

PROPERTY, ET AL. v. NUISANCE, ET AL.

IRVIN DAGEN* AND EDWARD C. CODY†

The urban renewal program which is being carried out pursuant to federal and state laws by local government bodies throughout the country has conferred extremely broad powers upon urban renewal agencies and local governing bodies. In practically all of the cases that have been decided in both the state and federal courts, including the United States Supreme Court, the power of local urban renewal agencies and governing bodies to decide which areas may be declared unusable in their present state and condition has been upheld by the courts.¹ In addition, practically all of the courts have upheld the right of the local agencies to acquire property which is not itself in a blighted or deteriorated condition, if such property lies within a legislatively determined blighted area. However, it would appear that the urban renewal statutes at both the federal and state levels contemplate that the local urban renewal agencies which acquire property or any interest in property must pay just compensation for such acquisition—that is, they must go through the normal eminent domain procedure. At no point do the federal or state laws contemplate that the local agency shall acquire any property rights without just compensation to owners.

Suggestions have been made that the local urban renewal agencies should be vested with the police power to condemn slum property (much as do various other city agencies, such as police and fire departments, departments of public safety, etc.) which, in the determination of the renewal agency or the local governing body, constitutes a menace to the community as a whole. Since the urban renewal legislation grants such broad powers to local bodies in the selection of areas which are a detriment to the community as a whole, the vesting of a broad police power in such agencies might lead to wholesale appropriation of property without what the courts would regard as due process under state and federal constitutions. In this article, we shall use “condemnation” to mean governmental actions within the “police power”; and for a taking by payment of compensation, we shall use the term “eminent domain.”

This article will attempt to deal with the nature of the property rights and interests to be acquired by the urban renewal agency, and a number of approaches to the value of such property rights and interests. Under the theory of the police power, the governmental agency which condemns property—and even destroys property—be-

* LL.B. 1954, St. Louis University. General Counsel, Land Clearance for Redevelopment Authority of the City of St. Louis and the St. Louis Housing Authority. Member of the Kentucky and Missouri bars.

† LL.B. 1956, St. Louis University. Assistant Counsel, Land Clearance for Redevelopment Authority of the City of St. Louis and the St. Louis Housing Authority. Member of the Missouri bar.

¹ *Validity, construction, and effect of statutes providing for urban redevelopment by private enterprise*, Annot., 44 A.L.R.2d 1414 (1954). See also Annot., 44 A.L.R.2d 1414 (Supp. Ser. 1960); *Berman v. Parker*, 348 U.S. 26 (1954).

cause of the illegal use of such property or because of the possible detriment to the community as a whole by a continued use of such property, acquires no right, title, or interest in the property so condemned or destroyed. The classic example, of course, is the case of a building adjacent to a burning building, and the destruction of the adjacent building by the fire department in order to avoid the spread of the fire to a much larger area in the community.² Other examples are the destruction of diseased cattle and other farm animals in order to prevent the spread of contagious animal diseases,³ the destruction of diseased trees in the vicinity of orchards,⁴ and the destruction of personal property⁵ and even improvements to real estate such as a home⁶ to prevent the spread of diseases.

Thus far, the courts have not been faced to any great extent with the question of whether the elimination of slum structures, which are conducive to unhealthy community life, and even disease and crime, are such nuisances that their elimination by the urban renewal agency without compensation to the owners thereof would fall into the same category as those just mentioned above. Nevertheless, it is worth speculating on whether or not the legislative determination that a certain area is a slum, or blighted, or insanitary, as these terms are used throughout the federal and state statutes, may one day be used as the basis for declaring the existence of slums to be so highly detrimental to the community as a whole that the governmental agency may take such property in the exercise of its police power without compensation for the land thereunder.⁷

The uses to which personal and real property may be put in a private enterprise society are not beyond control or limitation. The question frequently arises, however, as to whether, even if the controls or limitations on use are within the powers of the state, they are of such a nature as to necessitate the payment of compensation to property owners affected thereby? The cases generally hold that every valid

² *Bowditch v. Boston*, 101 U.S. 16, 18 (1879): "At the common law everyone had the right to destroy real or personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. In the case of the *Prerogative*, 12 Rep. 13, it is said, 'For the Commonwealth a man shall suffer damage, as for saving a city or town a house shall be plucked down if the next one be on fire; and a thing for the Commonwealth every man may do without being liable to an action.' There are many other cases besides that of fire—some of them involving the destruction of life itself—where the same rule is applied. 'The rights of necessity are a part of the law.' *Republica v. Sparhawk*, 1 Dall. 357, 362." See also *Hughes v. United States*, 230 U.S. 24 (1913).

³ *New Orleans v. Charouveau*, 121 La. 890, 46 So. 911 (1908); *Houston v. State*, 98 Wis. 481, 74 N.W. 111 (1898); *Newark & S. P. Horse Car Co. v. Hunt*, 50 N.J.L. 308, 12 Atl. 697 (1888).

