

BULLDOZING HOMES TO BUILD SHOPPING MALLS: THE CHINESE TAKINGS LAW FROM A COMPARATIVE PERSPECTIVE

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SUMMARY: I. *The Fate of Private Housing in China*. II. *Bulldozing Homes to Develop the Economy*. III. *Comparative Perspective*. IV. *Conclusion: Ideology, Reality and Transaction Costs*.

The transformation from public to private ownership of real property in China provides a test case for theories on the relationship between various property rights schemes and transaction costs. This paper examines the Chinese takings law and its role in economic development. The Chinese takings law was formed before the Property Code, which will take effect on October 1, 2007. The purpose of the Chinese takings law is to lower transaction costs, and thus increase economic efficiency. Judged by the government's standards, the takings law has successfully served the government's purpose. However, from the private owners' perspective, the law is grossly unfair. In a rash of takings across China, private owners are denied proper compensation, due process protection, and access to justice. In extreme cases, owners have been violently evicted from their homes.

The objective of this paper is to bring attention to the social cost associated with the exercise of eminent domain powers, the importance of

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which has been largely ignored by the Chinese government and scholars. Comparing Chinese takings law with those in the United States and Singapore, this research shows that the current takings law in China has actually increased, rather than decreased, transaction costs. The reason is that the current law has failed to take into account the social costs.

Part 1 of the paper traces the different treatments of private ownership of urban homes since 1949. It explains how and why the Chinese government dramatically changed its attitudes towards private property because of the different ideological beliefs to which it subscribed. In Part 2, the paper examines the serious problems associated with the current takings law in China, and provides a detailed analysis of the three elements of the takings law: public purpose, compensation, and due process of law. Part 3 briefly examines the takings laws of the United State and Singapore. China is not alone facing the tension between the protection of private ownership and the need for further economic development. The purpose of the comparative analysis is to provide new perspectives into the debate about how the takings law should be structured. This section also compares the administrative costs of takings among the three jurisdictions. Finally, the paper concludes that the low costs of implementing takings in China have contributed to the massive abuse of government powers, which has substantially increased social costs.

I. THE FATE OF PRIVATE HOUSING IN CHINA

Private ownership is the prerequisite for takings to be an issue. Three decades ago, China hardly had to face takings problems. The reason is that most urban real property was owned by the whole people, who “entrusted” their property to the Government. As the *de facto* owner, the Government had absolute power to use public property at will. Since the 1980s, the Chinese government gradually accorded private ownership of urban housing, because it believed that private property rights were a driving force for economic growth. But the government soon began to take privately owned homes back and give them to commercial developers whom it believed better suited for further economic expansion. In competition with the government-backed commercial developers, private property owners have constantly lost the battle for protecting their properties.

1. *The impact of Marxism on Urban Housing in the 1950s*

China's early policy on private ownership of urban housing was based on Marx's *On Capital*.¹ According to Marx, private land ownership and private home ownership were different in nature and thus should be treated differently after the Proletarian Revolution. The reason that land owners were able to extract rent was merely because they occupied a piece of natural resources. Yet, the owner has neither made significant contributions to improve his property, nor taken any risks in generating profits from his land.² Therefore, private land ownership served the very basis for pure exploitation.³ Unlike private land owners, however, home owners made substantial contributions to their properties. The rent income that home owners received from tenants represented a return in the form of interest and amortization from their investments.⁴ Accordingly, Marx concluded that private land ownership should be eliminated, whereas private home ownership should be recognized after the Proletarians took power.

In formulating the early laws and policies on urban housing, the Chinese government followed the Marxist doctrine closely. On the eve of the establishment of the People's Republic of China, the government publicly responded to a question concerning the nature of private rental housing property in urban areas and how the government would deal with the home owners. The reply, entitled "*Policy on the Nature of Urban Housing and Rent*" (hereafter, Housing Policy), was published in *The People's Daily* on August 12, 1949.⁵ In the Housing Policy, the government declared that urban housing was not a means of feudal exploita-

¹ Marx, Karl, *Das Capital* (Edited by Frederick Engels.) Moscow, Progress Publishers, (1971.) Marx's view on urban housing and rent appeared in volume 3, Chapter 21 and Chapter 46. This book is also available at <http://www.marxists.org/archive/marx/works/1894-c3/index.htm> (Last visited, August 15, 2007.)

² *Id.* To illustrate his point on the differentiation between ground rent and house rent, Marx cited the testimony of Edward Capps (a big building speculator in London) testimony before the Select Committee on Bank Acts of 1857.

³ *Idem.*

⁴ *Idem.*

⁵ Guanyu Chengshi Fangchan, Fangzu de Xingzhi he Zhengce [Policy on the Nature of Urban Housing and Rent (hereafter Housing Policy)], *The People's Daily*, (August 11, 1949). Also available at http://bbs.procedurallaw.cn/topic.asp?TOPIC_ID=1464&ARCHIVE= (last visited August 15, 2007.)

tion. Therefore, it should not be subject to confiscation. This policy was a tremendous relief to urban home owners.

In the *Housing Policy*, the government not only recognized the legitimacy of urban home ownership, but also delineated its understanding and application of Marx's theory regarding the distinction between rural land ownership and urban home ownership.

It is important to note that, in the last part of the *Housing Policy*, the government went beyond (or even became contradictory to) Marx's theory by arguing that recognizing private ownership was the only way to motivate owners to maintain and increase housing supply.⁶ Private investment was crucial to meeting increasing demand for housing, because the newly established government had no financial means to provide it.⁷ The government acknowledged that some cities failed to observe the distinction between rural land and urban housing.⁸ They either confiscated private housing or arbitrarily set housing rent at extremely low levels. Without property protection, home owners in those cities not only stopped maintaining current housing, but also stopped investment in building new houses. Consequently, the housing stock in those cities dwindled rapidly. Both home owners and tenants suffered greatly from the radical measures.⁹

This line of analysis demonstrates that the government was still rational to the extent that it heeded to the basic laws of economics about incentive and property rights at the early stages of the PRC history. However, that consciousness was soon replaced by the radical ideology that viewed any form of private property as capitalistic, a remnant that should be completely eliminated.¹⁰

2. *State Managed Mandatory Leasing of Private Housing during Socialism Transformation (jingzu)*

The promises in the *Housing Policy* were only kept for six years (1949-1955). When the so-called "socialization" was carried out, private ownership was deemed an obstacle for developing a socially-planned

⁶ *Idem.*

⁷ *Idem.*

⁸ *Idem.*

⁹ *Idem.*

¹⁰ *Idem.*

economy. Private housing was not an exception. In the 1950s, private housing accounted for the majority of urban housing in large cities such as Beijing and Shanghai. The government became concerned over the threat that the high proportion of private housing posed on the “socialization movement”. In 1955, the central government issued the “*The Opinions on the Current Situations on Private Housing and Opinions for Socialization*” (Hereafter, *Opinions*.)¹¹ The *Opinions* were issued in the form of government “red tape,” but it was widely regarded as an enactment, under which a number of local rules on private housing were formulated.¹²

Unlike the 1949 *Housing Policy*, the 1955 *Opinions* blamed private owners and real estate brokers for the increasing rental prices and shortage of housing construction. The major purpose of the *Opinions* was to set up minimum housing quotas that private owners were entitled to occupy. Any space beyond the minimum standard had to be rented out to the public at a state-set rate.¹³ This method was called “*jingzu*”, which means state-managed mandatory leasing. Under the proposed system, private owners were no longer free to decide how much to lease and at what price, despite the fact that they still legally retained ownership in their properties. All leasing activities were regulated and performed by the government. In addition, the government confiscated empty lots and easements owned by private parties in urban areas.¹⁴

It is clear that the government attributed the problems inherent in any real estate market to private home ownership. While the government did not abolish private home ownership all at once, to many home owners, losing ownership was a clear forecast. After the *Opinions* were issued, real estate prices fell sharply, resulting in frantic housing sales. Due to a lack of buyers, some owners even demolished their houses and sold the wood and bricks for other construction uses. The government’s goal for increasing housing supply was clearly not achieved.

¹¹ Zhongyang Shujichu Dier Bangong Shi [Central Committee No. 2 Secretary Office], Guanyu Muqian Chengshi Siyou Fangchan Jiben Qingkuang Ji Jinxing Shehui Zhu-yi Gaizao de Yijian [Current Situations on Private Housing and Opinions for Socialization]. January 18, 1955. Also available at <http://sh.focus.cn/newshtml/43563.html> (last visited August 15, 2007.)

¹² *Idem*.

¹³ *Idem*.

¹⁴ *Idem*.

Regardless of the negative result that mandatory leasing brought to the housing market, local governments faithfully carried it out. In 1958, the Beijing government released detailed rules on mandatory leasing, which were followed by other cities nationwide.¹⁵ According to the rules, private home owners were entitled to retain a base area of 15 rooms or 225 square meters for their own use or private leasing. Any space beyond the base area was subject to mandatory leasing. Even though the government did not take possession of private housing, it acted as an agent for private owners exercising property rights, such as entering contracts with tenants and collecting rent. Private owners received 20% to 40% of the rent collected by the government.¹⁶ In the process of carrying out mandatory leasing, some local governments deliberately reduced the base area in order to gain more control of housing units. In extreme cases, local governments disregarded the base area all together. In some cases, private owners were required to pay rent for their own bedrooms.¹⁷

3. *Deprivation of Private Housing during the Great Proletarian Cultural Revolution*

While mandatory leasing seriously restricted private owners from exercising their property rights, private ownership was, at least in theory, still legitimate. Owners were continuously paid nominal rent by the government for leasing their property to the public. However, when the Cultural Revolution broke out in 1966, the already abridged private property rights were deprived completely. Acting upon the Red Guards' call for eradicating the remnants of capitalist enterprises, the State Council issued "*the Report on Several Questions Concerning Finance, Trade and Handicraft Industry*" ("*Report*") on September 23, 1966.¹⁸ The *Report*

¹⁵ Cao Pei, *Real Estate law in China 6* (Hong Kong : Sweet & Maxwell, c1998).

¹⁶ *Idem*.

¹⁷ Zhang Peng, Bai Wan Hu Chengshi Zuwu, Chanquan Jiuzhang Chongfan [Millions of private owners lost their houses (during socialist transformation.) Now is it time for them to claim property rights?], Jinji [Economics Magazine], January 15, 2004. Available at <http://finance.sina.com.cn/g/20040115/1108604474.shtml> (last visited August 15, 2007.)

¹⁸ Guanyu Caizheng Maoyi he Shou Gongye Fangmian Ruogan Zhengce Wenti de Baogao [Report on several issues on the policies regarding finance and trade, and handicraft industry] promulgated by Guowu Yuan Caimao Bangongshi, Guojia Jingji Weiyuan-

declared that all public and private jointly managed enterprises were to be converted to state-owned enterprises. The state ceased paying dividends on private securities. Even though the *Report* did not address mandatory leasing, the state stopped payment of rent to private home owners as well. Unlike the *Housing Policy* (1949) and *Housing Opinions* (1955), which laid out the rationale behind the government actions toward private housing, the *Report* offered no explanation for the actions. During the lawless period, the Red Guards publicly humiliated intellectuals, overseas Chinese and Party members belonging to disgraced groups, and had their homes raided and confiscated. The seized properties were either turned to headquarters of “revolutionary organizations”, or directly occupied by family members of the Red Guards. As the legal system was also seized by the Red Guards, there was no recourse for property owners to seek relief. Under high political pressure, no one dared to argue that housing was not a means of production and thus should be treated differently from capitalist industry and commerce. As one of the “achievements” of the Cultural Revolution, private home owners, as part of exploiting class, were eliminated through violent means without any legal basis. By the end of the 1970s, urban housing was predominantly owned by the government.

4. *Public Housing and Housing Shortage*

Following the Soviet model, the Government eventually monopolized its housing through socialization and the government became the sole provider of public housing.¹⁹ As a part of a wide range of social benefits, housing was allocated to workers with extremely low rents in urban areas. People living in rural areas, which made up approximately 90% of the total population, were excluded from the benefit of public housing.

