

NEVADA’S RESIDENTIAL REAL ESTATE CRISIS: LOCAL GOVERNMENTS AND THE USE OF EMINENT DOMAIN TO CONDEMN MORTGAGE NOTES

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INTRODUCTION

The real estate crisis has profoundly impacted homeowners and communities throughout the country.¹ Individual homeowners have lost substantial wealth as the value of their homes fell below the amount owed on the mortgage, and many families have lost homes to foreclosures and short sales. Communities have suffered the impact of vacant homes,² both on the quality of life in neighborhoods, and on the value of other homes in the community.³ In the

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¹ Scholars have developed a variety of economic and regulatory explanations for the housing bubble and collapse. This Essay does not attempt to advance that conversation. Instead, this Essay describes one new attempt to address the negative impacts on homeowners and communities. For a recent, comprehensive description of the various explanations for the mortgage crisis, including the argument that the housing bubble was driven more by supply-side than demand-side forces, see Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177 (2012).

² John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 633 (2008).

³ See Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POL’Y DEBATE 57, 58 (2006) (finding that foreclosures reduced nearby property values as a whole by an average of \$159,000 per foreclosure in Chicago during 1997 and 1998.); see also DEBBIE BOCIAN ET AL., COLLATERAL DAMAGE: THE SPILLOVER COSTS OF FORECLOSURES, CENTER FOR RESPONSIBLE LENDING 2 (2012) (finding that during the years 2007 to 2011, \$1.95 trillion in property value has been lost or will be lost by residents who live near foreclosures,

midst of this upheaval, governments at all levels—local, state, and federal—have developed strategies and programs to help their constituencies cope with the crisis.⁴

Many homeowners, meanwhile, are still struggling to pay the mortgage. If a house is “underwater,” a homeowner must consider both the economics and the morality of walking away from a house with a mortgage that far exceeds its value, a practice known as “strategic default.”⁵ Nevadans are among those most hard-hit by the mortgage crisis and have increasingly found strategic default an acceptable option.⁶ At the same time, however, most Nevadans still see homeownership as a key feature of the American dream.⁷ And despite the sometimes disappointing results of previous government attempts to mitigate the effects of the housing crisis,⁸ fifty-five percent of Nevadans recently polled continue to support government assistance in this area.⁹

This Essay describes a novel plan to address the effects of the housing bubble and collapse on homeowners and cities. Under this approach, local governments would use the power of eminent domain to condemn and purchase mortgage notes. Most, if not all, of these notes would be ones that originally financed the purchase of a home and are now burdened by a mortgage whose amount far exceeds the present value of the home. After the exercise of eminent domain, the local government would own the note. The borrower could continue to make the same monthly payments, paid to the local government instead of the previous creditor. In the alternative, the borrower could refinance the

over one-half of this loss is associated with communities of color, and that, on average, families affected by nearby foreclosures have already lost or will lose \$21,077 in household wealth).

⁴ Other state and local interventions include creating outreach and counseling programs, providing financial assistance to individual borrowers, facilitating legal assistance to homeowners in the foreclosure process, reaching agreements with banks including settlements, legislating moratoria on foreclosures, cracking down on foreclosure “rescue” businesses, and creating mediation processes. See Frank S. Alexander et al., *Legislative Responses to the Foreclosure Crisis in Nonjudicial Foreclosure States*, 31 REV. BANKING & FIN. L. 341, 357-65 (2011).

⁵ See Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 972 (2010) (arguing that many underwater borrowers do not strategically default to avoid the shame associated with foreclosure and because of a fear of the consequences of foreclosure).

⁶ See, e.g., Buck Wargo, *In Nevada, 23 Percent Who Lost Homes to Foreclosure Could Afford Payments* (Jan. 25, 2011, 9:22 AM), <http://www.lasvegassun.com/news/2011/jan/25/nevada-23-percent-who-lost-homes-foreclosure-could/>; see also NEV. ASS'N OF REALTORS, NEVADA'S FACE OF FORECLOSURE: AN IN-DEPTH LOOK AT NEVADA'S HOUSING CRISIS 4 (2012), available at <http://www.faceofforeclosure.com/images/SGS-NVAR-12-FoFReport3-WebQuality-FINAL.pdf> (“Forty-five percent of all Nevada residents surveyed said strategic default is an acceptable, logical financial decision while 45% said homeowners should not strategically default and they have a legal and ethical obligation to pay their mortgage if they are able.”).

⁷ *Id.* at 10 (noting that seventy-nine percent of people who had experienced foreclosure think housing is a key feature of the American Dream).

⁸ Fifty-two percent of Nevada residents believe government foreclosure prevention programs are not really having an impact. *Id.*

⁹ *Id.* at 14. To illustrate, however, the diversity of opinion and the difficulty of this issue, thirty percent of homeowners *who have experienced foreclosure* say that government should *not* step in to help. *Id.*

note in the private market based on current housing market values.¹⁰ After refinancing based on current housing values, the value of the house could exceed the amount borrowed—thereby changing its status from “underwater” to a house with some equity. Moreover, the borrower would most likely pay less in monthly mortgage payments because those payments would be based on a lower housing value and a resulting lower mortgage loan.

A handful of local governments around the country—including San Bernardino County,¹¹ and the cities of North Las Vegas,¹² Sacramento,¹³ Berkeley,¹⁴ and Chicago¹⁵—have considered or are considering adopting this eminent domain approach to mortgage notes. Many more have probably considered the possibility, though with less resulting media coverage. Not surprisingly, the idea has been controversial. Some of the discussion covers ground familiar to debates about eminent domain: whether the government is intruding into an area best addressed by the private market, whether appropriate compensation is being given to the underlying property owners, and whether the public judgment of a local government has been overwhelmed by private interests and corporate agendas.¹⁶

Much of the concern about this application of eminent domain arises in response to the traditional use of eminent domain, which typically involves the

¹⁰ See *FAQ*, MORTGAGE RESOLUTION PARTNERS, <http://mortgageresolutionpartners.com/faqs> (last visited May 2, 2013).