⁴ *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S.E. 141 (1920); *Miller v. Schoene*, 276 U.S. 272 (1928); *Balch v. Glenn*, 85 Kan. 735, 119 Pac. 67 (1911); *State v. Main*, 69 Conn. 123, 37 Atl. 80 (1897).

⁵ *Savannah v. Mulligan*, 95 Ga. 323, 22 S.E. 621 (1895) (bedding destroyed in scarlet fever case); *Rogers v. Barker*, 31 Barb. (N.Y.) 447 (1860) (infected clothing destroyed).

⁶ *Sings v. Joliet*, 237 Ill. 300, 86 N.E. 663 (1908) (home containing small-pox germs).

⁷ There is certainly precedent on a limited or individualized scale for the summary destruction of buildings whose very existence constitutes an apparent and immediate menace to the health, safety, and welfare of the community. *Cummings v. Lobsitz*, 43 Okla. 704, 142 Pac. 993 (1914); *Houston v. Lurie*, 148 Tex. 391, 224 S.W.2d 871 (1949).

exercise of the police power is apt to affect the property of someone adversely.⁸ This is well illustrated in the case where property has been rezoned from a higher to a lower use. For example, in an area formerly zoned for one-acre lots for single-family residences, the later rezoning by a city to require three acres for each residence, has been upheld as a proper exercise of the zoning power.⁹

The exercise of the police power, however, sometimes reaches a point where it shades into a taking requiring the payment of just compensation. In the early case of *Pennsylvania Coal Company v. Mahon*,¹⁰ Justice Holmes, speaking for a majority of the United States Supreme Court, stated that a Pennsylvania statute forbidding the mining of coal under private dwellings or streets in cities in places where the right to mine such coal had been reserved in the grant conveying such property was unconstitutional, in that it was a taking of private property without due process of law. The reasoning of the court was based on its conclusion that there is a question of degree of control, which cannot be disposed of by general propositions of law, and that one fact for consideration in determining such limits is the extent of the diminution of use. When the degree of control reaches a certain magnitude, the factual situation must be thoroughly examined to see whether there is, in fact, a taking (even though allegedly pursuant to the police power) which requires compensation to the property owner to sustain the act. And while the greatest weight is given to the findings and declarations of the legislature, interested parties always retain the right to contend that the legislature has gone beyond its constitutional power. The *Pennsylvania Coal* case, while not slavishly followed in all instances since 1922, remains the weight of authority, and has been cited favorably by numerous courts to uphold the proposition that even the exercise of the police power can go but so far, and even agencies purporting to act under the police power may be forced by the courts to take by eminent domain and to pay just compensation in certain factual situations.¹¹

In his very able and useful treatise on municipal law,¹² Charles Rhyne sets forth his view of the distinction between the power of eminent domain and the police power. In Rhyne's view, the taking by eminent domain is for the purpose of putting the property taken to a public use by the taking agency—e.g., highways, parks, and schools. On the other hand, under the police power, as Mr. Rhyne views it, property may be destroyed or its value impaired, but in no event is it taken by the condemning public agency for its own use or as that agency's own property.

⁸ *Oliver Cadillac Co. v. Christopher*, 317 Mo. 1179, 298 S.W. 720 (1927); *Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁹ *Flora Realty & Inv. Co. v. City of Ladue*, 362 Mo. 1025, 246 S.W.2d 771, *appeal dismissed*, 344 U.S. 802 (1952).

¹⁰ 260 U.S. 393 (1922), with dissenting opinion by Mr. Justice Brandeis at 416.

¹¹ "Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416." *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

¹² CHARLES S. RHYNE, *MUNICIPAL LAW* § 26-3, at 530 (1957).

Even if we follow Mr. Rhyne's line of reasoning, we can arrive at the conclusion that while the urban renewal agency has an unqualified duty to pay an owner just compensation for his property, the urban renewal agency, on the other hand, has no obligation to pay for any illegal use of the property; nor does the agency have a duty to pay for a nuisance, if it can be shown that the property taken does constitute a nuisance and that the improvements have a market value diminished by the cost of remedying the illegal uses or have value that could be ascribed to the illegal uses of the improvements. While the police power would not be the power under which the urban renewal agency would be taking the improvements, if the urban renewal agency is able to show to the court in an eminent domain proceeding that the improvement is a burden rather than a benefit to the land and that the urban renewal agency is taking for its purposes only the land to be sold thereafter for a legal and useful purpose, then it may be possible for the urban renewal agency to arrive at the same results as though it were taking under the police power.

As indicated above, as soon as the area of eminent domain is approached, the courts are faced with the problem of valuation of the property or interests in property taken by the governmental agency. Lewis Orgel, in his *Valuation Under Eminent Domain*,¹³ points out that even within the power of eminent domain, there is the possibility of establishing a standard of valuation which would allow a finding of a diminished value, or even no value, for improvements which constitute a nuisance in the sense that they are a detriment to the community as a whole. Mr. Orgel, in discussing "Market Value as Enhanced by Present Illegal Uses," states:¹⁴

In a number of cases the courts have stated or held that present market value, based on past illegal uses, might not be considered in making an award of just compensation, although the property has been used for those purposes, and though such use did result in an enhancement of market value. . . .