The concept of allocated housing with a nominal rent sounded appealing to many people, especially those who paid a considerable portion of their income for homes in the West. However, public housing was not only hard to obtain, but also of low quality. The main reason for this is

hu [the Finance and Trade Office of the State Council and the State Economic Committee] on September 24, 1966. Document number (1966) 507. Also available at http://bbs.procedurallaw.cn/topic.asp?TOPIC_ID=1464&ARCHIVE= (last visited August 15, 2007.)

¹⁹ Through confiscation, mandatory leasing, and takings.

that the state viewed housing as a non-productive means, which could not contribute to economic growth. “Putting production first, housing second” was a common political pledge everywhere from oil fields to industrial zones during the pre-reform era.²⁰ Thus, housing construction and maintenance was not the government’s priority. As a result, the state, as the major source of housing development, was reluctant to increase production in the housing sector. The average living space per capita had dwindled from 4.5 square meters in 1949 to 3.6 square meters in 1979.²¹ In addition to inadequate investment, the rapid population increase during this period also triggered the housing shortage.²² It was not uncommon for two or even three generations of a family to live in one flat with less than three bedrooms. In 1982, an estimated 1.89 million families with three generations shared space in flat units.²³ The living conditions in the overcrowded public housing were intolerable. In order to create more space with limited state investment, designers had no choice but to leave out “luxury” items in residential housing. A survey in the early 1990s revealed that nearly 60% of public housing was not equipped with private toilets and kitchens due to the high cost of installation.²⁴ In summary, the problems associated with the pre-reform housing policy were a result of scarcity of supply, low standards, and poor maintenance.²⁵

²⁰ Cheng, Shiwei, *Zhongguo Chengzhen Zhufang Zhidu Gaige-mubiao moshi yu shishi nandian* [China Urban Housing System Reform: Goal, Model and Difficulties]. *Minzhu yu Jianshe Chubanshe* [Democracy and Construction Press], 1999. [Hereafter Cheng], at 5. This book is one of the most comprehensive sources in Chinese language that collects scholarly writings on China’s public housing reform. According to this book, from 1958 to 1977, the state reduced housing investment substantially under the principle of “production first, housing second”.

²¹ *Ibidem*, at 5.

²² The pressure brought by the population increase on the planned economy was enormous. This explains the reason that the Chinese government put forth the controversial “population control” policy. For detailed discussion on the correlation between China’s economic constraints and population growth, see generally Fall, 2003, Amy Hampton, Comment, *Population Control in China: Sacrificing Human Rights for the Great Good? Birth Control Surgeries: 1971-1986*, 11 *Tulsa J. Comp. & Int’l L.* 321 (2003.) Xizhe Peng, *Population Policy and Program in China: Challenge and Prospective*, 35 *Tex. Int’l L.J.* 51 (2000.)

²³ *Idem*.

²⁴ Li Chen, Jean Jinghan and David Wills (ed.), *THE IMPACT OF CHINA’S ECONOMIC REFORMS UPON LAND, PROPERTY AND CONSTRUCTION*123 (UK: Ashgate, 1999.)

²⁵ *Idem*. at 122.

5 Housing Reform and Private Ownership

The traditional housing distribution system was neither fair nor cost-efficient. It was stretched to the brink of bankruptcy. Soon after general economic reforms began, the Central Government contemplated an overhaul of the public housing system. After experimenting in several middle-sized cities, housing reform was gradually carried out across the nation in the mid 1980s. Generally, the aim of the reform was to privatize public housing.²⁶ However, the privatization campaign was not successful in the first phase of the reform. Only a small number of workers were willing to purchase public housing, despite that the prices were as low as one-third of construction costs. The failure of the reform was largely attributable to poorly defined property rights and a lack of a functional real estate market.

As reform progressed, ambiguous property rights began to emerge as a major legal hurdle for property sales. The government was reluctant to award full ownership of the housing purchased during the reform. When residents were considering buying public housing, their primary concern was whether they could actually “own” (right to occupy, to use, to profit and to dispose of) their homes.²⁷ For many, the appropriation of private property after liberation was a fresh memory. In the absence of explicit legal guarantees, it was difficult to convince workers to invest savings to purchasing homes. These concerns were not unreasonable. In the first phase of the reform, ownership of housing sold at a discounted price was largely curtailed.²⁸ For example, according to the Yantai model rules, workers who purchased public housing at a discounted price were only

²⁶ For the development of housing reform, see Yun Zhiping and Bai Yihong, *Zhongguo Zhufang Zhidu Gaige* [China Housing Reform]. Zhongguo Jingji Chubanshe [China Economics Press], 1990.

²⁷ Cai pointed out that owners were more concerned about the right to dispose or profit than the right to use. He maintained that property ownership was the center of the reform. Without clearly defining property rights, it was impossible to set up housing market. See Cai Derong, *Zhongguo Chengzhen Zhufang Zhidu Gaige Yanjiu* [Studies on China Urban Housing Reform]. Hunan Chubanshe, 1996. At 41-42.

²⁸ *Zhongguo Shehui Kexue Yuan Caimao Yanjiu Suo*, Meiguo Niuyue Gonggong Guanli Yanjiu Suo, [China Academy of Social Science (CASS) and New York Public Management Research Institute], *Zhongguo Chengzhen Zhufan Zhidu Gaige* [China Urban Housing Reform]. 22 (Beijing: Jingji Guanli Chubanshe [Economic Management Publishing House], 1996).

given the right to use and inherit. They were not allowed to transfer, rent, give or mortgage their homes. If it was necessary to sell, the housing was to be sold back to the original work unit at the purchase price less depreciation value.²⁹ These promises did not generate adequate incentive for residents to invest in housing.

The major rise in home sales came after the State Council issued “*The Decision on Deepening Urban Housing Reform*” in 1994.”³⁰ According to the *Decision*, Public housing was sold either at market price for high income families or prices based on construction costs for middle and low income families. Workers who purchased housing at market price had full ownership of the housing, including the right to use, inherit, profit and dispose of. Workers who purchased housing at prices based on construction costs had limited ownership, which included the right to use and inherit and limited rights to profit from the housing. After five years from the purchase of a house based on the price of construction costs, the owner was allowed to sell on the housing market as long as the land use fees and taxes were paid in full. Any proceeds from the sale were split between the owner and the work unit, which originally provided subsidies according to a predefined rate.³¹ In sum, the higher the price paid at the time of purchase, the broader the ownership awarded. The provisions on ownership were fair and pragmatic. To some extent, the *Decision* was modeled after the British Housing Act of 1981, which dealt with a similar situation in the process of privatizing public housing in the United Kingdom.³²

The results of the housing and land reforms were profound. Both private home ownership and per capita living space increased dramatically. By the end of 2002, more than 72% of residential housing was privately owned.³³ By a different calculation, some scholars speculated that the ac-

²⁹ Guowuyan Guanyu Shenhua Chengzhen Zhufang Zhidu Gaige de Jueding [State Council Decision on Deepening Urban Housing Reform], 1994. [Hereafter Housing Reform Decision] This document was collected in State Council on Housing Reform, at 133. Based on this important guideline, local governments issued implementing rules.

³⁰ *Ibidem*, at 119.

³¹ Articles 14-2, Housing Reform Decision. State Council on Housing Reform. At 135-136.

³² See supra note 29, at 29.

³³ Ruan, *Zhongguo Chengzhen Jumin zhufang shuiping gaishan ren pingjun mianji chao 22 pingmi* [Urban Housing improved, space per capita reached 22 square meters]. *Zhongguo Xiwen She* [China News], August 1, 2003. This news report is also available at <http://www.people.com.cn/GB/jingji/1038/1995500.html> (last visited July 22, 2005.)

tual number could be as high as 81.55% in 2004.³⁴ The average living space per capita in urban areas increased more than 6 times, from 3.6 square meters in 1979 to 23.7 square meters in 2003.³⁵ Among all the provinces and large cities (excluding Hong Kong and Taiwan), Shanghai residents enjoyed the largest living space per capita, which reached to 29.35 square meters by 2003.³⁶ According to the same survey, Beijing ranked third, with an average living space of 24.77 square meters.³⁷

6 Urban Land Ownership and Land Reform

Parallel with the housing reform, land reform was initiated in the early 1980s. Because land in China is owned either by the state or by collectives, individuals who purchased housing during the housing reform had no rights to own or transfer the land underneath the home. Therefore, land reform was of particular importance to the housing reform.

According to the Constitution, all urban land is own by the State. Land in rural areas is own by agricultural collectives. Individuals are not entitled to own land. According to *the Law of Land Administration*, the land department under the State Council is responsible for land administration and supervision across the country.³⁸

Urban land reform was prompted by the arrival of foreign investment during the economic reforms. To benefit from foreign investment, the State

³⁴ 2004 Nian Dichan Nidu Baogao Fabu [2004 Report on Real Estate Market Released], available at <http://www.people.com.cn/GB/jingji/1038/1995500.html> (last visited August 12, 2007.) Based on his calculation, Liu pointed out the figure of private of housing could have been much higher than what the annual report indicated.

³⁵ *Shehui baozhang baiqi shu zi zhufang-ren pingjun zhufang mianji 23.7 pingmi* [While paper on social security-housing: space per capita reached 23.7 square meter] Guoji Jinrong Bao [International Finance Daily], September 9, 2004, available at: <http://news.sz.soufun.com/2004-09-09/320208.htm> (last visited August 12, 2007.)

³⁶ Chen Xiaoping, Shanghai renjun zhufang mianji da 29.35 pingfang mi ju neidi shouwei. [The largest in the nation: Space per capita in Shanghai reached 29.35 square meters]. Shanghai Qingnian Bao [Shanghai Youth Daily] August 9, 2004, available at <http://sh.house.sina.com.cn/2004-08-09/9828.html> (last visited August 12, 2007.)

³⁷ Xie Wei, Beijing renjun zhufang 24.77 pingfang mi neidi ju disan [Beijing ranked the third; its housing per capita reached 24.77 square meters]. Xinjing Bao [New Beijing Daily], June 26, 2004, available at <http://house.focus.cn/newshtml/68231.html> (last visited on August 12, 2007.)

³⁸ Zhonghua Renmin Gonghe Guo Tudi Guanli Fa [Land Administration Law of the People's Republic of China (LAL)], art. 5.

Council changed its traditional way of allocating lands to State-Owned Enterprises (SOE) based on need. In 1980, the State Council issued its first piece of legislation on land use rights, which heralded the dramatic changes of the land administration system in China.³⁹ According to these Regulations, when Sino-foreign joint ventures applied for land, they were required to pay land use fees, regardless of whether the land was a new tract or an occupied tract that was already used by the Chinese partner. The fee included the cost of land surface readjustment, re-settlement for laid-off workers, and other things such as easements and utilities. The land use fee could also be counted as a share of contribution from the Chinese partner to the joint venture. The land use rights were, however, not transferable.

The initial changes were inspiring. However, foreign investors soon discovered that the non-transferable land-use right was inconvenient for business transactions. Local governments also complained that it was difficult to monitor individual businesses after land-use rights were granted. In addition, the non-transferable requirement was conducive to black-market activities. To encourage foreign investment, this concern was addressed in the 1988 amendment to the Constitution. A clause was added to Article 10 of the *Constitution* which recognized the legitimacy of transferable land-use rights. Revised article 10 reads:

No organization or individual may appropriate, buy, sell or unlawfully transfer land in other ways. *The right to the use of land may be transferred in according with law.* (Emphasis added).

After the constitutional hurdle was cleared, the State Council enacted the *Interim Regulations Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas*, which set forth the scope and procedures for appropriating land-use rights and giving them to investors.⁴⁰

³⁹ Guanyu Zhongwai Heying Qiye Jianshe Yongdi de Zaxing Guiding [Interim Regulations on Construction Land Use for Sino-Foreign Joint Corporations (joint ventures)], 1980.

