Was the Big Sky Really Falling? Examining Montana's Response to Kelo v. City of New London

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WAS THE BIG SKY REALLY FALLING?
EXAMINING MONTANA'S RESPONSE TO
KELO V. CITY OF NEW LONDON

Michelle Bryan Mudd

INTRODUCTION

The U.S. Supreme Court sent shockwaves throughout the country when it ruled in *Kelo v. City of New London*¹ that New London, Connecticut could condemn ordinary neighborhood properties and resell the land to private developers for economic development.² Those shockwaves were felt in Montana, where many citizens let it be known that they did not want *Kelo* to happen in their state. But could *Kelo* happen in Montana? The short answer is “no”—not under facts like those in the *Kelo* case. But the introspection *Kelo* triggered did reveal some gray areas in the State’s eminent domain law that warranted clarification. Ultimately, however, the Legislature lost sight of Montana law in its rush to enact a *Kelo* fix and may have taken the response too far by eliminating an important tool for condemning and renewing unsafe urban properties.

Part I of this article summarizes the *Kelo* decision and highlights what will later be shown as key distinctions between U.S. Supreme Court jurisprudence and eminent domain law in Montana. Part II provides a brief sketch of Montana eminent domain law, highlights the key distinctions between Montana law and *Kelo*, and identifies some of the gray areas in Montana law. Part III then describes Montana’s legislative response to *Kelo* and where the State’s eminent domain law stands today. Finally, the article concludes with an assessment of Montana’s response to *Kelo* and suggests future possibilities for Montana’s eminent domain law that better balance private property rights and community safety.

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² Id. at 488–90.
I. A SUMMARY OF THE KELO DECISION

A. The Human Stories

The public’s interest in *Kelo* lies in the human stories of the case. The landowners New London threatened with condemnation included middle-class Americans living in a typical residential neighborhood. Among them was Wilhelmina Dery, born to Italian immigrants in 1918 in the very house New London condemned, and who had lived there for sixty years with her husband Charles.3 Their son Matthew Dery lived next door in a home his grandmother gave him as a wedding gift.4 Their neighbor Susette Kelo was a registered nurse who had purchased her Victorian-era home for its view and access to the water, and invested her money and time restoring her home.5 None of the properties involved were blighted or in poor condition.6 In the words of the Institute for Justice, which took the landowners’ case, the “richness and vibrancy of this neighborhood reflect[ed] the American ideal of community and the dream of home ownership,” and was destroyed for other private enterprises based on a “nebulous” concept of economic development.7

New London, on the other hand, told the tale of a failing community in an “untenable economic situation.”8 Its naval facility at Fort Trumball closed in 1996, its unemployment rate was “nearly double that of the State,” and its population had declined to depression-era levels.9 When pharmaceutical giant Pfizer Inc. proposed to build a $300 million research facility next to Fort Trumball, city planners leaped at the opportunity to rejuvenate New London by drawing new business to Fort Trumball.10 New London created a ninety-acre redevelopment plan that included a conference center, restaurants, shopping, a pedestrian riverwalk, new residences, a museum, and office and retail space.11 Planners

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10. Id.
11. Id. at 474.
projected that the redevelopment would create 1,000 new jobs and increase tax and other revenue. All that stood in New London’s way were 115 private lots within the development area. Ultimately nine landowners, including Ms. Kelo and the Dery Family, refused to sell when they discovered that their land would likely go to private developers rather than for use by the general public.

This classic David-meets-Goliath story made for easy reporting, and Americans, including thousands of everyday Montanans, predictably formed a belief that local government could now give their middle-class homes to a big private developer. Less easy to report were the legal nuances of the United States Supreme Court’s decision that New London could indeed take the landowners’ properties under federal constitutional law and Connecticut’s broad definition of “public use.” Had those legal nuances been better understood, the response in states like Montana, with more restrictive constitutional and eminent domain principles, may have been more measured.

B. Connecticut’s Eminent Domain Law

Connecticut, like many other states, has a statute that expressly recognizes economic development as a type of “public use” for which land can be condemned. Indeed, its General Assembly has declared a state policy that acquiring and improving “unified land and water areas” for the “growth of industry and business”—particularly in “distressed municipalities”—is integral to the

12. Id. at 472.
13. Id. at 475–76, 479.
15. Kelo, 545 U.S. at 488–90.
18. Id. at § 32-9p(b) (defining “Distressed municipality” as “any municipality in the state which, according to the United States Department of Housing and Urban Development meets the necessary number of quantitative physical and economic distress thresholds which are then applicable for eligibility for the urban development action grant program under the Housing and Community Development Act of 1977, as amended [42 U.S.C.A. § 5318], or any town within which is located an unconsolidated city or borough which meets such distress thresholds”). Title 42 U.S.C.A. § 5318 in turn takes into account “factors such as the age of housing; the extent of poverty; the extent of population lag; growth of per capita income; and the extent of unemployment, job lag, or surplus labor.”
state’s economic welfare and thus in the public interest. Notably, condemnation for economic development does not require a showing of blight or other poor conditions on the affected parcels. In fact, the principal focus of the condemnation is not on the condition of the existing land use (whatever that may be) but rather on the potential for the “upgraded” land use to bring more revenue to the distressed community.

Connecticut had designated New London as a distressed municipality in 1990, even before the naval facility closure caused another 1,500 people to lose their jobs. Fort Trumball was also considered a “regional center” for which the Connecticut Legislature set a goal of “encouraging new industries to locate... to provide meaningful economic opportunity for inner city residents...” These designations helped New London undertake economic development (and receive federal subsidies) through a formal revitalization plan that received state agency approval. It was under this state-specific set of economic development laws that the *Kelo* case arose.

C. The U.S. Supreme Court's Ruling

The sole question before the United States Supreme Court in *Kelo* was whether New London’s condemnation for economic development qualified as a “public use” for which property could be taken under the Fifth Amendment of the United States Constitution (made applicable to the States via the Fourteenth Amendment). The Court, with Justice Stevens writing for the majority, held that economic development was indeed a public use.

Under what it termed a “strong theme of federalism” jurisprudence, the Court noted that the New London condemnation was based on a Connecticut statute that specifically recognizes economic development as a public use. The Court then extended its “longstanding policy of deference” to New London’s assessment

20. Id. at §§ 8-186, -189.
21. This focus contrasts with the principal focus of blight statutes, which is supposed to be on rehabilitating existing properties when possible and eliminating and preventing the recurrence of blight where rehabilitation cannot occur. See infra pt. II.B.
24. Id. at § 8-189.
26. Id. at 484.
27. Id. at 480, 482–84.
that "the area was sufficiently distressed to justify a program of economic rejuvenation . . . ." 28 Observing that New London had a "carefully formulated" plan that had undergone "thorough deliberation" and state agency review, the Court declined to question the City's judgment that the condemnations would likely result in "appreciable benefits to the community." 29 The Court distinguished New London's comprehensive planned area from a one-to-one transfer of an individual parcel of land to a pre-selected private party "outside the confines of an integrated development plan"—a transaction that likely would receive greater judicial scrutiny. 30

The Court upheld the condemnation even though much of the condemned property would end up in private ownership with no guarantee of general public use. According to the Court, it "long ago rejected any literal requirement that condemned property be put into use for the general public" in favor of a more expansive reading of public use as "public purpose." 31 The Court observed that economic development is a traditional government function that benefits the public, even if individual private parties benefit as well: "The public end may be as well or better served through an agency of private enterprise than through a department of government . . . ." 32 Additionally, the Court did not scrutinize the wisdom of including particular homes such as those of the Dery Family or Ms. Kelo within the redevelopment area. Rather, the Court extended deference to the whole of New London's plan and declined to review properties "on a piecemeal basis," stating that "[j]ust as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project." 33