There are several important questions which must be answered with respect to the urban renewal program and the exercise of the power of eminent domain thereunder. The first is with respect to the effect on value arising from the legislative determination that the area in which the improvement stands is so blighted or deteriorated that it constitutes a menace of great proportions to the surrounding areas of the community.¹⁵ In this sense, it might be said that such a legislative indictment assumes the nature of a contagious disease which, if not eliminated, will

¹³ I LEWIS ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* § 3, at 17 (2d ed. 1953).

¹⁴ *Id.* at 163.

¹⁵ In cases involving eminent domain proceedings by municipal bodies other than urban renewal agencies, the courts have recognized that long before the actual institution of eminent domain proceedings relating to part of a property, the possibility of such action, shown by preliminary steps or plans or even discussion or rumors, may influence advantageously or disadvantageously the value of the property and its fitness for some intended use. *Lansburgh v. Market Street R. Co.*, 98 Cal. App.2d 426, 220 P.2d 423 (1950). However, in an urban redevelopment case, a court has theorized that this type of situation is a mere incident of ownership of real property, and hence a reduction or increase in the market value of property occurring by reason of legislation authorizing some public project cannot be considered a taking in the constitutional sense. *Sorbino v. New Brunswick*, 43 N.J. Super. 554, 129 A.2d 473 (1958). See also *Danforth v. United States*, 308 U.S. 271 (1939).

infect the entire community. But this very legislative determination of blight is usually turned on its head by slum property owners. They say their property has fallen in value due to such declaration. In truth and in fact, it is really the other way around. In most instances, the particular property, and certainly the area of the urban renewal project as a whole, has so deteriorated in social usefulness that in order to stop its contagious spread in other areas (much as in our earlier example of the fire and adjacent buildings), the legislative body of the community has had to call a halt to its continued use and occupancy and declare it to be in the public interest that it be totally destroyed.

Is not this legislative determination of blight, therefore, prima facie evidence that the usefulness and value of all property in such an area has diminished? If that is so, a penalty should be assessed against all property in such an area. In effect, the burden of proof should be on the owner to show that in his particular case, he is without fault, that he has not contributed to the legislatively-determined condition, and that his property is in a legal condition, properly used, and therefore has a market value based on such condition and use. Even if the courts will not go so far, the taking agency should certainly be allowed to pay less for property because of its illegal uses and its greater or lesser contribution to the slum character of the area, which has been declared to be a detriment to the community as a whole.

This question has been before the courts, and a partial solution has recently been enacted into law in Illinois.¹⁶

Evidence is admissible as to (1) any unsafe, insanitary substandard or other illegal condition, use or occupancy of the property; (2) the effect of such condition on income from the property; and (3) the reasonable costs of causing the property to be placed in a legal condition, use or occupancy. Such evidence is admissible notwithstanding the absence of any official action taken to require the correction or abatement of any such illegal condition, use or occupancy.

It is suggested that even without the existence of a statute along the above lines, the courts should, and actually have, allowed evidence of illegal uses in condemnation cases. An interesting early case is that of *McKinney v. Nashville*,¹⁷ in which the city condemned a saloon which was being used for gambling purposes; and the court instructed the jury that it could consider only the lawful uses to which the property could be put. The court said:¹⁸

. . . and the use of any portion of this property for gambling purposes was in violation of the law. And, if it was true that such illegitimate use did inflate the rental value of this property, then the jury was properly told that a rent inflated by this use, to the extent of the inflation, could not be taken into consideration as constituting a part of the rental value. It is true that it might be a matter of difficulty to determine where the rental value from a legitimate use ended and that from the illegitimate use began, yet that is the misfortune of the owner, for which the city is not responsible.

¹⁶ ILL. REV. STAT. C. 47, § 9-5 (1959).

¹⁷ 102 Tenn. 131, 52 S.W. 781 (1899).

¹⁸ 102 Tenn. at 139, 52 S.W. at 783.

In the areas in which urban renewal agencies operate, there will not necessarily be such clear-cut inflated rental values as that present in the *McKinney* case. However, in urban renewal areas, there are numerous instances of violation of building codes and fire and other safety ordinances of the community.¹⁹ The problem here is not whether these uses have inflated the value, but rather whether the community standard, as evidenced by its codes and ordinances, must be taken as the starting point for determination of values. That is, if a building is below the standard required by codes and ordinances, shall its value be diminished by the amount of money that would be required to bring the particular building to the legally required standard? If we approach the question in this manner, we are merely stating that the community requires all buildings to be up to a certain standard; any deficiencies must be remedied before the building has a *legal* market value; and even if it is sold, it cannot be put to use until it is brought up to the required standard.