⁴⁰ Zhonghua Renmin Gongheguo Chengzhen Guoyou Tudi Shiyongquan Churang he Zhuanrang Zaxing Tiaoli [Interim Regulations of the People's Republic of China Concerning Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas], 1990 (hereafter, ATLR.) The title of the law has been translated in several

Based on the principles of separating land-use rights from land ownership, the law extends land-use rights to companies, enterprises, organizations and individuals within the territory of China.⁴¹ This means that, not only foreign investors, but also national economic entities and individuals are eligible to apply for land-use rights. Unlike previous laws, this law allows land-use rights grantees to transfer, lease, and mortgage the rights within the duration provided by law.⁴²

Land-use rights are granted for a certain period of time according to different types of uses:⁴³ for residential use, 70 years; for industrial use, 50 years; for Education, Science and Technology, Culture, Sports use, 40 years; for commercial use, 50 years. In general, the grantor (the state) does not have the right to reclaim the land-use right during the term of the grant. However, under special circumstances, such as public interest, the grantor may requisition the land-use rights through legal proceedings. If this occurs, the grantor is required to pay compensation based on the remaining time of the land-use right term and the grantee's investment in the land.

In sum, only after the urban housing reform and land reform, residents became real owners of their apartment homes. However, China's home owners do not own the land underneath their apartments. They only have the right to use the land for up to 70 years.

II. BULLDOZING HOMES TO DEVELOP THE ECONOMY

The reason for housing reform is that the government was eager to shift the burden of providing housing from the state to individuals. Individual owners had indeed made substantial contribution to boot the housing industry. A few years later, however, commercial developers emerged as a major force of the economic growth. In addition, local governments heavily rely on commercial developers to take on urban renewal and other local leaders preferred "image projects", such as gigantic squares, sky-

versions. The translation used in Randolph and Lou's Chinese Real estate Law is "Interim Provisions for the Granting and Transfer of Land Use Rights on State Owned Urban Land. In order to keep the translation consistent with majority of works on land use rights in China, Beijing University Law School's translation is used here.

⁴¹ ATR. Art 3.

⁴² ATR. Art 4.

⁴³ ATR. Art. 12.

scrapers. As a result, the newly-become homeowners found that they were no long in the government's favor. In the tension between individual homeowners and deep-pocketed developers, the government sides with the latter.

1 *Commercial Developers vs. Private Home owners*

Economic development has led to a rapid growth in urban population and expansion of urban construction projects. The 1990s witnessed large-scale housing construction projects aimed at improving old urban districts across the country.⁴⁴ To make room for new developments, massive demolitions ensued. The demolition and relocation activities were chiefly managed and financed by the local governments. In Beijing, for example, the municipal government was responsible for the entire process of city reconstruction, from allocating funds, relocating residents, and setting compensation standards to providing resettlement housing. The initial purpose of demolition and relocation was to improve the living conditions of local residents.⁴⁵ As a result, residents gladly waited for government action to demolish their shabby flats, because they knew that they would eventually be moved into larger and better apartment homes. The public praised the government for its policy on urban reconstruction.⁴⁶

However, the government's funding of housing construction quickly dried up. During the economic reform, commercial developers stepped in to complete unfinished government projects after the state opened its land-use and housing markets. Toward the end of 1990s, commercial developers played a prominent role in demolition and relocation activities. However, this came with a heavy price tag for urban residents. Due to the lack of uniform laws, policies on demolition and relocation favored developers over residents. To cut costs and gain maximum returns, commercial developers were reluctant to provide residents with compensation and relocation arrangements after demolishing old houses. In terms of setting compensation standards and authoring forced evictions, residents began to see governments siding with developers. The tension between residents and developers became a source of dissatisfaction. Conse-

⁴⁴ Zhao Ling, *Chaiqian Shinian Beixi Ju [Happy endings became tragedies over 10 years]* *Nanfang Zhoumo [Southern Weeken]*, April 14, 2004.

⁴⁵ *Idem.*

⁴⁶ *Idem.*

quently, the public's previously welcoming attitude became antagonistic towards demolition and relocation projects. In 1995, the Beijing government received a sharp increase of complaints filed by residents, whose houses were taken away without proper compensation.⁴⁷ In February 2000, 10,375 families together filed a class action lawsuit challenging the government's decision to demolish and relocate their homes, a surprise to the government at the time.⁴⁸

2. *The Chinese Takings Laws*

The tremendous harm inflicted on private owners can be directly related to China's fast economic development. The tension between residents and developers has seriously affected social stability. In order to strike a balance between economic development and private property protection, the Chinese lawmakers passed several laws to regulate government takings: (1) Article 13 of the *Constitution*; (2) *Regulations on Urban Housing Demolition and Relocations, 2001 (Regulations)*; (3) "*Urgent Notice on Diligently Carrying out Urban Housing Demolition and Relocation, and Maintaining Social Stability*" (the "*Notice*."⁴⁹ Despite the great importance that the Central government attached to takings issues, the above laws and regulations are not fully enforced to protect private property.

3. *Problems with the Chinese Takings Laws*

The Takings laws presuppose that government can take private property without the owner's consent. But that does not mean that the government has unlimited power to utilize the power of takings. In the United

⁴⁷ *Idem.*

⁴⁸ *Idem.*

⁴⁹ Guanyu Renzhen Zhuohao Chengzheng Fangwu Chaiqian Gongzhuo, Weihu Shehui Wending De Jinji Tongzhi [An Urgent Notice on Diligently Carrying out Urban Housing Demolition and Relocation, Maintaining Social Stability] issued by the Office of the State Council on September 19, 2003. Guoban fa ming dian [2003] No. 42. Urgent Notice (Jinji Tongzhi) is a type of normative document, which has no legally binding effect. However, it can have huge impact on local governments in a time of crisis. For example, during the SARS epidemic in 2003, the state council issued several influential urgent notices urging local governments to take measures on prevention, control, and treatment of the disease. See Generally, Liu, Chinese Law on SARS. New York, Hein 2004.

States, the taking clause provides two limitations on the government, i.e., private owners are entitled to just compensation and the project has to be for public use. The public use requirement limits the very scope of the eminent domain power. “Government may compel an individual to forfeit her property for the public’s use, but not for the benefit of another private person. This requirement promotes fairness as well as security”.⁵⁰ The purpose of the just compensation requirement is to spread the cost of condemnations and thus “prevents the public from loading upon one individual more than his just share of the burdens of government”.⁵¹ In China, the takings law also has the two basic requirements: public use and just compensation.⁵² However, neither of the requirements imposes meaningful restraints on government powers to take private homes for economic developments.

A. Public Purpose

This research reveals that there is no single case in which a homeowner has even attempted to challenge public purpose of a particular government project. The reason is that “public interest” is an extremely elusive term in Chinese law, which in practice grants the government the absolute power to make decisions based on local leaders’ preferences. “Public interest” has been interpreted far beyond the scope of traditional for-public-use projects, such as highways, parks, or schools. Therefore, it is not unusual for local governments to take private homes and handed it over to commercial developers under the disguise of “public interest”. In reality, every government action is deemed as for public purpose in China. Therefore, individual owners, whose interest adversely affected by government decisions, simply do not have any cause of action to challenge the purpose of the project. The court, which is an integral part of the government, would not take such a case. Besides, very few lawyers are willing to accept cases challenging government decisions. In sum, there

⁵⁰ *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U. S. 302, 336 (2002) (“The concepts of ‘fairness and justice’ ...underlie the Takings Clause”).

⁵¹ *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 325 (1893); see also *Armstrong v. United States*, 364 U. S. 40, 49 (1960).

⁵² *Zhonghua Renmin Gonghe Guo Xianfa* [The Constitution of the People’s Republic of China] art. 13.

is no legal remedy when government abuses “public purpose” requirement in the takings law.

Local leaders are under enormous pressure from the central government to keep local GDP high, so that the overall economic growth could stay on the fast track. Since local leaders are appointed by the government at higher level, rather than elected by the local people, the local leaders clearly know that their political fates hinge on how well they could fulfill the wishes of higher officials. In recent years, the sole standard for evaluating a leader’s ability is local GDP. For example, as an implied rule in Shandong Province, less than 17% GDP increase would not bode well for a local leader’s political future.⁵³ The frantic pursuit of high GDP has resulted in many so called “image or legacy projects”, by which leaders score high political credits needed for reappointment or promotion. Therefore, gigantic shopping malls, industrial parks, skyscrapers, among others are on the top agenda of new leaders.

During their five years tenure, local leaders make every effort to achieve high economic growth. The most efficient way to develop economy is to sell the land use rights of the best location in town to foreign or domestic commercial developers. Due to historical reasons, the best locations with utility lines and easy access to transformation are usually condensed residential neighborhoods. In order to clear the way for commercial developers, local leaders would first emphasize that the commercial development is for local economy, which is for public use. For the “bright future of the city”, the leaders would ask all residents affected by the project to make sacrifices by moving out in timely fashion, accepting low compensation standards, being willing to relocate to remote suburban areas. In case of resistance, the leaders would not hesitate to authorize forced eviction order to make room for economic development. Under the disguise of “public purpose”, the local leaders utilize all powers in disposal to facilitate commercial development.

Zoning law could have put some effective restriction on local leader’s urge to engage in wasteful “image” or “legacy” projects. In practice, however, the Urban Zoning Law of the People’s Republic of China is powerless in preventing local leaders from frequently changing city blueprints and selling land use rights to commercial developers.

⁵³ Li Ming, Shandong geshi zhuiqiu GDP gaosu zengzhang cheng diyu 17% nabuchu shou [Cities in Shandong province in a hot pursuit of high economic growth: less than 17% increase in GDP is not enough], *Diyi Caijing Ribao* [No1 Finance Daily], (July 31, 2006).

First, there is no effective restriction of government's decision making process. Under the current political system, the head of a city or a province has the absolute power to make key decisions. The current zoning law was enacted in 1989 and took effect in 1990. The purpose of the zoning law is to rationalize limited urban land resources and maintain continuity of urban construction and expansion.⁵⁴ The law requires that the State Council draw a plan for national land use and local governments draw their respective plans for local urban development.⁵⁵ According to the law, the national plan is subject to the final approval by the National People's Congress.⁵⁶ Likewise, local plans should be approved by the Local People's Congress at corresponding levels. In addition, local plans are subject to approval by the government at a higher level. Cities with a population of over 10 million are required to submit their plans to the State Council for approval.⁵⁷ The reporting and approval requirement is designed to hold local governments accountable for their use of urban land. However, the system fails to achieve its intended purpose. The main reason is that the People's Congress is not an independent co-equal branch that could enforce meaningful supervision over government decisions. Despite its increasing status in recent years, People's Congress is still very weak in relation to the government. It is still beholden to the government for budget, essential supplies, and more importantly, appointments for key posts in the Congress. It is not uncommon for a government official, whose continuous appointment as a governor is barred by law,⁵⁸ to assume the key position in the Congress. Being appointed as a head of the Congress is a comfortable step for government officials towards a full retirement. Accordingly, the People's Congress is reluctant to second guess government decisions. Therefore, there is no single case in which a local People's Congress has rejected government's zoning plan or made substantial changes to it.

The second reason for failing to observe the Zoning Law is that the income from the land sales is so great that it accounts for a substantial part of local revenue. The national land sale income in 2006 reached 700

⁵⁴ Zhonghua Renming Gonghe Guo Chengshi Guihua Fa [The Urban Zoning Law of the People's Republic of China], (1989). Article 1.

⁵⁵ *Ibidem*, article 21-22.

⁵⁶ *Idem*.

⁵⁷ *Idem*.

