

criminal prosecution. In view of these practical considerations, the present rule appears to encourage violations of the law. On the other hand, the civil action is not affected by a dissolution, and in numerous cases this relief is sought without a concomitant criminal prosecution.

While there appear few reported cases in which a corporate defendant has gained immunity by dissolution, there exists no record of actual incidents which did not go beyond the trial court. At least one writer has indicated that it is not an infrequent occurrence, but that few cases are appealed.⁶²

⁶² Marcus, *op. cit.* supra note 57. See also, Note, 32 Col. L. Rev. 347, 360 (1932).

"CONSERVATION"—A NEW AREA FOR URBAN REDEVELOPMENT

The most recent legal problem in the growing field of urban redevelopment is presented by an amendment to the Illinois Neighborhood Redevelopment Corporation Law¹ authorizing groups of citizens to incorporate² in order to exercise the power of eminent domain for a unique purpose: the "conservation" of deteriorating urban areas. The effect of this new legislation is to arm with a substantial weapon groups most interested in preventing further neighborhood deterioration. Its premise is that such groups, by acquiring and rebuilding isolated dilapidated structures, may be best able to restore a declining neighborhood and prevent its becoming a slum.

The amendment makes available for neighborhood "conservation" the procedures which the original 1941 act set up for the redevelopment of areas already deteriorated to the "slum" or "blight" stages.³ There are three procedural steps which must be carried out before actual reconstruction of the area may begin. First, a group of at least three citizens, presumably including, in most cases, residents of the neighborhood, must incorporate. This requires filing with the Secretary of State certain organizational information and a statement of proposed redevelopment objectives.⁴ Second, a "development plan" meeting specific statutory requirements⁵ must be approved by the appropriate local Rede-

¹ The Neighborhood Redevelopment Corporation Law, Ill. Rev. Stat. (1941) c. 32, §§ 550.1-550.44, approved July 9, 1941, amended July 13, 1953, Sen. Bill 627, 68th Assemb. Reg. Sess. (1953).

² Private redevelopment corporations were authorized by the 1941 Act, *ibid.*, and similar legislation of the earlier type is found today in a number of states, including Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Virginia, and Wisconsin.

³ Sen. Bill 627, *op. cit.* supra note 1, at § 3-9.

⁴ Ill. Rev. Stat. (1941) c. 32, § 550.7.

⁵ *Ibid.*, at § 550.17 (1). Such plan must contain a legal description of the proposed Development Area; present use of property therein; structures to be demolished, repaired, or altered; new structures contemplated; contemplated recreation areas; zoning changes; method of financing the development; time estimates of developing the area and other pertinent information.

velopment Commission. After public hearing⁶ before the Commission, a certificate of convenience and necessity may be issued to the corporation.⁷ After receiving such certification, and after purchasing or acquiring option to purchase or, alternatively, obtaining the assent of the owners of sixty per cent of the land within the development area specified in the plan,⁸ condemnation proceedings may be begun. Approval of the specific condemnation proposal must also be obtained from the Redevelopment Commission before the corporation may go into court to complete this third and final stage prior to actual reconstruction of the specified properties.⁹

The statutory procedures have been approved by the Illinois Supreme Court as satisfying the requirements of procedural due process with regard to redevelopment of "slums" or "blighted areas."¹⁰ The novelty of the amendment is that it extends the use of these procedures and powers to the rehabilitation of "conservation areas"—city neighborhoods which are not yet deteriorated to slum or blight conditions, but which by reason of "dilapidation, obsolescence, or deterioration, or illegal use of individual structures, overcrowding of structures and community facilities, conversion of residential units into non-residential use, detrious land use or layout, or any combination of these factors . . ." may become "such a Slum and Blighted Area."¹¹ Thus the amended Act extends

⁶ *Ibid.*, at § 550.18(1). Before the public hearing, the corporation must post a performance bond with the Commission, *ibid.*, at § 550.17(2)(a); and the Commission must first have transmitted a copy of the corporation application for approval to the Plan Commission of the city (if any). Notice of the hearing must be published in a newspaper of the city, and copies of the application made available to the public. "At the time and place of such hearing, informal criticisms, suggestions and objections to the application for approval of the proposed Development Plan may be made by any party in attendance. . . ." *Ibid.*, at § 550.18(1).

⁷ *Ibid.*, at § 550.18(2). Without this certificate, no redevelopment corporation may acquire title to real property or begin a proceeding for acquiring property by eminent domain. *Ibid.*, at § 550.42(2)(c).

⁸ *Ibid.*, at § 550.42(1)(c). In this alternative, the amendment modifies and liberalizes the older law which did not authorize institution of condemnation proceedings on the basis of the assent of landowners, but rather required showing of purchase or acquisition of options to purchase of the requisite percentage. This procedural modification may seem sufficiently important to raise possible questions in regard to constitutional guaranties of due process. But since the easier neighborhood approval via "consent" is patterned after similar provisions in drainage cases, these precedents would seem to cover such difficulties.

⁹ *Ibid.*, at § 550.42(1).

¹⁰ *Zum v. City of Chicago*, 389 Ill. 114, 59 N.E. 2d 18 (1945).

The new act, Sen. Bill 627, *op. cit.* supra note 1, modifies a few of the procedures in addition to the neighborhood approval requirement, note 8 supra. "Development Plan" is further defined in § 3-4, but not in terms of limitations; discrimination on the basis of "race, color, creed, or national origin" is prohibited in, e.g., § 10-12; the minimum 10% playground area is made inapplicable to conservation area projects in § 17-2(c); the requirement that 90% of the Development Area be devoted to residences is made inapplicable to conservation areas in § 17-3(h). Most of these changes seem drawn to make the statute better applicable to deal with problems peculiar to conservation.

