footnote{336}{Wu Xin Hui, supra note 24.} This tendency encourages strategic holdout and increases the transaction costs of bargaining. Second, the stark inequality in resources and bargaining power between property owners and private developers impedes the attainment of a fair and efficient agreement. Third, a significant portion of subjective value is the community externalities whose values are dependent on the community not breaking up.\footnote{337}{See Parchomovsky & Siegelman, supra note 144, at 114.} The current practice in the United States and China allows the use of the “divide and conquer” tactic by enticing a portion of the community to “cash out [early] at an attractive price.”\footnote{338}{Id. at 124.} The withdrawal of these community members in turn diminishes the value of the community for the remaining members and causes them to sell quickly before the value diminishes any further.\footnote{339}{Id.} This is what has happened in China—remaining owners are left completely stranded in the construction site with no neighbors or amenities.\footnote{340}{Ye Peng Fei, supra note 65.} There is hardly any user value left in those circumstances, and any hold out would be pointless without any other leverage for strategic holdout.\footnote{341}{See supra Part II.C.3. In the case of China, that leverage is in the form of local and international media coverage. See supra notes 60-62 and accompanying text.} This exploitation is both unfair and inefficient given the uncompensated loss of the community value.\footnote{342}{Parchomovsky & Siegelman, supra note 144, at 124.}

Here, the structure and transparency of the Singapore en-bloc process is extremely useful. There is no risk of unequal treatment based on the timing of the agreement, as all property owners stand and fall together. There is also the need for the majority to consent for the distribution method of the compensation, preventing unfair prejudice of a certain minority. Unfair prejudice of the minority is kept in check by requiring an independent valuer to determine the distribution method and the government intermediary’s power to block the en-bloc process if the distribution of compensation is not made in good faith.\footnote{343}{See supra Part IV.C.} The fact that all property owners stand and fall together prevents the exploitation tactic of “divide and con-
quer.” The playing field is leveled as the resources of all the property owners are pooled together in the bargaining process. The appointment of the collective sale committee to negotiate with the private developers reflects the “common way to overcome the collective action problem”; “some group members assume the role of leaders and spearhead the effort to coordinate the group.” The agency problem is introduced but is mitigated by the procedural guidelines, which regulate the process and the collective sale committee that must to be elected or appointed by the property owners. The agency problem is further reduced by the fact that the issue concerns each property owner intimately and substantially. Thus, there is no lack of incentive on the part of the property owners to supervise the operation of the appointed committee.

VI. A NEW MODEL

While the above discussions confirmed the advantages of the Singapore en-bloc process over traditional eminent domain, the Singapore en-bloc process is currently only applicable to strata-title property. Landed property is excluded from the exercise of eminent domain by the private developers. Indeed, this distinction was recognized in the parliamentary debate and used to justify the amendment, since when buying a unit in a strata-title property one is only buying into the common property and not a specific land lot. The nature of strata-title property also facilitates the en-bloc process. There is an existing management structure, for the purpose of maintaining the common property/area, and a meeting mechanism to which the en-bloc procedures, such as appointment of a collective sale committee and procurement of consent, can adapt.

This inapplicability to landed property is not particularly serious in the context of Singapore since only 5% of the Singapore households reside in landed property. Nevertheless, there is no reason why the characteristics of the Singapore en-bloc process, which provide the efficiency and fairness advantages over the cur-

344. Parchomovsky & Siegelman, supra note 144, at 130.
345. Id. at 131.
347. LEOW BEE GEOK, CENSUS OF POPULATION 2000: HOUSEHOLDS AND HOUSING 35 (2007) (on file with author). The bulk of Singapore households (88%) reside in HDB flats (public housing). Id. These HDB are naturally not subjected to the en-bloc process given the fact that the government owns the land of the HDB housing estate. The HDB flats are, however, subject to the Selective En Bloc Redevelopment Scheme and the various upgrading programs for urban renewal and land use optimization. See SING. DEPT OF STATISTICS, supra note 220, at 110-11.
rent economic development eminent domain practice in the United States and China, cannot be adopted for future eminent domain practices. The new model proposed below draws on these characteristics with the necessary modifications and improvements to suit the context of China. The lessons and improvements from the analysis of the Singapore en-bloc process are also incorporated. In particular, the issue of who should bear the transaction of a failed acquisition is addressed. The developing nature of China’s economy dictates a greater necessity and corresponding public interest in economic development eminent domain. Nevertheless, the applicability of the new model to the United States will be discussed at the end.