⁵⁸ The tenure of government officials is five years.

billion Yuan (US\$10 billion).⁵⁹ Unlike tax revenue, the land sale income is not subject to budgetary supervision.⁶⁰ Therefore, land sale has become the hottest item for local governments to make profit.⁶¹ Mr. Gang, the head of legal department of the State Land Ministry once referred land sale income as “Mayor’s pocked money,” because it can be used at local leaders’ will without effective restraints.⁶² No city is willing to lose competitive edge by imposing any zoning restriction on its ability to profit from land use right sales. As a scholar pointed out, Zoning Law is completely irrelevant when leaders make their decisions as to which track to sell and for what purpose the land would eventually be put into use, as long as the sale can increase local government’s pocket.⁶³

In a recent open bid on July 24, 2007, the most expensive one-track land sale took place in Changsha, the capital of Hunan province. Beichen and Chengke Co. purchased a 156 acre track for 9 billion Yuan (US\$1.18 billion).⁶⁴ According to the report, the track will be use for building a complex of a museum, a concert hall, a library and other commercial amenities along the Xiangjiang River. The local government is responsible for land acquisition, demolition, relocation and resettlement. The commercial developers are responsible for developing the track into what the government called a “cultural Manhattan”, a signature project for the City of Changsha. However, it is impossible to know how much of the track will actually be used for the proposed public facilities. It is highly unlikely for a commercial developer to act philanthropically by building a non-profit complex on the entire billion-dollar worth track. Once the purchase is complete, the developer has much leeway to decide what to build on the tract. The true motive of the development seems obvious to the local residence as the housing price in the surrounding area has already gone up substantially.

⁵⁹ Zhi Ling, Tudi Churang Jing Cheng Difang Zhengfu “Zuire” Chuangshou Xiangmu [Land use right sale has become the “hottest” item for local governments to make profit], *Zhongguo Qingnian Bao* [China Youth Daily], (August 3, 2007).

⁶⁰ *Idem.*

⁶¹ *Idem.*

⁶² Luo Tao, Guotu Bu: Tudi Shouyi Buneng Chengwei Shizhang “Linghuaqian” [The Ministry of State Land: land sale income should not become mayor’s pocket money], *Jingji Cankao Bao* [Economic Information Daily], (September 12, 2006.)

⁶³ *Idem.*

⁶⁴ Wang Xiaoxia, Changsha Paichu Quanguo Diwang, Haodu Fangjia Kuangzhang [the most expansive land sale took place in Changsha, which resulted in unexpected high housing price], *Zhongguo Jingji Shibao* [China Economic News], (August 1, 2007.)

B. *Compensation Issues*

As discussed above, there is no room to challenge the public purpose of a particular project. Therefore, the private owners whose homes have been condemned for economic development are left with no choice but to hope for fair compensation. However, these innocent hopes are often dashed. Inadequate compensation has become the major source of confrontation between private owners and developers backed by local governments. Despite strict regulations on official media, some tragic protests against low compensation standards have been reported by national news outlets from time to time. In August 2003, Mr. Weng poured gasoline to himself and set a fire at the local demolition and relocation office, which had forcefully evicted his family and demolished his home without proper compensations.⁶⁵ Mr. Weng burned to death. On September 15, 2003, Mr. Zhu set himself on fire in the Tiananmen Square in Beijing protesting that the government took his house without adequate compensation.⁶⁶ Mr. Zhu was severely burned. On September 14, 2006, Ms. Xie drank a bottle of pesticide in protest of the low compensation for her house taken for the Hunan Agricultural University campus expansion project.⁶⁷

Having realized the serious social consequences as result of inadequate compensation, the Central Government has repeatedly issued notices or regulations demanding local governments increase compensation standards. In 2003, the Ministry of Construction issued the *Guiding Opinions on the Appraisal of Urban Housing Demolitions* (the Guiding Opinions). According to the Opinions, compensation for urban housing taken for economic development purposes must be based on market value. However, it is difficult for the affected residents to find accurate market

⁶⁵ Wang Cijiang and Chengshi Chaiqian, *Sifa Heyi Quewai [Urban Demolition: Lack of Law and Order]*, China Net, (Sept. 22, 2003), available at www.china.org.cn/chinese/law/408670.htm (last visited August 15, 2007).

⁶⁶ Yan Xiaomei, *Anhui Qingyang Xian Nongmin Zhu Zhengliang Ze Tiananmen Zifen Diaocha [Report on Mr. Zhu's Immolation in the Tiananmen Square]*, Dongfang Zao Bao [East Morning News], (Sept. 18, 2003).

⁶⁷ Cao Cang, *Hunan nongda chaiqian jiufen diaocha: zhigong fudu qianren juji [An investigation of Hunan Agricultural Demolition Incident: a worker swallowed pesticide in protest and thousands took the street]*, Zhongguo Jinji Zhoukan [China Economics Weekly], November 13, 2006. Available at <http://edu.people.com.cn/GB/5029855.html> (last visited, August 15, 2007).

information given the immaturity of the Chinese real estate market. Especially when an entire track of land with numerous home owners involved is taken for commercial use, it is almost impossible to have a comparable value of the houses. Acting upon developers' request, local governments often take advantage of information deficiency and deliberately set low compensation standard in order to cut development costs. Backed by the government, the developers often find various excuses to deny private owners legitimate demand for compensation, as soon as the demolition and relocation order is issued. Despite that the law requires developers to set aside funds for compensation and resettlement, very few developers are willing to do so due to lack of enforcement mechanism.

Using outdated market value as compensation standards is another way to lower costs. Yang's case illustrates how the local government took advantage of outdated rules and denied Mr. Yang, an owner of a private enterprise, adequate compensation. In May 2002, Mr. Yang,⁶⁸ the owner of Meiting Chemical Company (Yang), received a demolition and relocation notice from the Science Garden Development Company (the Science Garden), which was affiliated with Jiangning Bureau of Construction.⁶⁹ After several rounds of negotiations, Yang and the Science Garden failed to reach agreement regarding compensation and resettlement. In accordance with the Regulations, Yang applied to Jiangning Bureau of Construction for arbitration. On July 31, 2002, the Bureau of Construction issued its arbitral decision, according to which the Science Garden was to pay Yang RMB 1,350,000 (US\$163,108) in compensation. The arbitration decision was based on the standards set forth in a temporary local rule regarding urban housing demolition and relocation, which was enacted 6 years earlier. If it had been based on the most current Regulations enacted by Nanjing Municipality, the Science Garden would have had to pay RMB 4,470,000, (US\$540,070.) The difference between the appraisals was RMB 3,120,000 (US\$376,961.) Upset by the Jiangning Bureau of Construction's arbitral decision, Yang filed an ad-

⁶⁸ Gongmin Zhuanggao Zhengfu Xingzheng "Lifa" Bu Zuwei [Citizen Sued Government for Legislative Omission] Fazi Ribao [Legal Daily], March 25, 2003. <http://www.gmw.cn/01wzb/2003-03/30/03-B625492A45BCB1F548256CF90028094A.htm> (last visited August 15, 2007.)

⁶⁹ In China, if a company is affiliated with a government department, it means that the company is directly managed by the government department. The head of the company often holds an associate position in the government department.

ministrative action with the Nanjing Intermediate People's Court, claiming that the local government failed to update its compensation rules in line with the current rules of the Nanjing Municipality. Yang asserted that the government's omission was the direct cause of the loss sustained by his company and requested that the appraisal be based on the current standards.

The case received tremendous media attention across the country, because it was the first case, in which an individual sued the government for failing to revise local compensation standards according to the laws at the higher level. Legal scholars took the opportunity to discuss the importance of legislative order and advocate the concept of judicial review. The vice secretary of the Standing Committee of National People's Congress commented: "Citizens should have right to sue the government. They should have the right to sue legislative institutions. If a law made by the legislature contradicts the constitution or basic law, citizens have the right to make suggestions to the Standing Committee of the National People's Congress. These rights are conferred by the Legislative Law". Despite the excitement the case aroused in the media and among idealistic scholars, the Court mechanically applied the law and dismissed Yang's claim. The court held that the outdated standards were enacted by the local government without definite groups or individuals in mind. Therefore, the rules were an abstract act, which fell outside the scope of the administrative review according to the *Administrative Litigation Law (ALL)*.⁷⁰

Yet another problem with compensation is that property owners are often taken advantage of in the complicated relocation arrangements. According to the Regulations, private owners have a choice of being compensated with lump sum money or with a new property of the same size at a similar location.⁷¹ Since the compensation standards are usually low and not enough for property owners to buy comparable housing, many owners choose to be compensated with a new property. The Regulations also provide that if the new property is larger than the condemned housing (which usually the case), the owners need to pay the difference.⁷² The rules seem to be fair to both sides, but developers have their own way to manipulate the rules.

⁷⁰ The Administrative Litigation Law of the People's Republic of China, article 11.

⁷¹ The Regulations, Articles 23-25.

⁷² *Ibidem*, article 25.

In order to persuade property owners to accept relocation package and vacate the proposed site quickly, some developers promise much larger property as compensation and offer very preferable price for the difference that owners need to pay. As a result, property owners happily accept the offer and sign the relocation and compensation agreements with developers. While waiting for completion of the project, property owners either find temporary housing by themselves with allowances paid by the developers or live in transit housing provided by the developers. However, it takes several years, or even a decade for a project to complete. By the time that the relocation housing is ready, the project management has changed hands for several times. By law, the new developer is required to honor all the agreements between the initial developer and residents.⁷³ In practice, however, there are cases where the subsequent developers set various hurdles that condemned property owners could move in their long waited houses without paying additional a large amount of money. In some cases, the developer put the relocation housing on sale at current market price.⁷⁴ Mr. Lu's ordeal illustrates the difficulty that private owners are facing when enforcing long term contracts with developers.⁷⁵

Mr. Lu's house was condemned for an urban renewal project in Guangxi in 1996. His house was 29.56 sqm. According to the relocation and compensation agreement, Mr. Lu was compensated with a new property of 49.56 sqm at similar location. For the additional 20 sqm, the developer offered 1,800 yuan/ sqm. For fear of any later changes, Mr. Lu notarized the agreement. After 11 years' waiting, when Mr. Lu was about the move his new property, the developer asked Mr. Lu to pay 2,800 yuan/sqm for the additional 20 sqm. The developer argued that the new payment is due to the market price increase during 11 years. Mr. Lu now is facing three choices: first, he could sue the developer in Court. Even though Mr. Lu is likely to win the case in Court, it will take a long time to get the issue resolved. The litigation costs might be well more expensive the additional charges the developer requested. If there is a close

⁷³ Jing Xiaofeng, Chaiqian hu 11 nian deng budao hetong yueding huiqianfang gongzheng hetong cheng kongwen [property owner could not move to relocation housing after 11 years, notarized contract is not honored], Nanguo Zhaobao [South China Morning News], (April 30, 2007).

⁷⁴ Will be discussed in 2.3.3 in this article.

⁷⁵ *Supra* note 74.

connection between the developer and the Court, Mr. Lu might have to wait in the judicial system longer than usual. The second option for Mr. Lu is to petition the government through administrative channel. Since the local media have already reported his ordeal, the local government might take some actions. Again, if the developer has a strong tie with the government, which is usually the case, Mr. Lu might not get a better solution than from the judicial system. Mr. Lu's third choice is to pay the additional charges as required by the developers. After spending 11 years in transit housing after his property was taken, Mr. Lu deserves much better treatment. However, none of the three choices sounds fair to him.