¹¹ Conservation Areas are also limited to those in which the structures in fifty per cent or more of the areas are residential, having an average of thirty-five years or more. *Ibid.*, at § 3-12.

the "self-help" technique of older slum redevelopment statutes to the newer concept of community conservation.¹²

The statutory declaration that "such elimination and rehabilitation and rebuilding, through the activities of Neighborhood Redevelopment Corporations as provided by the Act, are . . . a public use. . . ."¹³ presents the central issue regarding the constitutionality of the amendment, the test of which is now before the courts.¹⁴ The Illinois Constitution, in language similar to that of most state constitutions, provides that private property shall not be taken for "public use" without just compensation.¹⁵ Since the words "public use" have been deemed words of limitation, the central question, as with earlier statutory authorizations of the exercise of the eminent domain power, will be whether the "use" question is "public." In the past decade there has been a growing judicial recognition, subject to certain reservations, that the power of eminent domain may be legitimately called into play for purposes of urban redevelopment.¹⁶ In this context, the new amendment poses questions broad in implication: may the power of eminent domain be brought to bear by a group of neighborhood residents banded together in a corporation to acquire the property of another in an area not yet a slum; if so, what are the limits to that power? This comment will consider these questions in the context of other measures directed at the problem of deteriorating urban areas.

¹² The "self-help" aspect of the new amendment (more fully developed in note 60 *infra*) helps to distinguish it from two other acts passed by the recent Illinois legislature which have been rather indiscriminately labelled "Conservation Acts" also. While this comment does not intend nor purport to discuss these fully, for purposes of distinguishing them from the Neighborhood Redevelopment Corporations (Conservation) Act under consideration, these other statutes are: (1) The Urban Community Conservation Act, Ill. Rev. Stat. (1953) c. 67½, § 91.8 (Sen. Bill 524), adopted July 13, 1953, which enables the city to set up a Conservation Board with broad powers of property condemnation to carry out redevelopment programs. It has been said to be defective in that it would take too long to be effective because it requires City Council action and reorganization of the building department [Julian Levi of the South East Chicago Commission, Hyde Park Herald, p. 1, col. 1, (July 30, 1953)], and in that "It is estimated it will cost anywhere from ten to sixty million dollars a square mile (depending on the condition of the community) from all sources of funds for an effective program." Alderman Robert E. Merriam, 5th Ward, Hyde Park Herald, p. 2, col. 4 (August 6, 1953). But cf. 48 Fortune, No. 6, at 101-2 (Dec. 1953), for a full and complimentary discussion of this plan. Consult also Seigel, Slum Prevention—A Public Purpose, 35 Chicago Bar Record 151 (1954). (2) A General Powers of Corporate Authorities Act, Ill. Rev. Stat. (1953) c. 24, § 23-70.2, 70.3 (Sen. Bill 587), adopted July 16, 1953, permits the city to repair or demolish dangerous and unsafe buildings where the owner refuses to do so thirty days after having been notified. But *if* zoning and building codes could be enforced, there would appear no need for this Act. Since they are not, this statute has the same defect: it is unenforceable.

¹³ Ill. Rev. Stat. (1941) c. 32, § 550.2.

¹⁴ Complaint filed as *Zisook v. Maryland-Drexel Neighborhood Redevelopment Corporation*, et al., in the Circuit Court of Cook County, Illinois, on January 28, 1954. Argument is set for March 5, 1954.

¹⁵ Ill. Const. Art. II, § 13.

¹⁶ See cases cited in note 31 *infra*.

I

Efforts to solve the problem of deteriorating segments of the American city have had a long and continuous history. About a century ago, the larger cities began to deal with their slum problems through sanitation and safety codes.¹⁷ Zoning ordinances, appearing around 1913, coupled with building codes, became widespread in the 1920's, and the following decade saw legislative development of criteria and procedure for closing down substandard dwellings.¹⁸ But "[y]ears of experience have demonstrated that efforts to overcome the problem of slums through legislation based only upon the state police power are largely ineffectual in terms of the over-all problem, and offer, at best, a partial answer which is soon dissipated when left standing alone."¹⁹

Beginning in 1937, state legislatures, responding to a federal offer of funds for low-cost housing in return for slum clearance,²⁰ adopted enabling legislation. A series of court decisions have upheld the constitutionality of slum clearance and low-cost housing as public purposes under the eminent domain power.²¹ These decisions involve many of the same issues²² that later arose under "genuine"²³ redevelopment legislation.

¹⁷ Such legislation rests ultimately on the police power of the state, finding its constitutional basis elucidated in the celebrated case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

¹⁸ Hill, *Recent Slum Clearance and Urban Redevelopment Laws*, 9 Wash. & Lee L. Rev. 173 (1952).

¹⁹ *Ibid.*, at 174. Cf. *Foeller v. Housing Authority of Portland*, 198 Ore. 205, 238, 256 P. 2d 752, 768 (1953): "The police power, unaided by the power of eminent domain, appears to be inadequate . . ." in meeting the slum problem. In a more lengthy review of such measures, one authority concluded that none have been successful and few enforced. Urban Land, Sept. 1946, p. 4, reviewing an article by Beatty in the *Appraisal Journal*, July 1946. For differing views as to reasons for failure of these early measures, consult Weil and Scigliano, *Urban Redevelopment*, 9 U. of Pitt. L. Rev. 74, (1947); Brown, *Urban Redevelopment*, 29 B.U.L. Rev. 318 (1949). Consult also *Zoning Amendments and Variations, and Neighborhood Decline in Illinois*, 48 Nw.U.L. Rev. 470 (1953), for an able discussion of Chicago zoning amendments and variations which ipso facto create undesirable land uses.

²⁰ 50 Stat. 888 (1937), 42 U.S.C.A. § 1401 (1943).

²¹ But as to what each court considers as meeting the public use test, the decisions vary. See note 33 *infra* for three examples.

