

## THE IMPACT OF URBAN RENEWAL ON LAND VALUES: NO COMPENSATION FOR NON-ACQUIRED LAND

A declaration of blight and the subsequent announcement of urban renewal plans usually has a disastrous effect on land values. Owners of property acquired under an urban renewal plan are protected from loss by statutory provisions and judicial resolution of how the property is to be valued for compensation purposes.<sup>1</sup> In *Sayre v. City of Cleveland*<sup>2</sup> the Sixth Circuit considered the loss of value to neighboring property not slated for acquisition under an urban renewal plan. Plaintiff was a trustee in bankruptcy for a company that owned seventy-three inner-city parcels of land.<sup>3</sup> These properties were located within the University-Euclid General Neighborhood Renewal Plan (GNRP), a preliminary plan generally indicating areas contemplated

---

1. Under Title III (Uniform Real Property Acquisition Policy) of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, federal agencies must ignore increases or decreases in the value of land caused by public improvement or threat thereof when the agency values the land. Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 § 301(3), 42 U.S.C. § 4651(3) (1970). This policy must also be followed by state agencies receiving federal funds "to the greatest extent practicable under state law." *Id.* § 305, 42 U.S.C. § 4655 (1970). Title III does not, however, create any right in the owner of the sought after property. *Id.* § 102, 42 U.S.C. § 4602 (1970). Additional assistance covering relocation and moving expenses may also be provided under Title II (Uniform Relocation Assistance) of this Act. *Id.* §§ 201-18, 42 U.S.C. §§ 4621-38 (1970). Courts can ignore the effects of project-induced blight by holding that the actual taking occurred when the condemnation proceedings were instituted. Valuation is then made as of the date of the taking. *See* cases cited note 31 *infra*. The court may also separate the date of valuation from what it considers to be the date of the taking. *See* note 42 and accompanying text *infra*. Protection may not always be provided. *See, e.g.,* St. Louis Housing Authority v. Barnes, 375 S.W.2d 144, 147 (Mo. 1964).

For an analysis of the British approach to planning blight see D. HAGMAN, PLANNING (CONDEMNATION) BLIGHT, PARTICIPATION AND JUST COMPENSATION: ANGLO-AMERICAN COMPARISONS (1972).

2. 493 F.2d 64 (6th Cir.), *cert. denied*, 419 U.S. 837 (1974).

3. The original suit listed 194 properties. Summary judgment was granted by the district court to the defendant for 107 of the parcels. Defendant appealed from the denial of a motion for summary judgment as to 87 properties. Fourteen of the 87 had since been acquired by the defendant leaving 73 involved in this appeal. *Id.* at 66-67.

for clearance and redevelopment.<sup>4</sup> Most were also included in the University-Euclid Urban Renewal Plan (Project One).<sup>5</sup> Project One, the first phase of the GNRP, indicated the precise parcels which the city intended to acquire.<sup>6</sup> None of the properties owned by plaintiff's bankrupt were designated for acquisition, but some of the properties were subsequently acquired. All of the properties, however, sustained a substantial loss in value due to their inclusion within the project's boundaries.

Plaintiff alleged an unconstitutional taking by the City of Cleveland without compensation in violation of the due process clause of the fifth amendment as applied to the states through the fourteenth amendment.<sup>7</sup> Plaintiff argued that GNRP, Project One, with the attendant publicity, and decline in public services normally supplied to the area led to a marked loss of tenants and increased vandalism and crime that destroyed the use and value of property in the area.<sup>8</sup> He argued further that this constituted a de facto taking which violated the fifth and fourteenth amendments despite the absence of physical invasion or condemnation by the city.<sup>9</sup> The Sixth Circuit held, however, that "there is no de facto taking of properties which have decreased in value because of an urban renewal project unless there is a physical invasion, damage or injury, or a restraint of some type, or action by the City to appropriate such properties."<sup>10</sup> Thus, the court adopted what may be termed the "strict" rule of de facto taking.<sup>11</sup>

---

4. The plan was made with federal assistance pursuant to 42 U.S.C. § 1452 (1970). 493 F.2d at 67.

5. Project One was also a federally funded program under 42 U.S.C. § 1460(b) (1970). 493 F.2d at 67-68.

6. Project One is the only phase of the GNRP that has begun. U.S. DEF'T OF HOUSING AND URBAN DEV., PROJECT REHAB MONITORING REPORT OVERVIEW 15-16 (1971).