C. Forced Eviction and Due Process of Law

In the United States, scholarly discussion on government takings primarily focuses on public use and just compensation requirements.⁷⁶ Forced eviction is hardly a focus, because constitutional guarantees that safeguard fundamental rights ensure that takings are carried out according to the due process of law. In China, however, citizen's basic rights are not guaranteed to the same degree, despite the recent constitutional amendments aimed at promoting individual rights, including private property rights. As discussed in Part I, property ownership in China has undergone dramatic changes in the less than 50 years of the PRC's history, from private to public and back to private. After decades of communist ideological influence, social disapproval of strong private ownership is still prevalent. The deep rooted prejudice against private ownership explains why the very first Property Code was met with strong resistance from conservative scholars. While the National People's Congress was about to pass the Property Code after over a decade of preparation, Dr. Gong, a constitutional law Professor at Beijing University, published his influential (his opponents say notorious) open letter claiming that the Property Code that would recognize the protection of private ownership seriously violates the basic constitutional principle on public owner-

⁷⁶ Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967). Lawrence Berger, The Public Use Requirement in Eminent Domain, 57 Or. L. Rev. 203 (1978). Michael A. Heller and James E. Krier, Deterrence and Distribution in the Law of Takings, 112 Harv. L. Rev. 997 (1999). Nicole Stelle Garnett, The Public-Use Question as a Takings Problem, 71 *Geo. Wash. L. Rev.* 934 (2003).

ship.⁷⁷ Because of Gong's accusation, the Congress put the deliberation of the law on hold for one year.⁷⁸ The Code was finally passed in March and will take effect in October 2007. Only with this background in mind can one fully understand the reason why ordinary private owners are facing enormous difficulties in asserting their legitimate rights.

According to the Regulations, forced eviction may occur under two circumstances. First, if residents refuse to vacate their houses after reaching an agreement with the developer regarding compensation, relocation, and transitional period, the developer can petition the court for a forced eviction order.⁷⁹ Second, if residents and the developer could not reach an agreement, the developer can petition for arbitration from the Demolition Bureau, a government division in charge of demolition and relocation.⁸⁰ After arbitration, if the residents decide to appeal the arbitral decision and refuse to vacate their houses within the duration set in the arbitration, the Demolition Bureau can issue a forced eviction order or the Demolition Bureau can petition the Court for a forced eviction order.⁸¹

In practice, most of forced eviction cases happened under the second circumstance. According to the *Regulations*, the Demolition Bureau is the only entity that arbitrates disputes between residents and developers with regard to compensation and resettlement. No residents trust Demolition Bureau as an impartial arbitrator. The reason is that the Demolition Bureau has already approved the compensation standard and resettlement plan when granting the demolition license to the developer. It is unlikely that the Demolition Bureau would rule against its own decision in the arbitration. In addition, as a regular government division, it is impossible for the Demolition Bureau to be immune from external interferences, especially from officials who have close ties to developers. According to a 2001 survey of five cities, conducted by Professor Wang,

⁷⁷ Article 6 of the Constitutional of China provides: The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people. The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of 'from each according to his ability, to each according to his work.

⁷⁸ See Zhang Fengjuan, Guojia Suoyou Quan Zhuti Fenxi [An Analysis of State Ownership], available http://www.honglaw.com.cn/Article_Show.asp?ArticleID=15108 (last visited August 15, 2007.)

⁷⁹ The Regulations, Article 15.

⁸⁰ *Ibidem*, Article 16.

⁸¹ *Ibidem*, and the Arbitration Procedure 17.

the chance for a resident to win arbitration from Demolition Bureau was only 0.03%.⁸²

For residents, the consequence of losing in Demolition Bureau arbitration is disastrous. It means that they have to face an immediate forced eviction either by the developer authorized by the Demolition Bureau, or by judicial force. According to Article 16(2) of the *Regulations*, if residents are not satisfied with the Demolition Bureau's decision, they may appeal the decision to the People's Court. However, the Demolition Bureau's decision is enforceable while the case is pending before the court.⁸³ This means that even if residents win their case in court, their only remedy is monetary damages. Injunctive relief has never been an option.

Forced eviction is often referred to as "savage eviction" or "violent eviction" by Chinese scholars.⁸⁴ Cutting off water and electricity, verbally threatening residents, physically assaulting residents, and sending thugs to break into homes, are among the various means frequently utilized by condemners to drive residents away from their homes. Mr. Howard W. French, a New York Times reporter, has this observation:⁸⁵

Stories are legion in Chinese cities of the arrest or even beating of people who protest too vigorously against their eviction and relocation. In one often-heard twist, holdouts are summoned to the local police station and return home only to find their house already demolished.

Mr. French's description only catches a few glimpses of what happened during demolition process in China. There are even worse cases than what he depicted above. Shanghai is the window of China's modernity, but few are aware of how much ordinary private owners have paid for the development. On January 9, 2005, Yang Sunqin, the Deputy CEO of Shanghai Chengkai Co. directed two staff, Wang and Lu, to set a fire on Mr. Zhu's home in order to evict the family. The fire quickly consumed the building, in which Zhu's elder parents were burned to death.

⁸² Wang Cailiang, Fangwu ChaiQian Jiufen Jiaodian Shiyi [Guide to Solving Disputes Over Urban Housing Demolition] 99 (Law Press China 2004.) Only one in 37 won the arbitral decision from the Demolition Bureau.

⁸³ The Regulations, Article 16 (1).

⁸⁴ For example, Wang Cailiang criticized violent eviction in his book. See general *supra* note 83.

⁸⁵ French, Howard W, *A Chinese Homeowner Stands Her Ground*, International Herald Tribune, March 27, 2007, at 2.

Zhu and other family members fled from an attic window and survived. Embarrassed by the incident, the government of Shanghai pledged full investigation.⁸⁶ The three suspects were soon arrested. In August 2005, The deputy CEO and one staff were sentenced to death with two-year suspension. The other staff member was sentence to life imprisonment.⁸⁷ Mr. Liu Yungeng, Deputy Secretary of Shanghai Municipality admitted during a news conference that the conflicts between developers and homeowners were the major source of social disconcert. Mr. Liu listed the horrendous means the developers used to force out homeowners, including, taking away stairways at night, smashing doors and windows, cutting off water and other utility lines.⁸⁸

Forcing residents out by all means necessary thrived because the profits from the demolition projects outweighed all conceivable legal consequences. In 2001, the Shanghai government decided to redevelop Maiqili district, where Zhu and other 1,000 families lived. In order to gain the residents' support, the government issued two decrees promising that residents would move back to the same location after the project was complete. The residents would need to pay a fair market value for the difference if their new houses are larger than the old ones. A year later, however, without any explanation to the residents, the government sold the tract to Chengke Co. for 265 million Yuan (US\$ 40 million) for commercial development, of which lucrative returns were ensured. Even though the purpose of the development changed, the government still waived Chengkai Co. the land right use fee in the amount of 79 million Yuan (US\$ 11 million). In sum, the Government and Chengkai Co were the two big winners in this deal.⁸⁹

Since the purpose of the project changed from urban renewal to commercial development, the Chengkai had no obligation to build houses for

⁸⁶ Fu Jianfeng, Shanghai "juqianhu" bei dichan shan zonghuo shaoshi shijian de beihou [An in-depth investigation of the incident in which two were burned to death by real estate developers], Nanfang Dushi Bao [the Southern Metro News], (March 3, 2005.)

⁸⁷ Dai Wei and Tian Qilin, Shanghai zonghuo biqian an tuxian chaiqian heimu [Forced eviction with fire reveals the dark side of demolition and relocation activities], Cai Jing [Caijing Magazine], (September 19, 2005).

⁸⁸ Li Rong, Shanghai jianjie daji dong chaiqian zhong sunhai qunzhong liyi de weifa xingwei [Shanghai determinedly cracks down illegal demolition that encroaches upon residents' property right], Xinhua Net, (February 3, 2005).

⁸⁹ See *Supra* note 88.

the residents to move back. In essence, the government took back the promises that it made to the residents after it sold out the project. Realizing there was no way to move back to the same location, the residents refused to reach agreements with Chengkai and held out. To Chengkai, the earlier it could clear the site, the earlier it would make profits. All means justify the end.

III. COMPARATIVE PERSPECTIVE

Economic development and large scale of takings sometimes go hand in hand. China is not alone to face the tension between protection of private property and the need to make room for further economic growth. Whether be a developing or developed economy, government takings are inevitable at various stages of economic development, as long as private ownership is recognized as a legitimate right. However, the ways of carrying out takings vary greatly in different jurisdictions. The following section provides comparative analysis of how takings laws in the United States and Singapore could offer some useful perspectives for the Chinese law makers.

1. *United States*

A. Public Purpose: From “narrow view” to “broad view”

Eminent domain is used for a “public use”. However, what constitute a public use? In the United States, it is very difficult to define “public use” in a precise and fixed form.⁹⁰ The concept of “public use” has been interpreted differently throughout time in the United States.

In the colonial times, the taking of private property for public use through the power of eminent domain was not controversial. The concept of “public use” was, however, the subject of heated debates as the government played an increasing role in facilitating commercial development.⁹¹ For a century (1830-1930), the debates involved two opposite points of view on how to construe “public use”—the “narrow view” and the “broad view”.⁹² The so-called “narrow view” held that private property taken through eminent domain must provide its intended use to the

⁹⁰ Nichols, *Supra* note 29, § 7.02 [1].

⁹¹ *Ibidem*, §7.01 [3].

⁹² Richard R. Powell, Powell on Real Property 79F.03 [3] [a]. [hereafter Powell].

public.⁹³ “The public must be entitled, as of right, to use or enjoy the property”.⁹⁴ The “broad view” maintained that “public use” included not only uses that were directly beneficial to the public, such as roads, but also uses to promote the general welfare and prosperity of the whole community.⁹⁵ Both approaches were embraced in early judicial decisions, which rendered the eminent domain doctrine inconsistent and unpredictable.⁹⁶

In the 1910s, the U.S. Supreme Court began to reject the “narrow view” in favor of the “broad view”, for it found the former to be an “unacceptable tool” in analyzing “takings” cases.⁹⁷ Further, the Court became increasingly deferential to Congress’s decision to utilize the power of eminent domain for “public use”.⁹⁸ This trend was reflected in a 1954 Supreme Court case, *Berman v. Parker*.⁹⁹ In *Berman*, a redevelopment project called for the appropriation of certain private properties in accordance with a Congressional act. A private owner, whose department store was in the condemnation area, challenged the constitutionality of the act and sought to enjoin the condemnation. The owner argued that the condemnation was not for public use and violated his property rights because the government intended to transfer the condemned property to another private owner. The Court, after expressing its deference to the legislature,¹⁰⁰ upheld the constitutionality of the act and confirmed the government’s right to condemn the property, provided that the owner received just compensation.¹⁰¹

In 1984, the Supreme Court once again demonstrated the “broad view” approach and its deference to the legislature in another leading case *Hawaii Housing Authority v. Midkiff*.¹⁰² At issue in this case was the consti-

⁹³ *Idem.*

⁹⁴ *Idem.*

⁹⁵ *Idem.*

⁹⁶ *Idem.* at 79F-28. see also Berger, The Public Use Requirement in Eminent Domain, 57 Or. L. Rev. 203, 209 (1978).

⁹⁷ Powell, *Supra* note 47, 79F.03 [3] [b]. at 79F-29.

⁹⁸ *Idem.*

⁹⁹ *Berman v. Parker*, 348 U.S. 26, (1954.)

¹⁰⁰ See *Id.* at 32. “Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.”

¹⁰¹ *Idem.*

¹⁰² *Hawaii Housing Authority v. Midkiff* 467 U.S. 229 (1984).

tutionality of the Hawaii Land Reform Act 1967 (the “Act”). Under the Act, lessees living on single-family residential lots owned by private landowners were entitled to ask the Hawaii Housing Authority (HHA) to condemn the property on which they lived. The Act was enacted to reduce the over concentrated land ownership in Hawaii. Pursuit to the Act, the HHA conducted a public hearing and found that condemnation would affect the public purpose.¹⁰³ The landowners filed a lawsuit alleging the Act violated the public use clause of the Fifth Amendment because the condemned lands were taken from one private owner and handed over to another. Citing *Berman v. Parker*, the Supreme Court restated its deference to the local legislature stating, “The ‘public use’ requirement is thus conterminous with the scope of a sovereign’s police power”.¹⁰⁴ The Court then pushed the scope of “public use” even further by stating that the mere fact that taking property from one private owner and giving it to another does not “condemn that taking as only a private purpose”.¹⁰⁵ “[I]t is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause”.¹⁰⁶ The Court found that the Act was constitutional, because it was enacted to “reduce perceived social and economic evils” caused by the over-concentrated ownership in the Hawaii real estate market.¹⁰⁷

The “broad view” approach has also found support in State courts.¹⁰⁸ State governments are not immune from the influence of commercial developers and interest groups.¹⁰⁹ To revitalize local economies, adding jobs and collecting taxes,¹¹⁰ some states have stretched the “broad view”

¹⁰³ *Ibidem*, at footnote.