²² It has been held, for example, that state legislatures may properly delegate the right of eminent domain to housing authorities; this does not constitute unconstitutional delegation of legislative powers; and such statutes are not invalid as class legislation or as granting special privileges or immunities because designed for low income groups. The following cases support all of these propositions: *Humphry v. Phoenix*, 55 Ariz. 374, 102 P. 2d 82 (1940); *Housing Authority v. Dockweiler*, 14 Cal. 2d 437, 94 P. 2d 794 (1939); *Williamson v. Housing Authority*, 186 Ga. 673, 199 S.E. 43 (1938); *Krause v. Peoria Housing Authority*, 370 Ill. 356, 19 N.E. 2d 193 (1939); *Edwards v. Housing Authority*, 215 Ind. 330, 19 N.E. 2d 741 (1939); *In re Brewster Street Housing Site*, 291 Mich. 313, 289 N.W. 493 (1939); *Rutherford v. Great Falls*, 107 Mont. 512, 86 P. 2d 656 (1939); *Dornañ v. Philadelphia Housing Authority*, 331 Pa. 209, 200 A. 834 (1938); *Housing Authority v. Higgenbotham*, 135 Tex. 289, 143 S.W. 2d 79 (1940). For further cases upholding state low-cost housing and slum clearance legislation, see 130 A.L.R. 1069-92 (1941) and 172 A.L.R. 966-77 (1948).

²³ Although no judicial opinion has been found which uses this term, implied support for its use is found in *Zurn v. Chicago*, 389 Ill. 114, 123, 59 N.E. 2d 18, 23 (1945), where the court

In 1941, several states authorized urban redevelopment of slums and blighted areas by private corporations through the acquisition, replanning, clearance, rehabilitation or rebuilding of an area for residential, recreational, commercial, industrial or other purposes.²⁴ Subsequently, two other types of urban redevelopment statutes have been enacted in a number of states:²⁵ (1) Housing Redevelopment Enabling Acts which expand the functions and duties of existing local housing authorities by delegating to them the initial task of land assembly and clearance; (2) Housing Redevelopment Land Agency Acts which create new local public instrumentalities as a part of the municipal government, but under which actual redevelopment of the area remains basically the job of private enterprise. More recently, legislation promoting re-utilization of vacant lands has been added to the growing list of urban redevelopment measures.²⁶

distinguishes the Illinois Redevelopment Corporation Law from prior slum clearance and housing statutes: "The act . . . is purely an act for slum clearance and rehabilitation of slum and blight areas." Urban redevelopment statutes do not necessarily involve low-cost housing.

²⁴ Consult note 2 supra.

²⁵ Consult Comparative Digest of the Principal Provisions of State Urban Redevelopment Legislation, National Housing Agency, April 1, 1947, as supplemented Oct. 15, 1950; Summaries of Slum Clearance and Public Housing Decisions, Oct. 1949, as supplemented July 1, 1951, Housing and Home Finance Agency.

²⁶ The concept of urban redevelopment of vacant lands has been applied to three distinct types of situations:

(1) Some statutes require the people to be rehoused who are currently residing in a designated district before such areas may be redeveloped. Acquisition and sale of vacant land in outlying areas is authorized for that purpose to avoid spectacles such as Chicago recently experienced wherein 2,000 families were reported to be living in "jungles" while their homes were destroyed around them in a slum clearance project. Chicago Sun-Times § 1, p. 14, col. 1, Sept. 27, 1953. *Riggin v. Dockweiler*, 15 Cal. 2d 651, 104 P. 2d 367 (1940), upheld the right of a housing authority to build housing projects in nonslum areas on vacant lands, and *Dorman v. Housing Authority*, 331 Pa. 209, 200 Atl. 834 (1938), held, inter alia, that to rehouse those displaced from such projects is a sufficient reason for condemnation of vacant lands.

(2) The next step was taken in *Cremer v. Peoria Housing Authority*, 399 Ill. 579, 78 N.E. 2d 276 (1948), wherein the court held a statute permitting the erection of low-cost housing projects on vacant land, *without* requiring elimination of an equivalent number of slum units, was a valid public use and purpose in view of the existing housing shortage.

(3) The third development has been to make vacant land *as such* the object of redevelopment legislation. Large areas of this land have lain idle and been by-passed by developers because of excessive tax delinquency, clouded titles and other factors which have made it impossible of assembly in sizeable tracts. Report of the Committee on Planning, Rebuilding and Developing Metropolitan Communities (Mimeograph) 2, Section of Real Property, Probate and Trust Law of the A.B.A. Sept. 1952. To aid would-be developers of such urban land, the Illinois Blighted Areas Redevelopment Act was amended in 1949 to permit the municipal land agencies to acquire areas of predominantly open land which were unmarketable because of "obsolete platting, diversity of ownership, deterioration of structures or site improvements, or taxes and special assessments delinquencies. . . ." Ill. Rev. Stat. c. 67½, § 64 (1953). The requirement of land unmarketability in such statutes is aimed at the difficulties of land assembly—always a major reason for use of eminent domain. Robbins, *Problems in Land Assembly in Walker, Urban Blight and Slums* 172 (1952). The court in *People ex rel. Gutknecht v. City of Chicago*, 414 Ill. 600, 111 N.E. 2d 626 (1953), upheld this as constitutional on the basis of four policy reasons: (1) alleviation of the housing shortage; (2) slum clearance aid; (3) removal of hazards to health, safety, morals and welfare; and (4) elimination of in-

Most of the statutes specifically point to the elimination of evils inherent in slum areas as ostensible objectives of urban redevelopment.²⁷

However, older technical and legislative tools of urban redevelopment, although numerous and multiform, seem not to have proved fully equal to the task.²⁸ Part of the explanation is that redevelopment of slum and blighted areas lowers the population density within a redeveloped district and thereby exerts a heavy pressure on the periphery with the result that the blight, instead of being eliminated, mushrooms out into adjoining land areas.²⁹ The chief draftsman of the new conservation amendment argues that under these circumstances, the place to attack slums is on the edges of the slum area. "The only difference between slum and conservation areas is that in a slum area, the cancerous growth has metastasized and nothing can cure the problem. The area must be cleared and built anew. On the other hand, in a conservation area, the blight is localized, and though spreading, may still be cured."³⁰

It is to this fringe area on the outskirts of spreading slum and blighted areas that the new preventive legislation is addressed. But the question remains, is the measure constitutional?

