Don't expect redevelopment officials to greet a school district pocket veto with wild enthusiasm. School districts are sometimes big, slow moving bureaucracies, self-absorbed, and unskilled in real estate development. Through indifference, incompetence and intransigence, they could delay to death otherwise viable redevelopment efforts.

III. PUBLIC AGENCY DEALINGS WITH THE DEVELOPER

A. WHY REDEVELOPMENT AGENCIES DON'T BECOME PROJECT OWNER/BUILDERS

Local redevelopment agencies are empowered to acquire and clear land, construct public facilities, and install utilities, landscaping and other infrastructure intended to make the area more attractive to private investment. They are not meant to become shopping center, office building or apartment house developers, competing at taxpayer expense directly with the private sector. Instead, under state law, redevelopment agencies must find private entrepreneurs willing to construct and operate the projects called for in the redevelopment plan. The agency promulgates a plan for each area scheduled for redevelopment, acquires the land necessary for the projects contemplated, and makes some provision for the requisite infrastructure. Then, unless the land is needed for a government use, the agency is obligated to sell or ground lease the acquired sites to private firms.

B. THE AGENCY-DEVELOPER TANGO

Early Consultation. Sophisticated redevelopment agencies won't initiate the redevelopment process without good reason to believe the site is of interest to private developers. The more cautious agencies won't acquire property until inking a contract with a solvent private developer to purchase the site. Otherwise, the agency risks getting stuck with an impractical plan, an unmarketable site, and unrecoverable acquisition costs.

Politically connected developers confer informally with public officials about the possibility of their striking a redevelopment deal long before the formal redevelopment process begins.[66] An experienced Florida-based land use attorney, Charles Siemon, observes that developers and local officials often reach tentative agreements before the beginning of the official public review process. The negotiated deal is presented and approved at a public meeting pretty much as presented.[67] State open meeting laws require elected officials to conduct their business in sessions that are open to the public, but these laws don't bar

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[66] Patience A. Crowder, *'Ain't No Sunshine: Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623 (2007).

[67] Charles L. Siemon, *Public/Private Partnerships and Fundamental Fairness, in City Deal Making* in Terry Jill Lassar, INTRODUCTION TO CITY DEAL MAKING 81(1990).

discussions between developers and individual officials, and most of them allow officials to conduct secret discussions of real estate transactions.[68]

A key feature of the agency-developer contract is a spreadsheet depicting estimated costs and revenues. The city and the developer reach an understanding on the present value of future cash flows, and the internal rate of return the developer should anticipate receiving before the redevelopment agency becomes entitled to share in the profits in exchange for its contributions to the venture. It is a matter to be renegotiated whether the city or the developer is responsible for site acquisition, obtaining all the necessary government land use approvals and building the basic infrastructure.

Sometimes, the redevelopment agency agrees to sell condemned sites to the master developer for less than the total cost of acquisition. Trying to put a price tag on every contract obligation and a value on every 'public good' depicted in the redevelopment plan might be a challenge since actual construction costs often vary from estimates, and it is never easy to know for sure which party got the better bargain until years after completion. But it is not difficult to look at the contract documents to make sure the public is receiving something of substantial value for its investment.

Competitive Bidding. Although competitive bidding is required in some states,[69] in other states including Florida and California, state law does not oblige redevelopment agencies to sell to the highest responsible bidder. There are some good reasons for this.[70] In most real estate sales, sellers desire nothing more than to net the highest price and couldn't care less what the buyer does with the property after closing. Redevelopment agencies aren't like the typical land seller. They are not singularly focused on achieving the best possible land price but are deeply concerned with how and when the buyer will complete the project since the public will judge the success of redevelopment based on the resulting project, its community-wide impacts, and the tax increment it yields for the host jurisdiction.

Most redevelopment projects are conceived with a quite specific user in mind as an anchor (*e.g.*, a multiplex cinema, a hotel, boutique retailing, big box retailers). If redevelopment land were sold to the highest bidder at public auction, a well-funded opportunist could place the winning bid and then demand a premium for selling it to the redevelopment agency's preferred user, often leaving the agency with no practical choice but to shell out a larger subsidy to make the project worthwhile for that user. Or a rival developer could purchase the pivotal site for a project totally out of sync with the agency's contemplated re-use strategy.