The Court did not inquire into whether the economic development plan ultimately would be successful, observing that once a condemnation meets the public purpose standard, any "empirical

28. Id. at 480, 483 ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").
29. Id. at 473–74, 483–84.
30. Id. at 487.
31. Kelo, 545 U.S. at 479 (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984) (upholding the government's condemnation and sale of privately-held lands to lessees to remedy land oligopoly in the State of Hawaii)).
32. Id. at 483–86 (citing Berman v. Parker, 348 U.S. 26, 34 (1954) (upholding condemnation and sale of blighted lands to new landowners to eliminate and prevent reversion of slum areas in Washington, D.C.)).
33. Id. at 481, 488–89 (citing Berman, 348 U.S. at 31).
debates over the wisdom of takings” are inappropriate.34 Thus, the Court looked only at the purpose, not the “mechanics,” of the condemnation.35

Finally, and significantly, the Court noted that states may enact stronger limits on the eminent domain power than those existing under the Fifth Amendment. Thus, the Kelo decision is largely irrelevant in a state that has a more stringent constitution and more stringent statutes than the “federal baseline.”36

The Kelo Court was polarized, splitting five to four.37 That division was mirrored in the legal and academic community, where scholars have written hundreds of articles suggesting either that the decision reflected the status quo,38 or on the other hand, that it dramatically altered the constitutional law of eminent domain.39

But for most Americans, the opinion seemed to elicit a more uniform, primal fear that the government could now single out a person’s property to give to the highest corporate bidder. In an extreme response, one individual submitted a proposal to the town of Weare, New Hampshire, to condemn Justice Souter’s farmhouse there and turn it into a hotel on the grounds that it would bring higher tax revenue to the town.40 Justice Stevens seemed himself to be haunted by the personal suffering the opinion caused, confessing that it was “entirely divorced from [his] judgment concerning the wisdom of the program.”41

Regardless of how one comes down on the Kelo decision, there has been an undisputable galvanizing effect on those who view property ownership as sacrosanct. The lawyers in Kelo took their cause on the road, including in Montana, where they warned citi-

34. Id. at 487–88 (citing Midkiff, 467 U.S. at 242).
35. Id. at 482 (citing Berman, 348 U.S. at 244).
36. Id. at 489.
37. Kelo, 545 U.S. at 470. Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer comprised the majority, while Justices O’Connor, Scalia, and Thomas, along with Chief Justice Rehnquist, comprised the minority. Id.
40. The Associated Press, Eminent Domain This! Justice’s Farm Is Target (June 29, 2005) (available at http://www.msnbc.com/id/8406056/) [hereinafter Eminent Domain This!].
zens about *Kelo* takings in the Big Sky State, and, in the words of one commentator, “seemed intent on alarming us into action.” And while the warning did succeed in alarming Montana into action, the warning may have been unnecessary under the State’s eminent domain law.

## II. MONTANA’S EMINENT DOMAIN LAW

### A. General Condemnation Powers and Limitations

The Montana Constitution allows private property to be taken only for “public use.” Additionally, the Montana Constitution’s Declaration of Rights grants all persons an inalienable right to possess, enjoy, and protect property. The Montana Supreme Court has deemed this property right to be a fundamental right that must be protected in the eminent domain process.

The Montana Code enumerates the types of public use that qualify for eminent domain. While the list is expansive, “economic development” is noticeably absent—a fact observed by national commentators surveying state eminent domain laws after *Kelo*. The list does include many traditional forms of condemnation for private ownership such as private roads to farms, telephone and power lines, various mining uses, and railways, but Montanans seeking reform after *Kelo* appeared surprisingly unconcerned with these types of “private ownership” condemnation.

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44. Id. at art. II, § 3.


47. Admittedly, several of the listed public uses indirectly impact a community’s economy, but economic development is not listed as a public use that could trigger condemnation in and of itself.

48. E.g. CCIM Inst., *Use of Eminent Domain for Economic Development: Reaction to Kelo by State Legislatures* (June 2006) (available at http://www.ccim.com/members/govaffairs/pdf/Eminent_Domain.pdf) (listing Montana as a state “forbidding the use of eminent domain for economic development unless it is to eliminate blighted properties); *Eminent Domain This!* supra n. 40 (listing Montana among a small number of states that does not allow condemnation for economic development); Hope Yena, *Supreme Court Says Cities Can Seize Homes for Private Developers*, Billings Gaz. (June 23, 2005) (available at http://www.billingsgazette.net/articles/2005/06/23/nation/export212501.txt) (reporting the same).
As discussed below, reformers instead focused on public use number (12) in the Legislature's list—urban renewal projects for blighted areas within cities—despite this public use being limited to blighted property that is beyond rehabilitation.

But before turning to urban renewal, the government's general evidentiary burden in a condemnation merits discussion. Even when a particular condemnation falls within the Legislature's list of public uses, there are additional statutory limitations on the government in Montana. The government must consider the property rights of the affected landowner and show that the use is "located in the manner that will be most compatible with the greatest public good and the least private injury...." The government also bears the burden of proving by a "preponderance of the evidence" that the use is a "public use," that "the public interest requires the taking" and that the taking is "necessary to the public use." The government is obliged to meet this burden in a court of law. Thus, even a brief survey of the Montana Constitution and Montana Code reveals several state limitations on eminent domain that are stricter than the Kelo baseline. And when examining Montana's urban renewal law in more detail, the differences from Kelo become even more marked.

B. Montana's Urban Renewal Law

(Before the 2007 Legislative Session)

In 1959, an attorney for the Blackfeet Tribe stood before the Montana Legislature's Committee on Affairs of Cities, urging it to pass House Bill 335, the Urban Renewal Law. The attorney drafted the bill to help the Tribe reclaim a blighted area called Moccasin Flats in Browning, Montana, where a polio epidemic had broken out the year before. He testified that the area "needs

49. See generally Mont. Code Ann. § 70-30-102 (2007) (listing some 45 categories of public uses). Perhaps of most concern are the categories "all public uses authorized by the government of the United States" and "all public uses permissible by the federal courts, Congress, or any other federal agency," which are so broad as to potentially include economic development activities.


51. Id. § 70-30-110(1).

52. Id. § 70-30-111(2).

53. Id.

54. This article does not address the underlying merits of urban renewal laws, which have had a mixture of success, but rather examines the question of whether under Montana's renewal law a Kelo taking could even occur. For a history and assessment of urban renewal efforts nationwide, along with an extensive bibliography, see John C. Teaford, Urban Renewal and Its Aftermath, 11 Hous. Policy Debate 443 (2000).
cleaning up very badly . . . before some other serious disease breaks out there."55 The bill was similar to laws other states had passed to take advantage of federal dollars available under Title I of the federal Housing Act.56 Proponents believed the bill could be an important reclamation tool not only for Browning but for other Montana cities with slum areas,57 and the Legislature overwhelm-
ingly enacted it into law,58 reciting that:

"[T]he prevention and elimination of [blighted] areas is a matter of state policy and state concern in order that the state and its municipalities shall not continue to be endangered by areas which are focal centers of disease, promote juvenile delinquency, are conducive to fires, are difficult to police and to provide police protection for, and, while contributing little to the tax income of the state and its municipalities, consume an excessive proportion of its revenues because of the extra services required for police, fire, accident, hospitalization, and other forms of public protection, services, and facilities.59"

Under the Urban Renewal Law,60 which saw relatively few changes until 2007, municipalities can eliminate “blighted areas” within an incorporated city or town that pose a “serious and growing menace, injurious to the public health, safety, morals, and welfare” of municipal residents.61 A “blighted area” is defined through a list of over twenty potential characteristics, including some of the obvious characteristics: “substantial physical dilapidation,” “unsanitary or unsafe conditions,” an “area that is conducive to . . . crime,” as well as land configurations that cause overcrowding or lack of access.62 But there are also some characteristics

