2010

More than Merely Incidental: Third-Party Beneficiary Rights in Urban Redevelopment Contracts

Patience A. Crowder

Georgetown Journal on Poverty Law & Policy
Volume XVII, Number 2, Spring 2010

More Than Merely Incidental: Third-Party Beneficiary Rights in Urban Redevelopment Contracts

Patience A. Crowder*

ABSTRACT

Historically speaking, community groups that seek to become involved in city-sponsored redevelopment projects have limited avenues of participation from which to choose. Most avenues of participation are found in administrative law, tort law, or constitutional law and relief is getting harder to obtain. Given the proliferation of privatization and public-private partnerships between local governments and private developers, contract law, the third-party beneficiary rule in particular, offers another realm of rights for urban residents confronted by redevelopment projects. Considering the totality of the circumstances surrounding redevelopment projects, urban residents, an identifiable class for whom public-private partners designate benefits, should be able to obtain relief as third-party beneficiaries to breached redevelopment deal contracts when a redevelopment project fails.

TABLE OF CONTENTS

* Wellspring Assistant Clinical Professor of Law, The University of Tulsa College of Law. B.A., Georgetown University; J.D., Rutgers University School of Law – Newark. I am especially grateful to Christopher Hill, Michèle Alexandre, Audrey McFarlane, and Odeana Neal for their insightful comments and suggestions. I thank Kirk Schauer for his exceptional research assistance. I am also thankful for comments provided by participants at the February 2008 Junior Faculty Regional Works-in-Progress Workshop at Washington University School of Law, the 2008 Clinical Writers' Workshop organized by the *Clinical Law Review*, the November 2008 Faculty Colloquy Series at the University of Tulsa College of Law, and the *Innovations in Transactional Scholarship* works-in-progress session at the 2009 AALS Workshop on Transactional Law. I thank the University of Tulsa College of Law for providing generous financial and research support, and I am grateful to the editorial staff of the *Georgetown Journal on Poverty Law & Policy* for their impeccable editing assistance.

I. INTRODUCTION

Historically speaking, community members that seek to become involved in city-sponsored redevelopment projects (public development) have limited avenues of participation. Most avenues of participation are found in administrative law (e.g., public hearings), tort law (e.g., nuisance), or constitutional law (e.g., eminent domain challenges), and relief is becoming harder to obtain.[1] The routine exclusion of the community from the deal-making process limits the role of residents in the structure of urban redevelopment deals. Given the proliferation of privatization and redevelopment public-private partnerships, contract law seems to offer another category of rights for urban residents confronted with redevelopment projects. In particular, the third-party beneficiary rule may hold some promise for providing relief for urban residents confronted with redevelopment deal contracts.

The third-party beneficiary rule is an altruistic doctrine. It provides a contract remedy for individuals or classes not party to a contract but who will otherwise benefit from its performance. The rule is contrary to the tenets of classical contract law where only the promisor or promisee to a contract could sue for breach or to enforce that contract. As such, courts had an aversion to extending contract remedies to non-parties. This was based on several factors that were eventually overridden by public policy concerns. Whether being analyzed through the lens of common law or a state statue, the rule's application has been unsteady since its origin. The rule has evolved through articulations by the First

1. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 477–83 (2005).

and Second Restatements of Contracts as well as judicial common law rules. Despite its nebulous development, one aspect of the rule has remained consistent: incidental beneficiaries have no contractual rights. Each articulation of the rule has maintained that incidental beneficiaries are third parties who, from the perspective of the contracting parties, unintentionally benefit from a contract, and, as such, have no enforcement rights.

This article argues that urban residents are more than merely incidental beneficiaries to redevelopment projects and that the third-party beneficiary rule can be invoked successfully by urban residents to enforce redevelopment contracts, specifically, the development agreement. Development agreements are contracts between a developer and a local government that govern certain foundational and regulatory aspects of a development project. The question of third-party beneficiary rights to development agreements is particularly interesting given the unique status afforded to government contracts by the rule, and it gives rise to two other questions. First, if urban residents can successfully use the third-party beneficiary rule to enforce redevelopment deal contracts, is enforcement of development agreements, as typically executed, a worthwhile objective? Second, if urban residents can successfully use the third-party beneficiary rule to enforce redevelopment deal contracts, and, assuming those contracts are worthy of enforcement, how (if at all) should redevelopment deal practice change to accommodate and/or reflect third-party beneficiary rights? By focusing on government contracts and analyzing party designations, contract defenses, claims of breach, and available remedies, this article analyzes each of these questions to demonstrate that the deal-making practices of local governments and private developers give rise to third-party beneficiary rights of urban residents confronted by redevelopment projects.