¹⁰⁴ *Ibidem*, at 240.

¹⁰⁵ *Ibidem*, at 244.

¹⁰⁶ *Idem*.

¹⁰⁷ *Ibidem*, at 241-242.

¹⁰⁸ Powell, *Supra* note 47, 79F.03 [3] [c], at 79F-32.

¹⁰⁹ Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 197, 199 (2003).

¹¹⁰ For example, section 2 of the [MICHIGAN] PLANNING, HOUSING, AND ZONING ECONOMIC DEVELOPMENT CORPORATIONS ACT provides: There exists in this state the continuing need for programs to alleviate and prevent conditions of unemployment, and the legislature finds that it is accordingly necessary to assist and retain local industrial and commercial enterprises..., it is also necessary to encourage the location and expansion of industrial and commercial enterprises, including employee-owned corporations, to more conveniently provide needed services and facilities of the industrial and commercial enterprises to municipalities and the residents of the muni-

to the extreme. In *Poletown Neighborhood Council v. City of Detroit*,¹¹¹ the Detroit Economic Development Corporation condemned a low-income Polish neighborhood consisting of private homes, churches, and businesses and transferred the tract of land to General Motors (GM) for use in an assembly plant. The neighborhood association and several residents in the affected area brought a lawsuit challenging the constitutionality of using the power of eminent domain to condemn private property to boost the economy. The residents argued that this taking was for private use instead of public use, despite the incidental benefit GM may bring to the public. The Michigan Supreme Court paid similar deference to the legislature as the U.S. Supreme Court did in *Berman v. Parker*. The Michigan court found that the legislature was better suited to decide whether the use of eminent domain met a public need.¹¹² Over two vigorous dissents, the court upheld the validity of the condemnation. Even though the *Poletown* decision was heavily criticized by legal scholars,¹¹³ the precedent stood for over two decades, during which eleven cases followed *Poletown*.¹¹⁴ The controversial case was finally overruled by the same court in a 2004 case, *County of Wayne v. Hathcock*,¹¹⁵ where private owners successfully blocked the city's decision to condemn private lands for developing a technological park.

B. *The Kelo Decision*

After *Midkiff*, the Supreme Court did not revisit its view on the scope of "public use" for two decades until *Kelo v. The City of New London*¹¹⁶ was brought to the Court in 2005. The central issue in *Kelo* was whether economic development fell within the scope of "public use". Unlike the *Midkiff* court, which unanimously held for the government, the *Kelo* court was sharply divided. In a five to four decision, the Court upheld the "broad view" approach established in *Berman* and *Midkiff*.

cipalities... Therefore, the powers granted in this act constitute the performance of essential *public purposes* and functions for this state and its municipalities. MCLS §125. 1602 (2004.)

¹¹¹ *Poletown Neighborhood Council v. City of Detroit* 304 N.W. 2d 455 (Mich. 1981).

¹¹² *Ibidem*, at. 458.

¹¹³ See Timothy Sandefur, A Gleeful Obituary for Poletown Neighborhood Council v. Detroit, 28 Harv. J.L. & Pub. Pol y 651 (2005).

¹¹⁴ Through Lexis Shepard's report.

¹¹⁵ *County of Wayne v. Hathcock* 684 N.W.2d 765 (Mich. 2004).

¹¹⁶ *Kelo v City of New London*, 545 U.S. 469 (2005).

The City of New London is located at the junction of the Thames River and Long Island.¹¹⁷ Despite its superb location, the City's economy was in decline for several decades. In 1998, the City's unemployment rate was nearly double that of the state and its population reached a record low. To revitalize the City's economy, the State authorized the New London Development Corporation (NLDC), a private nonprofit entity, to draw up redevelopment plans. The State issued multi-million dollar bonds in support of the NLDC's planning activities to create Fort Trumbull State Park. At the same time, Pfizer Inc. announced its plan to build a \$300 million research facility in the vicinity of the State Park.¹¹⁸ Both the City and the State saw Pfizer's project as a catalyst to the area's rejuvenation. In order to facilitate Pfizer's investment and other commercial opportunities in anticipation of Pfizer's arrival, the NLDC finalized an integrated development plan. The plan required ninety acres of the Fort Trumbull area to be condemned for the project. Petitioners owned properties within the Fort Trumbull area.¹¹⁹

The petitioners raised several arguments. First, they argued that the Court should adopt a new bright-line rule that disqualifies economic development as "public use".¹²⁰ The Court rejected the petitioners' claim by reaffirming the pivotal role of the government in revitalizing the local economy. The Court held that promoting economic development is a traditional government function.¹²¹ After comparing to *Berman*, *Midkiff* and other cases, the Court concluded that *Kelo* is indistinguishable from previous cases. It held that "there is no basis for exempting economic development from our traditionally broad understanding of public purpose".¹²² In the decision, Justice Stevens emphasized that the development plan was "carefully considered", and there was no evidence of an illegitimate purpose.¹²³

Then the Petitioners argued that using eminent domain for economic development blurred the boundary between public and private takings.¹²⁴ Citing *Midkiff* and *Berman*, the Court reasoned that the government's re-

¹¹⁷ *Ibidem*, at 473.

¹¹⁸ *Idem*.

¹¹⁹ *Idem*.

¹²⁰ *Ibidem*, at 484.

¹²¹ *Idem*.

¹²² *Ibidem*, at 485.

¹²³ *Ibidem*, at 484-485.

¹²⁴ *Ibidem*, at 485.

development projects would often benefit individual private parties, no matter whether the project is carried out either by the government itself or by a private entity.¹²⁵ The Court held that “[t]he public end may be as well or better served through an agency of private enterprise than through a department of government”.¹²⁶ Finally, the petitioners argued that the court should require a “reasonable certainty” that the expected public use would actually succeed.¹²⁷ The Court reiterated its long held deferential approach and declined to second-guess the efficacy of the NWDL’s well-thought redevelopment plan.¹²⁸ It also declined to consider how the NWDL would eventually use the condemned property.¹²⁹

The *Kelo* decision has drawn enormous criticism. Justice O’Connor, joined by the Chief Justice, and Justices Scalia and Thomas, raised vigorous objection to the majority of the Court. In her dissenting opinion, O’Connor accused the Court of abandoning its “long held, basic limitation on government power”.¹³⁰ She warned of the serious consequences if the Court failed to exercise its necessary judicial check when one takes property from A and gives to B.

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded —*i. e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in process.¹³¹

O’Connor further pointed out that the *Kelo* decision made private and public use indistinguishable, because it qualified economic development takings as “public use”, as long as there were any incidental public benefits from subsequent ordinary use of private property.¹³² In O’Connor’s view, the decision renders the words “for public use” meaningless under the Takings Clause of the Fifth Amendment.¹³³

125 *Idem.*

126 *Ibidem*, at 486.

127 *Ibidem*, at 487.

128 *Ibidem*, at 488.

129 *Ibidem*, at 489.

130 *Ibidem*, at 494.

131 *Idem.*

132 *Idem.*

133 *Idem.*

C. *Kelo Debate in China*

American scholars may be surprised that the *Kelo* decision received enormous fanfare from the Chinese media. Some scholars claimed that the protection of property under the U.S. Constitution was all but an empty promise.¹³⁴ A few weeks after the decision, the *China Real Estate News*, the official newspaper of the Chinese Construction Ministry, published a long article about the *Kelo* case.¹³⁵ Land Bureaus in major cities, which have been plagued with a takings problem, posted a Chinese translation of the *Kelo* decision on their websites with the subtitle, “*Kelo v. New London: How the U.S. Supreme Court deals with economic takings?*”¹³⁶ The purpose of making the *Kelo* decision available from the Chinese governmental agency’s news outlet is obvious: (1) it implies that the United States is no better than China in protecting private property; (2) takings for economic development is not only justified in China, but also in the U.S.

The debate about the *Kelo* case among Chinese scholars is valuable and healthy. However, these scholars seem to miss one crucial point—why the U.S. Supreme Court took its deferential approach, that is, let the New London Legislature decide the purpose of the takings. In the *Kelo* decision, Justice Stevens emphasized that the development plan was “carefully considered”, and there was no evidence of an illegitimate purpose. To a large extent, the Court relied on the judgment of the local government, which was duly elected and its decision was approved by the local legislature.

In China, however, the local government is not elected by the people, but appointed by officials at higher government. Consequently, local leaders are accountable to governments at a higher level, not the local people. When the central government sets a goal for rapid economic growth, local leaders accomplish the goal by all means, with little consideration for subsequent costs of such development plans. Local devel-

¹³⁴ Ren Donglei, *Meiguo de chaiqian zhengdi guansi* [The eminent domain case in the United States] <http://www.tecn.cn/data/detail.php?id=7455> (last visited, August 14, 2007).

¹³⁵ Zhong Yuan, *Guojia zhengyong de falu yubo* [the shockwave of government takings], *China Real Estate News*, (July 18, 2005).

¹³⁶ *Fei Tian, Cong “Kailuo su xin lundun shi an” Jiedu meiguo zhengfu ruhe jie jue zhengdi zhengyi* [Interpreting U.S. takings law from the *Kelo* case], *Zhongguo Fangdichan Bao* [China Real Estate News], December 12, 2005.

opment plans are often made in haste and in secret, without consultation with the local people. In theory, the local People's Congress should have the power to make the final decision on development plans. In practice, however, the Congress is not independent from the central government. There is not a single case where the Congress has disapproved a government proposal.

At ideological level, private property is treated differently in the U.S. and in China. In the United States, the origins of property can be traced back to several schools of thought—natural rights, personal protections, and economic utility.¹³⁷ A natural right theory stems from John Locke's writings, which were very influential in early America. His works are still widely studied and cited by many scholars. According to Locke, property is a natural endowment that every member of a society deserves to have. The right to property is a pre-social or pre-legal right coming from God. Like the rights to life and liberty, the right to property should not be subject to restriction by the state. The goal of a civil society is the protection of property rights.¹³⁸

The second school of thought asserts that it is vital to protect property rights because they are closely connected with personal rights. Without property rights, other rights are not possible. In a widely cited passage, Justice Stewart depicts the correlations of property rights and other fundamental rights:

...the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.¹³⁹

This school of thought advocates strong property rights protection. If property rights can be arbitrarily changed, other rights will be in jeopardy.

¹³⁷ See generally, 2-5 Nichols on Eminent Domain § 5.01.

¹³⁸ 2-5 Nichols on Eminent Domain § 5.01. [3][a].

¹³⁹ Lynch v. Household Finance 405 U.S. 538, 552 (1972).

The third school of thought emphasizes the economic utility aspect of property rights. As Posner points out, “legal protection of property rights creates incentives to exploit resources efficiently”.¹⁴⁰ The protection of property rights is a practical means to achieve economic prosperity, rather than the ultimate goal of a society. When the government believes that property owners stand in the way of economic development, it will change the existing rules to assign valuable resources to the presumed efficient users. A typical example is exercising the power of eminent domain to facilitate economic development. This school of thought does not invariably support strong property rights.

Each school of thought has merit. No single school is a dominant theory that is universally accepted by American scholars. Instead, the combination of these intellectual traditions has played an important role in shaping the current American jurisprudence of property law.

