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Development Hell: Lawsuits that Impede Development

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Development Hell: Lawsuits that Impede Development

INTRODUCTION

Local governments seek to increase the value of their tax base through large-scale urban redevelopment projects to meet the costs of providing services to urban communities. *See Kelo v. City of New London, Conn.*, 545 U.S. 469, 483, 125 S. Ct. 2655, 2665, 162 L. Ed. 2d 439 (2005) (upholding a carefully formulated an economic development plan that…[the City] believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue."). To convert blighted urban areas into sources of tax revenue, local governments assemble land parcels for economic redevelopment through eminent domain. *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (upholding a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing was unrepairable). "Case law establishes that the elimination of blight is a public purpose." *City of N. Kansas City v. K.C. Beaton Holding Co., LLC*, 417 S.W.3d 825, 831 (Mo. Ct. App. 2014); *See Goldstein v. New York State Urban Dev. Corp.*, 13 N.Y.3d 511, 524, 921 N.E.2d 164, 170-71 (2009) ("it is indisputable that the removal of urban blight is a proper, and, indeed, constitutionally sanctioned, predicate for the exercise of the power of eminent domain."); *City of Midwest City v. House of Realty, Inc.*, 2008 OK 28, 198 P.3d 886, 893 (2008) ("We agree with the landowner that blight is the public purpose that constitutionally justifies the subsequent sale of property for private use.").

Prior to conveying these assembled land parcels to developers for redevelopment consistent with the local government's goals, municipal governments can become ensnared in the briar patch of litigation. Local governments need to recognize and understand the motives of the plaintiffs who disrupt redevelopment projects with litigation in order to prevent these lawsuits or to extricate themselves from these cases as quickly as possible.

DISCUSSION

Plaintiffs initiate litigation to derail or delay urban redevelopment projects for two principal purposes: (1) to wield power or (2) to obtain money.

(1) To wield power, meaning:
Do want I want or I'll sue to stop your development from proceeding.

(2) To obtain money, meaning:
Pay me to go away or I'll file suit to increase your costs by delaying your development until you pay me.

I. PLAINTIFFS WIELDING POWER.

There are two types of power wielding plaintiffs: (1) self-styled power brokers and (2) ideological plaintiffs.

A. Self-styled power broker plaintiffs.

Self-styled power brokers are usually unelected individuals, who believe that they are entitled greater influence in the local government's decision making process than many elected officials and government employees. Before an urban redevelopment project is approved or the local government enters into a land disposition and redevelopment agreement with a prospective developer, the self-styled power broker expects that he (or she) will be asked for their assent to and their views of the proposed project. They also expect that they will be asked for their approval of the prospective developer even though the self-styled power broker has no role in the contemplated project, is not competing for the project and holds no official authority in the local government project approval process.

When the local government fails to seek the assent of the self-styled power broker, they will initiate litigation to disrupt or derail the proposed redevelopment project under consideration. *See e.g. 120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore City*, 413 Md. 309, 329, 992 A.2d 459, 471 (2010) (arguing that the court "erred by accepting…that the ultimate authority to approve the LDA was vested in the BOE.").

Even though the substantive grounds alleged in the lawsuit may not be the actual motive for the suit, they are able to bring these claims based on the misguided expansion of taxpayer standing. *See State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 92 A.3d 400, 462-63 (2014), reconsideration denied (May 16, 2014) ("So long as the plaintiffs allege, in good faith, an *ultra vires* or illegal act by the State or one of its officers…such allegations are sufficient to confer taxpayer standing doctrine, so as to entitle the plaintiff to get its foot in the courthouse door and receive potentially a merits hearing (all other things being equal) and determination whether the acts were, in fact, illegal or *ultra vires.*"). Since these lawsuits do not provide remedies that inure to the direct monetary benefit of the plaintiff, they appear to be an attempt to wield authority over the government's decision-making process and to affect the economics of the proposed project. *See State Ctr., LLC*, 438 Md. at __, 92 A.3d at 456 (taxpayers granted "declaratory relief that the governmental action is illegal and *ultra vires* and that the action thus taken should be voided; and injunctive relief to preclude further illegal and *ultra vires* governmental actions that will cause pecuniary harm to their taxes."); *see also Broxton v. Siegelman,* 861 So.2d 376, 385 (Ala.2003) ("[T]he right of a taxpayer to sue is based upon the taxpayer's equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation."); *see also* Comment, *Taxpayers' Actions: Public Invocation of the Judiciary*, 13 Wake Forest L.Rev. 397, 397–98 (1977) ("Recoveries in taxpayers' suits run directly to the government and indirectly to the taxpayers in the form of tax dollar savings and good government.").