II

Court approval has repeatedly been given to the delegation of eminent domain powers in order to redevelop slum and blighted areas.³¹ But each new

hibitions to sound community growth via development of vacant lands. Accord: *State ex rel. Bruestle v. Rich*, 159 Ohio St. 13, 110 N.E. 2d 778 (1953) (semble, upholding condemnation of an area including 3.7% vacant land); *Oliver v. City of Clairton*, 374 Pa. 333, 98 A. 2d 47 (1953) (permissible to condemn 58 residential lots 90% vacant in an area zoned for industrial use). Contra: *Housing and Redevelopment Authority of Hibbing v. Greenhaven* (Minn. D.C., February 15, 1952) (not published); *Opinion to the Governor*, 76 R.I. 249, 69 A. 2d 531 (1949).

²⁷ Consult text to note 40 *infra*.

²⁸ *Brown*, *op. cit. supra* note 19, at 372. In 1948, for example, it was complained that although twenty-five states and the District of Columbia had urban redevelopment laws, only two projects in New York were at work and only Detroit and Indianapolis had plans in progress. Weintraub and Tough, *Redevelopment Without Plan*, 37 Nat. Munic. Rev. 364 (1948). Since passage of Title I of the Federal Housing Act of 1949 (Pub. Law 171, 81st Cong., 63 Stat. 413), some greater strides have been made in slum clearance with federal aid. Consult *The Housing Act of 1949*, 44 Ill. L. Rev. 685 (1949), and *Housing Statistics*, Housing and Home Finance Agency 38, May 1953. How substantial the progress is remains to be seen.

²⁹ *Downs and Downs, How to Fight the Slums*, *Chicago Daily News*, p. 12, col. 6 (Sept. 21, 1953); *ibid.*, p. 24, col. 6 (Sept. 22, 1953).

³⁰ Julian H. Levi, South East Chicago Commission, in a private interview.

³¹ The following cases have upheld a finding of public use with regard to respective urban redevelopment legislation: *In re Opinion of the Justices*, 254 Ala. 343, 48 S. 2d 757 (1950); *Rowe v. Housing Authority of Little Rock*, 220 Ark. 698, 249 S.W. 2d 551 (1952); *Burn v. City of Chicago*, 389 Ill. 114, 59 N.E. 2d 18 (1945); *People ex rel. Tuohy v. Chicago*, 394 Ill. 477, 68 N.E. 2d 761 (1946); *Chicago Land Clearance Commission v. White*, 411 Ill. 310, 104 N.E. 2d 236 (1952); *Herzinger v. Mayor and City Council of Baltimore*, — Md. —, 98 A. 2d 87 (1953); *In the Matter of Slum Clearance in the City of Detroit*, 331 Mich. 714, 50 N.W. 2d 340 (1951); *Redfern v. Board of Commissioners of Jersey City*, 137 N.J.L. 356, 59 A. 2d 641 (1948); *Murray v. LaGuardia*, 291 N.Y. 320, 52 N.E. 2d 884 (1943); *In re Harlem Slum*

urban redevelopment statute must face the "public use" test afresh. While some issues have been laid to rest by decisions under the 1937 Federal Housing Act and supplementary state legislation,³² these cases are of limited use in evaluating the legality of new conservation measures.³³

The right of a state to take private property "was originally founded on *state necessity*. . . . In process of time the right has been more liberally construed. The term *public use* has been substituted; and what shall be considered a public use, is, under the decisions of our courts, an unsettled question."³⁴ Although the foregoing was written in 1832, public use remains an illusive concept.³⁵ Two lines of decisions have defined public use differently, one holding that it means "use by the public," the other necessitating only the broader finding of public advantage, convenience or benefit.³⁶

Clearance Project, — Misc. —, 114 N.Y.S. 2d 787 (1952); *State ex rel. Bruestle v. Rich, Mayor*, 159 Ohio St. 13, 110 N.E. 2d 778 (1953); *Foeller v. Housing Authority of Portland*, 198 Ore. 205, 256 P. 2d 752 (1953); *Belovsky v. Redevelopment Authority of Philadelphia*, 357 Pa. 329, 54 A. 2d 277 (1947); *Schenck v. City of Pittsburgh*, 364 Pa. 31, 70 A. 2d 612 (1950); *Recht v. City of Clairton*, 374 Pa. 333, 98 A. 2d 47 (1953); *Opinion to the Governor*, 76 R.I. 249, 69 A. 2d 531 (1949); *Ajootian v. Providence Redevelopment Agency of Providence*, — R.I. —, 91 A. 2d 21 (1952); *Nashville Housing Authority v. City of Nashville*, 192 Tenn. 103, 237 S.W. 2d 946 (1951). See also: *Opinion of the Justices*, 321 Mass. 766, 73 N.E. 2d 886 (1947); *In re Opinion of the Justices*, 94 N.H. 515, 53 A. 2d 194 (1947).