7. U.S. CONST. amends. 5, 14, § 1. Plaintiff originally alleged negligence, but because of the defendant's immunity he was forced to amend. The allegation of a de facto taking which replaced it created federal jurisdiction which was lacking in the first complaint. *See Sayre v. City of Cleveland*, 282 F. Supp. 175, 181 (N.D. Ohio 1967); Brief for the Appellant at 21-22, *Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir.), *cert. denied*, 419 U.S. 837 (1974).

8. Brief of Appellee at 6-7, *Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir. 1974).

9. *Sayre v. City of Cleveland*, 282 F. Supp. 175, 183 (N.D. Ohio 1967); *see Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964).

10. 493 F.2d at 70.

11. *E.g.*, *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 254-55, 269 N.E.2d 895, 903, 321 N.Y.S.2d 345, 356-57 (1971).

It is well established, however, that a taking requiring compensation may occur without the accompaniment of formal condemnation proceedings,<sup>12</sup> although mere consequential damages are not compensable.<sup>13</sup> Application of either rule becomes difficult when the facts in an individual case are somewhere between these two generally accepted rules of law. Under the strict rule the aggrieved owner is to be compensated only when a governmental project results in an affirmative occupancy which invades the land directly.<sup>14</sup> Exceptions and broad interpretations of the strict rule abound. Approximately half the states are not bound to the narrow federal rule, since their state constitutional eminent domain provisions allow compensation for loss due to damage as well as actual taking of property.<sup>15</sup> By

---

12. See, e.g., *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950) (dam permanently raising water table destroying use of farm constitutes a compensable taking); *Eyherabide v. United States*, 345 F.2d 565 (Ct. Cl. 1965) (mistaken use of property as part of gunnery range compensable as a de facto taking). See generally Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3; Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184-90 (1967); Sackman, *Condemnation Blight—A Problem in Compensability and Value*, in 1973 INSTITUTE ON PLANNING, ZONING & EMINENT DOMAIN PROCEEDINGS 157.

13. *Campbell v. United States*, 266 U.S. 368 (1924) (governmental use of adjacent land diminishing value not compensable); *Gibson v. United States*, 166 U.S. 269 (1897) (loss of access from riparian land to navigable stream due to governmental activity on the stream not compensable); *Woodland Mkt. Realty Co. v. City of Cleveland*, 426 F.2d 955 (6th Cir. 1970) (land adjacent to property appropriated for urban renewal is not taken even though a substantial decrease in the market value occurred). The court in *Sayre* found *Woodland Market* to be dispositive. 493 F.2d at 70. States, however, may compensate for consequential damages by statute. 11 E. McQUILLIN, MUNICIPAL CORPORATIONS § 32.93 (Supp. 1974).

14. This constitutes a de facto taking. Compensation may be had through inverse condemnation proceedings. See note 12 *supra*. Frequent examples of this strict rule are flooding and airplane overflight cases. The United States Supreme Court has required compensation for the owner of land that was permanently flooded by the backwaters of a dam. *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871); accord, *United States v. Cress*, 243 U.S. 316 (1917). The invasion must be direct. See note 13 *supra*. Compensation has also been required for land that lost its value due to direct aircraft overflights. *United States v. Causby*, 328 U.S. 256 (1946); accord, *Griggs v. Allegheny*, 369 U.S. 84 (1962). For a discussion of the requirement that direct overflights are necessary see Michelman, *supra* note 12, at 1169-70. *But cf.* *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963) (damage due to plane flights not directly overhead are not compensable).

15. See, e.g., *Conger v. Pierce County*, 116 Wash. 27, 198 P. 377 (1921); MO. CONST. art. I, § 26; Mandelker, *supra* note 12, at 18-19.

viewing the interference with legal property rights as an equivalent of a physical taking, recovery may be allowed absent affirmative occupancy or a resulting public use<sup>16</sup> if there is an interference with use.<sup>17</sup> An expanded approach to compensation may be justified by drawing an analogy to the anticipated results in a comparable private action. If the landowner could have maintained an action for tort—nuisance, trespass or negligence—against a private citizen, the courts under this approach will apply the standards of these actions to the parties in an inverse condemnation action.<sup>18</sup> Some courts have also examined private property rights such as riparian rights and the right to lateral support in a similar manner.<sup>19</sup>

Reliance on tort or property theories is useful only for analogy and not as a basis for finding consequential damages compensable.<sup>20</sup> Damage due to governmental activities not directly invading the property is not a taking even though the use of the property may be impaired.<sup>21</sup> In *Woodland Market Realty Co. v. City of Cleveland*<sup>22</sup> the Sixth Circuit considered whether property immediately adjacent to appropriated property is actually taken because of a substantial drop in value occasioned by an urban renewal project.<sup>23</sup> The court

---

16. For a discussion of the public use requirement see 2A P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 7.1 (3d ed. 1974).