Taxpayer standing is permitted to challenge a variety of governmental conduct. *See e.g. Barber v. Ritter*, 196 P.3d 238, 246–47 (Colo.2008); *Smith v. W. Va. State Bd. of Educ.*, 170 W.Va. 593, 295 S.E.2d 680, 683 (1982); *Greater Harbor 2000 v. City of Seattle*, 132 Wash.2d 267, 937 P.2d 1082, 1090–91 (1997); *see generally* Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 Fordham L.Rev. 1263, 1282, 1282 n. 122 (2012).

In Maryland, a taxpayer plaintiff may allege that the government's *ultra vires* or illegal acts may negatively affect the taxpayer's property value or may result in pecuniary loss or a tax increase.

See 120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore, 407 Md. 253, 265, 964 A.2d 662, 668-69 (2009) (to establish taxpayer standing, "a taxpayer need only assert that a municipality or public official engaged in illegal or ultra vires acts and that such acts pose potential pecuniary damage or a tax increase to the taxpayer."). "This requirement has been applied leniently and seems rather easy to meet, particularly in the context of reviewing a trial court's case was brought on behalf of other taxpayers." *State Ctr., LLC*, 438 Md. at __, 92 A.3d at 462.

To allege *ultra vires* or illegal acts by the government, the complaint may assert simply that the local government's process of awarding a project to a developer was an unlawful *ultra vires* delegation of power. *See e.g. 120 W. Fayette St., LLLP*, 407 Md. at 268, 964 A.2d at 670 (holding that the allegation that "the LDA is a public works project that was illegally 'massaged outside the requisite bidding process' provided in Art. VI § 11 of the Baltimore City Charter" sufficient to plead "that a municipality had engaged in illegal and ultra vires acts that could potentially cause…[Plaintiff] pecuniary harm or an increase in taxes"). Alternatively, a plaintiff may allege that the government failed to submit the project for competitive bidding or competitive selection as a public work. *See e.g. 120 W. Fayette St., LLLP*, 413 Md. at 333, 341, 992 A.2d at 474, 479 (granting taxpayer standing for an alleged violation of competitive bidding requirements "to prevent favoritism and collusion" as well as "to eliminate ... government overspending").

To show a special interest distinct from the general public, as required for taxpayer standing, plaintiffs "must demonstrate that injury has or will result." *W. Farms Mall, LLC v. Town of W. Hartford*, 279 Conn. 1, 15, 901 A.2d 649, 658 (2006). The Maryland courts have been lenient in accepting allegations of "potential pecuniary loss." *See e.g. Baltimore Retail Liquor Package Stores Ass'n v. Kerngood*, 171 Md. 426, 429, 189 A. 209, 210 (1937) ("The courts of the State will entertain jurisdiction of suits by citizens and taxpayers for the writ of mandamus, or that of injunction, to correct unlawful action by municipal officers when the action may injuriously affect rights and property of the parties complaining…the interest or injury which will support such a suit is broadly comprehensive**.**"); *Inlet Assocs. v. Assateague House Condo. Ass'n*, 313 Md. 413, 441, 545 A.2d 1296, 1310 (1988) (""[T]he taxpayer plaintiff is not required to allege facts which necessarily lead to the conclusion that taxes will be increased; rather the test is whether the taxpayer reasonably may sustain a pecuniary loss or a tax increase—whether there has been a showing of potential pecuniary damage."). "[I]n the context of taxpayer suits challenging governmental acts for failing allegedly to abide by competitive bidding requirements, this Court has conferred a particularly broad interpretation of potential pecuniary loss." *State Ctr., LLC*, 438 Md. at__, 92 A.3d at 469.

Other courts hold that a plaintiff's allegations of potential pecuniary damage are too speculative or remote to show taxpayer injury. *See Olson v. City of Golden*, 53 P.3d 747, 750-51 (Colo. Ct. App. 2002) (dismissing complaint alleging that the local government conveyed the property to the developer for less than fair value will reduce the local government's revenues from the renewal project causing injury to taxpayers); *but see Barber v. Ritter*, 196 P.3d 238, 247 (Colo. 2008) (holding "that Petitioners have taxpayer standing to challenge the constitutionality of the transfers of money from the special funds to the state's General Fund and the concomitant

expenditure of that money to defray general governmental expense, rather than to defray the cost of services provided to those charged.").