¹¹ See Mark Muckenfuss, *San Bernardino: County Steps Forward on Housing Idea*, PRESS-ENTERPRISE (June 30, 2012, 2:52 PM), <http://www.pe.com/local-news/san-bernardino-county/san-bernardino-county-headlines-index/20120630-san-bernardino-county-steps-forward-on-housing-idea.ece>. San Bernardino later declined to adopt the plan. See Alejandro Lazo, *San Bernardino County Abandons Mortgage Plan*, L.A. TIMES (Jan. 25, 2013), <http://articles.latimes.com/2013/jan/25/business/la-fi-eminent-domain-20130125>.

¹² Chris Sieroty, *North Las Vegas to Consider the Use of Eminent Domain to Save Homes*, LAS VEGAS REV.-J. (Mar. 6, 2013, 2:24 AM), <http://www.reviewjournal.com/business/north-las-vegas-consider-use-eminent-domain-save-homes>.

¹³ See Hudson Sangree, *Sacramento Area Officials Explore Using Eminent Domain to Aid Underwater Homeowners*, SACRAMENTO BEE (Aug. 11, 2012, 12:00 AM), <http://www.sacbee.com/2012/08/11/4715792/sacramento-area-officials-explore.html>.

¹⁴ See Andrew S. Ross, *Eminent Domain Plan Gaining Support*, S.F. CHRON. (July 31, 2012, 4:58 PM), <http://www.sfgate.com/business/bottomline/article/Berkeley-eyes-eminent-domain-for-mortgages-3751091.php>.

¹⁵ See Micah Maidenber, *Alderman Wants To Explore Fighting Foreclosures with Eminent Domain*, CHICAGO REAL ESTATE DAILY.COM (July 30, 2012), <http://www.chicagorealestate.com/article/20120730/CRED03/120739989/alderman-wants-to-explore-fighting-foreclosures-with-eminent-domain>.

¹⁶ See, e.g., Steven Greenhut, *Eminent Domain is Bad Ploy for Underwater Mortgages*, BLOOMBERG.COM (June 28, 2012, 3:30 PM), <http://www.bloomberg.com/news/2012-06-28/eminent-domain-is-bad-ploy-for-underwater-mortgages.html> (arguing that compensation to mortgage holders under eminent domain would be insufficient, the market can address this problem on its own, large financiers of the eminent domain project would benefit at the expense of smaller investors who could purchase individual homes at short sale and in foreclosure, and private firms may be less likely to lend in these areas in the future); Felix Salmon, *Why You Can't Use Eminent Domain to Buy Performing Mortgages*, REUTERS (July 9, 2012), <http://blogs.reuters.com/felix-salmon/2012/07/09/why-you-cant-use-eminent-domain-to-buy-performing-mortgages/> (supporting the idea of using eminent domain to buy defaulted properties, but opposing Mortgage Resolution Partners' idea of buying the mortgages).

taking of *real estate*. The overwhelming majority of legal precedent, as well as common wisdom about the propriety of eminent domain, is shaped by its application to real property. We are usually concerned about the taking of a house,¹⁷ the propriety and viability of a proposed redevelopment project,¹⁸ or the loss of a community.¹⁹ These applications of eminent domain to *tangible* property have, understandably, shaped the evolution and criticism of the doctrine. Moreover, the underlying tangible property typically has significant personal value to the owner, magnifying the intensity of the owner's response and the level of public disapproval.

Conversely, this proposed use of eminent domain involves the taking of *mortgage notes*. Here, the object of the eminent domain action is a piece of paper, a note held by faceless corporate investors.²⁰ These notes are not physically held in a vault or at the local bank, but in securitized trusts.²¹ There is no compelling story to tell of raising children in a home, or of the dislocation of long-time residents of a community. Thus, the absence of an emotional, fact-driven narrative might remove some of the long-standing objections to the use of eminent domain in this novel context.

¹⁷ Susette Kelo was the owner of a small pink house in New London, Connecticut that was seized using the power of eminent domain, and a plaintiff in the 2005 Supreme Court case, *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁸ See, e.g., Audrey G. McFarlane, *Rebuilding the Public-Private City: Regulatory Taking's Anti-Subordination Insights for Eminent Domain and Redevelopment*, 42 IND. L. REV. 97, 97 (2009).

¹⁹ Eminent domain "can entail, as it did in this case, intangible losses, such as severance or personal attachments to one's domicile and neighborhood and the destruction of an organic community of a most unique and irreplaceable character." *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 481 (Mich. 1981), *overruled by* *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004). See also Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1006 ("The notoriety [of *Poletown*] stemmed from the massive scale and seeming callousness of Detroit's use of eminent domain: destroying an entire neighborhood and condemning the homes of 4,200 people, as well as numerous businesses, churches, and schools so that the land could be transferred to General Motors for the construction of a new factory.").

²⁰ The nature of the property—a note within a securitized bundle of notes—is another troublesome feature of the debate. It is a hard enough task to determine whether the use of eminent domain is legal or wise. Securitization adds another complication, both because it is complex and because it adds several layers of confusion in determining who owns the underlying property—the note. See, e.g., Roy D. Oppenheim & Jacquelyn K. Trask-Rahn, *Deconstructing the Black Magic of Securitized Trusts: How the Mortgage-Backed Securitization Process Is Hurting the Banking Industry's Ability to Foreclose and Proving the Best Offense for a Foreclosure Defense*, 41 STETSON L. REV. 745 (2012); Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1 (2011) (examining the problems created by mortgage securitization).

²¹ Levitin & Twomey, *supra* note 20, at 11. ("The traditional portfolio lending relationship . . . is now the exception in the home mortgage market. Instead, mortgages are generally financed through securitization. Securitization is a financing method involving the issuance of securities against a dedicated cashflow stream, such as mortgage payments, that is isolated from other creditors' claims. Securitization links consumer borrowers with capital market financing, potentially lowering the cost of mortgage capital. It also allows financing institutions to avoid the credit risk, interest-rate risk, and liquidity risk associated with holding the mortgages on their own books.").