To prevent this, the agency has options not necessarily inconsistent with competitive bidding. For instance, it could restrict the re-use of the site and

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[68] Patience A. Crowder, *'Ain't No Sunshine: Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623, fn 66, 67 at p. 650 (2007).

[69] *See, e.g.*, GA. CODE ANN. § 36-61-10(b)(1) (West 2004). Bidders are charged with notice of all the criteria embodied in redevelopment plans. *Dyson v. Dixon*, 134 S.E.2d 1 (Ga. 1963).

[70] Beatty, Coomes, Jr., et al., REDEVELOPMENT IN CALIFORNIA 135 (2d ed. 1995).

impose detailed land use controls by ordinance or agreement. It could also try to bar inept developers by formulating criteria that would limit bidding to firms with a proven record of quality construction and exemplary management.

RFPs, RFQs and IFPs. Redevelopment agencies utilize three main types of 'bidding' procedures: 'requests for proposals' (RFPs), 'requests for qualifications' (RFQs) and 'invitations for proposals' (IFPs).

A typical RFP contains a detailed description of the desired project, identifies the boundaries of the site, the relevant market area, design criteria and guidelines, and any development limitations on noise, traffic, air quality, density, heights, or land uses. It is expensive for the agency to prepare and costly for developers to respond to.

When redevelopment agencies aren't sure how to achieve their goals, they advertise for IFPs either at large or only to pre-qualified applicants, hoping the development community will come up with feasible solutions to the problems the agency has identified.

An agency keeps developer application costs low by issuing instead an RFQ. An RFQ simply calls for the developer to describe its track record and financial strength. The agency evaluates the applicants' past achievements, design skills, and financial strengths, and then narrows the field to a 'short list' of candidates. In a second stage of submission, 'short list' applicants respond to an RFP or the agency enters an exclusive negotiating agreement with one of them.

Before incurring the cost of responding to an RFP or IFP, lawyers and planners caution developers to make sure that the agency is serious, honest, and responsible, committed to go through with the project, that the agency possesses the legal authority to acquire and sell the site, that the process isn't 'wired' to a favored developer; and that the submission requirements are realistic. Following an assessment of what the agency's 'wish list' will cost, the developer assembles the right team and starts to develop a proposal.[71]

Exclusive Negotiating Agreements. Most redevelopment agencies don't rush directly into a formal contract for the sale of redevelopment land to the private redeveloper. They first select a developer with whom they agree to negotiate exclusively. The purpose of these exclusive negotiating agreements is to establish procedures and standards for the ultimate purchase and sale of the land. Public agencies begin the deal-making process through the use of exclusive negotiating agreements for the same reason realty buyers and sellers often commence complicated transactions with letters of intent: to break down the negotiation into manageable fail-safe stages, starting with the big issues and working out the intricate details later. Proceeding piecemeal, the parties don't waste time and legal fees wrangling over minutiae before they have achieved agreement on the main deal points.

Exclusive negotiating agreements identify the parties (typically the redevelopment agency, the private redeveloper, and sometimes an anchor tenant as well), the location of the site, and a description of the agency's objectives for

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[71] Ian Portnoy & Bradford Perkins, *Developing With a Public Agency Partner*, 15 REAL EST. REV. 75-79 (Spring 1985).

the re-use of the site. The agreement identifies the scope of the project–its financing, design and ancillary public improvements, and the development schedule. Quite often, exclusive negotiation agreements incorporate reciprocal promises of confidentiality. Each party agrees not to reveal the other party's development concept to potential rivals.[72]

In an exclusive negotiating agreement, the public agency promises: "not to negotiate with any other person or entity regarding the acquisition and development of the project." This doesn't preclude the agency from consulting with other developers on the side as long as the agency refrains from negotiating deal points with anyone but the holder of the exclusive until its expiration.[73]

Developers usually pay something for an exclusive negotiating right with a redevelopment agency. To evidence intent to negotiate in good faith, the developer deposits cash, a certified check, or letter of credit. The deposit could be applied to the purchase price if all goes well or forfeited if the developer shirks its obligation to negotiate in good faith.