Three decisions leave the ultimate issue in doubt for the respective states: *Prunk v. Indianapolis Redevelopment Commission*, 228 Ind. 579, 93 N.E. 2d 171 (1950) (provision in Redevelopment Act denying appeal from trial court judgment unconstitutional; but since Act contains a separability clause, this decision does not invalidate entire act); *Redevelopment Authority v. State Corporation Commission*, 171 Kan. 581, 236 P. 2d 782 (1951) (semble); *McCord v. Housing Authority of Dallas*, 234 S.W. 2d 108 (Tex. Civ. App., 1950), review denied, 236 S.W. 2d 115 (Texas, 1951) (Housing Authority under a low-rent housing statute may not acquire slum areas to sell for redevelopment without implementing legislation).

Two courts have held redevelopment acts unconstitutional as not constituting a public use: *Adams v. Housing Authority*, 60 S. 2d 663 (Fla., 1952); *Housing Authority of Atlanta v. Johnson*, 209 Ga. 560, 74 S.E. 2d 891 (1953).

³² See note 22 supra.

³³ In *New York City Housing Authority v. Muller*, 270 N.Y. 333, 1 N.E. 2d 153 (1936), for example, the court decided public *slum* clearance was a sufficient public purpose to authorize the use of eminent domain. *Dornan v. Philadelphia Housing Authority*, 331 Pa. 209, 200 Atl. 834 (1938), decided that housing *plus* slum clearance is a sufficient public use. And *Cremer v. Housing Authority of Peoria*, 399 Ill. 579, 78 N.E. 2d 276 (1948), decided *housing* alone is a public use. It is true that these three cases involved different statutes in different jurisdictions. But all three have been cited indiscriminantly in support of urban redevelopment legislation. It would seem some distinction is in order by the courts.

³⁴ *Scudder v. Trenton Delaware Falls Co.*, 1 N.J. Eq. 694, 726 (1832).

³⁵ "'Public use,' as applied to the exercise of the power of eminent domain, is not capable of precise definition. The term is elastic and keeps pace with changing conditions." 18 Am. Jur., *Eminent Domain* § 36 (1938), and cases cited therein.

³⁶ *Robbins and Yankauer, Eminent Domain in Acquiring Subdivisions and Open Land in Redevelopment Programs: A Question of Public Use*, in *Woodbury, Urban Redevelopment: Problems and Practices* 463 (1953). See *Opinion to the Governor*, 76 R.I. 249, 69 A. 2d 531 (1949), for an excellent judicial display of the opposing views. Consult also citations in note 38 infra.

The early American courts regarded as proper the use of the power of eminent domain by private corporations and persons for the purpose of developing the industrial and natural resources of the state. But faced with exploitation of the power by private interests, the courts of many states adopted, during the middle of the nineteenth century, the stricter test of "use by the public" with respect to private takings.³⁷ This view, until recently, has been the definition more generally adopted by American courts and authorities. But there can be little doubt that in many jurisdictions the doctrine is no longer rigorously followed notwithstanding judicial expressions to the contrary.³⁸ Since the definition of public use often depends upon the surrounding circumstances, it is recognized that what constitutes a public use may vary with changing conceptions of the scope and function of government.³⁹

In relation to urban redevelopment, legislative declarations that slum and blighted areas are "conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime,"⁴⁰ have helped the courts find a public use, whether it is described as public benefit⁴¹ or use by the public.⁴² Courts have further held that the benefit need only accrue to the people of a particular district and need not benefit the public at large,⁴³ justification for the use of eminent domain in such projects being found in the foregoing indirect benefits derived by the community from the elimination and rehabilitation of slums. One

³⁷ Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. Rev. 615, 617-18 (1940). E.g., *Alfred Phosphate Co. v. Duck River Phosphate Co.*, 120 Tenn. 260, 113 S.W. 410 (1907), where the court thwarted an outrageous attempt of one mining company to condemn the private railroad of a competitor to secure easier access to a mainline railroad.

³⁸ Most legal journals are in accord that the public housing decisions have in effect constituted judicial abandonment of the restrictive "use by the public" test. E.g., *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599 (1949); McDougal and Mueller, *Public Purpose in Public Housing: An Anachronism Reburied*, 52 Yale L. J. 42 (1942); Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. Rev. 615, 624, 633 (1940).

³⁹ *Clark v. Nash*, 198 U.S. 361 (1905). In stressing the changing nature of the concept of public use, the Indiana court in *Fountain Park Co. v. Hensler*, 199 Ind. 95, 114, 155 N.E. 465, 471 (1927), pointed out that in nearly all of the older states in the early 1800's, mill statutes were enacted which declared the grinding of corn was a public necessity; accordingly the power of eminent domain was extended to permit persons engaged in operating grist mills to secure land of others for construction and maintenance of such mills. The court found these ancient mill rights have their counterpart in condemnation rights accorded builders of modern electric dams.

⁴⁰ R.I. Acts and Resolves (1946) c. 1802, § 2(a). Ample statistics are available to back up such legislative declarations. E.g., in an average large city, slums and blighted districts account for only 20% of the residential area, but 33% of the population, 45% of major crimes, 55% of juvenile delinquency, 50% of arrests, 60% of tuberculosis victims, 50% of disease, 35% of fires, 45% of city service costs, and 6% of real estate revenues. Sanders and Rabuck, *New City Patterns* 5 (1946). Consult also *Conservation of Dwellings: The Prevention of Blight*, 29 Ind. L. J. 109 (1953).

⁴¹ *People ex rel. Tuohy v. Chicago*, 394 Ill. 477, 68 N.E. 2d 761 (1946).

⁴² *Foeller v. Portland Housing Authority*, 198 Ore. 205, 232, 256 P. 2d 752, 765 (1953).