In *W. Farms Mall, LLC, supra.*, the court rejected "the plaintiff's theory of standing [since it was] largely is predicated on the *probability* of a tax increase triggered by the *likelihood* of certain events." *Id.*at 16. The plaintiff failed to demonstrate that "its taxes would increase if the Blue Back Square project were to proceed as planned…" *Id.*; *see e.g. Seymour v. Region One Bd. of Educ*., 874 A.2d 742, 749 (Conn. 2005) ("It is not enough for the plaintiff to show that her tax dollars have contributed to the challenged project .... [T]he plaintiff must prove that the project has directly or indirectly increased her taxes ...." (citing *Seymour v. Region One Bd. of Educ*., 803 A.2d 318 (Conn. 2002))).

In the redevelopment context, when the local government anticipates expending funds to acquire properties through condemnation, taxpayer standing may be sustained since the remedy would potentially decrease the taxpayer's burden. *See Boitnott v. Mayor & City Council of Baltimore*, 356 Md. 226, 234, 738 A.2d 881, 885 (1999) (finding standing based on "the allegation by the petitioners that the City has expended Twenty million dollars in developing Inner Harbor East prior to the present litigation is sufficient allegation of potential pecuniary damage by way of tax increase to withstand a standing challenge.").

The burden on taxpayer plaintiffs to show a risk of monetary loss has been lightened by some courts. Even though the local government may have incurred the land acquisition and relocation expenses years earlier, courts may rely on these expenditures to show potential pecuniary loss or an increase in taxes. *See e.g.120 W. Fayette St., LLLP*, 407 Md. at 268-69, 964 A.2d at 671 (taxpayer standing based on the allegation "that the City offered to deduct up to $10 million from the sale price of the 'Superblock' if Lexington Square agreed to improve the 'Superblock' properties by performing public works on or near them."). In reality, the goal of the redevelopment project is to increase the value of the municipality's tax base, potentially lowering taxes. *See Kerpelman v. Board of Public Works of Md.*, 261 Md. 436, 442–43, 276 A.2d 56, 60 (1971) (failing to allege sufficient injury because "the challenged transactions have-or-will-result in the placing of additional land on the tax rolls which will increase the tax base of the State so that the State taxes paid by [complainant] will actually be reduced as a result of those transactions"). Ironically, the very lawsuit that prevents the redevelopment project from proceeding causes pecuniary loss to the municipality and its taxpayers. *See* Alberto B. Lopez, *Kelo-Style Failings*, 72 Ohio St. L.J. 777, 794 (2011) ("a community stands to lose millions of dollars after property acquired for redevelopment devolves into a large field of weeds").

Courts have invoked statutes of limitation to bar constitutional challenges of redevelopment authority enabling ordinances passed years earlier. *See e.g. Milan Inv. Grp., Inc. v. City of Miami*, 50 So. 3d 662 (Fla. Dist. Ct. App. 2010) ("statute of limitations applied to property owner's challenges to the constitutionality of statutes and ordinances establishing city's downtown development authority."); *Chambers v. Twp. of Neptune*, A-0981-09T2, 2010 WL 3932431 (N.J. Super. Ct. App. Div. Oct. 5, 2010) (challenger failed to raise a substantial constitutional issue to obtain an extension or waiver of the time limit in order to object to redevelopment plan).

Courts have expanded property owner standing to permit challenges of redevelopment by importing neighboring property owner standing concepts from zoning law. *See State Ctr., LLC*, 438 Md. at __, 92 A.3d at 442 ("the principles of property owner standing in Maryland stem from the State's statutory zoning laws, which grant an 'aggrieved person' the right to challenge many zoning actions."); *see also Deerfield v. City of Hampton*, 283 Va. 759, 762, 766, 724 S.E.2d 724, 725, 728 (2012) (applying the "aggrieved person" standard to a city's decision to allow a development of a residential subdivision on a portion of a beach).