In China, the economic utility theory underlies current property reforms. This is because the reforms are largely driven by the economic need to foster private property rights, rather than the desire to protect individual freedoms. After several decades of communist rule, it is difficult for China to eradicate a deep-rooted ideology, which holds that the state is the only source of individual rights. Natural rights theory is not sensitive to the ears of the public or the intellectuals. Further, the theory linking personal protections and property rights does not appeal to top decision makers, because they focus more on social stability than individual freedom. Naturally, the economic utility theory finds a large audience among Chinese decision-makers as well as scholars, who strive to find a well-crafted theory to justify the means for economic growth. Locke’s theory is rarely mentioned, let alone having influence in the law making process.

2. *Singapore*

Turning a sleepy fishing village into an attractive international metropolitan area in a span of three decades, Singapore has impressed the world with its superb economic performance. Singapore has become a model for many Asian countries striving for modernity and prosperity. As a result, a great deal of literature is devoted to finding the causes of

¹⁴⁰ Posner, Richard, *Economic Analysis of Law* 32 (6th ed. 2003).

this economic miracle. However, very few scholars have examined the mixed impact of the Singaporean takings law on the economic development and social justice of the country. The problems that Singapore faced in the 1960s bear striking resemblance to what the Chinese government is facing today. With over 75% of the population being ethnic Chinese, Singapore shares a similar culture and tradition with China. Despite the differences in state structure and legal systems, the two nations have taken similar paternalistic measures to maintain social order, including public housing and compulsory land acquisition. (In the 1970s, Singapore even imposed strict family planning in order to relieve the pressure on the housing supply resulting from rapid population growth.) Therefore, a study of the Singaporean takings law offers unique lessons for China.

A. *Public purpose*

At the end of the Japanese occupation in the 1940s, Singapore's economy was devastated. When the People's Action Party (PAP) assumed power in 1959, it faced the enormous challenge of rebuilding Singapore from ruins. In order to maintain political power, the PAP focused on practical ways to improve its citizens' standard of living. The PAP made public housing a top priority, because it viewed housing as "a crucial ingredient to immediate and lasting success".¹⁴¹ To fulfill this campaign promise, the PAP laid out a master plan to redevelop Singapore, which required a large scale land acquisition.¹⁴²

The major legal hurdle for land acquisition was the constitutional guaranty that prevented the government from taking private land without paying just compensation. Before 1965, the Malaysian Constitution was applicable to Singapore. Article 13 of the Malaysian Constitution provided:

- (1) No person shall be deprived of property save in accordance with the law;
- (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.¹⁴³

¹⁴¹ Aya Gruber, *Public Housing in Singapore: The Use of Ends-Based Reasoning in the Quest for a Workable System*, 38Harv. Int'l L. J. 236, 239 (1997).

¹⁴² *Ibidem*, at 247-249.

¹⁴³ Tan, Kevin, Singapore Country Report at 23, in *Coordinador de Derecho comparado Asia-México. Culturas y Sistemas Jurídicos Comparados*. IJ-UNAM. 2007 (edited

In most democratic countries, just compensation is designed to prevent the government from abusing the power of eminent domain. Singapore had two options to pursue its redevelopment plan. One was to abide by the Constitution, which meant that the government would pay just compensation to owners whose properties were taken for public use. The other was to eliminate the constitutional guarantee, so that the government would have no limits when taking private property. The PAP chose the latter. In the PAP's view, compensation was an unjustified burden for its redevelopment plan.¹⁴⁴

In 1965, when Singapore separated from Malaysia, the PAP took advantage of the opportunity and proposed to exclude Article 13 in the new Singaporean Constitution. Prime Minister Lee Kuan Yew, the founding father of the modern Singapore state, expressed his deep concern that the constitutional guarantee would bog down the acquisition process, and thus hinder economic development.¹⁴⁵ During a parliamentary debate on whether Article 13 should be included in the new Constitution, Mr. Lee made his view unequivocally:

We have specifically set out to exclude [Article 13]...Once we spell out that no law shall provide for the compulsory acquisition or use of property without adequate compensation, we open the door for litigation and ultimately for adjudication by the Court on what is or is not adequate compensation.¹⁴⁶

Mr. Lee's assertion was based on the lesson that the government learned during the construction of the Jurong Industrial Site. In that project, the government invested a considerable amount of state funds for developing infrastructure. With the completion of the project, the value of adjacent land went up rapidly. When the Jurong Industrial Site needed to expand and build ancillary services, such as schools and hospitals, the government had to pay hefty compensation to land owners according to the previous law. In Mr. Lee's view, had the government not developed the industrial site, the value of adjacent land would not have appreciated.

by Serna de la Garza and José María). The article is available online at <http://www.bibliojuridica.org/libros/5/2398/10.pdf> (last visited August 15, 2007).

¹⁴⁴ Singapore Parliamentary Debates Official Report, 22 December 1965, at columns 435-436.

¹⁴⁵ *Idem.*

¹⁴⁶ *Idem.*

The government compensation at current market price was a windfall for the property owners, who had contributed nothing. The enhanced value was “created wholly by the expenditure of State funds”.¹⁴⁷

Since the PAP was the dominate party in Singaporean politics, Mr. Lee’s proposal to exclude Article 13 would surely be passed by the Parliament. Despite the fact that the Constitution has gone through various changes in four decades, the current Singaporean Constitution has not yet embraced any guarantee that is comparable to the Fifth Amendment to the U.S. Constitution.

Without constitutional constraints, the Parliament passed the Land Acquisition Act (LAA) in 1966, which granted expansive power to the government. Article 5 (1) of the LAA provided that private property can be taken for the following purposes:¹⁴⁸

Whenever any particular land is needed —

(a) for any public purpose;

(b) by any person, corporation or statutory board, for any work or an undertaking which, in the opinion of the Minister, is of public benefit or of public utility or in the public interest; or.

(c) for any residential, commercial or industrial purposes,

the President may, by notification published in the *Gazette*, declare the land to be required for the purpose specified in the notification.

Article 5 (1) is so inclusive that any takings could fit in the scope. In practice, it is impossible to challenge the purpose of government takings. In *Galstaun v. Attorney-General*,¹⁴⁹ the owner’s land was acquired for the extension of a public road. The owner found that the extension project was already finished when his land was acquired. As a result, the owner brought an action to the court alleging that the government did not actually use the acquired land for the road extension project as announced in the official gazette. Among others claims, the owner sought a declaratory judgment that the purported acquisition was illegal on the ground that the government had abused its power. The court emphasized the government’s broad power conferred by Section 3 of the Land Acquisition Act, 1960 and rejected the owner’s claim. The court reasoned:

¹⁴⁷ *Idem*.

¹⁴⁸ Tan, *Supra* note 144, at 28.

¹⁴⁹ *Galstaun v Attorney-General* [1981] 1 MLJ 9, at p 10, per FA Chua J. (available from Lexis.com).

The government is the proper authority for deciding what a public purpose is. When the government declares that a certain purpose is a public purpose, it must be presumed that the Government is in possession of facts which include the Government to declare that the purpose is a public purpose.¹⁵⁰

In *Galstaun*, the court made it extremely difficult for there to be subsequent litigation over whether a particular taking is for public use. This line of reasoning echoes the *Berman* case, in which the U.S. Supreme Court asserted, “Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive”.¹⁵¹ In Singapore, unfortunately, there are virtually no limitations on takings, because the constitutional guarantee was stripped away from the Constitution.

*Basco Enterprises PTE LTD v. Soh Siong Wai*¹⁵² is another case that demonstrates that the public purpose doctrine in Singaporean law was indeed off limits. In this case, the appellant owned a colonial building, Stamford House, located at the center of Singapore. The Urban Redevelopment Authority (URA), a government agency, condemned the building in 1984 for redevelopment. The owner was compensated at the 1973 market value. After the title was transferred to the URA, the owner learned that the building was actually used for cultural preservation. The façade of the building was preserved; the interior was used for retail outlets. The URA put the house on sale by open public tender at current (1988) market value. The owner sued the URA, alleging that the URA acted in bad faith when it acquired the building because its ultimate use of the building was not for the alleged purpose. The owner also contended that the URA acted *ultra vires* by taking private property for cultural preservation, a jurisdiction of which exclusively fell in the realm of another government agency.

The Court dismissed the owner’s claims and ruled in favor of the URA. It is not clear whether Judge Keong read the *Berman* case. His reasoning strikingly resembled that in *Berman*. First, Judge Keong stated that the building at issue should not be considered in isolation because

¹⁵⁰ *Idem*.

¹⁵¹ *Berman v. Parker*, 348 U.S. 26, (1954).

¹⁵² *Basco Enterprises PTE LTD v. Soh Siong Wai* [1989]1 SLR 150 (this case is available from Lexis.com)

the redevelopment project affected other buildings in the area. After confirming the broad ambit of urban redevelopment, the Court held that the URA was the property agency to decide how to use the condemned buildings. Second, Judge Keong was reluctant to second guess the government's decision. He reasoned that "[i]t is not necessary for [the Court] to decide the narrower point whether, if Stamford House had been acquired alone for urban redevelopment".¹⁵³

B. *Compensation*

In Singapore, the compensation for condemned property is based on market value. However, the meaning of market value is very different from that in the U.S. The general rule in the U.S. is that the value of the condemned property is fixed at the time the property is taken.¹⁵⁴ In Singapore, the price is determined by the market value at either of the two retrospective dates set in the law. If there is a difference between the values, the lower is applicable. This compensation scheme is laid out in Section 33 of the Land Compensation Act (LCA),¹⁵⁵ which provides:

Section 33. —(1) In determining the amount of compensation to be awarded for land acquired under this Act, the Board shall... take into consideration the following matters and no others:

(a) the market value —

(i)

(A) as at 1st January 1986 in respect of land acquired on or after 30th November 1987 but before 18th January 1993;

(B) as at 1st January 1992 in respect of land acquired on or after 18th January 1993 but before 27th September 1995; and

(C) as at 1st January 1995 in respect of land acquired on or after 27th September 1995;

...

Whichever is the lower.

The objective of this provision was to ensure that property owners would not be unjustly enriched by any government funded project. How-

¹⁵³ *Idem.*

¹⁵⁴ 4-12A Nichols on Eminent Domain § 12A.01.

¹⁵⁵ Khublall, N. *Compulsory Land Acquisition—Singapore and Malaysia* at 118 (1994, 2a.ed.).

ever, the unfairness of this provision is evident in the decision of *Collector of Land Revenue v. Ang Thian Soo*.¹⁵⁶ At issue in this case was whether the compensation should be based on the market value as of the retrospective date set in Section 33(1)(a)(i), or as of the date of acquisition. Based on the former standard, Mr. Soo would only be paid \$236,450, despite the fact that he bought the house for \$335,000. If the latter standard was applicable, the compensation award would be as much as \$670,000.

What made this case unique was that the construction of Soo's house was not finished until four years *after* the retrospective date for compensation set in the law. Mr. Soo argued that the retrospective date was irrelevant in valuing his house because the house was not built, and thus it did not have any market value at that time. In supporting his argument, Soo cited two similar cases, in which owners were compensated according to the values at the date of condemnation, because their houses did not exist at the retrospective date. The trial court (the Board) accepted Soo's argument and ruled that the compensation should be based on the date of acquisition and awarded Soo with \$670,000 in compensation. The Collector appealed the decision to the Appellate Court, which not only overruled the trial court decision, but also the two cases that Soo cited. The Appellate Court's approach was straightforward. It literally applied the original text of Section 33(1)(a), and concluded that Mr. Soo's argument was contrary to the express words of the law. It held that the acquisitioned property should only be valued at the dates set in the law, *which is the lower*, and *no other* factors should be considered. Consequently, the only evaluation standard applicable in this case was the lower of the prescribed market values. Therefore, the Appellate Court reduced the amount of the compensation from \$670,000 to \$260,000.¹⁵⁷

This case has drawn heavy criticism from Singaporean scholars, because it runs afoul of the basic principle of the takings law commonly recognized in the academia.¹⁵⁸ The ruling in the *Soo* case obviously rendered the property owner in a much worse situation. Professor Khublall commented that the current scheme for compensation was unfair and should be changed, because property owners in Singapore "w[ere] unreasonably penalized when their property [was] condemned".¹⁵⁹

¹⁵⁶ 1 SLR 11, [1990] 1 SLR 11 (this case is available from Lexis.com).