⁴³ *People ex rel. Tuohy v. Chicago*, 399 Ill. 551, 78 N.E. 2d 285 (1949).

court has even gone so far as to declare that in the case of an urban redevelopment law, the justification for granting eminent domain power is even clearer than in the case of a housing authorities law,⁴⁴ because in the former act the only major purpose is that of eliminating and rehabilitating blighted sections of municipalities, "and that purpose certainly falls within *any* conception of 'public use'. . . ."⁴⁵ Whether or not in the process private interests derive some benefit has been considered immaterial.⁴⁶ Indeed, the first American appellate court to pass on a modern redevelopment law upheld a statute which the court found was designed to promote cooperation between cities and private capital to rehabilitate slums.⁴⁷

The fact that the foregoing rationales were developed in connection with slum clearance projects and that the amendment under consideration applies instead to areas which are currently deteriorating should not be held to vitiate its public purpose. The basic policy considerations remain the same whether the project justified is the eradication of an existing slum or the prevention of a new one. If the legislation is reasonably aimed at an admitted evil, the public purpose test would seem to be fulfilled. Indeed, some courts have already remarked on the public use involved in the prevention of future slums.⁴⁸

III

Opponents of the conservation amendment might reasonably point out that the courts have upheld expansion of the doctrine of public use with considerable reluctance and in so doing have expressed unwillingness to further impinge upon

⁴⁴ No less than 38 courts have upheld this type of legislation. See note 22 *supra*.

⁴⁵ *Belovsky v. Redevelopment Authority*, 357 Pa. 329, 339, 54 A. 2d 277, 281 (1947). The Massachusetts court upheld the validity of a slum clearance law in *Allydonn Realty Corp. v. Holyoke Housing Authority*, 304 Mass. 288, 23 N.E. 2d 665, 669 (1939), and in so doing distinguished the act in question from a prior public housing law declared unconstitutional in *In re Opinion of the Justices*, 211 Mass. 624, 98 N.E. 611 (1912). The court's reasoning was noteworthy: "Any effect that [the housing statute] might have in preserving the public safety, health, and morals was incidental, remote and doubtful," whereas the slum clearance act was seen as a public use.

⁴⁶ Opinion to the Governor, 76 R.I. 249, 262, 69 A. 2d 531, 537 (1949). See in accord cases cited note 30 *supra*.

⁴⁷ *Murray v. LaGuardia*, 291 N.Y. 320, 52 N.E. 2d 884 (1943), cert. denied 321 U.S. 771 (1944). The New York cases, however, are buttressed by a special constitutional amendment: N.Y. Const. Art. 18, § 1.

⁴⁸ Dicta from the Cremer case, 399 Ill. 579, 78 N.E. 2d 276 (1948) (see note 26 *supra*), intimates the Illinois Court *may* look with favor upon the Conservation Act since it upheld a statute in that case with these words: the effect and purpose of the act in the face of an acute housing shortage was to "promote the development of substantial housing and thus aid in *preventing the creation of new blighted areas* and permit existing areas to be cleared." (Italics supplied). See also *People ex rel. Gutknecht v. City of Chicago*, 414 Ill. 600, 111 N.E. 2d 626 (1953), where the court noted vacant land redevelopment eliminated inhibitions to sound community growth; the *Dorman* case, 331 Pa. 209, 200 Atl. 834 (1938) (note 26 *supra*), a Pennsylvania decision wherein public housing was upheld as a necessary preventive of future slums; note 66 *infra*.

the landowner's rights.⁴⁹ While it is true that the older text writers have pointed to seemingly limitless rights of a landowner with regard to the free use and disposition of his land,⁵⁰ more recent views have placed greater emphasis on the duties and limits to the rights of ownership.⁵¹ Indeed, a landowner has never had absolute dominion over the use and disposition of his property without regard for public policy or the rights of his neighbor.⁵² Furthermore, it seems well established that through statute-granted use of eminent domain powers an easement may be acquired in the land of another for a public use⁵³ or for the benefit of adjoining land to promote its beneficial use on grounds of public health, convenience and welfare.⁵⁴ Turnpikes and toll roads are instances of the former and mill acts of the latter in both of which a fee rather than a mere easement is involved. Without question, many of these easements and fees involve substantial if not a preponderance of private benefit.⁵⁵

The courts have long recognized in reference to the "scenic highway" cases⁵⁶

⁴⁹ Expressions of judicial hesitancy to expand the delegated area of eminent domain have been manifested in three ways: (1) Both Florida and Georgia decline to grant any delegation of power (see note 31 *supra*), the latter stating categorically that "we cannot subscribe to the doctrine that the power of eminent domain may be resorted to and a private person deprived of his property every time there may be some public benefit resulting. To do so would be to cut the very foundation from under the sacred right to own property." *Housing Authority of Atlanta v. Johnson*, 209 Ga. 560, 563, 74 S.E. 2d 891, 894 (1953). (2) Even in the majority camp, of those cases noted *supra* in note 31, many have included vigorous dissenting views, e.g., *Zurn v. City of Chicago*, 389 Ill. 114, 59 N.E. 2d 18 (1945); *Belovsky v. Redevelopment Authority*, 357 Pa. 329, 54 A. 2d 277 (1947); *Kaskel v. Impellitteri*, 306 N.Y. 73, 115 N.E. 2d 659 (1953). (3) And among the majority view that such delegation of eminent domain for urban redevelopment is warranted, at least one judge admits it was with a "strained conviction" that he upheld an urban redevelopment statute. Consult Weiss, Judge Samuel A., *Is the Power of Eminent Domain Dangerous Under the Urban Redevelopment Act?*, 57 Dick. L. Rev. 326 (1953).

⁵⁰ E.g., 3 *Tiffany*, Real Property § 714.

⁵¹ Aigler, Smith, and Tefft, 2 *Cases and Materials on the Law of Property* (2nd ed.) 1; Pound, *The Changing Role of Property in American Jurisprudence*, 12 *Conference Series of Univ. Chi. Law School* 31 (1953).

⁵² Pound, *op. cit. supra* note 51, at 41; 3 *Tiffany* § 714; *Clinic and Hospital v. McConnell*, — Mo. App. —, 236 S.W. 2d 384 (1951), and cases cited therein.