56. Id.; see also Teaford, supra n. 54, at 443-47.
58. Mont. H.J. 524-25, 36th Leg., Reg. Sess. (1959) (showing the House passed the bill by a vote of 81 to 3); Mont. Sen. J. 520, 36th Leg., Reg. Sess. (1959) (showing the Senate passed the bill by a vote of 41 to 11).
60. The latest version of the Urban Renewal Law appears at Mont. Code Ann. §§ 7-15-4201 to -4324 (2007). This part of the discussion, however, focuses on the law existing prior to the 2007 Legislative Session, which originally appeared at 1959 Mont. Laws 422-45. Where the law changed in 2007, the change is noted.
62. Id. at § 7-15-4206(2). The statute provides:

(2) “Blighted area” means an area that is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime; substantially impairs or arrests the sound growth of the city or its environs; retards the provision of housing accommodations; or constitutes an economic or social liability or is detrimental or constitutes a menace to the public health, safety, welfare, and morals in its present condition and use, by reason of:
that critics have described as "nebulous,"\textsuperscript{63} such as "diversity of ownership," "inappropriate . . . uses of land," or "improper subdivision"—terms that could describe blighted areas, but also could apply to ordinary, maintained areas as well.\textsuperscript{64}

To designate a blighted area, a municipal governing body must adopt a "resolution of necessity" finding that the area has one or more of these statutory characteristics of blight and that "rehabilitation, redevelopment, or a combination thereof of such area or areas is necessary in the interest of the public health, safety, morals, or welfare . . . ."\textsuperscript{65} The governing body then enacts a detailed "urban renewal plan" that guides the city's renewal actions within the blighted area.\textsuperscript{66} This process is intended to be a

\begin{itemize}
  \item [(a)] the substantial physical dilapidation; deterioration; defective construction, material, and arrangement; or age obsolescence of buildings or improvements, whether residential or nonresidential;
  \item [(b)] inadequate provision for ventilation, light, proper sanitary facilities, or open spaces as determined by competent appraisers on the basis of an examination of the building standards of the municipality;
  \item [(c)] inappropriate or mixed uses of land or buildings;
  \item [(d)] high density of population and overcrowding;
  \item [(e)] defective or inadequate street layout;
  \item [(f)] faulty lot layout in relation to size, adequacy, accessibility, or usefulness;
  \item [(g)] excessive land coverage;
  \item [(h)] unsanitary or unsafe conditions;
  \item [(i)] deterioration of site;
  \item [(j)] diversity of ownership;
  \item [(k)] tax or special assessment delinquency exceeding the fair value of the land;
  \item [(l)] defective or unusual conditions of title;
  \item [(m)] improper subdivision or obsolete platting;
  \item [(n)] the existence of conditions that endanger life or property by fire or other causes; or
  \item [(o)] any combination of the factors listed in this subsection (2).
\end{itemize}

\textit{Id.}

\textsuperscript{63} See e.g. \textit{Feb. 13, 2007 Sen. Hrg., infra} n. 165, at 1:37:47–1:43:29 (Senator McGee testifying); \textit{Feb. 19, 2007 Sen. Hrg., infra} n. 155, at 1:44:50–1:47:30 (Senator O'Neil testifying that blighted is a "nebulous" term; proponent Tim Ravndal, Montana Multiple Use Association, testifying that the definition of blight has "ruined communities" like in \textit{Kelo}).

\textsuperscript{64} See e.g. \textit{Jan. 24, 2007 Sen. Hrg., infra} n. 178, at 28:45–31:29 (Senator Jent testifying that "one person's blight might be another person's charm").

\textsuperscript{65} Mont. Code Ann. §§ 7-15-4210, -4216 (2005 and 2007). Note that the Law contemplates renewal of blighted areas—not an isolated, targeted property. This is an additional distinction from the "home-to-Home Depot" (one-to-one transfer) example often used by \textit{Kelo} reformers.


"Urban renewal plan" means a plan for one or more urban renewal areas or for an urban renewal project. The plan:

\begin{itemize}
  \item [(a)] must conform to the growth policy if one has been adopted pursuant to Title 76, chapter 1; and
  \item [(b)] must be sufficiently complete to indicate, on a yearly basis or otherwise:
transparent one that always requires public notice and hearings, and even voter approval if general obligation bonds are to be used.\textsuperscript{67}

Under the Law, municipalities can use a variety of tools to renew a designated blighted area, from voluntary landowner repair of the existing structure,\textsuperscript{68} to compulsory repair, to government acquisition, demolition and new construction.\textsuperscript{69} These renewal actions are classified as either "rehabilitation" or "redevelopment."\textsuperscript{70} While the definitions of these terms overlap to some degree, rehabilitation appears to be aimed principally at property restoration,\textsuperscript{71} whereas redevelopment appears to be aimed principally at demolition and reconstruction for new uses that will prevent the recurrence of blight.\textsuperscript{72} As between rehabilitation and redevelopment, "to the extent feasible salvable blighted areas should be rehabilitated through voluntary action and the regulatory process."\textsuperscript{73}

For non-salvable land that a municipality believes must be redeveloped, the local government can acquire the land through traditional property transfers such as lease or purchase, or it can resort to eminent domain.\textsuperscript{74} Historically, the Urban Renewal Law has empowered a municipality to retain the acquired property for municipal uses or dispose of the property through sale, lease, or other transfer for residential, recreational, commercial, industrial,

\begin{itemize}
  \item [(i)] any land acquisition, demolition, and removal of structures; redevelopment; improvements; and rehabilitation that is proposed to be carried out in the urban renewal area;
  \item [(ii)] zoning and planning changes, if any, including changes to the growth policy if one has been adopted pursuant to Title 76, chapter 1;
  \item [(iii)] land uses, maximum densities, building requirements; and
  \item [(iv)] the plan's relationship to definite local objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements.
\end{itemize}

\textit{Id. See also} Mont. Code Ann. § 7-15-4217 (2005 and 2007) (providing criteria for local government approval of project).

\textsuperscript{67} \textit{Id.} at §§ 7-15-4210 to -4218.

\textsuperscript{68} \textit{Id.} at § 7-15-4206(16).

\textsuperscript{69} \textit{Id.} at §§ 7-15-4203(1), -4206(15).

\textsuperscript{70} \textit{Id.} at § 7-15-4203.

\textsuperscript{71} \textit{Id.} at § 7-15-4206(16).


or other uses consistent with the renewal plan and the city's zoning.\textsuperscript{75} When property is transferred, the transfer is to occur "as rapidly as possible" and "shall afford maximum opportunity, consistent with the sound needs of the municipality as a whole, to the rehabilitation or redevelopment of the urban renewal area by private enterprise."\textsuperscript{76}

Reading these statutory provisions through the lens of \textit{Kelo}, critics had concerns that a "creative" city council could use one of the "nebulous" characteristics of blight to designate an ordinary property as "blighted" and then proceed to condemn the property for future transfer to a private enterprise.\textsuperscript{77} While no critic identified an instance when a Montana city has used the Urban Renewal Law to condemn even a legitimately blighted property for resale to a private landowner, there is certainly no harm in foreclosing the possibility of abuse. But in rushing to close this potential loophole as a "\textit{Kelo}" fix, reformers failed to appreciate that \textit{Kelo} did not involve blighted property. New London did not need to show any characteristic of blight because it proceeded under statutes allowing condemnation for pure economic development.\textsuperscript{78} Reformers also failed to appreciate that the Urban Renewal Law exists within the context of Montana's eminent domain jurisprudence—jurisprudence that offers unique private property protections not available under \textit{Kelo}.