This expanded property owner standing is based on the ability to see or hear the purportedly illegal redevelopment. *See Comm. for Responsible Development on 25th Street v. Baltimore*, 137 Md. App. 60, 86, 767 A.2d 906, 920 (2001) ("[T]o be considered an aggrieved party, the complaining property owner must be in 'sight or sound' range of the property that is the subject of his complaint."); *see also Duddles v. City Council of West Linn*, 21 Or. App. 310, 328, 535 P.2d 583, *rev. den.* (1975) (property owner in reasonably close proximity, such as within sight or sound of proposed use of land, should ordinarily have standing to challenge land use decision in writ of review proceeding).

Since large-scale urban renewal projects may encompass many city blocks, the grant of standing to adjoining, confronting or neighboring property owners of a planned urban renewal project creates a universe of property owners with standing each of whom has the power to sue, to delay and, potentially, to derail the project. *See Ray v. Mayor & City Council of Baltimore*, 430 Md. 74, 81, 59 A.3d 545, 549 (2013) ("[a]n adjoining, confronting or nearby property owner is deemed, *prima facie,* to be specially damaged and, therefore, a person aggrieved."); *but see East Thirteenth Street Community Association*, 84 N.Y.2d at 292, 617 N.Y.S.2d 706, 641 N.E.2d 1368 (1994) (holding that condominium boards, tenants and residents of buildings near a parcel of property that the Urban Development Corporation was seeking to take by eminent domain did not have standing to challenge the taking since they were not "the holder[s] of any right, title, interest, lien, charge or encumbrance in real property subject to an acquisition or proposed acquisition"); *City of Sunland Park v. Santa Teresa Servs. Co.*, 2003-NMCA-106, 134 N.M. 243, 253, 75 P.3d 843, 853 ("only persons with an ownership interest capable of being taken or damaged would appear to have standing to raise issues about the basic features of such an action, such as the authority of the condemnor to proceed, the identity of the fact finder, and the description of the property or its value.").

"[A]n owner's lay opinion of decreasing property values and increasing traffic has been considered sufficient for special aggrievement when combined with proximity that is almost as great as in cases where properties are 'adjoining, confronting or nearby.'" *Ray*, 430 Md. at 83, 59 A.3d at 550; *but see Merritt v. City of Warner Robins*, 243 Ga. App. 693, 534 S.E.2d 149, 150 (2000) (holding "that a homeowner's sole opinion as to diminished property value standing alone does not satisfy the aggrieved citizen test for standing and that Georgia law does not recognize a claim for special damages based only upon traffic congestion").

Aggrieved property-owner standing to challenge a redevelopment project is contingent on what constitutes a "land use decision." *See 120 W. Fayette St., LLLP v. Mayor of Baltimore*, 426 Md. 14, 30-31, 43 A.3d 355, 365 (2012) (the grant of tax-payer or adjacent landowner standing is limited to a "challenge to or pursuant to a land use decision,…[in which] a party was seeking to

challenge or enforce was either an ordinance, variance, reclassification, or special exception provided by a local zoning body, or a permit or license issued by an administrative agency.").

Even if the local government prevails in the litigation, plaintiffs seeking a declaratory judgment are often able to avoid dismissal and proceed to the discovery phase of litigation where they may uncover facts that may present the local government in an unflattering light, discourage potential investors and financing sources and, at a minimum, significantly delay the project. *See e.g. Smith v. City of St. Louis*, 395 S.W.3d 20, 24 (Mo. 2013) (declaratory judgment action alleging that city's redevelopment ordinances were void reversed).

B. Ideological plaintiffs.

The motivation for the ideological plaintiff's lawsuit is usually the substantive grounds raised in the suit. For example, ideological plaintiffs who raise claims based on environmental contamination and historic preservation, may legitimately seek to protect these interests on behalf of the community. *See e.g. Neighborhood Dev. Corp. v. Advisory Council on Historic Pres., Dep't of Hous. & Urban Dev., City of Louisville*, 632 F.2d 21, 24 (6th Cir. 1980) (Commonly shared "deprivation of the use of an aesthetic resource is…constitutes injury-in-fact" sufficient for standing). Although property values are a constitutionally protected interest, these plaintiffs are not granted standing unless they can show more than a diminution in value. *See Dupont Circle Citizens Ass'n v. Barry*, 455 A.2d 417, 423 (D.C. 1983) (challenged approval of a construction permit for a building does not threaten to affect any constitutionally protected interests in a concrete manner based on speculative diminution in property values and an alleged blight on the character of the historic district). More often in the urban redevelopment context, the plaintiffs raising these issues are, in fact, self-styled power brokers, economic competitors or plaintiffs seeking payment.