Like many states, Nevada was especially hard hit by the mortgage crisis. This Essay focuses on Nevada law in particular, however, because Nevada was one of several states that enacted strident legislative and constitutional reforms in the wake of the Supreme Court's decision in *Kelo v. City of New London*.²² Despite these reforms, however, there is no indication that the public or the legislature considered the condemnation of *mortgage notes* in making changes to Nevada law following *Kelo*.²³ Similarly, while there was a national conversation between 2005 and 2010 about how states ought to respond to the *Kelo* decision, these conversations focused on the traditional use of eminent domain power in regards to real estate, not the condemnation of mortgage notes.²⁴ Given this background, Nevada cities might now wonder whether condemning mortgage notes is a proper exercise of their eminent domain power.

While local governments have many incentives to act to help individual homeowners as well as entire communities in responding to the mortgage crisis, local governments are understandably risk averse.²⁵ They may question whether they have the authority to condemn mortgage notes under the applicable statutes and, if so, whether the condemnation is a valid public use. I believe the answer to both questions is "yes."

This is a complex topic, and one that would benefit from a book-length treatment exploring the history of eminent domain, its past applications by local governments, and a detailed treatment of the mortgage securitization market. My goal in this Essay is considerably more modest. Though there are significant policy debates surrounding this use of eminent domain, this Essay does not attempt to discuss, in detail, the pros and cons of local intervention. Instead, the Essay takes a decidedly pro-local stance and supports intervention by local governments. This approach is premised, in part, on the conclusion that state legislatures have not considered and therefore have not foreclosed local action and, in part, on the observation that while state and national actors have discussed and instituted measures to ameliorate the effects of the housing crisis on individuals and communities, local governments have had relatively fewer opportunities to create meaningful change in this area. Although this Essay does not elaborate on some of the details of the obstacles to local governments using eminent domain to condemn mortgage notes, it notes the arguments and presumes their significance: no governmental entity has used eminent domain to condemn mortgage notes before, traditional concerns about the use of eminent domain still affect the conversation, and precisely how the financial sector

²² See Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 *FORDHAM URB. L.J.* 1119, 1158 (2011); see generally Marc Mihaly & Turner Smith, *Kelo's Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 *ECOLOGY L.Q.* 703 (2011).

²³ For a recent description of Nevada's eminent domain law, see Mark F. Bruce & Jonathan D. Shipman, *A Quick Review of Takings Law in Nevada in the Wake of Kelo*, Pappas and the People's Initiative to Stop the Taking of our Land, 20 *NEV. LAW.*, Jan. 2012, at 21.

²⁴ See Mihaly & Smith, *supra* note 22, at 707–08.

²⁵ Susan Rose-Ackerman notably described this limitation to local innovation and experimentation stating that there is no property right in local government innovation. Therefore, local governments will find it easier to copy successful efforts and local government officials will find copying a safer path for reelection. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 *J. LEGAL STUD.* 593, 604–05 (1980).

would be affected and how it would react remain real questions. I remain hopeful, however, that local governments will choose to engage this national housing issue because of the potential this intervention has for breaking through the housing market impasse in many communities.

To begin, Part I of this Essay will discuss the development of eminent domain law in the state of Nevada, both before and after the Supreme Court's landmark decision in *Kelo v. City of New London*. Specifically, the development of eminent domain law in Nevada resulted from a backlash to the Court's interpretation of public use and was an attempt to restrict the government's use of the doctrine to take private property. Next, this section will examine the authority of cities to exercise eminent domain power generally, as well as the extent of this authority to condemn mortgage notes. Part II will then explain why this novel use of the doctrine of eminent domain is appropriate at the local level and why cities and other municipalities are better suited than the federal government to use the power of eminent domain to assist struggling homeowners.

I. EMINENT DOMAIN LAW

A. *Reaction to the Kelo Decision in Nevada*

The eminent domain doctrine is deceptively easy to state—private property shall not be taken for public use without just compensation.²⁶ Moreover, the term “public use” had been broadly construed and relatively stable for the twenty years preceding the 2005 Supreme Court decision in *Kelo v. City of New London*.²⁷ During that time, the public use requirement could be satisfied by virtually any declaration by a local, state, or federal legislative body that a proposed use of eminent domain would result in some social or economic public benefit, including mere economic development.²⁸ Though this definition was tested in legislatures and courts before *Kelo*, lower court decisions—particularly those applying the U.S. Constitution—supported this broad view.²⁹

Despite its expansive definition, however, the use of eminent domain was neither easy nor uncontroversial before *Kelo*. State courts struggled with vari-

²⁶ *Kelo v. City of New London*, 545 U.S. 469, 496 (2005).

²⁷ In *Kelo*, the city of New London used eminent domain to acquire a number of parcels, including the home of Susette Kelo, to facilitate the development of a mixed-use office, retail, and residential center. The city's justification for using eminent domain rested on the potential economic development benefits of a successful center. The U.S. Supreme Court upheld this use of eminent domain for economic development, but the mixed-use development was never built. *Id.* at 489–90.

²⁸ See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 63–65 (1986). This broad view of public use supports the view that the legislature's determination of public use should be given great deference by courts. *Id.*

²⁹ Two cases I use in my Property class to demonstrate this principle are *Berman v. Parker*, 348 U.S. 26, 33 (1954) and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 231–32 (1984). In *Berman*, the Court held that “the concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary.” *Berman*, 348 U.S. at 33. In *Midkiff*, the Court affirmed the Hawaii legislature's conclusion that using eminent domain to address limited land ownership in the state was a valid public use. *Midkiff*, 467 U.S. at 231–32.

ous legal and policy implications of the doctrine, including the use of economic development as the rationale to support public use.³⁰ One noteworthy, and widely-discussed, example of this struggle occurred in a Michigan Supreme Court case upholding the bulldozing of an entire community to create an automobile plant.³¹ While the majority emphasized the project's significant public purpose,³² the dissent highlighted the project's effect on the neighborhood's "elderly, mostly retired" residents³³ and the pressure General Motors put on the city of Detroit to complete the project.³⁴

Although *Kelo* provided some guidance to lower courts when it reaffirmed a broad interpretation of public use in a 5–4 decision,³⁵ the decision also ignited a national backlash in response to its holding that the government could take property from one private entity and transfer it to another private entity under the guise of eminent domain and economic development.³⁶ Popular opinion seemed largely aligned with Justice O'Connor's observation in *Kelo* that, by adopting such a broad view of eminent domain, "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."³⁷

This national eminent domain conversation is crucial to understanding the development of Nevada eminent domain law. Before 2005, Nevada law reflected a commonly held, broad view of public use. The Nevada Supreme Court, as recently as 2003, had upheld a broad interpretation of public use that included economic development, stating that "[t]he Nevada Legislature has clearly defined economic redevelopment as a public purpose."³⁸ Similarly, before 2005, the Nevada Constitution contained a short and fairly typical description of eminent domain:

Sec. 8. Rights of accused in criminal prosecutions; jeopardy; rights of victims of crime; due process of law; eminent domain.