17. See notes 30-31 and accompanying text *infra*.

18. Sovereign immunity may be applicable in these actions. Immunity does not apply to a fifth amendment taking since the amendment contains a self-executing and implied waiver. See, e.g., *United States v. Causby*, 328 U.S. 256 (1946); *Bacich v. Board of Control*, 23 Cal. 2d 343, 144 P.2d 818 (1943); *Hickman v. Kansas City*, 120 Mo. 110, 25 S.W. 225 (1894); *Swift & Co. v. City of Newport News*, 105 Va. 108, 52 S.E. 821 (1906).

19. *United States v. Cress*, 243 U.S. 316 (1917); *Siefert v. City of Brooklyn*, 101 N.Y. 136, 4 N.E. 321 (1886); *Bunyan v. Palisades Interstate Park*, 167 App. Div. 457, 153 N.Y.S. 622 (1915). See 11 E. McQUILLIN, *supra* note 13, § 32.93; *Foster, Tort Liability Under Damage Clauses*, 5 OKLA. L. REV. 1 (1952); *Mandelker, supra* note 12, at 9-12.

20. See cases cited note 13 *supra*.

21. *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945) ("damage alone gives courts no power to require compensation where there is not an actual taking of property"); *Richards v. Washington Terminal Co.*, 233 U.S. 546, 554 (1914) (damage from legalized nuisance not compensable without invasion); *Transportation Co. v. Chicago*, 99 U.S. 635 (1878) (damage caused by adjacent municipal construction project).

22. 426 F.2d 955 (6th Cir. 1970).

23. *Id.* at 957.

rejected the claim of a compensable taking even though the action might normally have represented a tort.<sup>24</sup> The consequential damage rule requires at least a partial taking or an acceptable alternative basis for recovery<sup>25</sup> before compensation is available. Since a claim of sovereign immunity may preclude the alternate basis, an owner could suffer serious losses that would not be compensable absent a finding that the property was taken.<sup>26</sup> *Sayre* comes within this category of cases. Because the plaintiff did not allege a direct physical invasion of the property,<sup>27</sup> a resulting public use or benefit, or an infringement upon traditional property rights,<sup>28</sup> no compensable de facto taking existed under traditional theories.<sup>29</sup>

The court arguably could have found a taking in *Sayre* on two grounds. First, a taking may be said to have occurred as a result of negative restraints.<sup>30</sup> Negative restraint cases are a logical extension of the affirmative occupancy requirement of traditional eminent domain theory. The government is viewed as affirmatively "occupying" the owner's property rights. The most frequent application

---

24. *Id.* at 958.

25. An alternate basis for recovery would exist where a state had waived its sovereign immunity.

26. *Sayre* alone involved a claim for \$10 million. Brief for Appellant at 3, *Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir. 1974).

27. See Michelman, *supra* note 12, at 1184-90. Plaintiff does not allege direct enough damage for even liberal state provisions. 11 E. McQUILLIN, *supra* note 13, § 32.38; 4A P. NICHOLS, *supra* note 16, at 14.1.

28. A property owner does not have a traditional property right in the value of his property. While discussing the substantial loss in value precipitated by an urban renewal project, the court in *Woodland Market* declared "[t]he action of the City has resulted in no diminution of the plaintiff's rights in its property. Its leasehold estate has remained intact. What has altered is the character of the neighborhood, not the character of the plaintiff's leasehold interest." 426 F.2d at 958.

29. See note 12 *supra*.

30. A negative restraint occurs when the government limits the owner's use through legal restraints rather than condemning or invading the land. "The term 'taking' should not be limited in an unreasonable or narrow sense. It should not be limited to the absolute conversion of property, and apply to land only; but it should include cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, or from any of the appurtenances thereto." *Pearsall v. Board of Supervisors*, 74 Mich. 558, 561, 42 N.W. 77, 77-78 (1889). *But cf.* *United States v. Certain Property Located in the Borough of Manhattan*, 374 F.2d 138 (2d Cir. 1967) (taking and valuation held to occur at the end of the proceeding). A negative restraint, therefore, may constitute only a valid exercise of the sovereign's police power as in zoning or it may constitute a taking. See note 31 *infra*.

occurs when the right to sell or repair the property is limited by the government because the property is slated for eventual acquisition.<sup>31</sup> If such limitations were not recognized as a taking, the government could limit rights that directly affect value, and then profit from its own actions in later condemnation proceedings.<sup>32</sup> These negative restraint cases are designed to limit the government's ability to abuse its power of eminent domain to the detriment of the land owner.