II. PLAINTIFFS SEEKING MONEY.

A. Plaintiffs alleging Direct Harm.

When local governments attempt to acquire multiple properties for urban redevelopment, "[h]old-outs pose a significant problem in public projects[.]" *Makowski v. Mayor & City Council of Baltimore*, 81 SEPT.TERM, 2013, 2014 WL 2853818*10 (Md. June 24, 2014). "Hold-outs" are "property owners [who] resist selling, wanting to be the last owner of a parcel or among the last, in order to be able to demand higher prices for their property because they are holding up a large project." *Mayor & City Council of Baltimore City v. Valsamaki*, 397 Md. 222, 257 n.18, 916 A.2d 324, 345 n. 18 (2007). "[W]hen the government seeks to address a problem such as community blight on a comprehensive basis, it, necessarily, needs to acquire multiple properties. Because of the democratic process and "the nature of public scrutiny", the need to acquire properties within a given area becomes public knowledge." *Makowski,* 2014 WL 2853818*10; *See* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence,* 92 Cornell L.Rev. 1, 5 (2006). "Because the public, and particularly, the owners of the properties the government seeks to acquire, have knowledge of the government's plans, the sovereign is placed at a "severe disadvantage" when it attempts to negotiate for the property's acquisition." *Makowski,* 2014 WL

2853818*10; *See* Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?,* 64 Ohio St. L.J. 451, 468–69 (2003). "[A] legal win gives holdouts a virtual injunction against forcible acquisition; therefore, such property owners can hold out for a price that far exceeds the fair market value of the property." Alberto B. Lopez, *Kelo-Style Failings*, 72 Ohio St. L.J. 777, 791 (2011).

Redevelopment of blighted neighborhoods can be delayed by "holdout" businesses such as adult entertainment businesses litigating alleged violations of their constitutional rights. *See e.g. In re Condemnation by Urban Redevelopment Auth. of Pittsburgh*, 590 Pa. 431, 436, 913 A.2d 178, 181 (2006) (Lone holdout adult-content movie theater owner alleging a violation of First Amendment rights litigated urban redevelopment authority's exercise of eminent domain over blighted three block area for 9 years).

Maryland law, like many jurisdictions, permits "quick-take actions ...to address the [holdout] situation." *Valsamaki,* 397 Md. at 257 n. 18, 916 A.2d at 345 n. 18; *See e.g. Duk Hea Oh v. Nat'l Capital Revitalization Corp.*, 7 A.3d 997 (D.C. 2010) (Economic development agency complied with statutory guidelines for executing a quick-take condemnation, as required for immediate possession of owner's property and an order to vacate); *cf. also Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1231 (C.D.Cal.2002) ("Eminent domain can even be an effective tool against free-riders who hold-out for exorbitant prices when private developers are attempting to assemble parcels for public places...."). In New York, local governments may take possession under a writ of assistance without a showing of necessity. *See In re City of New York,* 41 Misc. 3d 818, 975 N.Y.S.2d 578, 579-80 (N.Y. Sup. Ct. 2013) ("A showing of necessity for possession of the property by a condemnor is not required before a writ of assistance may be granted"). "To rule otherwise, would allow a claimant to delay the condemnor's exercise of its right to gain possession of the property." *Id.*

Churches can delay eminent domain by quick-take action. An order of immediate possession of a paved, lighted, and fenced-in parking lot used by the parishioners of an adjacent to church was vacated in *Order of Friars Minor of Province of The Most Holy Name v. Denver Urban Renewal Auth.*, 186 Colo. 367, 369, 527 P.2d 804, 805 (1974) (*en banc*). Since the church was in a high-crime area slated for urban renewal, the church's elderly parishioners would cease attending church unless the parking lot could be preserved.