...

Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made.³⁹

³⁰ The Nevada Supreme Court, for example, upheld the taking of property in downtown Las Vegas for the construction of a parking garage for the growing Fremont Experience project. *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 11–12 (Nev. 2003).

³¹ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458–59 (Mich. 1981), *overruled by* *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

³² "We hold this project is warranted on the basis that its significance for the people of Detroit and the state has been demonstrated." *Id.* at 460.

³³ *Id.* at 470 (Ryan, J., dissenting).

³⁴ *Id.* at 481. "Virtually the only discordant sounds of dissent have come from the minuscule minority of citizens most profoundly affected by this case, the Poletown residents whose neighborhood has been destroyed." *Id.* at 482.

³⁵ *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

³⁶ See, e.g., George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45, 48 (2008).

³⁷ *Kelo*, 545 U.S. at 503 (O'Connor, J., dissenting).

³⁸ *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 5 (Nev. 2003) (upholding use of eminent domain).

³⁹ NEV. CONST. art. I, § 8, cl. 6.

After the *Kelo* decision in 2005, however, in response to concerns about government overreaching through eminent domain actions, as well as through other, more insidious land use regulations, eminent domain opponents led successful efforts across the nation, including in Nevada, to amend state constitutions and enact legislation to restrict the practice.⁴⁰ In Nevada, the suggested amendments were among the most restrictive in the nation, with significant proposed changes to both the state statute and the state constitution.⁴¹ A successful ballot initiative (the People's Initiative to Stop the Taking of Our Land or "PISTOL") was passed by voters in 2006 and 2008 and amended the Nevada Constitution to add Section 22 to Article 1. The amendment stated that "[p]ublic use shall not include the direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party."⁴² This amendment survived a court challenge⁴³ as well as later attempts at modification by the legislature and others⁴⁴ who were concerned that the amendment was overly restrictive.⁴⁵ Its survival reflects the strong sentiment—held by many legislators and the general public—against the traditional use of eminent domain.

B. Authority and Public Use

Unlike the traditional use of eminent domain, which prohibits private-to-private transfers, the condemnation of mortgage notes appears viable under

⁴⁰ Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2103–04 (2009) (noting that "the majority of the newly enacted post-*Kelo* reform laws are likely to be ineffective" and offering "a tentative explanation for the often ineffective nature of post-*Kelo* reform: widespread political ignorance that enables state and federal legislators to pass off primarily cosmetic laws as meaningful reforms"); See also Andrew P. Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to Kelo*, 17 SUP. CT. ECON. REV. 237, 244 (2009).

⁴¹ Nevada received a B+ by the property-rights oriented Castle Coalition and would likely have received an A if the Constitutional amendment had been finalized by the time of the Castle Coalition report. CASTLE COAL., 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *Kelo* 32 (2007), available at http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf.

⁴² NEV. CONST. art. 1, § 22, cl. 1.

⁴³ The PISTOL initiative survived a court challenge that involved more than one subject. The court merely struck the portions of the initiative that did not address eminent domain directly. *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 141 P.3d 1235, 1250 (Nev. 2006).

⁴⁴ The Amendment stated that property condemned by eminent domain must be put to a valid public use in five years or the ownership would revert to the original owner. *Id.* at 1239. Transportation officials argued that the short five-year window would be insufficient for road projects and argued for a fifteen-year window. See *Minutes of the S. Comm. on Judiciary*, 2007 Leg., 74th Sess. 8–9 (Nev. 2007).

⁴⁵ In 2007, state and local legislatures worked with the PISTOL ballot initiative authors to create an alternative constitutional amendment that would, in part, soften some of the original PISTOL initiative provisions first approved by voters in 2006. See LEGISLATIVE COUNSEL BUREAU, SUMMARY OF LEGISLATION, 74th Sess., at 151–52 & 207 (Nev. 2007) (describing Assembly Bill 102 to amend the Nevada Revised Statutes and Assembly Joint Resolution 3 to amend the Nevada Constitution). The proposal was approved by the Nevada legislature during its 2007 and 2009 sessions, but failed as a ballot measure in 2010. *State-wide Ballot Results*, NEV. SECRETARY ST., <http://www.nvsos.gov/SilverState2010gen/Bal-lots.aspx> (last visited May 2, 2013).

Nevada law. In order to exercise eminent domain to condemn mortgage notes, two conditions must be met. First, cities must have the power to exercise eminent domain generally; in other words, the cities must have the authority to act. Second, the authority to exercise eminent domain for public use must extend to the taking of mortgage notes. The Nevada eminent domain statute seems to satisfy both of these related conditions.

First, a city must have the authority to exercise eminent domain. A core principle of state and local government law is that cities have no “inherent” legal status; they are created by states.⁴⁶ Therefore, a city’s authority to act may be broadened or limited by state legislation. These broad and narrow views are roughly captured in descriptions of states as “home rule” or “Dillon’s rule” states. Cities in home rule states generally rule themselves unless expressly prohibited, while cities in Dillon’s rule states look for specific authorization.⁴⁷ While these are not precise categories or descriptions, and the actual exercise of local power often defies these oversimplified categories, Nevada is a Dillon’s rule state,⁴⁸ and its cities therefore require specific authorization to exercise local powers.⁴⁹ This authority is clearly found in NRS 37.010(1)(c), which states:

[T]he right of eminent domain may be exercised in behalf of the following public uses:

...