The courts, however, have been unwilling to hold that either planning or legislation alone is a sufficient restraint to constitute a compensable taking.<sup>33</sup> They continue to require a direct restraint on recognized property rights.<sup>34</sup> In *Sayre* plaintiff lacked the two elements necessary to claim that a de facto taking had occurred. First, the city had not demonstrated any intent to acquire,<sup>35</sup> and secondly, there

---

31. *E.g.*, *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968). Most cases involve restraints during the pendency of a condemnation action. In *Foster* the process was started twice and lasted over ten years. *See also* *Eleopoulos v. Richmond Redev. Agency*, 351 F. Supp. 63 (N.D. Cal. 1972); *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367 (E.D. Mich. 1970); *Haczela v. City of Bridgeport*, 299 F. Supp. 709 (D. Conn. 1969).

32. *Amen v. City of Dearborn*, 363 F. Supp. 1267 (E.D. Mich. 1973), is exemplary of the types of affirmative value-depressing acts that cities can engage in and might be considered a new diminution of value case, since there were few legal restraints involved. *See* notes 39-44 and accompanying text *infra*. *See also* 9 URBAN L. ANN. 317 (1975).

33. *E.g.*, *Danforth v. United States*, 308 U.S. 271, 286 (1939); *United States v. Sponenbarger*, 308 U.S. 256, 258 (1939); *Bauman v. Ross*, 167 U.S. 548, 596-98 (1897); *23 Tracts of Land v. United States*, 177 F.2d 967 (6th Cir. 1949); *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973); *Cayon v. City of Chicopee*, 360 Mass. 606, 277 N.E.2d 116 (1971); *Bakken v. State*, 142 Mont. 166, 382 P.2d 550 (1963); *Wilson v. City of Long Branch*, 27 N.J. 360, 142 A.2d 837, *cert. denied*, 358 U.S. 873 (1958); *Empire Constr., Inc. v. City of Tulsa*, 512 P.2d 119 (Okla.), *cert. denied*, 414 U.S. 1094 (1973).

34. *See* cases cited note 13 *supra*.

35. The intent requirement prevents a claim alleging abuse of eminent domain powers from succeeding solely on a pattern of conduct. Intent was exhibited as to fourteen of the parcels through a notice sent to the tenants. Thirteen of these parcels were acquired and are not part of this appeal. The conduct which plaintiff alleged affected the other parcels would, if the requisite intent existed, be adequate to constitute a de facto taking. Plaintiff tried to utilize the "natural consequence" approach employed by some courts in negative restraint cases to determine whether

was no demonstrable direct restraint.<sup>36</sup> While courts may grant relief absent one element if the other is particularly prevalent,<sup>37</sup> it is not consistent with this approach to grant relief when there is no intent to acquire and the restraints are not significant.<sup>38</sup>

Secondly, the *Sayre* court could have found a taking by relying on the diminution of value theory. In *Pennsylvania Coal Co. v. Mahon*<sup>39</sup> the United States Supreme Court held that a Pennsylvania law exceeded state police powers, constituting a taking without compensation. In so holding it found that diminution of value was one factor to be used in determining the limits of police powers.<sup>40</sup> This approach has found new favor recently, not as a theory of taking, but as one of valuation.<sup>41</sup> Courts, though unwilling to hold that a taking occurs

---

the city "intended" to take the property. Instead of using it to measure governmental intention after commencement of condemnation proceedings, he relied upon it as a threshold determiner of blight, arguing that because the defendant knew that blight would be the natural consequence of the urban renewal plan, the city must therefore have intended to take the plaintiff's property. *Sayre v. United States*, 282 F. Supp. 175, 185 (N.D. Ohio 1967); see *Biggs Rental Co. v. United States*, 353 F.2d 1013 (Ct. Cl. 1965), *cert. denied*, 384 U.S. 927 (1966); Brief for Appellant at 20-21, Brief for Appellee at 19-20, *Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir. 1974).

36. See notes 30, 35 *supra*. Even pendency of condemnation may not be enough in some instances. *St. Louis Housing Authority v. Barnes*, 375 S.W.2d 144 (Mo. 1964); *Smith v. Erie Rd. Co.*, 134 Ohio St. 135, 16 N.E.2d 310 (1938).