\section*{C. Montana's Eminent Domain Jurisprudence}

\subsection*{1. General Analytical Framework\textsuperscript{79}}

In a relatively recent set of companion rulings in \textit{City of Bozeman v. Vaniman},\textsuperscript{80} the Montana Supreme Court laid the framework for analyzing condemnations that benefit private parties. The Court held that private property ownership is a fundamental

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{75} Mont. Code Ann. § 7-15-4258. In 2007, S.B. 41 eliminated the power of government to transfer condemned land to a private entity. \textit{See infra} pt. III.D and related discussion.
\item \textsuperscript{76} Mont. Code Ann. §§ 7-15-4208, -4262, -4263.
\item \textsuperscript{77} \textit{Infra} pts. III.B, III.C.
\item \textsuperscript{78} \textit{Kelo} v. \textit{City of New London}, 545 U.S. 469, 480, 482-84 (2005).
\item \textsuperscript{79} This section does not attempt to comprehensively describe all aspects of Montana's eminent domain law, but rather focuses on those aspects of the law relevant to potential "economic development" condemnations for transfer to private enterprise. For a more comprehensive description of Montana's eminent domain law, \textit{see} Krista Lee Evans, \textit{Eminent Domain in Montana} (Legis. Envtl. Policy Off. 2001) (available at http://leg.mt.gov/content/publications/lepo/2001edhandbook.pdf).
\end{itemize}
\end{footnotesize}
right under Article II, Section 3 of the Montana Constitution, and that this right is directly implicated in an eminent domain proceeding.\textsuperscript{81} The Court added that in any condemnation, the government’s eminent domain powers are “strictly construed.”\textsuperscript{82} Further, it held that eminent domain statutes must be given a plain interpretation “favoring the person’s fundamental rights.”\textsuperscript{83}

Although the Court held that Montana’s condemnation statutes are to be strictly construed, the Court did not state that the condemnations pursuant to those statutes are subject to strict scrutiny—perhaps a question saved for another day.\textsuperscript{84} In other contexts the Court has stated that infringements of fundamental rights do require strict scrutiny review:

Strict scrutiny of a legislative act requires the government to show a compelling state interest for its action. When the government intrudes upon a fundamental right, any compelling state interest for doing so must be [carried out through a means that is] closely tailored to effectuate only that compelling state interest. In addition to the necessity that the State show a compelling state interest for invasion of a fundamental right, the State, to sustain the validity of such invasion, must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective.\textsuperscript{85}

While the Court did not resolve the level of scrutiny issue in the Vaniman cases, it did affirm that in condemnation proceedings the statutory burden of proof is on the government to show by a “preponderance of the evidence” that the condemnation serves a public use, that the public interest requires the condemnation, and that the condemnation is necessary to the use.\textsuperscript{86} The govern-

\textsuperscript{81.} Vaniman I, 869 P.2d at 792.
\textsuperscript{82.} Id.
\textsuperscript{83.} Id. The Court’s statement raises the question of whether the “plain meaning” of statutes that expressly favor public use can truly be interpreted to favor a person’s fundamental rights. The Court’s additional citation to Montana Code Annotated § 1-2-104 may shed some light on this question: “When a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted.”
\textsuperscript{84.} The possibility of strict scrutiny review raises the question of whether every statutory public use can be a compelling one in every case. Under strict scrutiny, it is unlikely a condemnor could continue to rely solely on the statutory list of public uses to prove the first element of a condemnation under Montana Code Annotated § 70-3-111. The condemnor might have to show that the use is both allowed by statute as well as compelling under the facts and circumstances of that particular case. Further, the “greatest public good” and “least private injury” balancing test in Montana Code Annotated § 70-30-110 may place more weight on the public’s interest than the “closely tailored” means test under strict scrutiny review.
\textsuperscript{85.} Wadsworth v. State, 911 P.2d 1165, 1174 (Mont. 1996) (internal citations omitted).
\textsuperscript{86.} Vaniman I, 869 P.2d at 792 (based on Mont. Code Ann. § 70-30-111). Curiously, the Court goes on to state that a “government’s finding of necessity is a political decision which
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In Vaniman, the City of Bozeman wished to condemn land for a highway interchange and visitor center. Based on the facts of the case, the City presumably could have met its statutory burden because: (1) the Legislature has listed both highway interchanges and visitor's centers as public uses; (2) the interchange was in the public interest because the site would “rest in the middle of the longest stretch of interstate highway in Montana which currently does not have a rest area;” and (3) the interchange was necessary to the public use because of its location and connection with North 19th Avenue.

Where the City ran into trouble was in negotiating with the Bozeman Chamber of Commerce—a private corporation—to locate its offices within a portion of the visitor center and to contribute toward the building costs. Under the City’s preliminary plans, the Chamber’s offices would occupy forty percent of the space within the visitor center. The Vanimans disputed this private use of their property, and appealed the district court’s preliminary condemnation order allowing the condemnation to proceed with the Chamber’s involvement. The Montana Supreme Court remanded, ordering the trial court to specifically consider whether or not the Chamber’s private use was merely de minimis in relation to the overall interchange project.

On remand, the district court concluded that the Chamber’s role in the interchange project was not de minimis, and that the
City had to eliminate the Chamber's offices from its plans. On a second appeal, the Court upheld the district court, observing that while some private "incidental benefits" can occur in eminent domain to "aid in the establishment of a public project," the private use by the Chamber was such a significant part of the project as to be constitutionally offensive. In reaching its holding, the Court fashioned the following three-part test for "incidental benefit":

1. Will the public use create an "incidental" benefit to private individuals?
2. Is the overall use that of the condemnor?
3. Is the private use insignificant?

Under this three-part test, the Court deemed the Chamber's private use of the visitor center to be more than "purely incidental" or a "corollary" to the public use. Interestingly, the Petitioners in Kelo cited to the Vaniman holdings when urging the U.S. Supreme Court to hold that New London's planned use for the condemned properties was not incidental to a public use. And during the 2007 Montana Legislative Session, some analysts cited the Vaniman holdings as prohibiting any condemnation on behalf of private enterprise and urged the Legislature to codify that prohibition.

To be sure, the Court did not limit its three-part test to highway interchanges, leaving the impression that this test could apply whenever a private use results from condemnation. However, the highway condemnation statutes do not expressly authorize any private use, and thus the Court was not doing anything revolutionary in concluding under the statute's "plain meaning" that a private corporation could not use the visitor's center. One can imagine a different outcome under some of the traditional condemnations such as telephone lines, power lines, private roads, or other categories that expressly recognize private ownership as a
byproduct of the condemnation.\textsuperscript{100} Similarly, the Urban Renewal Law expressly contemplates that certain private enterprise can be commingled with the public use of eliminating a blighted area.\textsuperscript{101} The legal treatise from which the Court crafted its three-part test indicates that urban renewal projects can benefit private interests in a way that is incidental to the overriding public purpose of preventing slums and cleaning up blighted areas.\textsuperscript{102} This analysis suggests that, depending on the extent of the private interest involved in an urban renewal project, it could be either so significant as to defeat the public use, or it could be incidental enough to be \textit{de minimis} to the public use. Thus \textit{Vaniman}, while clearly limiting the role of private enterprise in eminent domain, likely does not foreclose all private enterprise as some analysts believe.