Attorneys caution developers not to pay too much for the right to negotiate exclusively. Exclusive negotiating agreements don't obligate the public agency to make a deal, just to talk about it. "Because of the uncertain scope of an undertaking to negotiate, a court cannot be expected to order its specific performance, though a court might enjoin a party that had undertaken to negotiate exclusively from negotiating with others. Usually, the injured party's recourse is to refuse to negotiate and to seek monetary relief."[74] Generally, monetary damages for breach of an agreement to negotiate are confined to losses the disappointed party can relate to the other party's failure to negotiate. Damages based on lost profits would be regarded as particularly speculative in these situations, since the parties never agreed to strike a deal, just to try to come to terms.

'Good faith' and 'fair dealing' imply a promise to try to reach an agreement. Attorneys caution public agencies to reduce the chance of a claimed breach by taking their exclusive negotiating obligation seriously. To infuse meaning into the vague promise to negotiate in good faith, an agreement might declare a party to be acting in good faith "so long as it makes reasonable efforts to attend scheduled meetings, directs its consultants to cooperate with the other Party, provides information necessary to the negotiations to the other Party, and uses commercially reasonable efforts to review and return with comment all correspondence, reports, documents or agreements received from the other Party that require such comments."[75] So that neither party feels compelled to continue

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[72] *Jensen v. Redevelopment Agency of Sandy City*, 951 P.2d 735 (Utah 1997) (Developer's idea for an auto mall was not so unique as to deserve protection absent a confidentiality agreement. Besides, city officials made no indiscriminate disclosures.).

[73] *Tuchscher Dev. Enters., Inc. v. San Diego Unified Port District*, 132 Cal. Rptr. 2d 57,75, 106 Cal. App. 4th 1219, 1241 (2003) ("such talks do not by themselves establish the City improperly negotiated").

[74] E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 264 (1987).

[75] *Exclusive Negotiation Agreement by and between the Community Redevelopment Agency of the City of Los Angeles and Shuwa Investments Corporation*, p. 2.

unproductive negotiations indefinitely, the parties may set an outer time limit to their mutual obligation, commonly six months to a year. After that, either party is free to terminate the negotiations by notifying the other party that the futile gabfest has reached its end.[76]

The Disposition and Development or Owner Participation Agreement.[77] If and when a deal is struck, the resulting contract between the pubic agency and the developer is called a Disposition and Development Agreement (DDA) if the private redeveloper doesn't already own the land and an Owner Participation Agreement (OPA) if it does. The agreement involves 'disposition' because the public agency is usually selling land to the developer for an agreed price on a specific date. 'Development' refers to the developer's promise to commence and complete a defined project and the agency's reciprocal obligations regarding tax rebates, grants, loans and the construction of public works at public expense. The DDA isn't binding until it is approved by the local governing body where legislative approval is prescribed by state statute,[78] or imposed as a contract condition.[79]

DDA/OPA Provisions. A DDA or OPA doesn't look at all like a typical land purchase-and-sale agreement. To fulfill these public objectives, the DDA or OPA embodies a description of the site, includes provision for agency approval of the developer's working drawings, and if the agency's subsidy depends on the developer's costs and returns, requires the developer to produce a pro forma, a detailed financing plan and periodic accounting.

City redevelopment agencies obligate the developer to build the project according to a schedule of promised performance. Completion deadlines and guarantees are essential because the redevelopment agency is counting on the property tax increment, and the higher tax levies won't apply until the buildings are finished and ready for use. The agency may reserve the right to re-purchase the property from a developer who doesn't build on time. DDAs and OPAs may also prescribe minimum wage rates, the hiring of minority subcontractors and the training and employment of local residents during and after construction.

Components of A Redevelopment Agency's Assistance Package. The DDA or OPA will specify the agency's obligations. Generally, redevelopment agencies utilize three types of subsidies:

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[76] "The Termination Notice shall be effective as of the date set forth therein (which shall not be less than fifteen (15) days after the delivery of the Termination Notice to the other Party) unless the Negotiating Period has been mutually extended in writing by the Agency and the Developer. . . ." *Exclusive Negotiating Agreement between Community Redevelopment Agency of the City of Los Angeles and United Alloys, Inc.*, p. 2-3 (undated).