The property owner, on the other hand, may, with all good intentions and on the basis of actual sale (and, unfortunately, with some law on his side), show that his property and other properties in similar condition have been bought and sold over the years. This may be true, but it should not influence the outcome; the sale of illegally used property should have no more significance in determining value for purposes of eminent domain than the sale of a gambling debt would have in determining the legally recognizable value thereof. In private contracts between the owners of such illegally used property, steps may be taken by each of them to enforce, privately, their rights as against each other. Should the courts be used, however, in order to enforce the alleged rights of the owners of such illegally used slum property? If all property ownership in slum areas were vested in parties to whom the deterioration of the area could be directly traced, a solution to the above problem would be much easier to discover. Unfortunately, that is not the case.

The classic example, and a very recent one, of what may happen with respect to a property taking in an urban renewal area is the *Mayme Riley* case.²⁰ This case should be required reading for every urban renewal agency official and every attorney representing such an agency in eminent domain proceedings. The variety of opinion of the various judges in the courts which have heard this case can be easily explained by the fact that most courts in eminent domain proceedings are anxious to arrive at a "fair and equitable" value as just compensation for the property owner. The courts, however, are faced with the same problem as the urban renewal

¹⁹ It is ironical that several of the courts which have invalidated redevelopment legislation in their application to particular factual situations have assigned as one of the reasons the opinion that a slum could be cleared by the exercise of police powers under general laws dealing with zoning, abatement of nuisances, and the preservation of public health. *Adams v. Housing Authority of Daytona Beach*, 60 So.2d 663, 666 (Fla. Sup. Ct. 1952): "If the only purpose is to remove or abate a blighted area, the police power is ample. Our general laws relating to cities and towns, Chapter 176, F.S.A., with reference to zoning and Section 167.05, F.S.A. with reference to abatement of nuisances and the preservation of the public health confer sufficient power. These provisions of our Statutes have been liberally construed by this Court." See also Opinion of the Justices, 332 Mass. 769, 782, 126 N.E.2d 795, 803 (1955).

²⁰ *Mayme Riley v. District of Columbia Redevelopment Land Agency*, 246 F.2d 641 (D.C. Cir. 1957).

agencies—that is, just compensation for Mayme Riley may be a windfall for the absentee owner of multiple parcels in a slum area. Yet, the law must be impartial—at least in theory—may not construct arbitrary classes, and must treat each piece of property like the next. For purposes of illustration, it would be well at this point to set up a hypothetical problem case, based in part on the *Mayme Riley* case as well as on a variety of experiences of the authors with similar fact situations. To avoid confusion, the name of Mary Jones will be used in place of that of Mayme Riley.

The legislatively declared slum area, or at least a part of the area, on which Mary Jones's home stands, will be called "Flower Street." It will be assumed that there are twenty-five row houses on this street, one of which is owned and occupied by Mary Jones. Eight of the row houses are owned by the Excelsior Realty Company, which at various times has owned more or less than these eight houses, and from which company Mary Jones bought her home about ten years ago. Excelsior bought its presently owned eight houses at various times during the past thirty-five years, has owned as many as twenty houses, has sold several, and has foreclosed on several. The eight houses now owned by Excelsior are three-story brick, were built about sixty years ago for single-family occupancy, and are now being used for three-family occupancy, a legal use under the zoning ordinances, provided that certain improvements in plumbing, electrical wiring, and so on, are present.

Mary Jones is widowed and the mother of five teen-age children. She has been employed regularly as a restaurant cook. Her husband's legacy to her, in addition to the children, consisted of a life insurance policy, which, after payment of medical and funeral expenses, left Mary about \$500. She learned that she could buy a house from Excelsior for \$350 down and that she could have some income from renting part of the house. The purchase price was \$8,000, and the \$7,650 balance was secured by two deeds of trust at eight per cent interest. Nominal monthly payments, within the earning capacity of Mary Jones, made it possible for her to use most of her rental income of about \$600 a year for repairs and additions. During the ten-year period of ownership, Mary Jones spent about \$2,000 on heating and plumbing alone. At the date of the eminent domain proceeding, she still owed about \$4,600 to Excelsior. The urban renewal agency, basing its action on the appraisals which it had secured, offered her \$4,400. Mary Jones set the value of her home at \$10,000.

Excelsior Realty's eight houses had cost the company a total of \$17,600. Including capitalized additions, the eight houses had a value on Excelsior's books, after depreciation, of \$7,200. The houses were in fair condition, but did not have certain of the additions which Mary Jones had put into her home. Imputed rentals for full occupancy were \$85 per month, or \$1,020 per year, for each house. Excelsior did not dispute the amount of rental income. The purchase of this type of property by real estate dealers was usually on a "wholesale" basis and was priced by real estate dealers in sales to each other on a "gross multiplier" of about four times the gross

annual rental income. The urban renewal agency offered Excelsior \$4,000 for each of its houses. Excelsior said that the gross multiplier should be six times the annual rental and that each of the houses, therefore, had a value of \$6,000.