Regardless of the lingering questions about \textit{Vaniman}'s incidental benefit test, it is clear that condemnations in Montana will be scrutinized—particularly when a private party may benefit—because of Montana's fundamental right to private property ownership. And it is clear that Montana's judicial scrutiny is far more stringent than the “federal baseline” set by \textit{Kelo}. This scrutiny was evident in 1973 when the Montana Supreme Court decided the first and only condemnation appeal under the Urban Renewal Law.\textsuperscript{103}

\textsuperscript{100} See generally Mont. Code Ann. § 70-30-102 (2007).
\textsuperscript{101} See supra pt. II.B and related discussion. Those who support private enterprise in urban renewal argue that its role is a “public” one under the theory that the presence of new structures that occurs after the removal of blight is critical to preventing the reversion of blight. See \textit{Berman v. Parker}, 348 U.S. 26, 34-35 (1954) (summarizing expert testimony: “The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes, but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.”). \textit{But see Teaford}, supra n. 54, for a critique of this position.
\textsuperscript{103} \textit{City of Helena v. DeWolf}, 508 P.2d 122, 127 (Mont. 1973). There may have been one additional landowner challenge in Helena that was rendered moot by the demolition of the building, but the underlying facts are unreported. \textit{See generally Burke v. City of Helena}, 497 P.2d 95 (Mont. 1972). This of course does not mean urban renewal has been a flawless process in Montana. \textit{See e.g. Fletcher v. City of Helena}, 517 P.2d 365 (Mont. 1973) (a negligence case against the City that arose when a relocated Helena landowner nearly died from a gas leak in her new apartment); \textit{Gallagher v. Johnson}, 611 P.2d 613 (Mont. 1980) (a libel case that arose from published statements attacking Anaconda's Urban Renewal Director). Further, as some commentators note, the landowners subject to this type of condemnation often lack the financial resources to challenge the government's action. \textit{See e.g. Kelo v. City of New London}, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting) (“Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of
2. Analysis under the Urban Renewal Law

In City of Helena v. DeWolf, the Montana Supreme Court indicated in multiple ways that local governments do not have carte blanche to condemn non-blighted properties based on urban renewal. DeWolf, which preceded Vaniman by two decades, did not involve a condemnation for a private developer (rather, a public street and parking lot), but it nonetheless provided strong indicia of the narrow circumstances under which such a condemnation could occur.

In DeWolf, the City of Helena designated its downtown as an urban renewal area, in which it sought to eliminate blight, to install public improvements,\(^\text{104}\) to add housing for the elderly, and to attract commercial redevelopment (an outdoor shopping center with a walking mall) that would prevent the recurrence of blight.\(^\text{105}\) Within the plan area, the City deemed eighty-nine percent of the buildings to be what it termed “deficient.”\(^\text{106}\) Although the record is not clear, the “non-deficient” buildings within the renewal area presumably were included because the City believed it needed the properties to redesign the renewal area as a whole.

The Union Market property apparently was one of the “non-deficient” buildings. The property, which consisted of four lots on which the Union Market operated and five other stores rented space, fell just inside the renewal area. Although the property needed some improvements to be brought up to code, the property was not substandard or blighted.\(^\text{107}\) The reason the City included the property in the renewal area was because it wanted to straighten a street that angled around the property, and it wanted to demolish the commercial structures to provide public parking for the future businesses it hoped to attract to the downtown. The City was able to acquire ninety percent of the land within the re-

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whites had incomes low enough to qualify for public housing, which, however, was seldom available to them.’ ”) (quoting Bernard J. Frieden & Lynne B. Sagalyn, Downtown, Inc.: How America Rebuilds Cities 17 (MIT Press 1989)).

104. The public improvements included streets, sidewalks, curbs, gutters, storm sewers, and parking areas. DeWolf, 508 P.2d at 124. Such infrastructure is a natural component of urban renewal because blighted areas often have poor street and lot layout that require redesign. See Mont. Code Ann. § 7-15-4206(2)(e), (f).


106. Id. at 124, 127. And within the area, the City did considerable “picking and choosing” by exempting some structures due to their historical or architectural significance.

107. Id. at 123–24.
newal area, but the owners of the Union Market property refused to sell, sending the matter into condemnation. 108

The Court, reversing the district court's preliminary order of condemnation, held that the City could not take the Union Market property because the taking was neither necessary to the urban renewal plan nor designed to ensure the least private injury. 109 The decision rested on several key conclusions.

First, the Court observed that the Union Market property was not blighted, that the Urban Renewal Law favored rehabilitation, and that "redevelopment is proper only when reclamation of an area by rehabilitation is impractical." 110 Yet the City had bypassed the rehabilitation option in favor of redevelopment without making any showing of impracticality. The Court, however, did not use this rule to require rehabilitation. Rather, the Court went through a series of steps that eliminated the Union Market property from the renewal plan altogether.

Because the Union Market property was not blighted, the Court held that the City needed to make the case that demolition of the businesses involved was otherwise necessary to the urban renewal project and that the condemnation was located where the least private injury would result. The Court then iterated the definition of necessity as "reasonable, requisite, and proper for the accomplishment of the end in view, under the particular circumstances of the case." 111

The Court also declined to "presume" that the condemnation was necessary simply because the City had passed an ordinance designating the area as blighted and declaring the necessity of condemnation to remedy the blight. 112 In other words, the City did not receive deference to its own governmental determination that the condemnation was necessary—even though it had extensive studies upon which it based its ordinance. 113 Instead, the

108. Id. at 124.
109. Id. at 129–30.
110. Id. at 124, 126 (citing what is now Mont. Code Ann. §§ 7-15-4203). The statute's wording differs from that of the Court's in a couple of ways. First, the statute uses the word "feasible" rather than the notion of "practical." Second, the statute says property "should be" rehabilitated rather than requiring rehabilitation. This semantic difference may be an additional reason why the case did not turn on the City's failure to address rehabilitation.
112. Id. at 126.
113. Id. at 124, 126–27 (noting that there was an 18-month planning stage and engineering and planning studies).
Court held that the City still carried the evidentiary burden in the condemnation proceeding to show that the condemnation was necessary. And while the Court did not mention the “strict construction” standard that would later surface in Vaniman, the Court’s approach reflected a similar willingness to scrutinize the government’s condemnation in favor of private property rights.

The Court further rejected the City’s argument that it need only prove the necessity of condemning the urban renewal area as a whole, and not the necessity of condemning an individual property within the area. Although the City cited United States Supreme Court precedent and “literally dozens of cases throughout the nation” that only considered the condemnation of the renewal area as a whole, the Montana Supreme Court in DeWolf proceeded to question whether the individual Union Market property was necessary to the “clearance of the blighted area and prevention of its recurrence.” Again, the Court’s decision—without saying as much—seems to parallel Vaniman’s “strict construction” approach of questioning a discrete piece of a condemnation because of its effect on a fundamental private property right protected by the Montana Constitution. The Court’s decision would also be consistent with strict scrutiny review because it resulted in a more closely tailored means to achieve urban renewal in Helena.

Zeroing in on the Union Market property, the Court then examined the specific uses (street alignment and parking space) the City intended for the property to determine whether the uses were indeed necessary and located to ensure the least private injury. After sifting through “considerable” oral and documentary evidence from the proceedings below, the Court concluded that the City had not carried its burden with regard to the Union Market property. As to the street alignment, the Court observed that a ten-foot shifting of the street could avoid the property without interfering with the effectiveness of the renewal area—a result with

114. Id. at 126, 129 ("Had the Legislature intended the urban renewal’s determination of necessity to be final, it would have been unnecessary to thereafter declare what evidence would be admissible at a hearing on necessity."). While the Court did not directly cite the "preponderance of evidence" burden that the eminent domain statutes impose on government, this portion of the ruling aligns itself with that burden.
115. Id. at 122, 127.
118. Id. at 128.
119. Id. at 124.
less private injury. The Court observed that the actual arrival of those businesses was not certain, and thus the City could not show a “present need nor a need in the reasonably foreseeable future” for those particular parking spaces. The Court thus measured the necessity for parking against “the reasonable probability of the success of the Urban Renewal development.” Without this showing, the Court opined that “the only limitation upon the amount of property that could be acquired... is the architect’s imagination.”