[77] Kurt P. Froehlich, *Practical Considerations in Negotiating and Drafting Development and Redevelopment Agreements*, 26 URB. LAW. 973 (1994).

[78] *See, e.g.*, FLA. STAT. ANN. § 163.358 (West 2005) (governing body has exclusive authority to grant final approval of any community redevelopment plan).

[79] *Striton Props., Inc. v. City of Jacksonville Beach*, 533 So. 2d 1174 (Fla. 1988) (developer had no vested right under DDA when deal was subject to city approval and city disapproved).

(1) The city sells land to the developer at less than the city's acquisition cost; this is called a land 'write down.'[80]

(2) The city agrees to refund or reduce the developer's local property, payroll, sales or gross receipts taxes, waive building permit and impact fees, or funnel federal and state grants to the developer.

(3) The city pays for public facilities that the developer would ordinarily have been required to install at its own expense. These might include parking garages, streets, curbs, gutters, sidewalks, street lighting, plazas, malls, and parks.

Determining Whether a Subsidy is Necessary for a Project and If So How Much. Understandably, developers will need to be compensated for meeting varied public requirements to the extent that they cannot recoup these costs from project tenants or purchasers. But how can a redevelopment agency determine the amount of subsidy appropriate for a particular project? The agency compares the developer's anticipated return on the project at hand with returns other developers are realizing on comparable projects.

> The theory of economic development assistance requires that the development would not take place 'but for' the public subsidy. Careful analysis must be made of each proposal to assure officials that this is the case. This analysis, however, is not a science. Any attempt to compare a projected return on investment for a project, with the return on investment necessary to induce the investment, requires the making of numerous assumptions as to costs and prices. These assumptions become more tenuous the longer the projection period. As a result, it may be difficult to be sure that the public incentive is necessary.[81]

The Challenge in Making Sure That Public Subsidies Don't Exceed Net Public Benefits. Public agencies regularly call for experts to estimate the net present value of future tax revenues from the project before committing to subsidize developers or major tenants. "The discounted present value of the increased taxes that will be paid (the benefit) can then be compared to the discounted present value of the tax abatement (the cost). So long as the calculations and judgments are done professionally and on the merits, the validity of the calculation can be quite high. However, sloppy, biased, or irrationally based analyses may result in invalid calculations."[82]

Cities dole out subsidies more efficiently by tying tax rebates and incentives to the developer's or retailer's actual gross sales or property tax receipts. For

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[80] 'Write down' is the difference between what it costs to assemble a site and what its fair market value would be when assembly is completed. The costs of acquisition include negotiating with many separate individual owners, clearing unusable buildings off the site, reconfiguring the roads and sidewalks and relocating utilities. To the extent that equally attractive 'green field' sites are available requiring none of these expenditures, there will be a significant gap between the cost of the urban site and the cost of the green field site. Covering the gap is the price of redevelopment.

[81] Martin E. Gold, *Economic Development Projects: A Perspective*, 19 URB. LAW. 193, 228 (Spring 1987).

[82] *Id.* at 228-29.

instance, instead of selling the site to the private redeveloper for a sum less than the agency paid to acquire it, the agency can lend the developer a portion of the purchase price and agree to credit the developer with a portion of the sales or property taxes produced by the new project.[83] If those anticipated revenues fail to materialize, the developer receives little or no credit against its purchase money note to the agency and ends up having to pay for the land in full.

Such a calculation, though better than an outright grant, fails to account for the secondary impacts of redevelopment. For instance, if the new development features a Wal-Mart as its anchor tenant, extensive anecdotal evidence shows that Wal-Mart derives a considerable portion of its sales from existing retailers and that declining sales in competing shopping centers can lead to store closures and increased vacancies, unless competing merchants re-position themselves to offer goods and services Wal-Mart doesn't sell.[84]