37. *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970); *Amen v. City of Dearborn*, 363 F. Supp. 1267 (E.D. Mich. 1973). In both instances the government, through widespread publicity of imminent condemnation, precluded sale or development of the property. The restraints were more practical than legal. Cf. cases cited note 33 *supra* in which the planning or legislation may have had the same practical effect but the intent was insufficient to induce court relief.

38. "[D]amages which are the incidental result of lawful governmental action, without any direct invasion of private property . . . do not constitute a taking under the Fifth Amendment." *Nunnally v. United States*, 239 F.2d 521, 524 (4th Cir. 1956). For a description of plaintiff's claim see note 46 *infra*.

39. 260 U.S. 393 (1922).

40. *Id.* at 413. This approach has been most widely used in zoning cases. See, e.g., *Dooley v. Town Planning & Zoning Comm'n*, 151 Conn. 304, 197 A.2d 770 (1964). Diminution of value has not found particular favor with scholars. See Michelman, *supra* note 12, at 1190-92; Sax, *Taking and the Police Power*, 74 YALE L.J. 36, 50-60 (1964). Even the Supreme Court has not become enamored with the approach of *Pennsylvania Coal*. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Danforth v. United States*, 308 U.S. 271 (1939).

41. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1961); *Biggs Rental Co. v. United States*, 353 F.2d 1013 (Ct. Cl. 1965), *cert. denied*, 384 U.S. 927 (1966); *In re Urban Renewal, Elmwood Park Project*, 376 Mich. 311, 136

immediately when legal restraints are placed on the property, may still protect the property owner by setting the date of valuation at the beginning of condemnation proceedings rather than the end.<sup>42</sup> The city is prevented from profiting from its own direct, intentional, value depressing acts. The traditional rules still apply in determining the acts necessary to constitute a taking.<sup>43</sup> This diminution of value approach is consistent with the view of the Supreme Court, and those of most state courts, when, conversely, the property value has actually been enhanced in the interim due to the government's own activities.<sup>44</sup>

Both the new diminution of value and the value-enhancement approaches to valuation presume a taking and are not applicable to the facts of *Sayre*. This case would require use of the diminution of value theory in conjunction with inroads that have been created by the courts under the negative restraint approach.<sup>45</sup> Plaintiff asked the court to combine and apply what were already two extensions of the traditional theories of taking.<sup>46</sup> In valuation cases, however, the

---

N.W.2d 896 (1965); *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971); *City of Cleveland v. Carcione*, 118 Ohio App. 525, 190 N.E.2d 52 (1963); SELECT SUBCOMM. ON REAL PROPERTY ACQUISITION OF THE HOUSE COMM. ON PUBLIC WORKS, 88th Cong., 2d Sess., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 64-67 (Comm. Print No. 31, 1964); 72 COLUM. L. REV. 772 (1972).

42. One significant difference in this approach is that it minimizes interest payments that begin accruing as soon as the property is taken. Under the new diminution of value approach, the interest does not start until the title passes, which may occur years after the date of valuation. Under the negative restraints approach interest starts with the taking, and since this approach is an expansion of de facto taking cases, title need not pass to constitute a taking. Under the negative restraints approach the date of the taking is frequently set at either the initiation of condemnation proceedings or the date the owner is notified of the proposed action. The difference in interest due may be substantial. In *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 254, 269 N.E.2d 895, 903, 321 N.Y.S.2d 345, 357 (1971), the difference amounted to \$459,603.86.

43. See *id.* at 254-55, 269 N.E.2d at 903, 321 N.Y.S.2d at 356-57.

44. *United States v. Cors*, 337 U.S. 325 (1949); *United States v. Miller*, 317 U.S. 369 (1943); *Shoemaker v. United States*, 147 U.S. 282 (1893); 4 P. NICHOLS, *supra* note 16, § 12.3151.