Part II discusses the current practice of urban redevelopment deal making. Part III details the evolution of third-party beneficiary rights. It is an illustrative review of the development of the third-party beneficiary rule that focuses on the articulations of both the First and Second Restatements of Contracts, the "intent to benefit" doctrine that developed at common law in the intervening time between the Restatements, and an articulation labeled the third-party-beneficiary principle.[2] Borrowing some of the vernacular of the third-party-beneficiary principle, Part IV argues that third-party beneficiary rights are inherent in development agreements by identifying the performance objectives of the contracting parties, the moral and public policy reasons that warrant enforcement by third-party inner city residents, and the lack of conflict between such enforcement and the performance objectives of the contracting parties. The article concludes by answering the questions asked in this Introduction. First, is enforcement of these types of deals a worthy objective? Second, if urban residents can successfully use a third-party beneficiary principle to enforce

2. *See* Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358 (1992) [hereinafter Eisenberg, *Third-Party*].

redevelopment deal contracts, and, assuming those contracts are worthy of enforcement, how (if at all) should redevelopment deal practice change to accommodate and/or reflect third-party beneficiary rights?[3]

The economics of our time make redevelopment a critically important issue because the urban renewal practices that led to the construction of most of the nation's major highways and the concomitant destruction of scores of urban neighborhoods are far from a distant memory. The nation's local governments are cash-strapped and focused on identifying "shovel ready" projects to secure federal stimulus dollars[4] as well as outsourcing or otherwise privatizing public services at an alarming rate to address budget shortfalls.[5] As local governments begin to break ground on their "shovel ready" projects[6] many of them will turn to the policies and procedures adopted during the urban renewal reign for expediency or because of the lack of reasonable alternatives.[7] The creation of the White House Office of Urban Affairs, however, is a strong indication of President Obama's focus on urban policy.[8] The office is charged with coordinating "all aspects of urban policy"[9] and is expected to work with local governments and nonprofit organizations to forge a stronger relationship between the federal government and local governments.[10] The Obama administration's focus on urban policy suggests that the time is ripe to correct inadequacies in the redevelopment deal-making process to stave off the potential displacement of urban residents and ensure that history does not repeat itself.

II. URBAN REDEVELOPMENT DEAL MAKING

With respect to the construction and maintenance of America's physical infrastructure and neighborhoods, the government's role as a provider of public

---

3. It is important to note that, throughout this article, "urban residents" encompasses homeowners, renters, and small business owners in urban areas.

4. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (2009).

5. *See, e.g.*, Lisa Donovan, *Tax Watchdog Group Sues Over Parking Deal*, CHI. SUN-TIMES, Aug. 19, 2009, at B1; Christopher Conkey, *Strapped Cities Outsource Transit Lines*, WALL ST. J., July 13, 2009, at A6.

6. It is interesting to note that many of these "shovel ready" projects involve the repair of highways that were originally constructed with urban renewal funds.

7. *See generally* Jonathan Karp, *In Some Cities, Downturn Rekindles Building Plans*, WALL ST. J., Dec. 17, 2008, at C8 ("For developers, tough times typically are ripe to extract concessions from governments that would have been beyond tier reach when times are good."). *See infra* notes 15–23 and accompanying text for a discussion about the Urban Renewal Program.

8. *See* Exec. Order No. 13,503, 74 Fed. Reg. 8139 (2009).

9. *Id.* at §3(b). A key function of the Office of Urban Affairs is "to engage in outreach and work closely with State and local officials, with nonprofit organizations, and with the private sector, both in seeking input regarding the development of a comprehensive urban policy and in ensuring that the implementation of Federal programs advances the objectives of that policy." *Id.* at §3(e).