⁵³ 3 *Tiffany* § 797. Examples cited by the author: railroad rights of way, mill acts, irrigation ditches, marsh drainage projects, and partition fences.

⁵⁴ Drainage cases as an instance of this principle were cited in *New York City Housing Authority v. Muller*, 270 N.Y. 333, 340, 1 N.E. 2d 153, 154 (1936), to support a decision upholding slum clearance and low cost housing.

⁵⁵ As to mill acts, see 3 *Tiffany* § 733. But consult 2 *Nichols on Eminent Domain* § 7.623 (1950) where severe criticism is made of the mill acts as inconsistent with the "doctrine" that the assistance of private enterprise is not a public use and the acts are explained as an historic anomaly. Nevertheless, the authors accept the rationale of corn grist mills and saw mill acts which, when first used in colonial days, did meet the strict public necessity test. Such criticism may be open to question since it merely repeats verbatim the opinion of an earlier edition, § 242 (1909), and seems *contra* to recent cases concerning vacant land. See cases in note 26 *supra*.

⁵⁶ *Higginson v. Nahant*, 93 Mass. 530 (1866), cited with approval in *Opinion of the Justices*, 234 Mass. 597, 127 N.E. 525 (1920), and *Rindge Co. v. Los Angeles*, 262 U.S. 700 (1923).

that it is a public use to provide pleasant and healthful surroundings in promoting public health, recreation and enjoyment. Similar reasoning has been advanced by a Minnesota court in upholding a statute which combined the police power and the power of eminent domain by providing damages for zoning restrictions imposed on the property owners.⁵⁷ The court admitted that the public got no physical use from the premises, but found support, *inter alia*, on the grounds that "[i]t is time that courts recognize the aesthetic as a factor in life."⁵⁸

The more recent slum and blighted areas redevelopment cases have not been content to rely on aesthetic considerations, but have recited the evils of juvenile delinquency, decreased tax revenue, and city costs in spelling out the public use test. But it would seem that these latter evils are but an end product of allowing old, dilapidated and unsightly slum structures to stand in an otherwise healthy middle-aged neighborhood, resulting in an accelerated decline of the whole area. While it may be urged that there are existing measures (e.g., zoning and building codes) which, if properly exercised, would meet the situation, the fact remains that prior measures, for whatever cause, have proved inadequate.⁵⁹

In this situation, it may well be that what is needed is a private grassroots remedy, such as is provided in the Act under consideration, wherein the property owners in immediate contact with and subject to the imminent danger of declining properties are given an opportunity to take direct action.⁶⁰ It has often

⁵⁷ *State ex rel. Twin City Bldg. and Investment Co. v. Houghton*, 144 Minn. 1, 176 N.W. 159 (1920). Realtor proposed to construct a three-story apartment building in a district designated by the common council as a residential area pursuant to the statute. He was not permitted to carry out his plans, but was compensated for the restrictions (considered a "taking" of some of his property rights) imposed. Accord: *Attorney General v. Williams*, 174 Mass. 476, 55 N.E. 77 (1899); *In re Kansas City Ordinance*, 298 Mo. 569, 252 S.W. 404 (1923).

⁵⁸ *State ex rel. Twin City Bldg. and Investment Co. v. Houghton*, 144 Minn. 1, 20, 176 N.W. 159, 162 (1920). The court found support for this proposition from: *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 74 N.E. 601 (1905); *In re City of New York*, 57 App. Div. 166, 68 N.Y. Supp. 196, *aff'd* 167 N.Y. 624, 60 N.E. 1108 (1901) (upholding condemnation to add a strip of land on each side of a street not for travel, but for "ornament and beauty"); *Bunyan v. Commissioners*, 167 App. Div. 457, 153 N.Y. Supp. 622 (1915) (permissible to take land used as a stone quarry along the Hudson Palisades to preserve the scenic beauty of the river); *Attorney General v. Williams*, 174 Mass. 476, 55 N.E. 77 (1899) (statute limiting the height of buildings about Copley Square, on compensation paid, sustained).

⁵⁹ See text to note 19 *supra*.

In *Adams v. Housing Authority*, 60 S. 2d 663, 666 (Fla., 1952), the court in striking down a redevelopment project pointed to several alternatives: (1) ordering discontinuance of the housing or (2) condemning the housing and thereby leaving the owners in possession to accomplish redevelopment or use within the limits of a zoning ordinance. The difficulties of these proposed alternatives, it is submitted, are: (1) Ordering discontinuance of the occupation of the houses will not clean up the slum; (2) If occupation discontinuance were enforced, this would lower the market value of the area without compensating the owners since any new use would require preliminary clearing of the area; (3) Condemning the houses and leaving the owners the task of redevelopment would be impractical because of the prohibitive clearance costs. The Florida court recognized the evils inherent in the slum area, but refused to allow the public to share the costs of the benefits it would derive.

⁶⁰ The premise of Redevelopment Corporation Laws is slum clearance by self help, as is made clear by the legislatures themselves. E.g., "The accomplishment of these ends by private initiative . . . should be fostered, encouraged and aided." Ill. Rev. Stat. (1943)

been said that "[t]he legislature has the right to experiment with new modes of dealing with old evils."⁶¹ But what is happening appears to be no more than a partial return to the early concept of "public use" signifying the public advantage, convenience or benefit derived from private activity in areas where it meets a justifiable community need.