A. Stage One: Drawing up the Plot of Land for Eminent Domain

The current Singapore en-bloc process is based on existing boundary of the strata-title development. This dispenses with the need to draw up the plot of land for eminent domain. In the new model, there is the need to identify the plot of land for economic development as per conventional eminent domain practice. In this regard, the starting stages of current practice and this new model are similar. The relevant planning authorities will conduct the necessary survey and study to identify the plot of land for economic development. It will then liaise with possible private developers on the possible development plan.

The next stage is different. Having identified the necessity of economic development and the plot of land for which eminent domain may be exercised, the next stage in the proposed model involves the assessment of uniqueness that the particular plot of land has within the development plan. This is relevant to the determination of the level of majority of consent required before eminent domain may be exercised. As seen above, the majority of consent required in the Singapore en-bloc process is tied to the age of the property, which can be seen as pegging the level of consent on the necessity of eminent domain—the older the property, the more necessary the use of eminent domain given the objective of urban renewal. Thus, if the necessity of a particular plot of land is not particularly instrumental to the development plan, the level of consent will naturally be higher to ensure the minimalization of uncompensated subjective value. On the other hand, if the particular plot of land is indispensable to the development plan, the level of majority consent should be reduced to minimize the likely
impediment of the development plan— a strategic holdout due to monopoly pricing by the owners/sellers.348

Nevertheless, the required level of consent should not fall below two-thirds for the following two reasons. First, the key advantage of injecting property rule protection is the ability to capture the subjective value of the property. This is to avoid the inefficiency of having such values uncompensated and not internalized. This advantage is likely to be diluted to an unacceptable degree if the level of consent is too low. Second, another benefit of the consent requirement is the reduction of dignitary harms. Instead of the acquired party feeling aggrieved from possible corruption or rent-seeking behavior by the rich and powerful private developers, the reliance of collective decision by the acquired party helps mitigate this perception of injustice. The requirement of a minimum of two-third majority ensures that the decision is based on a clear majority. This is particularly necessary in China where procedures may not be strictly adhered to in the initial stages of implementation. The minimum requirement of two-thirds majority can withstand a significant level of procedural defect and still ensure there is at least a majority consenting.

B. Stage Two: Negotiation Among Parties

Having identified the plot of land, the next stage is the negotiation phase. This phase first involves the setting up of a committee to negotiate on behalf of the affected owners. The committee is necessary to help pool together the resources of the affected owners and overcome collective action problems. Members of the committee should be appointed by owners, and the committee should preferably be comprised of the owners themselves. Since effective negotiation requires significant resources, such as the hiring of property appraisers and lawyers, the acquiring party should be legally required to provide a certain amount of money to the committee at the onset of negotiations. This ensures that the inequality in resources does not prejudice efficient and effective negotiation. This requirement also guarantees the acquired party is not unfairly burdened with all of the transaction costs of a failed acquisition.

The committee will be tasked to negotiate with the acquirer of the land. This includes assessing the current value and potential value of the land to determine the legitimacy of the monetary offer. Another important task is to serve as a channel of feedback for the owners. The committee should collect and compile the various special requests and needs of the owners and convey them to the po-

tential acquirer. This would allow the acquirer to consider offering more money or coming up with a specific package to meet those needs in order to secure their consent. A set of procedures regulating the negotiation process should be stipulated so as to ensure a fair and transparent process. These procedures should include those of the Singapore en-bloc process: a notice period, provisions for meeting management, a required quorum at meetings, and disclosure of any conflict of interest.349

Having negotiated with the committee, the acquirer will then prepare a compensation and relocation package for the approval of the owners. The current Singapore en-bloc practice does not require the approval to be sought at the same time. However, transparency of the procedure will be better assured if the owners can come together and vote on the proposal at the same time. The voting is preferably anonymous to prevent any undue influence or duress in seeking the consent. This is a concern in China given the resorts to violence and other underhanded techniques employed at times.350 The turnout of the voting should not be a problem given the owners’ intimate and substantial interest in the issue. The owners will vote on the whole compensation package, including the distribution methods. The amount of votes an owner is entitled would certainly be varied unless all the property of the plot is identical. As a preliminary matter, a voting share should be determined by using an equally weighted combination of the property’s area and tax value—each expressed as a percentage of the entire area and tax value of the property sought to be acquired.351

Prima facie, the compensation package will have to offer a premium over existing market value in order to entice the owners to sell. This is an efficient and desirable outcome given the economic development nature of this exercise of eminent domain. As opposed to eminent domain for traditional public use purposes of public infrastructure, there must be a substantial increase in the economic value of the land after redevelopment to justify such economic development eminent domain by private developers. If the acquiring private developers are not prepared to pay a premium over the current market value of the land, then it is likely the proposed new development is not more economically viable than the current use.