(c) County, city, town and school district activities. Public buildings and grounds for the use of any county, incorporated city or town, or school district, reservoirs, water rights, canals, aqueducts, flumes, ditches or pipes for conducting water for the use of the inhabitants of any county, incorporated city or town, for draining any county, incorporated city or town, for raising the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels, for roads, streets and alleys, *and all other public purposes for the benefit of any county, incorporated city or town, or the inhabitants thereof.*⁵⁰

While Nevada cities may therefore feel confident in their authority to condemn *land* under eminent domain for public use under the statute, they may still question whether the authority to exercise eminent domain for public use extends to *mortgage notes*. Adding to this uncertainty, the language of the Nevada statute does not refer to the condemnation of mortgage notes but instead refers explicitly to real property. For example, the statute requires the plaintiff to name the “owners, occupants and claimants of the property” as defendants.⁵¹ Of course, there is no “occupant” of a mortgage note, and the corresponding defendant would be the trustee of the trust that holds the note. A similar provision states that an eminent domain petition must contain a description of each piece of land sought to be taken, and whether it includes the whole

⁴⁶ See, e.g., *City of Reno v. Cnty. of Washoe*, 580 P.2d 460, 462 (Nev. 1978).

⁴⁷ For a general description of home rule and Dillon’s rule distinctions, see GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 36–38 (2008).

⁴⁸ *Ronnow v. City of Las Vegas*, 65 P.2d 133, 136 (Nev. 1937).

⁴⁹ *Id.* NRS 37.0095 provides that any agency or political subdivision of the state can exercise eminent domain power. NEV. REV. STAT. § 37.0095 (2011).

⁵⁰ NEV. REV. STAT. § 37.010(1)(c) (emphasis added).

⁵¹ *Id.* § 37.070(1)(c).

or only part of an entire parcel or tract.⁵² Again, the reference to “land” reflects the more traditional use of eminent domain.⁵³

Furthermore, the statute has a list of enumerated local government public uses, which does not include mortgage notes.⁵⁴ For example, the statute specifically mentions aqueducts, flumes and ditches.⁵⁵ One could argue that the legislature intended only to allow those uses listed in the statute, but prohibit others, including mortgage notes, that it did not list.⁵⁶ However, one also needs to consider the final portion of this local government section: “*and all other public purposes for the benefit of any county, incorporated city or town, or the inhabitants thereof.*”⁵⁷ Had it intended to significantly limit the scope of public use, or to limit it to the uses listed in the statute, the legislature could have included more limiting language, as other states have done. For example, Arizona contains a similar laundry list of public uses but includes specific reference to legislative authority limiting local action.⁵⁸ Similarly, while the Montana eminent domain statute includes forty-five categories of public uses,⁵⁹ none of the provisions include Nevada’s “all other public purposes” provision.⁶⁰ Therefore, even given its limited enumerated uses, the last sentence of this section, encompassing “all other public purposes” into the definition of public use, suggests that the legislature intended a broad reading of public use.⁶¹

⁵² *Id.* § 37.070(1)(f).

⁵³ The statute provides that “[t]he fee simple or lesser estate in real property, *and any other property*, are subject to” eminent domain. *Id.* § 37.020(1) (emphasis added). In one case, property owners were allowed just compensation for the value of the benefit of a restrictive covenant on adjacent land that was taken by eminent domain. *Meredith v. Washoe Cnty. Sch. Dist.*, 435 P.2d 750, 752 (Nev. 1968).

⁵⁴ See NEV. REV. STAT. § 37.010(1)(a)–(o). One study of post-*Kelo* legislation identified nineteen states, including Nevada, with statutes employing this inclusionary drafting approach. This approach clarifies public use with respect to activities important to individual states, and sometimes excludes certain activities as public use. Steven J. Eagle & Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP. PROB. & TR. J. 799, 804 (2008).

⁵⁵ NEV. REV. STAT. § 37.010(c).

⁵⁶ One principle of statutory interpretation, *expressio unius est exclusio alterius*, is that the statement of one thing is to the exclusion of another. See, e.g., *In re Estate of Prestie*, 138 P.3d 520, 524 (Nev. 2006) (applying the principle to the construction of a will).

⁵⁷ NEV. REV. STAT. § 37.010(c). The Utah statute has a list similar to Nevada’s and includes a provision authorizing “all other public uses for the benefit of any county, city, or town, or its inhabitants” UTAH CODE ANN. § 78B-6-501(3)(f) (West 2012).

⁵⁸ “Roads, streets, and alleys, and all other public uses for the benefit of a county, city, town or village, or the inhabitants thereof, which is authorized by the legislature.” ARIZ. REV. STAT. ANN. § 12-1111(6) (2012).

⁵⁹ MONT. CODE ANN. § 70-30-102 (2011).

⁶⁰ A similar provision in the Montana statute authorizing local governments to use eminent domain states that eminent domain can be used for the public use of “roads, streets, alleys, controlled-access facilities, and other publicly owned buildings and facilities for the benefit of a county, city, or town or the inhabitants of a county, city, or town” *Id.* § 70-30-102(7).

⁶¹ NEV. REV. STAT. § 37.010(c). Some might be tempted, erroneously, to measure public use by focusing on the number of mortgages taken under the plan. To the extent that the plan takes only ten mortgage notes, some might regard the plan as insufficiently “public.” Similarly, if the plan takes 10,000 notes in Nevada, it would appear on its face to have quite a

Furthermore, although scholars and policy-makers have vigorously debated the meaning of public use in the wake of the *Kelo* decision,⁶² that debate has typically centered on developer-driven eminent domain actions in which the developer, or another non-governmental entity, was awarded ownership of the underlying property for new construction or redevelopment.⁶³ As noted above, and in response to the perceived impropriety of these types of action, many states, including Nevada, passed statutes and constitutional amendments to limit, or eliminate, these “private-to-private” transfers.⁶⁴

Unlike traditional eminent domain actions, however, the plan to condemn mortgage notes does not involve a private-to-private transfer. Under this scheme, local governments would use eminent domain to purchase notes from trustees. After the purchase, the homeowner could choose to refinance the house by obtaining a mortgage from another lender based on the current market value of the house. If the homeowner successfully refinances the house, the local government would simply extinguish the note it obtained by eminent domain upon payment by the new lender. If instead the homeowner does not refinance, the local government would continue to hold the note it obtained by eminent domain. In neither case would the government transfer the property—here the underlying note—to a private party.