10. *See* Press Release, The White House, Office of the Press Secretary, President Obama Announces Next Steps in Development of Urban and Metropolitan Agenda; Announces National Conversation on Urban and Metropolitan Policy; Calls for Review of Federal Policies that Impact Urban and Metropolitan America (July 13, 2009).

services progressed from watching the private sector be the initial provider of services to assuming responsibility for the provision of public services to shared responsibilities under public-private partnerships. In early colonial and frontier communities, functions such as water supply and waste disposal were managed by individual households or private companies.[11] Then, the "twin forces of urbanization and industrialization" in the nineteenth century transformed America's cities and prompted the expansion of government.[12] Along with certain technological advancements, industrialization and urbanization encouraged "slums" and unsanitary health conditions which stirred the passions of "'[c]ivic-minded' businessmen, middle-class reformers, and . . . some . . . politicians with large working-class constituencies [who] argued for a more activist municipal government to alleviate [these] problems."[13] So, what was once private enterprise became a public responsibility.

As cities expanded across the nation and grew in terms of both land mass and population, local governments assumed more responsibility for the provision of services to city residents. Early city-sponsored projects included public infrastructure projects such as bridges, canals, and railroads. Under the New Deal, the Federal government assumed a larger role in addressing the needs of America's improvised citizens.[14] After World War II, however, the American landscape expanded to include suburbs, while cities underwent a crippling exodus of their populations and disinvestment by business industries. To halt the resulting fiscal crises that stemmed from lost tax revenue, cities began to partner with private developers to obtain federal funds through the federal government's Urban Renewal Program,[15] which provided grants to city governments to fund redevelopment projects.[16] "Redevelopment is the process of taking land that was previously improved, and that is now either underutilized or vacant, and developing it pursuant to a plan of development that may be for a single use or for a mix of uses."[17] Under the program, cities acquired properties in blighted areas, which were then sold to private developers at a loss.[18] Initially, federal regulations required that these relationships be formal partnerships that required

---

11. *See* R. SCOTT FOSLER & RENEE A. BERGER, PUBLIC-PRIVATE PARTNERSHIP IN AMERICAN CITIES: SEVEN CASE STUDIES 2 (1982).

12. *See id.*

13. *See* M.V. Levine, *The Politics of Partnership*, *in* UNEQUAL PARTNERSHIPS 15 (Gregory D. Squires ed., 1989).

14. *See* Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 413 (2006) (noting that many previously private activities became regulated under the public interest focus of the New Deal).

15. *See* Housing Act of 1949, Pub. L. No. 81-171, tit. I, 63 Stat. 413 (1949). The Urban Renewal Program underwent many transformations and vestiges of it exist today as the Community Development Block Grants Program (CDBG), leaving many of the urban renewal area land designations still in effect.

16. *See* THE EDITORS OF FORTUNE, THE EXPLODING METROPOLIS 102–105 (1958).

17. REDEVELOPMENT: PLANNING, LAW, AND PROJECT IMPLEMENTATION xxxi (Brian W. Blaesser & Thomas P. Cody eds., 2008).

18. *See* THE EDITORS OF FORTUNE, THE EXPLODING METROPOLIS 102–105 (1958).

sophisticated contracts and other documents to govern and memorialize the relationships. Over time, however, these arrangements began to re-privatize public functions through the emergence of public-private partnerships.[19]

While rudimentary frameworks for public-private partnerships were established between 1945 and 1970, public-private partnerships really began to flourish between 1970 and 1985.[20] This was due in large part to the administrations of Presidents Jimmy Carter and Ronald Reagan – but for different reasons. The Carter Administration encouraged public-private partnerships to buttress the provision of social services.[21] The Reagan Administration encouraged public-private partnerships to decrease federal government expenditures.[22] These divergent motives produced mixed results, with the ultimate result being that public-private partnerships became entrenched at the local government level.[23]

Today's cities still do not have sufficient revenue streams or staff with the technical skills to manage to single-handily execute popular redevelopment projects such as mixed-use housing and commercial retail projects. From the cities' perspective, the touted economic benefits of public-private partnerships are numerous and decrease direct outlays of city revenue for such projects. Partnering with private developers brings greater access to technical skills and capital. Private developers have higher tolerance for risk and the ability to front predevelopment expenses (such as engineers, land surveys, and feasibility studies)[24] to combat the upfront and planning expenses of redevelopment projects. For their part as entrepreneurs in the development game, cities bring certain types of currency or "public capital"[25] to the deal table. For example, local governments provide various types of legislation to facilitate redevelopment projects, including tax increment financing,[26] revenue bonds,[27] and tax

19. *See* Richard F. Babcock, *The City as Entrepreneur: Fiscal Wisdom or Regulatory Folly?*, *in* CITY DEAL MAKING 9, 11–12 (Terry Jil Lassar ed., 1990); *see also* Verkuil, *supra* note 14, at 419.