B. Plaintiffs alleging indirect harm.

Redevelopment creates potential plaintiffs who claim that their personal or property rights are specially and adversely affected even though they may be far removed from the site of the redevelopment project. Plaintiffs claim economic harm caused by the new competing businesses in the project area. *See e.g. State Ctr., LLC*, 438 Md. at __, 92 A.3d at 450 (plaintiffs alleged that "the prophecy of lost customers and tenants due to the competition from the subsidized State Center Project are sufficient…to confer property owner standing."); *see also W. Farms Mall, LLC*, 279 Conn. at 7, 901 A.2d at 653 (municipal defendants asserted "that the plaintiff maliciously had commenced the present action solely for the purpose of delaying the Blue Back Square project so as to prevent competition").

Economic harm from a government subsidized project does not provide aggrieved person standing. *See Bryniarski v. Montgomery Cnty. Bd. of Appeals*, 247 Md. 137, 145, 230 A.2d 289, 295 (1967) ("A person whose sole reason for objecting to the board's action is to prevent competition with his established business is not a person aggrieved."). Federal, state and local governments provide credits, grants and subsidies to urban renewal projects, such as, Community Development Block Grants, Maryland's Community Development Administration and Tax Increment Financing which give the developer a competitive advantage. *See Great Rivers Habitat Alliance v. City of St. Peters*, 384 S.W.3d 279, 290-91 (Mo. Ct. App. 2012), *reh'g and/or transfer denied* (Oct. 2, 2012), *transfer denied* (Dec. 18, 2012) (affirming legislative finding of blight, the court concluded that the Redevelopment Area had not been subject to growth and development through investment by private enterprise and was not reasonably anticipated to be developed without the adoption of tax increment financing was, at minimum, fairly debatable"); *see also Haugland v. City of Bismarck*, 2012 ND 123, ¶ 38, 818 N.W.2d 660 (2012) (city use of tax increment financing ultimately increases the tax base for property within the municipality and provides improvements for a designated area benefitting all the inhabitants of the municipality).

C. Developer Plaintiffs.

Developer plaintiffs seek title to the government's land acquired for redevelopment as soon as possible while doing as little as possible. When the government does not convey title to the developer, they will file suit against the municipality asserting two species of claims: (1) equitable claims, like an injunction, and (2) claims at law for monetary damages. Equitable claims create a cloud on title to property, effectively preventing the city from securing a replacement developer or financing for the development. Without a claim to the title of the property, the government can secure a replacement developer, so that the development can proceed despite the pending claim for damages.

The developer plaintiff can increase the government's costs by delaying the project through litigation. The government money used to assemble the land is tied up in the unsold land. The local government may incur ongoing carrying costs, such as the cost of repeatedly cleaning and boarding the blighted properties. Instead of increasing the value of the city's tax base, the vacant blighted properties decrease the value of adjoining landowner's properties, further damaging the tax base. Importantly, the delay of the project damages the city's credibility with the community to whom it promised jobs, economic prosperity and lower taxes. *See Kelo*, 545 U.S. at 484, 125 S. Ct. at 2665 ("Promoting economic development is a traditional and long-accepted function of government.").

Generally, a local government will not convey title to the land to the developer until the local government receives adequate assurance that developer will perform under the parties' agreement. These agreements attempt to create objective conditions precedent for closing the sale of the land. The most significant of these conditions is securing financing for the project. Developers dispute what documentation is adequate to show financing for the project. The local government may expect, for example, evidence of development financing for closing such as the standard commitment letters issued by the Federal Department of Housing and Urban Redevelopment, Federal Housing Administration or Maryland's Community Development

Administration. *See e.g.* 24 C.F.R. § 970.5 ("Firm financial commitment means a commitment that obligates a creditable source, lender, or equity provider, to the lending or equity investment of a specific sum of funds to be made on or before a specific date(s) and may contain contingencies or conditions that must be satisfied by the borrower (or entity receiving equity investments) before the closing of the transaction. The condition of a firm commitment must be that it is enforceable by the borrower (or entity receiving the equity investment) upon the satisfaction of all contingencies or conditions."); *see also* COMAR §§ 05.03.02.15; 05.05.05.20 or 05.12.01.19. Whether there is documentation less than a "commitment letter" that could be acceptable to the local government is often a contested issue.

Whether the developer's proffered evidence of financing to construct the development, in fact, obligates the lender to make the loan is also contested. The court reversed a one million dollar judgment entered against the city in *City of Hollywood v. Diamond Parking, Inc.*, 950 So. 2d 472, 473 (Fla. Dist. Ct. App. 2007) for failure to give the developer notice and an opportunity to cure defects in the financing commitment letter submitted by the developer to the city. The court reversed the judgment against the city because the developer failed to disclose to the city that the lender had withdrawn the financing commitment to the developer prior to closing. *Id.* at 474.