349. See supra Part IV.C.
350. See supra Part II.C.1.
351. For example, if the area of a property comprises 10% of the total plot of land sought to be acquired and the property's tax value is 5% of the total property tax value of the entire property, the owner of this property would be entitled to 7.5% of the voting shares ((.10 + .05)/2 = .075).
Looking at the other aspect of the negotiation, it would be preferable to have more than one private developer competing for the project. The competition will help ensure a more efficient and valuable deal for the owners of the acquired land. Nonetheless, competition in this regard is not strictly necessary, as the owners have the means to evaluate the adequacy of the compensation package and can still easily reject an inadequate compensation package with nothing to lose.

C. Stage Three: Third Party Intermediary

If the acquiring party manages to secure the required level of consent, the next stage is to allow for redress to the objecting owners. Procedurally, it should be stipulated clearly at the outset and also during the voting that there is an avenue of redress/appeal for the objecting owners.

An administrative authority could be tasked with handling such an avenue of redress. The following key areas should be included in the board’s analysis: (i) whether the negotiation and distribution methods are done in good faith; (ii) whether there is some special subjective value of the objecting owners which requires higher compensation or special arrangement; and (iii) whether the procedural requirements of the process are followed. Like the Singapore en-bloc process, the authority should have the power to mediate the objections and to order any additional compensation on account of the peculiar circumstances of the objecting owners. The authority should also refuse to grant eminent domain on the objecting owners if there is a lack of good faith or injustice in the process.

Admittedly, given the rampant corruption in China, whether the authority is administrative or judicial in nature is possibly the weak link in the entire process. The goals of installing procedural safeguards and protecting the minority are circumvented if the board is biased. This may be mitigated by ensuring that the authority is appointed by the central government and answers directly to it. However, the danger of rent-seeking and corruption remains a constant threat without an overall structural revamp and imposition of the rule of law. Nevertheless, this is a structural deficiency, which is inevitable whenever a government intermediary is involved. The new model still goes a long way in safeguarding the interests of the acquired party through the requirement of majority consent. The acquired party is, at the very least, no longer at the whim of the acquiring party.

352. See supra Part II.C.4.
<table>
<thead>
<tr>
<th>Step 1:</th>
<th>Identify the plot of land for economic development</th>
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| Step 2: | Assessment of the uniqueness of the property to determine the level of consent required  
  - the more pressing, the lower the level of consent  
  - minimum level of consent should be 2/3 |
| Step 3: | Appointment of negotiating committee  
  - accomplished through voting by owners |
| Step 4: | Negotiation by negotiating committee  
  - receive funds from acquiring party  
  - engage necessary professional services (lawyers and property appraisers)  
  - gather feedback from owners |
| Step 5: | Compensation package proposed by acquiring party  
  - can include replacing housing |
| Step 6: | Voting by owners  
  - preferably unanimous  
  - number of votes based on area and value of property  
  *(Process halted if level of consent not obtained)* |
| Step 7: | Appeal by minority owners  
  - for higher compensation or complaints on the process  
  *(Process halted if bad faith or prejudice found)* |
| Step 8: | Acquiring party distributes compensation package and exercises eminent domain on any dissenting owners |
D. A Different Social-Cultural Perspective on Private Property Rights

Charles Cohen has suggested banning eminent domain for economic development altogether; the main justifications are injustice (abusive capture by interest groups) and inefficiency (undercompensation and a failure to internalize costs). However, as explained above, the new model premised on the Singapore en-bloc process is effective at reducing the injustice and inefficiency. More importantly, while one of the important purposes of government is to protect property rights, it is the government that defines the scope of the property rights it is supposed to protect. Different socioeconomic circumstances will naturally require a different level and nature of property rights protection.