20. *See* Levine, *supra* note 13, at 21.

21. *See* BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 216 (1989). Public-private partnerships are certainly not limited to redevelopment activities. *See, e.g.*, Michele E. Gilman, *Legal Accountability in an Era of Privatized Welfare,* 89 Cal. L. Rev. 569 (2001) (examining the privatization of the federal welfare program).

22. *See* L.C. Ledebur, *The Reagan Revolution and Beyond*, *in* REBUILDING AMERICA'S CITIES 191, 197–200 (Paul R. Porter & David C. Sweet eds., 1984).

23. *See* Levine, *supra* note 13, at 12.

24. *See, e.g.*, FRIEDEN & SAGALYN, DOWNTOWN, INC., *supra* note 21, at 133–53.

25. "Public capital" has been defined as the wealth and authority available to city governments to produce more wealth. *See* MICHAEL A. PAGANO & ANN O'M. BOWMAN, CITYSCAPES AND CAPITAL: THE POLITICS OF URBAN DEVELOPMENT 21 (1997).

26. Tax increment financing (TIF) is the most popular and powerful forms of legislation that local governments can provide. A TIF district is a legislative tax district that frames a commercial redevelopment project. The property tax rates in a TIF district are frozen, and any subsequent increase in tax revenue based on the assessed value of the property is used to pay for the redevelopment project. *See* John Stainback, *The Public/Private Finance of Redevelopment, in* REDEVELOPMENT: PLANNING, LAW, AND PROJECT IMPLEMENTATION 173 (Brian W. Blaesser & Thomas P. Cody eds., 2008).

27. Municipal bonds are bonds that are guaranteed solely by revenues generated by a project. *Id.*

credit programs.[28] For private developers, the involvement of local government reduces uncertainty.[29] Private developers, for example, believe that negotiations for land and the permitting process will be easier to navigate with a city partner.[30]

Supporters of public-private partnerships argue that extending the role of local government beyond regulation will decrease the amount of municipal bureaucracy that impacts a redevelopment project to make these partnerships more efficient.[31] Critics argue that public-private partnerships are dominated by business interests and, as a result, "have little impact on the central economic problems of urban areas."[32] The nature of public-private partnerships raises fundamental questions about the rights of the people affected by these partnerships. Each "partner" party to the partnership's contracts has rights; but it is not just these "partner" parties that are affected by the deal.

Urban redevelopment projects are a series of contracts between local governments and private developers that are regulated by federal, state, and local governments.[33] The development agreement is the central contract that defines the redevelopment project.[34] Local governments are authorized to enter into these contracts as a function of their police power and typically utilize a form document that private developers modify to suit their specific projects. Given their local character, these documents take many forms. There are, however, common elements to the contracts, including the identity of the parties; identification of the land to be developed (also known as the redevelopment project's footprint) and, if relevant, authorization for land assembly; cross-references to project authorizations; references to project and public financing; and provisions for utilities.[35] The redevelopment process, however, is not encapsulated in one single document. Instead, the process is a series of agreements between a local government and private developer that is subject to several different statutory mechanisms drafted to regulate funding sources, land

28. There are a variety of tax credit programs, including historic preservation tax credit; the Brownfields Tax Incentive, new market tax credits, and low-income housing tax credits. *See id.* at 168–69.

29. *See* Levine, *supra* note 13, at 18.

30. *See id.*

31. *Id.* at 12–14.

32. *Id.* at 13 (listing inner-city poverty, neighborhood decay, and decreasing employment opportunities as economic problems).

33. *See generally* WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT ch. 2 (2001) (describing the legal process involved in redevelopment and calling "redevelopment" a term of art used to describe that process).