This proposed use of eminent domain is an admittedly unorthodox transaction, but it is an entirely *different* transaction than states, like Nevada, passed legislation to address. The amendments to the Nevada statute and Constitution explicitly address transferring property from one private party to another private party and explicitly prevent using eminent domain to achieve this result.⁶⁵ A history of private-to-private transfers, many of which have been the subject of traditional eminent domain litigation, support concern for these types of transfers and corresponding amendments to curb them. Those types of transfers are not at issue here. If the Nevada ballot initiatives had been intended to prevent more than private-to-private transfers, those initiatives could have been drafted differently—perhaps to ban eminent domain actions that were based

public reach. While this approach to the public question may be germane to the *political* analysis, it does not seem appropriate for the *legal* analysis. Local government officials should rightly be attentive to the magnitude of the housing crisis at the local level and how many notes and neighborhoods should be targeted. It is appropriate for a local government to debate whether it should target one or two neighborhoods ravaged by the housing crisis or it should target neighborhoods throughout a city. The question of whether to implement the plan in one neighborhood or ten is a political or strategic question about how exactly to exercise the plan. As a legal question, however, public use would be satisfied regardless of the number of neighborhoods targeted. Using eminent domain in one neighborhood to take mortgage notes is little different than using eminent domain in one neighborhood to condemn a small street or right of way for public use. *See e.g., id.* § 37.070(1)(f) (statute allowing state to condemn a small street or right of way for public use).

⁶² *See, e.g.,* Mihaly & Turner, *supra* note 22.

⁶³ Justice Kennedy expressed concern about developer-driven economic development schemes in his *Kelo* concurrence. *See Kelo v. City of New London*, 545 U.S. 469, 490–91 (2005) (Kennedy, J., concurring).

⁶⁴ NEV. CONST. art. 1, § 22, cl. 1.

⁶⁵ *See id.*

solely on economic development, a ban that some states did enact.⁶⁶ Instead, the Nevada ballot initiatives focused on banning private-to-private transactions, and there is no evidence to suggest that this non-traditional use of eminent domain to condemn mortgage notes was intended to be included in that ban.

II. THE PROPRIETY OF LOCAL ACTION

While there is ongoing debate about the causes of the housing bubble and subsequent market decline, few would argue that it has not had a devastating effect on individuals, communities, and local governments. Individuals have lost their homes to foreclosures and short sales, suffered losses to their credit ratings that will make future borrowing difficult, and endured the uncertainty and fear of owing far more on their houses than those houses are worth. Communities have lost neighbors to foreclosure and subsequent dislocation, suffered regional value declines, and endured the physical deterioration of vacant homes.⁶⁷ Local governments weathered the financial costs of financing ordinary public services with a smaller population, as well as the increased services needed in communities facing the physical and psychological impact of foreclosure and widespread dislocation.⁶⁸ While the national real estate crisis has had significant local effects, local real estate *lending* also has distinctly national characteristics.⁶⁹ Given this national reach, the question of whether local governments *should* act to help individuals and communities affected by the real estate crisis raises complicated questions about the efficacy and propriety of local action.

⁶⁶ For recent discussions of direct democracy efforts, see Patricia E. Salkin & Charles Gottlieb, *Engaging Deliberative Democracy at the Grassroots: Prioritizing the Effects of the Fiscal Crisis in New York at the Local Government Level*, 39 *FORDHAM URB. L.J.* 727, 755–60 (2012) (discussing the efficacy of deliberative democracy); see also Julie M. Cheslik, *Will Grassroots Democracy Solve the Government Fiscal Crisis?*, 39 *FORDHAM URB. L.J.* 625, 632 (2012) (highlighting the limitations of initiative and referendum to sound government decision making).

⁶⁷ The Center for Responsible Lending found that the average cost to neighbors near foreclosed houses was \$21,077 over the span of years from 2007 to 2011. The total cost of foreclosure will be even higher because this figure does not include the lost equity of the family that has been foreclosed on, the loss of local tax revenue, vacant properties and increased crime, or lower school performance by affected children. *BOCIAN ET AL.*, *supra* note 3, at 2.

⁶⁸ Raymond H. Brescia et al., *Crisis Management: Principles that Should Guide the Disposition of Federally Owned, Foreclosed Properties*, 45 *IND. L. REV.* 305, 309 (2012). The harms that individuals and communities suffered during the collapse of the housing bubble also influence future decisions to buy homes. See Nestor M. Davidson, *Property and Identity: Vulnerability and Insecurity in the Housing Crisis*, 47 *HARV. C.R.-C.L. L. REV.* 119, 131–32 (2012) (“In the context of the housing crisis, the emotional attachment to homeownership and the larger cultural symbolism that feeds that attachment mean that the experiences of families losing their houses through foreclosure can have tremendous emotional salience for would-be buyers.”).

⁶⁹ The national scope of residential mortgage lending is reflected in its regulation by national banking and civil rights laws. See, e.g., Truth in Lending Act, 15 U.S.C. § 1601 (2012) (requiring the disclosure of certain lending terms); Fair Housing Act, 42 U.S.C. § 3604(a) (2012) (requiring nondiscrimination based on race, national origin and other characteristics in the conveyance of property).

An eminent domain action is local. Eminent domain proceedings to condemn mortgage notes would be brought in district court in the county where the property is located,⁷⁰ and the local government could consolidate related eminent domain actions into one suit.⁷¹ While local governments are “closer to the people,” the question of whether issues are better addressed at the local level versus the national level remains contested.⁷² The vast scope of the housing and lending crisis suggests that local government may not be appropriately situated to address the needs of others—at the state, national, or international level. On the other hand, it is clear that there are distinctly local components of the mortgage crisis; that is, cities and states have experienced the crisis in different ways. Professor Robert Hockett illustrates this local impact through a color-coded map showing the concentration of underwater houses across the country.⁷³ The map shows clear concentrations in cities throughout Nevada, California, Florida, and other states.⁷⁴ To the extent that the spatial effects of the real estate crisis are local, cities should be empowered to address these effects at the local level.