Ultimately, the Court was not comfortable permitting the destruction of a “going business” based simply on the “indefinite future when it just might be needed”—even if local government, engineers, and planners had studied the downtown’s blight and determined that the street and parking needs were “completely interwoven with” the renewal plan as a whole. Because the renewal plan could proceed without the Union Market property, the Court ordered that the property be excluded from the project.

Considering that the Montana Supreme Court denied an urban renewal condemnation for a public parking lot and street realignment, it is difficult to imagine the Court approving a city’s “creative” use of an urban renewal condemnation to take an unblighted neighborhood residence for a private developer. Thus, when reviewing Montana case law along with Montana’s condemnation statutes, the difference between Montana law and Kelō’s federal baseline appears even more pronounced.

D. A Summary of the Differences between Montana Law and Kelō

By placing Montana’s Constitution, eminent domain statutes, and eminent domain jurisprudence alongside the Kelō decision, it becomes apparent that the New London condemnations could not...
happen in Montana. And as the *Kelo* decision reminds us, a more stringent state condemnation law would indeed make *Kelo*'s federal analysis largely irrelevant.

Foremost, Montana law does not authorize economic development as a public use, and Montana courts, which “strictly construe” the public uses listed in Montana Code Annotated § 70-30-102, cannot read in such a use by implication. By contrast, Connecticut has an extensive statutory scheme that expressly recognizes condemnations for economic development regardless of the condition of the property taken. If New London were a city in Montana, it would have no statutory method to take the Dery Family’s homes nor Susette Kelo’s home for pure economic development. Nor could the city have taken the homes under Montana’s Urban Renewal Law, because the area New London revitalized was not a blighted area. New London would have been stuck negotiating with the landowners or leaving the land intact and simply revitalizing the neighborhood around the existing homes.

Although Montana’s public use statutes alone would have halted New London in its tracks, exploring some additional legal contrasts with *Kelo* are worthwhile. For example, suppose New London had designated an urban renewal area under Montana law and “creatively” designated the property within it—including the Dery and Kelo properties—as “blighted.” Now recall that *DeWolff* held that redevelopment is proper only when rehabilitation is impractical. Under that holding, the City would have to provide affirmative evidence showing why rehabilitation is not an option and why demolition and redevelopment is necessary. Since the Dery and Kelo properties were not in poor condition, and did not require demolition, this threshold showing would go unmet.

Further, a Montana court would not simply assess the legitimacy of the overall renewal plan and then stop its analysis as the U.S. Supreme Court did in *Kelo*. Instead, the necessity of condemning the Dery and Kelo properties would be front and center. Consider this statement by the U.S. Supreme Court:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular

127. See *supra* nn. 73, 110, and related discussion.
tract to complete the integrated plan rests in the discretion of the legislative branch.\textsuperscript{128}

Now consider this statement by the Montana Supreme Court:

Where it is shown, as here, that the property is not reasonably necessary to the clearance of the blighted area and prevention of its recurrence, the "area concept" does not prevail. . . . [The property here] can be eliminated from the project without harming the balance of the project. The Urban Renewal plan can be amended for that purpose.\textsuperscript{129}

Further, in scrutinizing the necessity of the individual condemnations, a Montana court—unlike the U.S. Supreme Court—would not extend deference to New London’s governmental assessment that its condemnation was for a public use. Instead, due to Montana’s fundamental right of private property ownership, a court would scrutinize the condemnation—perhaps even applying the strict scrutiny review it has used with other fundamental rights.\textsuperscript{130}

Our statutes also would require New London to show by a “preponderance of the evidence” that it was necessary to condemn the Dery Family and Kelo homes for the urban renewal project, and to show that the condemnation effected the “least private injury” to the Derys and Ms. Kelo—evidence the city did not have to produce under \textit{Kelo}.\textsuperscript{131}

Under \textit{DeWolf}, New London also would have to convince a Montana court that its renewal plan had a reasonable probability of success and that the Dery and Kelo properties were needed now or in the reasonably foreseeable future for the project to be successful.\textsuperscript{132} Would one less business in the ninety-acre development at Fort Trumball mean the demise of the whole plan? If not, a court could simply carve the properties out of the plan altogether as it did in \textit{DeWolf}.

Finally, a Montana court may apply \textit{Vaniman}'s three-part test to determine whether the private aspects of New London’s


\textsuperscript{129} \textit{DeWolf}, 508 P.2d at 128.

\textsuperscript{130} See supra nn. 81–85 and related discussion. While there is always a risk that the Montana Supreme Court will decline to follow its own precedent in the future, the consistencies between \textit{DeWolf} and the \textit{Vaniman} cases, which span 20 years, along with the Court’s history of safeguarding fundamental rights in the Montana Constitution, suggest a likelihood that the Court will continue to strictly construe the government’s exercise of eminent domain.

\textsuperscript{131} See supra nn. 86–87, 111 and related discussion.

\textsuperscript{132} See supra n. 119 and related discussion.
condemnation were so significant to the public use as to offend the Montana Constitution. A visual, side-by-side comparison of *Kelo*’s law and Montana law may be helpful.

### Table of Comparison

<table>
<thead>
<tr>
<th>Kelo</th>
<th>Montana</th>
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<td>Construes “public use” broadly to mean a “public purpose” and imposes a rational basis standard of review of the condemnation.</td>
<td>Recognizes a fundamental right to private property ownership under the Montana Constitution and strictly construes “public use.” There is the potential for strict scrutiny review due to the fundamental right involved.</td>
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<tr>
<td>A state statute expressly lists economic development as a public use without regard to the condition of the property taken.</td>
<td>The “public use” statutes are strictly construed in favor of private property rights, and there is no state statute authorizing economic development as a public use.  There is an urban renewal statute applicable only in blighted areas that (before 2007) would allow a condemnation for demolition and redevelopment if the property could not be rehabilitated.</td>
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<tr>
<td>Gives deference to the city’s assessment of public use at the time it creates the redevelopment area.</td>
<td>Does not give deference to the city’s assessment of public use at the time it creates a renewal district, but rather requires that the city show the necessity of the public use by a preponderance of the evidence in a judicial proceeding.</td>
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<tr>
<td>Only reviews the overall redevelopment area as a whole in deciding whether the condemnation is valid, and will not review individual properties on a piecemeal basis.</td>
<td>Reviews the specific piece of property within the renewal area. Also requires the condemnation to effect the “least private injury” to the particular property, and may order the city to remove the property from the renewal area if the city does not meet its burden. May apply Vaniman’s three-part test for incidental private use to further limit private enterprise on the property.</td>
</tr>
<tr>
<td>Does not require the city to show the probability that the redevelopment plan will be successful.</td>
<td>Requires the city to show a reasonable probability of success for the renewal plan to establish a present or reasonably foreseeable future need for the property.</td>
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133. See infra n. 156 and related discussion. S.B. 363 made this lack of authorization more explicit by expressly prohibiting urban renewal for the purpose of increasing “government tax revenue.”
As this side-by-side comparison shows, Montana eminent domain law is markedly different than the federal and Connecticut law underlying *Kelo*. And because Montana law is more stringent than the *Kelo* baseline, Montana law—not *Kelo*—has governed, and still does, in Montana.\(^{134}\) Unfortunately, public clamor for a *Kelo* “fix” in the Big Sky State overshadowed any meaningful analysis of Montana’s private property protections.