Responsible redevelopment agencies require market and fiscal impact assessments of contemplated projects, as do city councils in making major planning and zoning decisions. Such studies estimate the secondary impacts of a proposed land use, whether it will harm other businesses to the point of extinction, whether it will draw new activity to the area, and whether the net result will be good or bad for the local tax base. As the Vermont Supreme Court observed in upholding a state environmental board's denial of building permit for a Wal-Mart in the town of St. Albans: "A municipality's ability to pay for these [public] services depends on its tax base, that is, the appraised value of property in the municipality's grand list. To the extent that a project's impact on existing retail stores negatively affects appraised property values, such impact is a factor that relates to the public health, safety, and welfare."[85]

To do a better job of making sure the redeveloper isn't subsidized in an amount exceeding the agency's *net* tax benefits, the City of Vista, in San Diego county, California, in its redevelopment deal with Wal-Mart called for a reduction in the subsidy if sales tax receipts of certain named retailers, likely to experience slower sales once Wal-Mart opened, failed to equal their past 5-year average tax yields. Also, Wal-Mart was to receive no credit for sales taxes

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[83] *Second Implementation Agreement to Disposition and Development Agreement* Sec. 1.015 (Redevelopment Agency of the City of San Diego and Pacific Development Partners, 10/16/2000): "Lessor acknowledges and agrees that payment of the Base Rent shall be calculated solely upon City's receipt of Sales Tax from transactions on, from or attributable to the Site based upon the percentages of sales taxes received by City for general fund purposes as of the date of this Lease."

[84] A global management and consulting firm estimated that for every Wal-Mart superstore that opened, two grocery stores would close. Adam Clanton et. al., *California Responses to Supercenter Development: A Survey of Ordinances, Cases and Elections* (Spring 2004) text at footnote 4.1. *Available at* http://www.uchastings.edu/site_files/cslgl/plri_big_box_paper_04.pdf (last visited 04/05/05). *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th 1184, 1213 (2004) ("Accordingly, we hold that the omission of analysis on the issue of urban/suburban decay and deterioration rendered the EIR's defective as informational documents. *Citizens for Quality Growth v. City of Mt. Shasta*, 198 Cal. App. 3d 433, 446 (Cal. App. 3d Dist. 1988). On remand, the EIR's must analyze whether the shopping centers, individually and/or cumulatively, indirectly could trigger the downward spiral of retail closures and consequent long-term vacancies that ultimately result in decay."). Kenneth E. Stone, *Impact of Wal-Mart Stores on Iowa Communities:1983-93*, ECONOMIC DEV. REV. 60 (Spring 1995).

[85] *In re Wal-Mart Stores, Inc.*, 702 A.2d 397, 401, 167 Vt. 75, 81 (1997).

produced by merchants that chose to relocate from other sites in the city to the Wal-Mart-anchored center.[86]

This formula could undercompensate Wal-Mart, though, for two reasons. Some firms thrive in the shadow of Wal-Mart. "Businesses selling merchandise different from the discounter usually benefit from the increased traffic flow the first few years."[87] The City of Vista formula fails to credit Wal-Mart with increased sales taxes collected from businesses that prosper by locating close enough to benefit from the shopper traffic attracted to the Wal-Mart. Also, Wal-Mart shoppers save lots of money most of which they spend locally, increasing sales tax receipts and spawning regional job growth. The Vista formula doesn't attempt to reward Wal-Mart for secondary benefits like these.[88]

Wal-Mart critics would be quick to point out that Wal-Mart pays lower wages and benefits than some of its competitors, particularly unionized supermarkets, so that better jobs may be lost than are gained, eroding aggregate personal incomes and, hence, consumer spending.[89]

Incorporating Into DDAs and OPAs Sanctions for Non-performance. The primary responsibility for making sure the public is getting its money's worth falls to local governments. Cities cannot reasonably expect private firms to put the public interest ahead of the interests of their shareholders, managers and directors absent a specific contract obligation to perform as promised or pay the price of default.[90] Nor can cities expect courts to imply promises of performance by firms accepting public subsidies. Most courts flatly refuse to imply promises of job creation or development activity, consistent with the general norm of contract law that courts won't re-write a bad contract for the disadvantaged party.[91]

Nonetheless, drafting and enforcing redevelopment and economic development deals is problematical. Public officials, insisting upon a rigorous contract *quid pro quo*, could send an unintended 'anti-business' signal and antagonize potential investors and employers, especially if they set up elaborate systems for continuous monitoring of contract compliance by firms receiving public subsidies.[92] Despite the drawbacks of legalistic approaches, when a plant or retailer closes or relocates after pocketing a big, well-publicized public

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[86] Allan Kotin & Richard Peiser, *Public-Private Joint Ventures for High Volume Retailers: Who Benefits?*, 34 URB. STUD. 1971,1972 (1997).