IV

The dangers inherent in a decision to allow private parties the use of eminent domain for urban redevelopment have, in certain instances, materialized. Presumably the power may not be used to take property from one and give it to another solely for private gain or because the latter could make better use of the premises.⁶² But this safeguard has to some extent been vitiated by the courts' reluctance to substitute their judgment for that of political bodies involved.⁶³ For example, a recent New York case⁶⁴ allows condemnation under an urban redevelopment law of a large area containing only a low percentage of slums, although the real objective was to facilitate land assembly for construction of a New York City coliseum. Only ten per cent of the area involved in the project was substandard or insanitary and only two per cent in fact constituted slum structures. Nevertheless, this fringe was lumped together with more substantial Columbus Circle buildings to give redevelopment color to the taking. Judge Van Voorhis, in a dissenting opinion, saw that the "main purpose . . . [was] not slum clearance but merely to lend color to the acquisition of land for a coliseum under the guise of a slum clearance project. . . ."⁶⁵

c. 32, § 550.2. A recent newspaper editorial favoring use of the Conservation Act suggests that "The problem of conserving neighborhoods is so large that it can't be solved by the city government alone or by any number of city-wide planning associations. It must be attacked by the property owners in each community acting in self-defense as well as in the public interest." Such action it found forthcoming by announced plans of the Greater North Michigan Avenue Association which, it was predicted, should find a big source of financial help in "the downtown merchants and property owners who have the most to lose from any deterioration of the central business district." *Chicago Sunday Tribune*, § 1, p. 14, col. 2 (Sept. 13, 1953).

⁶¹ *Foeller v. Housing Authority of Portland*, 198 Ore. 205, 236, 256 P. 2d 752, 767 (1953).

⁶² *Opinion of the Justices*, 204 Mass. 607, 91 N.E. 405 (1910), held that the taking of private property to insure proper development of industrial facilities was considered primarily for the benefit of individuals and only incidentally for promotion of the public weal. Accordingly, it was not considered a public use justifying use of eminent domain.

⁶³ E.g., *Schenck v. City of Pittsburgh*, 364 Pa. 31, 36, 70 A. 2d 612, 614 (1950): "[S]ince [the] act gives the power of eminent domain to the Urban Redevelopment Authority, it is for that agency, and not for the courts, to determine whether or not the power should be exercised in the particular instance." The question "is not a judicial one, at least in the absence of fraud or palpable bad faith." In *Kaskel v. Impellitteri*, 306 N.Y. 73, 115 N.E. 2d 659 (1953), (semble), the court declined to reconsider a Planning Commission and Board of Estimate finding in the absence of fraud or corruption.

⁶⁴ By a five to two vote, the New Court of Appeals held that a pawnshop operator whose business was conducted on a proposed coliseum site was not entitled to a trial on the issue of whether the area could be properly classed as "substandard and insanitary" by city administrative bodies. *Kaskel v. Impellitteri*, 306 N.Y. 73, 115 N.E. 2d 659 (1953).

⁶⁵ *Ibid.*, at 83, 664.

In upholding a recent District of Columbia slum clearance project, the court indicated⁶⁶ that seizure for slum clearance is permissible, but that seizure of old and out-dated property merely to improve the aesthetics and living conditions of the neighborhood as determined by government agents fails to pass the Fifth Amendment test. Absent impingement upon rights of others, and absent public use or compelling public necessity for the property, the individual's right is superior to all rights of the government and is impregnable to the efforts of the government to seize it.

These cases illustrate possible misuses of the newly amended statute which should be recognized. They deal, however, with problems which have arisen under urban redevelopment statutes of a type which the Illinois courts and others have already examined and found constitutional.⁶⁷ It seems unlikely that the small incremental opportunity for possible misuse presented by the amendment's extension of the statutory scope from "slum-clearance" to "conservation" should warrant a finding that public use is absent. Rather the difficult cases illustrate the need for careful judicial scrutiny when the provisions of the conservation amendment, or indeed any earlier redevelopment law, are sought to be invoked in a particular case.

V

Regardless of the outcome of forthcoming litigation involving the Conservation Amendment, it is significant as representing a new effort on the part of a legislature to deal with what has been called the greatest problem facing American municipalities today:⁶⁸ how to deal with deteriorating urban areas. In view of the history behind the new amendment, precedents, analogies from other fields of property law, and the impelling need for a new measure to cope with an old but increasingly prevalent evil, this comment suggests the amendment is warranted and constitutional in its delegation of the state public purpose power of eminent domain. But whatever the judicial outcome of the soon-to-be-tested amendment, it promises to be a forerunner of more redevelopment measures designed to preserve declining urban areas.⁶⁹

⁶⁶ *Schneider v. District of Columbia*, 22 L.W. 2201 (D. D.C., Nov. 5, 1953). Though not called upon to do so, the court added interesting dicta clearly favorable (but presumably unintended) to the Illinois conservation amendment: "it seems to us that the *prevention* of such [slum] conditions is a public purpose which would sustain the validity of seizure by eminent domain. . . ." (Italics supplied.) Quoted from page 17 mimeographed copy of decision.

⁶⁷ *Zurn v. City of Chicago*, 389 Ill. 114, 59 N.E. 2d 18 (1945); see note 31 supra.

⁶⁸ Housing Conservation Round Table [Reprint], House and Home, Oct. 1953, pp. 100-104.

⁶⁹ Consult the proposed Enabling Act for the creation of municipal conservation authorities embodying the proposal for prevention, rehabilitation and elimination of slums and blight by the Build America Better Council of the National Association of Real Estate Boards [Mimeograph] Oct. 7, 1953. This proposal represents an about-face in policy thinking by the association sponsor. It calls for a municipal conservation authority run by a board of commissioners, appointed by the presiding city officer, among whose powers and duties seem to be incorporated both the recent Illinois statutes discussed supra at note 12. For other recent proposals, consult Leaders of Attack on Blight Agree on Recommendations to Every City, *The Magazine of Building: House and Home*, Oct. 1953, pp. 100-104, illus.; Modernizing Illinois Eminent Domain Procedures, 48 Nw.U.L. Rev. 484 (1953).