III. MONTANA’S RESPONSES TO *KELO*

Despite significant legal obstacles to a *Kelo* taking in Montana, there have been several recent attempts to pass legislation that professed to protect Montanans from losing their homes like the landowners in *Kelo*. Some of the key legislative responses are worth examination.\(^{135}\)

A. *Initiative I-154*

Dubbed the “Protect Our Homes” initiative by its proponents, I-154 was speeding toward the November 2006 voter ballot in Montana. As proponents gathered approximately 36,000 signatures statewide,\(^{136}\) they pitched the initiative with statements such as:

Last year, the U.S. Supreme Court’s *Kelo* decision ruled that government could use eminent domain to seize your property and retransfer it to a mall developer. You could have a big box store where your living room once was. The only justification needed for bulldozing your home is government’s desire to collect higher taxes from a commercial development. The Court ruled this broader eminent domain interpretation would apply unless your state passes a law like I-154 that prohibits this abuse.\(^{137}\)

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135. In addition to the bills discussed here, several additional bills were requested and assigned numbers and short titles, but never advanced through the drafting process: S.B. 536 (“revise eminent domain laws”); L.C. 0059 (“revise eminent domain laws”); L.C. 0737 (“revise eminent domain laws”); L.C. 0807 (“revise eminent domain laws”); L.C. 1281 (“prohibit eminent domain for private development”); L.C. 1636 (“revise eminent domain law”); and L.C. 2037 (“revise eminent domain and regulatory taking law”). The topic among policy makers was, to say the least, a popular one.

136. Findings of Fact, Conclusions of Law, and Or. Invalidating Certification of CI-98, CI-97, and I-154 at 20, *Montanans for Just. v. State*, Cause No. CDV-06-1162(d) (Mont. 8th Dist. 2006). The final count was over 10,000 more signatures than needed to get the measure on the ballot. *Id.*

Or, more succinctly: "Keep that new eminent domain law from coming to Montana and taking our homes away."  

Statements like these underscore the powerful role that fear played in Montana’s response to Kelo. Who wouldn't sign a petition when threatened with losing the family home to Home Depot? But the signature gatherers, many of whom were paid according to the volume of signatures they could gather, either did not understand or chose not to explain whether Montana’s current law would even allow such a tragedy to occur.

The text of the initiative stated that government could not use eminent domain “with an intention to directly or indirectly transfer a possessor interest in the property taken to another private party. . . .” Interestingly, the initiative then stated that an exception to this rule would be the public uses enumerated in Montana Code Annotated § 70-30-102. The initiative essentially proposed a rule that would keep Montana’s eminent domain powers the same.

By carving out § 70-30-102, the initiative excepted urban renewal from its purview. But the initiative did so expressly a second time by excepting blighted properties. In what may be its only true limits on a condemnation for private property, the initiative did raise the government’s burden of proof to “clear and convincing” before it could condemn blighted property for transfer to private ownership, and stated that the showing must “separately account” for each property taken (presumably reacting to Kelo’s “area as a whole” analysis). This change would have codified existing case law since DeWolf already held that the government must account for individual condemnations within an urban renewal area. Thus, the prime target for Kelo reform in Montana (urban renewal) was nearly untouched by the initiative, though

139. Findings of Fact, Conclusions of Law, and Or. Invalidating Certification of CI-98, CI-97, and I-154 at 5, Montanans for Just. v. State, Cause No. CDV-06-1162(d) (Mont. 8th Dist. 2006). For a story on signature gatherer Eric Dondero, see Ring, supra n. 138.
141. Id. at § 5(1)(b).
142. Id. at § 5(1)(a) (defining blighted property as “improved or unimproved property that constitutes a danger to the safety and health of the community by reason of dilapidation, lack of ventilation, light and sanitary facilities, deleterious land use or any combination of these factors . . .”).
143. See supra n. 156 and related discussion.
the initiative may have meaningfully raised government’s evidentiary burden for urban renewal condemnations.

So why go to all the trouble of getting I-154 on the ballot if it did not truly reform Montana’s eminent domain laws? According to opponents of the measure, I-154 was a “bait-and-switch” initiative. Proponents more benignly termed it “Kelo-plus.” While eminent domain reform was the hook, the true reform was a regulatory (non-physical) takings provision that recognized a taking if a regulation resulted in “diminished value or economic loss to the private party subject to the government regulation.” The provision required government compensation or a waiver of the regulation for the affected landowner—what some have termed a “pay-or-waive” regulation similar to Oregon’s much publicized Measure 37. Opponents asserted that the initiative would essentially hand a “blank check” to developers and “derail” land use planning in Montana at a time when development is skyrocketing. Proponents described the measure as giving voters “a chance to say how far regulations can go without compensating landowners when their property values are reduced by land-use regulations.” Regardless of how one feels about regulatory takings, it is disconcerting that such a sweeping change—unrelated to Kelo—could rest principally on Montana’s fearful response to a Kelo taking.

I-154 was not Montana-inspired, but rather funded by out-of-state interests working on similar laws in five other states. While there may be nothing extraordinary about outside special interests using the Montana initiative process, the popularity of the one-size-fits-all “Kelo-plus” initiative further suggests that

146. I-154, supra n. 140.
147. Rebuttal to Argument for I-154, supra n. 144.
148. E.g. id; Gilroy, supra n. 145; Ring, supra n. 138.
150. See Ring, supra n. 138 (identifying Americans for Limited Government and Howie Rich, a New York City “real estate mogul” and board member of the Cato Institute in Washington, D.C., as the principal funding sources for the Montana initiative); Findings of Fact, Conclusions of Law, and Or. Invalidating Certification of CI-98, CI-97, and I-154 at 6, Montanans for Just. et al. v. State, Cause No. CDV-06-1162(d) (Mont. 8th Dist. 2006) (noting that unidentified out-of-state national organizations provided financial backing).
meaningful analysis of Montana eminent domain law was lacking as Montana rushed to respond to Kelo.

Despite having around 10,000 more signatures than required,\textsuperscript{151} I-154 (along with two other initiatives) was ultimately stricken from the ballot due to findings that some signature gatherers had employed improper practices in gathering and reporting signatures.\textsuperscript{152}

\textbf{B. Montana Senate Bill 477}

In the 2007 Montana Legislature, proposed Senate Bill 477 (S.B. 477) went further than I-154 by altogether eliminating urban renewal as a public use under Montana Code Annotated § 70-30-102 and striking all eminent domain provisions from the Urban Renewal Law.\textsuperscript{153} This bill would have allowed cities to continue urban renewal, but only on properties where the landowner willingly sells the property. Thus, a landowner with blighted property within an urban renewal area could refuse to sell the property and a municipality would have no power to condemn—regardless of whether the municipality wished to use property for a public use or private enterprise.\textsuperscript{154}

Although the bill’s sponsor stated that his principal concern was the “nebulous” definition of blight,\textsuperscript{155} which could allow cities to take even non-dilapidated property, the bill simply abolished condemnation of all blighted properties rather than tighten the Law’s definition. Proponents of S.B. 477 cited Kelo as an example of how the “blight” laws have “ruined communities,” and encouraged the bill’s passage to do away with this “abuse of
power.” A representative of the Montana League of Cities and Towns, on the other hand, opposed the bill, offering a “burned-out building” scenario where a city would be unable to condemn and clear a harmful structure under S.B. 477. The representative did agree that the blight definition was broad enough that a city could take unfair advantage, but assured legislators, “we don’t do that in Montana.” Ultimately, S.B. 477 died in standing committee—presumably because two other Democrat-sponsored bills dealing with eminent domain had already passed out of committee and would soon become law. Those bills were Senate Bills 363 and 41.

C. Montana Senate Bill 363

In its original formulation, Senate Bill 363 (S.B. 363) was little more than a bill of reassurance, primarily reiterating existing Montana law. For example, the bill limited condemnation for urban renewal to blighted property, which was already the case under the Urban Renewal Law. S.B. 363 also precluded eminent domain if the purpose of an urban renewal project “is to increase government tax revenue” and required that government show a condemnation is necessary for a “public” use. Since Montana law already required that condemnation be for a “public use,” and its public use statute has never authorized “tax revenue” as a category of condemnation, these parts of the bill also seemed more a reassurance for the public’s benefit than a genuine change in the law. Indeed, the bill’s sponsor admitted that although she believed Montana law in its current formulation likely prevented a Kelo taking, S.B. 363 was necessary to placate the fears of Montanans.