34. *See, e.g.*, John J. Delaney, *Development Agreements: The Road from Prohibition to "Let's Make a Deal!"*, 25 URB. LAW. 49, 52 (1993). "A common purpose for a development agreement is to authorize a redevelopment project to proceed." Brian W. Blaesser & Thomas P. Cody, *Entitlement Processes in Redevelopment, in* REDEVELOPMENT: PLANNING, LAW, AND PROJECT IMPLEMENTATION 226 (Brian W. Blaesser & Thomas P. Cody eds., 2008). From the developer's perspective, development agreements have also been used to memorialize extended vested rights or promises related to zoning conditions. *See* 4 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 71:2 (4th ed. 2008).

35. *See* Blaesser & Cody, *supra* note 34, at 226.

acquisitions, and displacement. Other contractual documents include subrecipient agreements[36] and relocation agreements,[37] as well as legislation necessary to advance the redevelopment project.[38]

The local government partner could be one of any of the following types of entities: a local legislative body,[39] a redevelopment authority, a planning commission, or a quasi-public entity.[40] The role of local legislative bodies in redevelopment is multifaceted. These entities are responsible for adopting a master or comprehensive plan; implementing regulations; determining where redevelopment can occur; approving proposed redevelopment projects; authorizing redevelopment authorities or similar development-focused entities; and orchestrating land assembly.[41] A redevelopment authority is a more "specialized government entity whose purpose is to plan, oversee, and implement redevelopment within a community."[42] Redevelopment authorities are typically formed by local government entities via state legislation. The powers of redevelopment authorities typically include the ability to buy, sell, or otherwise acquire property as well as receive and spend redevelopment funds.[43] Planning commissions are generally not legislative bodies; however, these commissions do prepare and submit master or comprehensive plans for adoption by local legislative bodies.[44] Quasi-public entities are formed for specific purposes, with popular purposes being the formation of business improvement districts[45] or other geographically-

36. Subrecipient agreements are agreements between a CDBG grantee and a subrecipient in the local community that applied for CDBG funds via the grantee. These agreements govern how CDBG funds are managed and spent. *See* U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, MANAGING CDBG: A GUIDEBOOK FOR CDBG GRANTEES FOR SUBRECIPIENT OVERSIGHT ch. 3 (2005).

37. Relocation contracts detail the relocation process, including timelines and available benefits. These are agreements between soon-to-be displaced residents and the public or private entity managing relocation. *See* HUD Handbook 1378, REAL ESTATE ACQUISITION AND RELOCATION POLICY AND GUIDANCE (May 2009), *available at* http://www.hud.gov/offices/cpd/library/relocation/policyandguidance/handbook1378.cfm.

38. *See* John Stainback, PUBLIC/PRIVATE FINANCE AND DEVELOPMENT 31 (2000). To receive allocations under the Urban Renewal Program, municipal governments designated urban renewal plans that identified "blighted" areas for redevelopment. Although the program has morphed into the CDBG program, many of the urban renewal designations exist and are amended pursuant to state and local legislation. *See* GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 970–73 (5th ed. 2005).

39. *See* Brian W. Blaesser & Thomas P. Cody, *Key Actors and Institutions in the Redevelopment Process*, *in* REDEVELOPMENT: PLANNING, LAW, AND PROJECT IMPLEMENTATION 4 (Brian W. Blaesser & Thomas P. Cody eds., 2008) (explaining that a "local legislative body" can be a "city council, a board of selectmen, a board of county commissioners, or a board of township trustees").

40. *See id.* at 4–6.

41. *Id.* at 4.

42. *Id.* at 5.

43. *Id.*

44. *See id.*

45. "A business improvement district is an organization of property owners in a commercial district who tax themselves to raise money for neighborhood improvement." *See Management and Operation of Redevelopment Projects*, *in* REDEVELOPMENT: PLANNING, LAW, AND PROJECT IMPLEMENTATION 242 (Brian W. Blaesser & Thomas P. Cody eds., 2008).

based services.[46] In addition to the developer, private interests participating on the developer's team represent several professions – including lawyers, architects, urban planners, landscape architects, engineers, environmental professionals, university administrators, lenders, and investors.[47]