45. See notes 30-32 and accompanying text *supra*.

46. See notes 35-36 and accompanying text *supra*. Plaintiff sought to use the diminution of value as a direct restraint. At the same time he wished to avoid the issues of directness and intent inherent in either the negative restraint approach or the new diminution of value theory. At no time did the City take any direct action against the plaintiff's properties, either by designating that the properties were to be acquired or by actually starting eminent domain proceedings. 493 F.2d at 67.



courts have required direct, intentional, value-depressing acts.<sup>47</sup> Even *Pennsylvania Coal* involved a direct restraint.<sup>48</sup> The de facto taking cases in which direct restraints or invasions seem unimportant are distinguishable, since they rely on the intent of the governmental unit involved.<sup>49</sup>

There are strong policy considerations, however, that militate against encompassing plaintiff's claim within either liberal approach. Since land values vary over time, plaintiff's loss may be either temporary or the result of other causes. If the project is successful, plaintiff will eventually profit from it because the governmental interference in the market is temporary. Project enhancement<sup>50</sup> and diminution of value approaches recognize the temporary character of the interference by considering the market value in spite of the interference.<sup>51</sup> The important distinctions between the de facto taking cases and *Sayre* is that plaintiff in *Sayre* had not lost his land. Thus, the losses claimed in *Sayre* may remain only "paper" losses. If plaintiff could recover damages and keep the land, he would profit unjustly when the value increased. If the government were to acquire title, it would have to dispose of land that it did not want in an already depressed market. This would increase both the cost of urban renewal and the value diminution caused by the program on those parcels still held by private owners. The only owners likely to benefit are those who can afford the attorney necessary to bring the requisite inverse condemnation action.

If plaintiff in *Sayre* had been allowed to recover, urban planning would be constrained to an intolerable degree. Plaintiff contended that mere inclusion first within a general urban renewal plan and then a specific renewal plan was sufficient to constitute a de facto taking. The potential liability of cities with urban renewal programs

---

47. See notes 33-38 and accompanying text *supra*.

48. In *Pennsylvania Coal* the mining company owned coal-bearing land and proceeded to sell the surface rights. Pennsylvania law prohibited mining under homes if that mining would cause subsidence. This effectively banned the exploitation of mineral rights in areas where the coal company did not own the surface rights. 260 U.S. at 413.

49. See note 37 *supra*. In both *Drakes Bay* and *Amen* the government had decided that it would eventually acquire the land in question.

50. See note 44 and accompanying text *supra*.

51. See note 42 *supra*.

would be astounding.<sup>52</sup> It may be argued that such court-led economic destruction of urban renewal would in fact be a blessing. The program on the whole has not been an overwhelming success.<sup>53</sup> Instead of heralding the death of urban renewal, a decision for plaintiff might only have shifted the emphasis to complete acquisition programs and intensified the present failings, especially those concerning relocation and destruction of low-income housing units. Such a decision would possibly limit options under an urban renewal plan, imposing a restraint on flexibility that would be undesirable given the size and complexity of current urban decay.

Arguably, the impact of allowing compensation for planning blight would not be limited to urban renewal. Allowing plaintiff to recover would recognize market value as a property right.<sup>54</sup> Almost any governmental activity could conceivably affect land valuation. Compensation in these instances would necessarily be required if valuation were recognized as a property right. The use of planning as a general, flexible and long-range decisionmaking tool would not be feasible.<sup>55</sup> While the problem that *Sayre* raises is serious, the judicial adaptations necessary to provide the plaintiff relief would completely disrupt governmental planning processes. Only if the plaintiff's loss was permanent and due to direct governmental action would the court feel that such a result is justified.

*Kim C. Brown*

---

52. See note 26 *supra*.

53. Urban renewal induced demolition has contributed to shortages of low-cost housing units, leading to intensification of slum conditions and residential segregation patterns. See generally NAT'L ADVISORY COMM. ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 152-70 (1968). Approximately 400,000 dwelling units were destroyed by urban renewal by 1967 while only 10,760 units of public housing had been built on urban renewal land. *Id.* at 160, 163. For a discussion of relocation in urban renewal programs see E. CAHN, T. EICHENBERG & R. ROMBERG, THE LEGAL LAWBREAKERS: A STUDY IN OFFICIAL LAWLESSNESS REGARDING FEDERAL RELOCATION REQUIREMENTS (1970); Gans, *The Failure of Urban Renewal*, COMMENTARY 537-57 (1965); Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745 (1971).

54. This would constitute a rejection of the very foundations of the consequential damage rule. See Sax, *supra* note 40, at 50. See also notes 13, 28 *supra*.

55. Brief for Cities of Cincinnati and Dayton as Amici Curiae at 2-4, *Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir. 1974). See *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 120-21, 514 P.2d 111, 117-18, 109 Cal. Rptr. 799, 805-06 (1973). A favorable decision for the plaintiff in *Sayre* would have to rest on the effect of the plan and not on the intent of the plan. Such a result is broad enough to include almost any form of planning and it would be difficult to distinguish any plan from *Sayre* on the basis of type or degree of specificity.