157. Id. at 1:48:03–1:52:13 (audio file) (testimony of Alec Hansen). Based on the 50-year absence of litigation, Mr. Hansen may be correct, but it is doubtful that Montanans in a post-Kelo world would take comfort in such a promise.
161. Id. at 4.
In the end, however, S.B. 363 became more surgical in its approach by narrowing the use of eminent domain in urban renewal to selected types of blighted property—namely, the dilapidated, unsanitary, or unsafe properties traditionally associated with blight. A city could still purchase property deemed blighted under some of the more “nebulous” characteristics such as “improper subdivision” or “inadequate street layout,” but it could not condemn those properties. Thus, the “burned-out building” owned by a recalcitrant landowner would still be within the reach of eminent domain, but other non-dilapidated properties would not.

The broad support for S.B. 363 underscored the far-ranging dissatisfaction with Kelo in Montana. Supporters included the Montana Association of Realtors, Montana Audubon Association, Montana League of Cities and Towns, Montana Trial Lawyers Association, Montana Trout Unlimited, Montana Stock Growers Association, Montana Conservation Voters, Montana Environmental Information Center, and the Montana Farm Bureau, among others. Governor Schweitzer signed S.B. 363 into law, announcing, “[t]he government ought not to pick winners and losers.” Even though this bill also rode in on the Kelo wave, its changes reflected a more analytical response to Kelo by eliminating the possibility—albeit a remote one—that a non-dilapidated structure in the urban renewal area (like the Union Market prop-
erty in Helena) could be condemned. While the DeWolf decision would likely prevent that outcome in any event, this legislation codified the balance between protecting ordinary neighborhood properties and allowing municipalities to mitigate and prevent the recurrence of true blight in a community. Unfortunately, the Legislature did not stop with S.B. 363 but instead rushed to embrace another Kelo-fix that would take that balance away.

D. Montana Senate Bill 41

Senate Bill 41 (S.B. 41) completely prohibited a city from condemning property for urban renewal “with the intent to sell, lease, or provide the property to a private entity.” While the bill initially required a ten-year holding period before making a transfer to private enterprise, the House Committee on Judiciary eliminated the ten-year holding period just hours after drafting S.B. 363’s more limited list of situations when a city could condemn blighted properties for urban redevelopment. As the sponsor of S.B. 363 stated, S.B. 41 would “shut down” a city’s ability to eliminate certain blighted areas. The Montana League of Cities and Towns similarly objected, stating that the bill would “saddle taxpayers with the cost of owning and maintaining a lot of surplus properties” because a city may have to condemn and demolish a dilapidated property but would then be unable to recoup the cost or redevelop the property through partnerships with private enterprise. Recall, again, that the focus is on non-salvable properties that are unable to be rehabilitated through either voluntary owner action or compulsory repair, thus requiring condemnation and demolition. A poignant example offered by one planner was that of abandoned industrial land held by out-of-state owners


172. Id. at 3:31:49–3:33:10 (testimony of Alec Hansen).

who under the bill could keep a large area of blighted inner city land out of reach from renewal.\footnote{Mar. 7, 2007 H. Hrg., supra n. 169, at 1:35:01–1:40:52 (testimony of Chris Behan).} Thus, in enacting S.B. 41 the Legislature left cities with the burden of dealing with genuine blight while taking away a significant tool for doing so.

S.B. 41 not only undermined the purpose of S.B. 363, it also created perplexing contradictions with other unchanged aspects of the Urban Renewal Law. In particular, the Law still contains strong policy statements that a city “shall afford maximum opportunity” for “redevelopment of the urban renewal area by private enterprise” including in the “disposition of any property acquired.”\footnote{Mont. Code Ann. §§ 7-15-4208, -4271(3) (2005 and 2007).} At the same time S.B. 41 changed the definition of “redevelopment” to state that “private enterprise or public agencies may not develop the condemned area in a way that is not for a public use.”\footnote{Mont. Sen. 41, 60th Leg., 1 Reg. Sess. 3-4 (Nov. 21, 2006) (available at http://laws.leg.mt.gov/pls/laws07/law0203w$startup) (emphasis added).} S.B. 41 then added a definition of “public use” that includes every eminent domain category listed in Montana Code Annotated § 70-30-102 (some of which involve private ownership) as well as projects financed by tax increment financing under Montana Code Annotated § 7-15-4288\footnote{Id. at 3.}—projects that include not only urban renewal but industrial infrastructure development, technology infrastructure development, and aerospace transportation. It is unclear how such an expansive definition of public use would not embrace some forms of private ownership.

made clear that the bills presented alternative rather than companion proposals.¹⁸⁰

E. The New Urban Renewal Law and Some Possible Ways to Restore Its Balance

Viewed collectively, Montana’s post-Kelo legislative efforts reveal the degree to which public sentiment drove the State’s eminent domain reforms. It made sense for Montana to revisit an urban renewal law that is now nearly fifty years old—to ensure both that it does not allow government abuse and that it reflects the needs of Montana’s communities today. But in revisiting that law Montanans lost sight of the very reasons why they felt the law was important in the first place—to renew areas in communities that legitimately need restoration for health and safety reasons.

Montana’s rush to respond to Kelo left the State with a paradoxical urban renewal law that simultaneously favors blight redevelopment through private enterprise and takes away a key tool for implementing that policy. One can imagine that the Blackfoot Tribe of 1959, facing a fear of further disease outbreaks, valued that additional tool. One can also imagine a future community left with unsafe blight (like abandoned industrial land) because a landowner refuses to sell and the city cannot afford to condemn and permanently own the property. One can even imagine a resource-rich community that can afford condemnation and its ongoing maintenance, but now has no private options for using that property in a way that renews the neighborhood and prevents the recurrence of blight.¹⁸¹

Montana’s rush to respond to Kelo also overlooked some balanced approaches already suggested by Montana’s eminent domain jurisprudence. For example, the statutes could require a city to show that there is a compelling interest for the redevelopment condemnation and that the condemnation is narrowly tailored.¹⁸² The statutes could also clarify and strengthen the re-

¹⁸¹. These hypothetical situations may seem like remote “worst case” scenarios, but it was also the remote “worst case” scenario of Kelo that prompted S.B. 41 and S.B. 363. Recall that outside of DeWolf, no one can cite an example of a Montana city using urban renewal to take a neighborhood property, and even there the proposed condemnation was neither targeted at a home nor intended for transfer to private enterprise. See supra pt. II.C.2. and related discussion.
¹⁸². Supra pt. II.C.1.
quirement that a city prove the impossibility of rehabilitation before condemning a property for redevelopment.183 And the statutes could make explicit the requirement that a city separately justify each condemned property, as opposed to the renewal area as a whole.184 Even the ill-fated I-154, despite its hidden ambitions, allowed condemnations of blighted land when the government met a heightened evidentiary burden (clear and convincing) in the condemnation proceedings.185 All of these approaches leave room for a city to condemn and redevelop in truly compelling situations of blight—a power envisioned by the still-existing policy statements contained in the Urban Renewal Law.

CONCLUSION

Montana’s response to Kelo was good to the extent that it caused the Legislature to examine the State’s eminent domain laws and address areas of potential ambiguity. But in many ways the legislative response aimed to appease the fear of the populace rather than to genuinely examine and build on its rich eminent domain law—a law that already contains meaningful landowner protections. This fear caused the Legislature to overreact by eliminating rather than merely limiting a key urban renewal tool in the prevention of unsafe community blight. Perhaps the year before Montana’s next legislative session will provide Montanans with enough distance from Kelo to consider how to best restore the balance between private property and community safety.

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183. See supra n. 110 and related discussion.
184. Id.
185. Supra pt. III.A.