As explained above, both local governments and private developers have established mechanisms that frame and facilitate their participation in public-private partnerships to pursue urban redevelopment projects. The partnership's redevelopment purpose, however, concerns other interests, specifically the interests of the residents presently residing in the proposed redevelopment's footprint. Urban residents have been challenging redevelopment projects since the beginning of the Urban Renewal Program, and one of the earliest cases, *Berman v. Parker*,[48] still serves as the foundation for arguments asserted by public-private partnerships seeking to redevelop an area. In *Berman*, a small business owner challenged the taking of his property via eminent domain by a public entity, the Redevelopment Land Agency, for a redevelopment project in southwest Washington, D.C.[49] The proposed redevelopment was massive in scope and involved several phases during which the Redevelopment Land Agency would sell smaller parcels of land to private developers who were to develop the land in a manner consistent with the redevelopment plan.[50] The owner argued that his property was not blighted and that the condemnation of his property for transfer to another private owner for a non-public use violated the Fifth Amendment's Takings Clause, which requires just compensation for the condemnation of private property.[51] The Supreme Court held that private uses that serve the public benefit do not violate the takings clause and that "non-slum" property was not immune from redevelopment.[52]

Berman was decided in 1954, and scores of cases have been brought before the courts since the decision.[53] In 2005, the Supreme Court issued its most recent decision concerning redevelopment issues in *Kelo v. City of New London*.[54] In *Kelo*, the plaintiffs were homeowners that challenged a proposed redevelopment

46. For a discussion of quasi-public development entities, see Patience A. Crowder, *"Ain't No Sunshine": Examining Informality and State Open Meeting Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623, 646 (2007).

47. *See* REDEVELOPMENT, *supra* note 17, at 7–9. A wide range of institutional investors financially support redevelopment projects with debt and equity financing, including pension plans, investment banks, hedge funds, and insurance companies. *See id.* at 139–41.

48. 348 U.S. 26 (1954).

49. *See id.*; *see also* Denis J. Brion, *The Meaning of the City: Urban Redevelopment and the Loss of Community*, 25 IND. L. REV. 685, 687–702 (1991) (providing a rich description of the story behind the case).

50. *See Berman*, 348 U.S. at 31.

51. *See id.*

52. *See id.* at 33–34.

53. For some of the more infamous cases, *see* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984); Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981).

54. 545 U.S. 469 (2005).

plan that sought to condemn their properties (and numerous others) to accommodate the construction of a $300 million pharmaceutical research facility.[55] The research facility was planned by a large pharmaceutical company and the city's economic development entity as a function of the city's economic development plan.[56] The plaintiffs argued that economic development was not a public use that satisfied the takings clause of the Fifth Amendment.[57] Relying in part on *Berman*, the Court held that economic development by private interests can qualify as "public use" under the Fifth Amendment.[58]

A reoccurring theme in *Berman*, *Kelo*, and the cases in between is the lack of community participation in the initial planning process. The public and the private partner planned each project, intentionally excluding the urban residents affected by the redevelopment project – and "affected" they were. For example, Professor Denis J. Brion details the plight of urban resident Mayme Riley as she traversed the redevelopment challenged in *Berman*.[59] Ms. Riley received a condemnation award of $7,000 for her home, however this was far from adequate considering that at the time she owed $8,902 on mortgages for the house, paid a $300 deposit for the house, and invested $877 for repairs and improvements to the house.[60] Her story is but one of hundreds,[61] and those voices should have been heard in the planning of the redevelopment projects that ultimately displaced them. Urban redevelopment can (and should) be successful with input from the current residents.[62] Exclusion, however, remains the practice, which means that other mechanisms have to be developed to respect the rights of urban residents confronted by redevelopment.

While, in principle, the nature of redevelopment triggers certain public mechanisms (such as public hearings at certain phases of the project), affected residents (including small business owners) have historically been displaced by the process. As stated by one developer, "[h]opefully, this is the last time we'll

---

55. *See id.* at 473.

56. *See id.*

57. *See id.* at 475–76.

58. *See id.* at 490.

59. *See* Brion, *supra* note 49, at 700–02 (citing Riley v. Redevelopment Land Agency, 246 F.2d 641 (D.C. Cir. 1957)).