While the use of eminent domain by cities to address the real estate and foreclosure crisis is a new phenomenon, cities have used other tools to address similar housing and lending issues. For example, local governments have attempted to ameliorate some of the effects of the housing crisis by requiring foreclosing banks to maintain vacant properties.⁷⁵ States, including Nevada, have required foreclosing lenders to participate in mediation with debtor homeowners,⁷⁶ or obtained large financial settlements against banks for wrongful lending practices and used these settlements to fund housing efforts at the local level.⁷⁷ And states, including Nevada, have also amended foreclosure laws to

⁷⁰ NEV. REV. STAT. § 37.060(1). The statute also moves eminent domain proceedings ahead of general civil matters on the docket. *Id.* § 37.055.

⁷¹ *Id.* § 37.070(2) (2011) (“All parcels lying in the county and required for the same public use may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the conveniences of parties. Each defendant, at the defendant’s option, may have a separate trial.”).

⁷² See, e.g., Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1400–02 (2012) (emphasizing the importance of federal intervention in local land use regulation).

⁷³ Robert C. Hockett, *Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt That Can Benefit Literally Everyone* 11 (Cornell Law School: Legal Studies Research Paper Series, Paper No. 12-64, 2012).

⁷⁴ *Id.*

⁷⁵ See NEV. REV. STAT. § 40.464(1) (describing the duty to maintain residential property acquired at foreclosure). See also Benjamin Spillman, *Ordinance Pressures Banks to Maintain Properties*, LAS VEGAS REV.-J., Dec. 8, 2011, at B1 (discussing Las Vegas ordinance that would impose fines and possibly jail time for neglect of foreclosed properties); James O’Toole, *Banks Labeled “Slumlords” Over Foreclosure Neglect*, CNNMONEY (Aug. 29, 2012, 10:11 AM), http://money.cnn.com/2012/08/29/real_estate/banks-slumlords/index.html (describing efforts of Los Angeles City Attorney’s office to compel banks to maintain foreclosed homes).

⁷⁶ Compare NEV. REV. STAT. § 107.085, with *id.* § 107.086.

⁷⁷ See Press Release, Office of the Nev. Attorney Gen., Attorney General Masto Announces Two Historic Mortgage Servicing Foreclosure Settlements (Feb. 9, 2012) (estimating Nevada’s share to be \$1.5 billion in mortgage relief); Chris Sieroty, *Banks Give Relief to Homeowners*, LAS VEGAS REV.-J., Nov. 20, 2012, at D1 (reporting on settlement activity

lessen the impact of, or wholly eliminate, deficiency judgments against borrowers.⁷⁸

Individuals and local governments are understandably frustrated by the failure of the private market and of federal interventions⁷⁹ to improve the housing market.⁸⁰ The number of participants and diverging interests in the typical securitization scheme makes it difficult, if not impossible, to reach an efficient resolution with respect to individual loan decisions like whether to restructure or foreclose a loan.⁸¹ And the disaggregation of property interests in the typical securitization scheme adds to the impossibility of voluntary resolutions.⁸² At the same time, investors have a limited ability to compel trustee action due to a collective action problem.⁸³ This eminent domain plan promotes alienability by

from Wells Fargo, Bank of America, JP Morgan Chase, Citigroup and Ally Financial between March 1 and September 30, 2012).

⁷⁸ See, e.g., NEV. REV. STAT. 40.455(3) (prohibiting deficiency judgments by financial institutions against owner occupier debtors who have not refinanced). Some attempts by cities to address housing and lending issues have not been successful. For example, cities have attempted to pass local ordinances to combat predatory lending. See generally Jonathan L. Entin & Shadya Y. Yazback, *City Governments and Predatory Lending*, 34 *FORDHAM URB. L.J.* 757, 757 (2007); Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 *CONN. L. REV.* 355, 355 (2006). See also *Mayor of N.Y. v. Council of N.Y.*, 780 N.Y.S.2d 266, 275–76 (N.Y. Sup. Ct. 2004) (invalidating New York City ordinance that did not allow predatory lenders to do business with the city); see also *Am. Fin. Servs. Ass'n v. City of Oakland*, 104 P.3d 813, 823 (Cal. 2005) (invalidating Oakland's ordinance regulating predatory lending). Courts determined that state legislators impliedly intended to regulate predatory lending to the exclusion of local governments. See *id.* (“We therefore conclude that through the enactment of [the state statute], the Legislature has fully occupied the field of regulation of predatory tactics in home mortgages.”). Cities have also attempted to use the Fair Housing Act to achieve similar results. See, e.g., Ngai Pindell, *The Fair Housing Act at Forty: Predatory Lending and the City as Plaintiff*, 18 *J. AFFORDABLE HOUSING & COMMUNITY DEV. L.* 169, 170 (2009); Relman, *supra* note 2, 629–30 & n.10 (describing Complaint for Declaratory and Injunctive Relief and Damages, *Mayor of Balt. v. Wells Fargo Bank, N.A.*, No. L08CV 062, 2008 WL 117894 (D. Md. Jan. 8, 2008)).

⁷⁹ See, e.g., Alexander et al., *supra* note 4, at 342 (describing federal legislative responses to the foreclosure crisis).

⁸⁰ The Home Affordable Modification Program (HAMP) has not turned around the Nevada housing market. “Nevadans expressed a dim view of government programs such as the Home Affordable Modification Program, or HAMP. Only 9 percent of those facing foreclosure and 10 percent of all Nevadans said foreclosure prevention programs have helped.” Hubble Smith, *Divide Over Ethics of Strategic Default*, *LAS VEGAS REV.-J.*, July 27, 2012, at D2.

⁸¹ “The contractual design of mortgage securitization effectively makes servicers principal-less agents; there is no party with the ability and incentive to monitor a servicer’s actions. Investors lack the information, capacity, and legal standing to effectively monitor servicer performance, and tranching and insurance often remove their incentive to do so.” Levitin & Twomey, *supra* note 20, at 7.

⁸² Joseph William Singer, *Subprime: Why a Free and Democratic Society Needs Law*, 47 *HARV. C.R.-C.L. L. REV.* 141, 165 (2012) (“The mortgages were diced into thousands of pieces, transferred to trusts, securitized, sold to investors, rated triple-A by rating agencies that had serious conflicts of interest and appeared not to know what they were doing, and managed by mortgage servicers whose contractual rights and obligations made it impossible for borrowers to renegotiate with lenders if the need arose.”).