¹⁵⁷ *Idem*.

¹⁵⁸ Khublall, *supra* note 156 at 119.

¹⁵⁹ *Ibidem*, at 120.

In this day and age, when land values are generally rising, it is wrong both in principle and in equity to award compensation on the basis of a retrospective date. It is abundantly clear that a dispossessed landowner cannot get the equivalent in compensation what he is compelled to give up.¹⁶⁰

Another distinct aspect of the Singaporean law regarding compensation is the so-called “set-off” provision.¹⁶¹ It is laid out in Clause (b) of Section 33(1). This provision requires that the Board of Appeal take consideration of any increase in the value of any other land of the owner interested “likely to accrue from the use to which the land acquired will be put.”¹⁶² In other words, this provision means that, if the new development after the takings is likely to increase the value of the owner’s remaining property, the increased value (or betterment) should be set off against the compensation for the condemned property.

The “set-off” clause has its origin in Section 7 of the English Land Compensation Act of 1961, which provides:

Where the vendor retains any contiguous or adjacent land, the value of which is enhanced by development carried out or proposed to be carried out under the ‘scheme’, the betterment is to be set-off against the compensation otherwise payable.¹⁶³

The Singaporean law is more stringent than the English provision, because it does not require the owner’s remaining land to be contiguous or adjacent to the condemned property. Any enhancement that the new development would bring to the owner’s remaining property, no matter where it is located, will be offset against the compensation for the part taken.¹⁶⁴

In practice, however, it is difficult for the court to apply the “set-off” provision for two reasons.¹⁶⁵ First, it is almost impossible to accurately assess how much a new development project will enhance the owner’s

¹⁶⁰ *Ibidem*, at 119-120.

¹⁶¹ *Ibidem*, at 199.

¹⁶² *Idem*.

¹⁶³ The “set-off” principle can be found in other English legislation regarding land acquisition. For example, Avon Weir Act of 1992, Section 33 provides: (2) In assessing the compensation payable to any person on the acquisition by the Corporation from him of any relevant land, the tribunal shall.

¹⁶⁴ *Idem*.

¹⁶⁵ *Idem*.

remaining property. For a new project to be profitable, it usually takes years, if not decades, to see the results. In reality, some projects may seem promising, but fail in the end. Neither the owners, nor the Collector can guarantee the success of the project. Second, suppose that the project is successful, it still is difficult to ascertain in what way the project will enhance the owner's interests. The owner may be tangentially benefited from the new development as is the public. It would be unfair to count the general benefit against the compensation for the owner's condemned property.

C. Not a model for China

Tourists are fond of the views of skyscrapers, which symbolize Singapore's modernity and prosperity. Scholars enjoy touting sharp growth charts and persuading developing countries to copy the same model—pursuing an economic miracle at minimum costs. Very few, however, have frankly focused on the tremendous social costs associated with the making of so called “miracles,” the negative impact of which may not be immediately seen.

Suppressing individual freedom and denying property owner's just compensation have a devastating impact on the public. It is a miscalculation when social costs are not taken into consideration. As a commentator noted:

The omnipresence of a paternalistic government indicates that [Singapore] is in danger of losing its soul. In a world where personal freedoms often give fundamental definition to one's existence, the leadership of Singapore appears bent on subordinating such freedoms in favor of its national agenda aimed at economic success.¹⁶⁶

Singapore's economic achievement is undeniably impressive. The Singapore model sounds appealing to many leaders in China, who are striving to achieve visible results during a short period of time, usually within a five-year tenure. However, the questionable means that the Singapore government utilized to reach the end would not do any good for China in the long run. Social riots and other serious problems demon-

¹⁶⁶ Quoted from Aya Gruber, “Public Housing in Singapore: The Use of Ends-Based Reasoning in the Quest for a Workable System”, 38 *Harv. Int'l L. J.* 236, 237 (1997).

strate that China cannot afford to ignore social justice during its course of economic growth.

3. *Transaction Costs for Eminent Domain Compared*

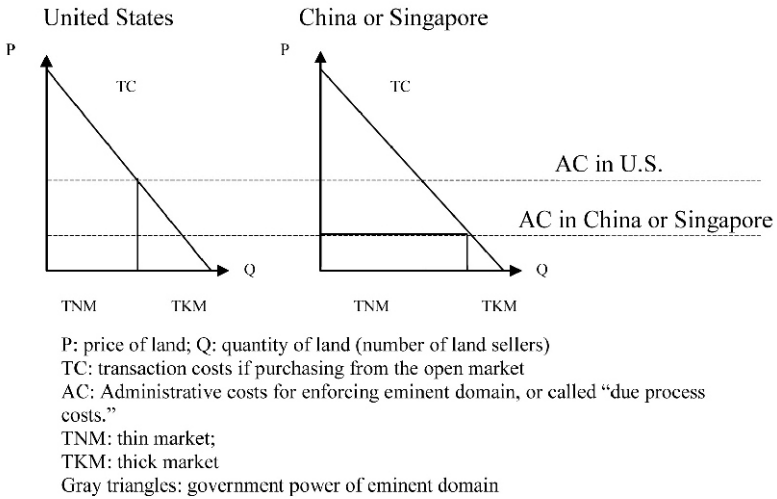
Using the criterion suggested by Merrill,¹⁶⁷ the following table summarizes administrative costs (AC) for enforcing eminent domain powers in China, United States and Singapore.

Administrative Costs for Eminent Domain (AC)	U.S.	China	Singapore
1. Costs to lobby the legislature to grant the power of eminent domain	high	none	none
2. Procedural costs required by the Constitution, including drafting and filing formal judicial complaints and service of process on the owner	high	very low	low
3. Costs associated with professional appraisal services	high	very low	low
4. Costs for the guarantee of condemnees' rights, including public hearings on the condemnation's legality and the amount of compensation required	high	very low	low
5. Costs of a lengthy lawsuit	high	very low	low

As indicated in the table above, the Chinese government has the sole power to draw development plans without public consultation. It even has the power to redraw zoning maps to legitimize a particular development project. The government deliberately sets property value low in compensating property owners. Property owners are not entitled to a genuine public hearing process before takings. Owners do not have effective means of challenging government decisions. Property owners are often forced to move without proper notice. The consequence of all of this is that the Chinese government has a broader ability to use eminent domain procedures than the U.S. Based on Merrill's criterion, with some modifications. The following diagrams show how the Administrative Costs in China is substantially lower than that in the U.S. The implication of the low adminis-

¹⁶⁷ Thomas W. Merrill, *The Economics of Public Use*, 72 *Cornell L. Rev.* 61, 77 (1986).

trative cost means that the Chinese or Singaporean Government is more likely to abuse eminent domain power than the U.S.



IV. CONCLUSION: IDEOLOGY, REALITY AND TRANSACTION COSTS

As Dr. North observed, “the ‘reality’ of a political-economic system is never known to anyone, but humans do construct elaborate beliefs about the nature of that ‘reality’—beliefs that are both a positive model of the way the system works and a normative model of how it should work”.¹⁶⁸ The case of urban housing ownership studied by this paper provides support for Dr. North’s assertion. Since the establishment of the People’s Republic of China in 1949, urban home ownership, as with other property rights, has gone through dramatic changes—from private to public and then back to private ownership again. Underlying these changes are various ideological beliefs to which the Communist-led government subscribed at different times.

¹⁶⁸ Douglass C. North. *Understanding the Process of Economic Change 2* (Princeton University Press, 2005).

In its first three decades, the government faithfully practiced Marxism. Consequently, abolition of private property was on the top of the government's agenda.¹⁶⁹ Following a Soviet model, the government implemented Marxism in every aspect of social and economic life. Private land was confiscated and landlords were either imprisoned or executed. Even though the government briefly allowed private ownership of urban housing for pragmatic reasons, it quickly claimed private housing as an obstacle for building the socialist economy. In the late 1950s, the government began the so-called socialization movement with a goal to eliminate the private economy. During that period, private housing owners were forced to lease their houses at reduced prices set by the government. By the late of the 1960s, when the "Cultural Revolution" broke out, private home ownership ceased to exist. By using formidable means, the government carried out massive appropriations of private property without compensation and due process. The lawless takings inflicted serious injustice, but it did accomplish the government's purported goal: transforming private ownership to public ownership. Apparently, the justification for the takings was Marx's assertion that public ownership was superior to private ownership. Public ownership was the very basis of a planned economy, which was perceived as the only way to maximize productivity. After the transformation, the government was the sole source for urban housing. Public ownership did not increase productivity. The government fell far short of achieving its goal of providing free housing for everyone. The allocation system was neither fair nor efficient. Further, the government experienced severe financial constraints because of the housing expenditure. All of this proved that the public housing system was a complete failure.

The second overhaul of the property institution took place in the late 1970s, when Mr. Deng Xiaoping initiated economic reforms. These changes were based on the belief that public and private ownership were not mutually exclusive. Drawing from the experience of developed economies, Deng was convinced that private ownership could facilitate economic growth more than public ownership. In order to reach a broad consensus, Deng launched a public campaign—"finding truth from facts".

¹⁶⁹ Marx, Carl, *The Communist Manifesto* (Chicago, H. Regnery, 1954), "the theory of the Communists may be summed up in the single sentence: Abolition of private property".

During the campaign, Deng articulated his famous “Cat Doctrine” (a cat is good if it catches mice no matter whether it is black or white). The implication of the “Cat Doctrine” was that the line between private ownership and public ownership was no longer a necessary one. The ideological shift from Marxism to “*Marketism*” heralded a new era in China. Subsequently, the People’s Congress made a series of constitutional changes that gradually recognized the legal status of private property. Against this backdrop, the government began urban housing and land reforms.

As previously discussed, the unique aspect of the housing and land reforms is that housing owners do not own the land underneath their houses. The driving force for the land reform is the government’s desire to attract foreign investment and profit from the sale of land use rights. However, the impact of the land reform on housing reform has been tremendous. The result of the reform is the separation of land use rights and land ownership. After the reform, individuals are not only able to purchase houses, but also can purchase the use rights of the land on which their houses stand for up to 70 years. Although the state still retains land ownership, the land reform has greatly facilitated real estate transactions, and motivated individuals to invest in the real estate market. Another impact of the land reform is that it has also opened up opportunities for developers to obtain land use rights for commercial development. Since land resources in China are extremely limited, commercial developments are usually carried out in populous residential areas. As a result, the allocation of land use rights between private property protection and commercial development has become a controversial issue. However the government is not well prepared for the conflict with private ownership and economic development. Only a few years into the reforms, new homeowners found that their properties were obstacles in the way of economic development. In the unbalanced tug-of-war between individual homeowners and deep-pocketed developers, the government sided with the latter by changing zoning plans to fit commercial development, authorizing forced evictions, deploying judicial police to execute eviction orders, lowering compensation standards, instructing courts not to hear cases involving demolitions, blocking class actions, etc.

Private home owners and commercial developers came into existence at about the same time the land and housing reforms began in China.

They were intended results perceived by the reformers. For the government, housing reforms significantly relieved its burden for providing public housing to urban residents. For residents, it was an opportunity to own a home, a dream quietly cherished by generations. For developers, the reforms created an unprecedented opportunity to profit from construction projects. However, the seemingly win-win-win scenario soon met harsh reality.

Turning away from orthodox Marxism, the current government subscribes to a new ideology—*GDPism*, which means that economic growth takes precedence over any other social goals of the government. Applying *GDPism* to eminent domain, the government gives full backing to commercial real estate development. In order to attracting investment, increase economy growth, and improve national image, the government narrowly construes transaction costs as the sheer costs for developers. Consequently, the value of private property is left out of the equation. In the absence of a system of enforceable property rights, powerless private owners are unfairly forced to bear the cost of economic development.