The concept of private property rights is deeply ingrained in the American psyche. “Private property is precious in America.” “[A]merican people believe that property rights are invested with moral significance.” “[S]ound protection of property rights is [deemed] fundamental to all other liberties.” Americans have strong expectations about the Constitutional protection of property rights and ask with conviction, “Why me?” when property is taken. The founders, being landowners themselves, understood the danger of a politically influential minority upsetting the distribution of property if there were an unrestricted right to seize private property. Indeed, in early American history, many courts viewed “laws or acts which ‘took from A to give to B’ as the paradigmatic abuse of government authority.” Neither did “the American founders accept government as the agent for redistributing private property for ‘economic development.’ ”

However, this was fundamentally changed in the nineteenth-century when eminent domain became an important economic development tool. Then, “ ‘public interest’ of economic prosperity

354. Baron, supra note 2, at 649.
355. Id. at 654.
356. Sandefur, supra note 2, at 726 (quoting California Congresswoman Maxine Waters) (internal quotation marks omitted).
357. Id. at 711 (quoting The Kelo Decision: Investigating Takings of Homes and Other Private Property, Hearing Before the S. Comm. on the Judiciary, 109th Cong. 14 (2005) (statement of Professor Thomas W. Merrill)) (internal quotation marks omitted).
358. Kochan, supra note 11, at 55.
359. Baron, supra note 2, at 647.
361. Sandefur, supra note 2, at 715. But c.f. Cohen, supra note 10, at 494 (opining that, throughout most of American history, public use is deemed to include anything that enhances public welfare).
362. Sandefur, supra note 2, at 773.
363. Schultz, supra note 51, at 200; Cohen, supra note 10, at 506.
American government attempted to “release energy” by encouraging private developers to make the best use of land. The legislature was also eager to attract investment, often at the expense of individual property owners. The judiciary exercised extensive deference to these government takings and recognized such weakened property rights as necessary for development.

This trend is further reinforced by the New Deal, which caused a cultural and philosophical shift in the perception of government and property rights. Government today is responsible not only for providing traditional public goods—such as roads, schools, and parks—but it is also expected to provide jobs and health care. U.S. courts have played their own role by “rubber stamping” the notion that condemnation and redevelopment by private developers are necessary for urban renewal and economic development by the government. Perhaps the fact that there is already an abundance of “shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce” serves as evidence that the justifications for eminent domain for such developments are weak. Nonetheless, this history of the ever-changing perspective of property rights in the United States highlights the interwoven link with the underlying socioeconomic circumstances.

The new model premised on the Singapore en-bloc process is still a departure from the absolute private property rights. However, China has only recently constitutionally recognized private property rights. Indeed, private property rights were virtually non-existent in the communist state until twenty years ago. Together with the developing state of China’s economy, there is a strong case for not defining private property rights in China with such absoluteness so as to exclude economic development eminent domain.

In any case, the evolutionary history of property rights in the United States suggests that the current objections against economic development eminent domain are unlikely to be based on some sacred notion of absolute property rights. Indeed, the main objections to economic development eminent domain are the injus-

364. Wang, supra note 21, at 611.
365. Id. at 612.
366. Id. at 613-14.
367. Sandefur, supra note 2, at 772-73.
368. Id. at 772.
369. Phan, supra note 21, at 642.
370. Cramer, supra note 111, at 434.
tice and inefficiency arising from rent-seeking and undercompensation. If that is the case, then the proposed new model, which is demonstrated to effectively tackle the rent-seeking and undercompensation problem, is applicable to the United States as well. The lower level of corruption in the United States also means the procedural safeguards from the government third-party intermediary can be better materialized.

VII. CONCLUSION

Economic development eminent domain by private developers does provide the dangerous potential for rent-seeking corruption and undercompensation inefficiency. However, the academic discussions in the United States and China have missed a crucial aspect of the issue by merely focusing on the takings aspect and not tackling the root cause of the problem in the givings aspect. In this regard, the givings principles espoused by Abraham Bell and Gideon Parchomovsky, which require the recipient of a government giving to pay a fair charge for the benefits received, fills the gap. This payment of a fair charge prevents the extraction of a windfall benefit from rent-seeking, tackling the root of the injustice problem. However, addressing the undercompensation issue and the accurate assessment of the charge requires a novel departure from the original givings jurisprudence through the injection of some property rule protection into the liability rule nature of eminent domain. Here, the Singapore en-bloc process, which utilizes a hybrid property-liability rule protection, demonstrates the necessity, fairness, efficiency, and advantages of such an approach over the current economic development eminent domain practice in the United States and China. A new model based on the Singapore en-bloc process, incorporating the necessary improvements and modifications as discussed in the previous sections, would provide a more equitable and efficient eminent domain tool for China as it strives to continue its rapid economic development.

In addition, the telling fact that Singapore has the lowest corruption rating compared to China and the United States, despite not having private property rights enshrined in her Constitution, also highlights the importance of this neglected givings jurisprudence in tackling the root of corruption and rent-seeking. Future reform proposals for eminent domain in the United States could do well to incorporate this givings jurisprudence for a more comprehensive approach to the undercompensation and rent-seeking problem.

373. TRANSPARENCY INT’L, supra note 312.