After developers invest millions of dollars in creating plans and drawings as well as securing permits and other authorizations to meet the conditions to secure financing, they often encounter difficulties obtaining project financing and ask the government for an extension of time to satisfy this condition. Despite the developer's investment of nearly $2,500,000 for design, development planning and market surveys in *Butler Block, LLC v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 242 Or. App. 395, 255 P.3d 665 (2011), the local government terminated the parties' agreement for the developer's failure to submit "evidence, reasonably satisfactory…that construction financing for the Developer Improvements has been or can be obtained." *Id.* at 402, 255 P.3d at 669. The government must balance the length of the delay requested by the developer with the length of time necessary to secure a replacement developer, who could secure project financing.

When the local government declines to grant a developer an extension of time to satisfy the conditions precedent for closing, such as obtaining construction financing, the developer is likely to initiate litigation. For agreements executed prior to 2008, developers have argued under contract provisions, such as "*force majeur*" clauses, for extensions of time for the developer's failure to perform for causes beyond their control, that the 2008 financial crisis excuses their inability to obtain financing.

The 2008 financial crisis should not excuse a developer's failure to meet its obligation to obtain financing or other capitalization adequate for construction of the project. In *Butler Block, LLC, supra.*, the developer argued that the local government entity anticipatorily breached the development agreement by refusing to grant the developer "an extension of time to perform when it was unable to obtain 'construction financing' in late 2007 'due to the unexpected collapse' of the 'global credit' and Portland 'real estate markets.'" *Id.* at 397, 255 P.3d at 666-67. The court held that the local government entity's failure to grant an extension to the developer was not an anticipatory repudiation of the parties' agreement. *Id.* The risk that commercial lenders might not provide a developer with the financing needed for construction of the project is a foreseeable risk that a developer accepts by entering into an agreement.

Local governments often seek to limit their financial exposure for the developer's expenses by including a "damages cap" provision in a land disposition and redevelopment agreement. Ironically, these provisions, designed to protect the City from liability for the developer's expenses, may permit a court to issue an injunction preventing the development project from proceeding. These damage limitation clauses create "unrecoverable losses," which constitute irreparable harm justifying the issuance of an injunction. *See Nat'l Ass'n of Mortgage Brokers v. Bd. of Governors of Fed. Reserve Sys.*, 773 F. Supp. 2d 151, 180 (D.D.C. 2011) ("Economic harm may qualify as irreparable, however, where a plaintiff's alleged damages are unrecoverable."). When the developer's economic losses are recoverable, they do not constitute irreparable harm, so an injunction would be less likely.

CONCLUSION

Understanding the motives of plaintiffs who seek to disrupt or prevent local government redevelopment projects that are designed to converted blighted urban areas into productive sources of local government tax revenue permits more informed decision-making in the conduct of ensuring litigation. Emphasis on public participation when considering the design of redevelopment projects may allow the municipality to avoid litigation with ideological plaintiffs as well as plaintiffs alleging indirect harm from the proposed project. Purchases of the properties within the project area by an undisclosed principal are an effective method in limiting the "hold out" problem. Initiating inquiries to purchase properties does not necessarily raise suspicion in today's market.

Local governments should expect aggressive litigation by the self-styled power broker with the full exercise of appellate rights. This litigation reflects a challenge to the political authority that cannot be prevented or resolved by counsel short of judgment.

Litigation with developers can be reduced by breaking redevelopment projects into smaller separately financed projects that provide a greater likelihood that the developer will be able to obtain financing. Drafting unambiguous conditions precedent to closing that are based on objective standards is critical to litigating land sale and redevelopment agreements successfully.

As seen above, local governments cannot depend on a sympathetic hearing from trial courts. While the local government may prevail eventually, the plaintiff will have achieved its goal of delaying and disrupting the redevelopment project. Even though the Supreme Court's 2005 decision in *Kelo, supra.* upheld the city's use of eminent domain to bulldoze a residential neighborhood, the razed 70 acre peninsula of land remains vacant today as a result of the city's dispute with the developer over whether it has satisfied the contractual conditions for financing. *See* Paul Choiniere, Take the Steps to pursue Fort Trumbull dreams. The Day (New London), December 8, 2013.