If the urban renewal agency had paid Mary Jones \$4,400, she would have then still to pay the holders of her deeds of trust an additional \$200 to pay off her indebtedness of \$4,600. In Mary Jones's view, she would have lost all of her down payment, all of the principal she had paid during the ten-year period of ownership, and all of the amounts she had spent for repairs and additions.

If, on the other hand, the urban renewal agency had paid Excelsior only \$4,000 per house, Excelsior would have had a total capital gain of \$24,800. Furthermore, Excelsior would have had to pay no immediate capital gain tax on the \$24,800 so long as the company invested in similar property within the statutory period set out in the Internal Revenue Code.²¹

Let us now suppose that the urban renewal agency had not been able to purchase any of the above property and had to resort to an eminent domain proceeding. Assume now that the court had awarded Excelsior \$5,000 for each of its eight houses, and that it had considered that Mary Jones had put certain additions into her home which were not in Excelsior's houses and, therefore, had awarded her \$6,000. Excelsior would probably have been reasonably well satisfied. Mary Jones would still be disappointed since, again in her view, she had been awarded less than her purchase price and no consideration had been given to her for the cost of improvements. In addition, she might not be in a position, financially, to relocate elsewhere. Prices have gone up, she is older, and while certain FHA mortgage provisions might make it possible for her to secure housing equal to her former home at a very low down payment, it would be difficult for her to assume the payment of the mortgage required on such property.

To go from the specific problem back to the general problem mentioned earlier—that is, what may be assessed against the party or parties responsible for the generation of a nuisance, in this case a slum area—can we arrive at a standard which could be employed by the court for the purpose of awarding just compensation to both Mary Jones and Excelsior without infringing on the constitutional rights of either of the above parties? Until the law can arrive at a method for penalizing those parties responsible for the creation and generation and continued use of the slums, there will continue to be in the future, as there has been in the past, a financial reward to dealers in and operators of slum properties, rather than an assessment of damages for the nuisance they have created and the blight they have placed not alone on their own property, not alone on the area in which their properties are located, but on the entire community.

One possible solution to the question of value is to place a wholesale and a retail value upon the above property. If Excelsior as a real estate dealer is able to buy and sell at a certain "wholesale" price (from and to other real estate dealers), then perhaps

²¹ INT. REV. CODE OF 1954, § 1033.

that is the fair value so far as the Excelsior Realty Company is concerned. The taking agency should not be required under law to pay more than the value to the owner of property. It is not required, for example, to pay to Excelsior the amount which Excelsior would add to its cost at such time as it sold to Mary Jones, for the simple reason that the sale to Mary Jones is for her use and includes certain financial risks on the part of Excelsior for which it is compensated by an increase in the price of the product sold. On the other hand, once the property comes into Mary Jones's hands, it can be said to have a retail value to her. The only difficulty with the wholesale/retail price solution is that Excelsior may evade this solution completely by selling the property to Mary Jones at the retail price and thereafter taking back mortgages amounting to almost the entire retail sales price. In that event, in an eminent domain proceeding, if the court were to award Mary Jones the so-called retail price, Excelsior would receive as its share of the proceeds—that is, the mortgage indebtedness—more than it would have received had it held the property in the same manner as the above eight houses.

The foregoing is one of several solutions which have been suggested. However, any solution which makes the same or similar property more or less valuable, in the eyes of the court or the urban renewal agency, on the basis of the ownership, on the one hand, by Mary Jones and, on the other, by Excelsior Realty runs right into the problem of how to avoid a windfall for Excelsior Realty in all cases. But in any event, the court should have the power to decide whether, and to what extent, Excelsior Realty (or any other party) is to be held liable for the generation and perpetuation of the slum. One very simple method would be, or would have been, rigid enforcement of all building and safety codes by the proper agencies in the community before the area had degenerated to its present blighted state. That not having been done, is it possible for the urban renewal agency and the court retroactively, in effect, to penalize the owners of property who, while they were under an obligation to maintain their properties at certain standards, were never made to live up to their obligation?

Perhaps the problem may be solved in the following manner, which would in no way violate any constitutional rights, would not be subject to attack as an *ex post facto* judgment, and which would, at the same time, penalize the individual owner of deteriorated property to the extent that his lack of care has brought about the slum condition which is now capable of being remedied only by a further investment of the taxpayers' funds in an urban renewal project.