⁸³ See Levitin & Twomey, *supra* note 20, at 62 (describing the collective action problem of investors acting on loan servicers) (“It is difficult for investors to achieve these collective

allowing local governments to purchase notes in securitized trusts that the trustees themselves are not empowered to voluntarily transfer.⁸⁴ Furthermore, action at the local level provides an opportunity for a more focused, and perhaps more effective, intervention. Local governments, because of their smaller size and closeness to their constituents, have a sharper sense of communities most impacted by the mortgage crisis and therefore may be able to address these communities' needs more directly and effectively than state and national actors could.

To the extent the eminent domain plan helps to stabilize neighborhoods and property values, the plan provides clear benefits to communities and to homeowners.⁸⁵ As is often the case, it is harder to predict the potential harms of local action, but the most likely source of harm would come from the financial sector, which could react to the use of eminent domain and the resulting uncertainty about the terms of future real estate finance contracts by making mortgage financing more expensive or otherwise harder to obtain in some communities.⁸⁶ Communities that choose to exercise eminent domain may face a focused reaction by national lenders. Similarly, if enough communities implemented a similar plan, it is possible that lenders would react by changing the terms of housing credit nationwide, rather than focusing a reaction on individual communities. Investors in current bundles of securitized loans could be harmed by perceived and actual adjustments in the return on their investments.⁸⁷

action thresholds for two reasons. First, investors simply do not know who the other investors are in particular deals, and institutional investors tend to be quite secretive about their investment positions. Second, tranching means that investors can have interests adverse to each other. Super-senior tranches are unlikely to support demands for action because they see no advantage in rocking the boat, while out-of-the-money junior tranches will only act if they anticipate a sufficient likelihood that they will recover a portion of their claim.”).

⁸⁴ See *id.* at 14 n.35.

⁸⁵ Critics may point to the unfairness of benefiting homeowners when it is believed that these homeowners' own investment decisions, whether poorly timed or motivated by out-sized greed, contributed to the housing crisis generally and the homeowner's particular underwater house. The harm, here, would be a psychic harm to those who think government intervention unfair or those who think they made more responsible investment decisions and are not being compensated for those good decisions by this plan.

⁸⁶ Katya Wachtel, *California Urges Fed Probe of Eminent Domain “Threats”*, REUTERS (Sept. 10, 2012, 4:42 PM), <http://www.reuters.com/article/2012/09/10/mortgages-eminent-domain-idUSL1E8KA4CX20120910> (describing California Lieutenant Governor Gavin Newsom's request of federal prosecutors to investigate investor attempts to boycott California communities that consider using eminent domain).

⁸⁷ In a move reflective of these and other potential harms, the Federal Housing Finance Agency requested public comment on this use of eminent domain, citing “significant concerns.” Use of Eminent Domain to Restructure Performing Loans, 77 Fed. Reg. 47,652 (Aug. 9, 2012). (“FHFA has significant concerns about the use of eminent domain to revise existing financial contracts and the alteration of the value of Enterprise or Bank securities holdings. In the case of the Enterprises, resulting losses from such a program would represent a cost ultimately borne by taxpayers. At the same time, FHFA has significant concerns with programs that could undermine and have a chilling effect on the extension of credit to borrowers seeking to become homeowners and on investors that support the housing market.”). Many financial and trade organizations, including the Association of Mortgage Investors, the primary trade association representing investors in mortgage-backed securities, have opposed this use of eminent domain to acquire mortgages citing constitu-

A related challenge to this proposed use of eminent domain involves valuation, including how much local governments should pay for mortgage notes to satisfy the just compensation requirement.⁸⁸ Eminent domain actions to condemn mortgage notes would be accompanied by compensation to the underlying note owners, but investors may view the particular compensation as insufficient, or they may react to a sense of general uncertainty about the potential terms of condemnation for other notes.

The challenges and benefits of this eminent domain plan are difficult to describe with certainty precisely because this application of eminent domain to mortgage notes is without clear comparison to other examples of eminent domain. As a result, local governments must weigh some risk of uncertainty (the reaction of local residents and some components of the financial sector) with the potential benefits (the opportunity for homeowners to refinance and the revitalization of communities). While public and private actors at the national and state level have debated and instituted ameliorative plans to address the effects of the mortgage crisis, local governments have been relatively absent from serious reform efforts. This use of eminent domain gives local governments a significant tool to affect the resolution of the housing crisis.

III. CONCLUSION

Nevada cities and the state legislature should carefully consider using eminent domain to address the effects of the real estate and foreclosure crisis. It is a new application of a traditional local power and, therefore, it is likely that there will be questions about both its legality and propriety. While the Nevada statute does not explicitly address the condemnation of mortgage notes, it does affirm a broad application of eminent domain for public use. Furthermore, this novel use of eminent domain power to condemn mortgage notes does not implicate the same concerns raised by the traditional use of eminent domain to take real property. Because of the magnitude and immediacy of the housing crisis in Nevada, and the expansive definition of public use in the Nevada eminent domain statute, cities should strongly consider using eminent domain to condemn the mortgage notes of underwater homes.

tional and business concerns. A coalition of organizations filed a comment with the FHFA against this use of eminent domain. *See* Joint response letter from the Mortgage Bankers Assoc. *et al.* to Alfred Pollard, Esq., Fed. Hous. Fin. Agency (Sept. 7, 2012). *See also* Letter from the Assoc. of Mortgage Investors to Alfred Pollard, Esq., Fed. Hous. Fin. Agency (Sept. 7, 2012) (in response to FHFA request for input, arguing that the use of eminent domain “will likely curtail access to the thirty-year fixed mortgage, an integral part of the American dream” and harm taxpayers through devaluation of their pensions, 401Ks, or mutual funds).

⁸⁸ The Nevada Constitution, amended by PISTOL, requires property to be valued at “its highest and best use.” NEV. CONST. art. I, § 22, cl. 3. The Constitution also states that “just compensation shall be defined as that sum of money, necessary to place the property owner back in the same position, monetarily, without any governmental offsets, as if the property had never been taken. Just compensation shall include, but is not limited to, compounded interest and all reasonable costs and expenses actually incurred.” NEV. CONST. art. I, § 22, cl. 4.