[87] Kenneth E. Stone, *Impact of Wal-Mart Stores on Iowa Communities:1983-93*, ECONOMIC DEV. REV. 60, 61 (Spring 1995).

[88] Gregory Freeman, *Wal-Mart Supercenters: What's in Store for California?*, LOS ANGELES ECONOMIC DEVELOPMENT CORPORATION (Jan. 2004).

[89] Marlon Boarnet, *The Impact of Big Box Grocers on Southern California: Jobs, Wages, and Municipal Finances* 33 (Sept. 1999).

[90] Rachel Weber, *Why Local Economic Development Incentives Don't Create Jobs: The Role of Corporate Governance*, 32 URB. LAW. 97, 111-19 (2000).

[91] *See* Joshua P. Rubin, Note, *Take the Money and Stay: Industrial Location Incentives and Relational Contracting*, 70 N.Y.U. L. REV. 1277, 1279 (1995) (author invokes concept of relational contracts to fault these decisions).

[92] Scott J. Ziance, *Making Economic Development Incentives More Efficient*, 30 URB. LAW. 33, 44 (1998).

subsidy, local officials may want the option of suing to save face.[93] For less dramatic failures, filing a lawsuit could raise in the media previously unasked questions about whether those who dispensed the subsidy knew what they were doing.

A former city attorney observed that when she tried to convince local redevelopment officials to put meaningful penalties into their agreements with redevelopers in the event they failed to deliver, she was greeted with "howls of anger, not just from the developers, but from city administrators who were afraid of losing (or not gaining) jobs and other benefits for their constituents. Those howls can take on a different tone, however, when a project fails, and there is no way to penalize the offending developer."[94]

IV. CHALLENGES TO REDEVELOPMENT RAISED BY THE OWNERS AND OCCUPANTS OF CONDEMNED LAND[95]

A. Pricing Public Acquisitions of Private Property

Negotiated Purchase and Sale Agreements. Public agencies acquiring private property seldom actually have to exercise eminent domain. Overwhelmingly, they acquire the property they need through private bargaining and negotiating with the owners. Most owners of commercial properties are overjoyed to sell to a public agency. The government is an all cash buyer not looking for vendor financing or financing contingencies in the purchase contract. Prudent condemnors often offer substantial premiums above market value to reward property owners to whom local officials have become beholden, and to avoid the costs of trial, avert adverse publicity, deter political protests that could hamstring the project indefinitely, and stall the agency's efforts to gain expeditious vacant possession.[96] Property owners worried about being short-changed could insist upon a most-favored-nation clause–that is, receipt of a price

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[93] *See, e.g., Charter Township v. General Motors Corp.*, 506 N.W.2d 556, 558 (Mich. Ct. App. 1993). General Motors closed a plant at Willow Run that had been granted two 12-year tax abatements valued at $12 billion. The trial court enjoined the plant closure on a finding of promissory estoppel but was reversed on appeal. Where the trial court had been willing to infer GM's promise of continued employment, the appellate court observed only "efforts to take advantage of a statutory opportunity," "expressions of [GM's] hopes or expectations," but no "assurances of continued employment." The appellate court observed that the promissory estoppel claim would have been strengthened if the resolution passed by the Township had been based on a promise made by GM, but it had not been. GM never made a promise of continued employment. Adam M. Lett, Note, *Tax Abatements and Promissory Estoppel: A Match Not Made in Ypsilanti*, 44 DEPAUL L. REV. 1301 (1995).

[94] Maura A. Flood, Associate Professor of Law, Gonzaga University School of Law, E-mail to BrokerDirt@umkc.edu (06/01/05).

[95] Gideon Kanner provided generous guidance to the author in drafting this section of the chapter.

[96] Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L REV. 101, 126-36 (2006).