In the foregoing example of Mary Jones and Excelsior, it was assumed that the properties were all in the minimum condition required by local building codes and safety ordinances and that they were being operated in accordance therewith. Now let us assume that Excelsior owned one building, which we will use for example purposes, in which a variety of building code and safety ordinance violations existed, such as overloaded electrical wiring and insufficient toilet facilities, which had never been located or cited by the local governmental enforcement agencies. Should this

condition be a penalty assessed against the property in an eminent domain proceeding? If so, how much should be deducted therefor from the value? Should it be the full cost of all repairs necessary to bring the property up to code standards? And if there existed a large number of such deficiencies, could the court arrive at the conclusion that the property had a zero value, in the sense that the cost of such repairs would be beyond the realizable value of the property in the particular slum area in which it was located? To go even further, if the court should arrive at such a solution, would the improvements then have a minus value, in the sense that the court could decide that the very existence of a building constituted a nuisance or such a detriment to the adjoining property that it was necessary to destroy the improvements, and, therefore, the cost of demolition should be deducted from any land value of the property?

Let us assume that one of Excelsior's buildings, which we will call Building "A," has no illegal conditions or uses and that another building, which we will call Building "B," has illegal conditions and uses which would require the expenditure of \$4,000 for plumbing, electrical wiring, etc. to bring that building up to the minimum code standard. And let us assume, further, that in spite of the disparity in condition, some of which, of course, is entirely hidden from the renters of such property, both buildings have a rental income of \$100 per month. Using for purposes of example five times gross yearly rental as the fair market value of such property, we would arrive at a market value of \$6,000 for Building "A" and \$6,000 for Building "B." Naturally, the income approach is only one of the methods of arriving at value in eminent domain proceedings; however, it has been our experience that it is a very persuasive method in slum property valuation, since so much of this type of property is sold without great regard for the condition of the property. As a matter of fact, this is one of the reasons why many owners in the position of the mythical Excelsior Realty have failed or refused to make necessary improvements or corrections of illegal conditions and uses. The character of the neighborhood has become so bad that they have found that it is often difficult or impossible to secure more than a certain rent, regardless of their diligence in correcting all illegal conditions and uses.

If we assume further that the very failure and neglect to correct illegal uses have led to the deterioration of the neighborhood as a whole, it becomes possible for the court to state that if Excelsior had lived up to the legal requirement for the use and occupancy of Building "B," the net results to the community might have been a saving of the entire area without the expensive process of urban renewal. The court could then go on to say that Excelsior Realty's failure over a period of years to maintain its property in a legal condition should reduce the value of that property to the extent now required to correct all of its illegal conditions and uses. In that event (and leaving aside for the moment the land value, for which, of course, there will always be a requirement for payment of just compensation), the award to Excelsior for Building "A" would be \$6,000, and the award to Excelsior for Building "B"

would be \$6,000 less \$4,000 (the cost of the needed repairs), or a net award of \$2,000. In this way, perhaps, the taxpayers' burden would not be so great; and those responsible in part for the generation of slum conditions would be paying for their years of carelessness and negligence.

Interestingly enough, the example of the hypothetical Excelsior situation of Building "A" and Building "B" also has illustrative use with regard to rehabilitation areas. First, let us examine the end-product desired by urban renewal agencies in rehabilitation areas. If it is merely the upgrading of an area, regardless of whether the present occupants remain in the area, then the area for all practical purposes takes on the character of a reconstruction area. In these circumstances, the purpose of rehabilitation (whether so stated or not) is the clearance of present occupants in the same manner as in a total redevelopment area, to which the former occupants may have little opportunity to return because of the higher rental or sales prices for new housing after redevelopment.

If, however, the purpose of the urban renewal agency's program is to rehabilitate individual homes in order to retain present occupants or to attract new occupants of similar economic means, then the legal process of eminent domain may be employed to arrive at a fair value to such present or prospective occupants. Assume that the Excelsior three-family occupied house we used for illustration is in a rehabilitation area and, in compliance with a comprehensive land use plan for the area as a whole, it is desired to turn it back to single-family occupancy or to allow only a limited area for multiple-family occupancy, based on the feasibility of providing adequate quarters for separate families. Again, as in the earlier examples of Mary Jones and Excelsior, the urban renewal agency would be faced with the problem of "reasonable classes" in the legal sense. Would the agency have to treat Mary Jones and Excelsior in exactly the same manner? It is suggested that there is no such requirement and that the agency has the power to determine reasonable restrictions on use, one of which could be that only owner-occupants would be eligible to purchase homes. The homes so purchased, or continued in occupancy by present occupants, would have such a restriction for the period of the redevelopment plan, usually about twenty-five years.²²

Assuming the legality and constitutionality of such regulations, the urban renewal agency would then take the following steps with each of the properties, that of Mary Jones and of Excelsior. Assume the urban renewal agency would purchase the Excelsior property for \$6,000 for Building "B." The agency would thereafter determine what would be required to be done to the property, in addition to the \$4,000 which would bring the property up to minimum code standards only. Assume

²²This situation has precedent in the cases involving zoning ordinances which attempt to terminate nonconforming uses by a specified date in the future. See cases collected in *Power to terminate lawful nonconforming use existing when zoning ordinance was passed, after use has been permitted to continue*, Annot., 42 A.L.R.2d 1146 (1953). See also cases collected in *Validity of zoning ordinance or similar public regulations requiring consent of neighboring property owners to permit or sanction specified uses or constructing of buildings*, Annot., 21 A.L.R.2d 551 (1950).

that it would cost an additional \$2,000 to rehabilitate the interior and exterior, and that with the expenditure of this \$6,000 in improvements and additions, the house now has a market value of \$7,500, after taking into consideration two additional factors: first, the rehabilitation or reconstruction of all houses on the street and in the project area; and second, public improvements to streets, sidewalks, and so forth, which result in a general upgrading of the area. The agency could then sell the house for \$1,500 to an owner-occupant for use by that family alone or for rental of certain stated space in addition to that occupied by the owner, with the requirement that the new owner make the above additions and repairs, which should cost approximately \$6,000. Having done this, the new owner would have been enabled to purchase reasonable living quarters for his family at fair market value and within his economic means (assuming his means to be similar to those of Mary Jones).

Had the above procedure been utilized at the time Mary Jones purchased her home, she could have been spared the tragedy which later ensued upon condemnation; and the community could have achieved its objectives at much less cost to the taxpayer. But how do we solve the particular situation of Mary Jones, if we assume the possibility of rehabilitation of her present home? She has been awarded \$6,000 by the court. Of this, she owes \$4,600 to the holders of her deeds of trust, so that the net payment to her is \$1,400. Let us assume that the urban renewal agency requires her, if she wishes to retain the house, to spend an additional \$2,000. Thereafter, her home will have a fair market value of \$7,500. Yet she has spent a total of \$7,750, consisting of these expenditures: down payment, \$350; equity payments over the ten-year period, \$3,400; repairs and additions over the ten-year period, \$4,000. And the repairs and additions currently required by the urban renewal agency will cost her an additional \$2,000. Should Mary Jones be compensated, and under what theory of law may she be compensated? While the answer to the first question may be most emphatically "yes," the answer to the second question does not come so easily. Yet there may be a way to arrive at a justifiable solution.

Go back to the example of the Excelsior house sold to an owner-occupant. That house, after rehabilitation, has the same value as the rehabilitated Mary Jones home. The new owner is paying \$1,500 to the urban renewal agency and agreeing to spend \$6,000 to rehabilitate it. Mary Jones, being required to spend only \$2,000 for rehabilitation, should pay the urban renewal agency \$5,500. This will then bring her total expenditure to \$15,250, less the \$1,400 she was able to keep out of the \$6,000 award, or a net total expenditure of \$13,850. Deduct from that figure a reasonable rental of \$500 per year, or \$5,000 for the ten-year period during which her family occupied a portion of the home, and the net cost is \$8,850—only \$1,350 more than the cost of the Excelsior home to its new owner. The urban renewal agency, by selling at \$5,000, has already taken a write-down of \$1,000. Where will the \$1,350 come from, in order to put Mary Jones on an equal footing with her new neighbor?

It would appear to be equitable to deduct this amount from the holders of the deeds of trust, on the theory that such deeds of trust have a market value below

their stated value. Obviously a change in the law would be required to effectuate such a procedure. Legislation restricting and even totally denying the rights of mortgage holders to obtain deficiency judgments has been sustained in the past to relieve the oppressions and hardships incident to the depression-ridden years of the 1930's, and it would seem there is just as much justification for such legislation nowadays to combat the pernicious effects of inflated mortgages which contribute to the existence of community blight.²³

The unfortunate situation existing today is that mortgage holders in the position of Excelsior, whether or not they have received all the payments on the mortgage, are not reachable by law. And this is so whether or not the origins of blight and deterioration and illegal conditions and uses can be traced back to them. Assuming for purposes of argument that there is a direct corollary between absentee slum landlordism and the existence of blight—or conversely, between the presence of owner-occupiers and the absence of blight—can it not fairly be said that inhibitions on the generators of slums are necessary? The suggestion is advanced that statutes governing conveyancing could be amended to require, along with the traditional warranties, a warranty that the property and improvements thereon contain no illegal conditions or uses; that the improvements on the property are not in violation of any building or safety codes or ordinances; and that if a local governing body subsequently, within a stated period of time, declares the area blighted, and proof is introduced of the violation of any of the applicable building or safety codes or ordinances during the time such property was owned by the vendor, then in that event he will defend, and if unsuccessful, will indemnify and save harmless the vendee from any loss occasioned thereby.

The above solution could have a twofold effect. It would limit the marketability of slum properties and would place the burden of proving absence of blight on the shoulders of those at fault, in either case accomplishing a desirable goal of penalizing those responsible in large measure for the deterioration of the affected properties. It is our opinion that such an agreement could be made binding on bona fide purchasers and assignees of the mortgage. Immunity could not be claimed where an assignee or purchaser has constructive or actual knowledge from the public records, or where he is put on inquiry by reason of suspicious or peculiar circumstances.²⁴

There is some analogy possible here with the situation confronting owners or mortgagees of motor vehicles seized for violations of the internal revenue laws relating to liquor. Remission or mitigation of such forfeitures is authorized,²⁵ provided that the claimant carries his burden of proving that he had at no time any knowledge or reason to believe that the confiscated vehicle would be used in the violation of federal or state laws relating to liquors, and further that he made inquiry of certain specified law enforcement officials as to the record and reputation of the

²³ Sec 2 GARRARD GLENN, MORTGAGES §§ 155, 156 (1943).

²⁴ Sec 59 C.J.S. § 372 (1949).

²⁵ 62 Stat. 840 (1948), 18 U.S.C. § 3617 (1958).

debtor, who later proved himself to be a liquor-law violator. The failure so to prove does not, of course, extinguish any right of action against the liquor-law violator in such cases, but the real security is gone.

It may readily be seen that these proposals will not alleviate the problem confronting the property owner who has already paid off his inflated mortgage, and the only remedy that suggests itself is for this party to seek relief through equity on the grounds that his contract was unconscionable.

The advent of more comprehensive legislation and, perhaps, of a separate court or quasi-judicial administrative tribunal may be one way of handling cases in urban renewal areas. The problems discussed in this article may very well be beyond solution under the present-day scope of the urban renewal and redevelopment programs. Certainly all of the undesirable social and economic evils which have crept into our land uses over the past half-century cannot be solved within the present framework of urban renewal and redevelopment laws, in spite of the wide powers granted under such laws.

It would appear, however, that existing legislation could be utilized more fully to accomplish the goals desired. For example, the exercise of the police powers has been utilized on a limited scale in some urban renewal fields such as conservation and rehabilitation. Typical of such statutory enactments is the Illinois Urban Community Conservation Act of 1953,²⁶ which vests in municipalities powers to conserve and rehabilitate substandard areas which are not sufficiently blighted to warrant area-wide clearance and redevelopment. Municipalities are thereby empowered to make necessary repairs to private property where the owner fails to do so and to assert a lien against the property for the costs of the repairs. Conjunctive use of this or other exercises of the police power and the power of eminent domain may make it possible to arrive at more equitable valuations in acquisition programs.

For example, under certain ordinances, an owner may be required to make a substandard building safe if the necessary alterations and improvements can be made at a cost less than fifty per cent of the value. On the other hand, if the cost is fifty per cent or more of the value of the building, the owner may be compelled to remove or demolish it.²⁷ Perhaps an urban renewal agency in a community having such ordinances should, in particular cases, present evidence that a building falls into the above category and that the cost of necessary repairs would exceed fifty per cent of the total value. Does this not have probative value to show that such building is valueless as it stands? And if so, should the taking of the improvement be considered non-compensable; and, since the building is a burden on the land, should not the award for the land be reduced by the cost of demolition? Certainly the policing agencies would have so considered the building when they got around to inspecting it; and

²⁶ ILL. REV. STAT. ch. 67½, pars. 91.8-91.16 (1953).

²⁷ *Pereplechikoff v. City of Los Angeles*, 345 P.2d 261 (Cal. App. 1959); *Soderfelt v. Drayton*, 79 N.D. 742, 59 N.W.2d 502 (1953).

merely because they did not do so is no reason to say that the building, as it stands, still has value when it is the subject of an eminent domain proceeding.

Urban renewal agencies may also employ the police powers of the local community as an aid to the powers of such urban renewal agencies. A recent example of such use may be found in the decision of the California District Court of Appeal in the case of *Hunter v. Adams*.²⁸ The Monterey urban renewal agency asked the City Council to freeze the issuance of building permits in an urban renewal project area for the planning period, which was about one year. The Council passed a resolution to that effect, and the resolution was upheld by the California court as a proper exercise of the police power against the contention of the property owner that there was a taking without just compensation and in violation of the due process clause of the California constitution. This case contains a comprehensive discussion of the continuing growth of the police power in relation to the changing conditions in our society.

Are we approaching, slowly but inexorably, the conclusion that real property in densely occupied urban areas may no longer be used in a manner determined by the whim of the owner thereof, but must be used in a manner and in accord with the needs of the community as a whole? If we are, then the power of eminent domain is evolving and must inevitably arrive at the point where the right of the community is to the land and the right of the owner of land is to just compensation for that land. Beyond that absolute right, the owner has no right to further compensation, unless he can show that he has done no injury to the community by his use or occupancy of the land. If the owner of the land can show that his use and occupancy of the land has benefited or at least has not had a detrimental effect on the community, then there is a value that can be ascribed to the improvements, for which he must receive just compensation. His failure to make such a showing should reduce his entitlement, not absolutely, but on a proportionate basis, as in the cases of comparative negligence. Difficult as this would be of judicial administration, it may be the only manner in which our urban society can control the evils which have been foisted on it by greed and neglect, and which in many instances can be traced to the individuals responsible therefor.

²⁸ *Hunter v. Adams*, 4 Cal. Repr. 776 (1st Appellate Dist.) (1960).