60. *See id.*

61. At the time of the redevelopment, the population of just one of the neighborhoods affected by the plan was 5012. *See Berman*, 348 U.S. at 30; *see also, e.g.*, *infra* notes 236–239 and accompanying text (regarding the Fillmore District in San Francisco, California). Chicago's deconstruction of all of its public housing projects by the end of 2009 is projected to displace 40,000 people. *See* David Kohn, *Tearing Down Cabrini-Green*, 60 MINUTES, July 23, 2003, http:///www.cbsnews.com/stories/2002/12/11/60II/main532704.shtml. Once complete, the city will have 14,000 fewer public housing units. *See id.*

62. *See, e.g.*, J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 547–52 (2007) (discussing the success of the community driven Dudley Street Initiative). More information available at Dudley Neigbors, Inc., http://www.dsni.org/dni (last visited January 31, 2010).

have to demolish a neighborhood in order to save it."[63] Whether or not a neighborhood is "saved" by redevelopment is debatable; however, the drafting and negotiation of the development agreement is typically done behind closed doors, with little to no involvement from the affected community.[64] Community advocates, scholars, and community development practitioners continue to search for ways to lessen the burden that redevelopment places overwhelmingly on urban residents, and, while there is no one way to solve the problem, the establishment of third-party beneficiary rights to redevelopment contracts for urban residents can help to achieve this goal.

III. THIRD-PARTY BENEFICIARIES

Despite altruistic underpinnings, third-party beneficiary rights have had a meandering evolution. For the formation of a valid contract, early contract law required the identification of a "promisor" and a "promisee" who were in "privity of contract" with each other.[65] In light of this requirement, courts had an early aversion to extending contract remedies to non-parties. This aversion was based on several factors, including (1) the idea that the extension of the right to sue to non-parties would "chill" commerce by deterring parties from entering into contracts because of the fear that they could be subject to breach of contract claims from an indeterminate number of third-party beneficiaries; (2) the fear that courts would be overrun by third-party beneficiary claims; and (3) the belief that contracts are based on mutual assent to the terms of the same deal as manifested through an offer and acceptance – a concept that seemed, at early common law, inconsistent with the notion of third-party beneficiary rights.[66] Public policy eventually overrode these concerns, and courts began to extend contract rights to third-party beneficiaries.

> [T]he third-party beneficiary doctrine has prevailed in this country primarily on the strength of its reasonableness and necessity, rather than upon any preconceived theory of law, until it has become a rule of law in its own right needing no fictitious basis for existence.[67]

It is important that the rights of all parties affected by a redevelopment project be analyzed in the context of the unique nature of redevelopment. Urban

---

63. Eugene L. Meyer, *Building a Technology Park in Baltimore by Rehabilitating a Neighborhood*, N.Y. TIMES, Aug. 5, 2008, at C7 (quoting the a senior vice president and development director of a development company heading a redevelopment project in Baltimore, Maryland).

64. *See* Crowder, *supra* note 46, at 626–38.

65. *See* 13 WILLISTON ON CONTRACTS § 37:1 (4th ed. 2009).

66. *See* Ernest M. Jones, *Legal Protection of Third Party Beneficiaries: On Opening Courthouse Doors*, 46 U. CIN. L. REV. 313, 316–19 (1977).

67. Note, *The Third Party Beneficiary Concept: A Proposal*, 57 COLUM. L. REV. 406 (1957) [hereinafter *Columbia Note*].

redevelopment projects are unique transactions for numerous reasons, the most fundamental being the amount and scope of the documents necessary to get a project underway, the number of residents that may be affected by a redevelopment project, the manner in which public-private partners promote a redevelopment project, and the amount of land required for the project. As explained below, these are the circumstances that must be analyzed to determine the designation of third-party beneficiary rights to redevelopment contracts. Several scholars have written articles detailing the history of the development of the third-party beneficiary rule, and there is no need to duplicate their efforts here.[68] What follows below is an illustrative review of the development of the third-party beneficiary rule.

A. Restatement (First) of Contracts

Classical contract law discouraged the development of third-party beneficiary rights because of its focus on the development of standardized rules and the goal of avoiding any doctrine that would discourage parties from contracting because they feared increased liability.[69] Modern contract law, however, steered away from this rigid focus to incorporate moral and social concerns in the recognition of third-party beneficiary rights,[70] although courts continue to struggle to develop standards for determining third-party beneficiary rights. The Restatement (First) of Contracts attempted to protect third-party beneficiaries by articulating rights for two types of third-party beneficiaries: creditor and donee beneficiaries.[71] A creditor beneficiary is the recipient of a promise to discharge a duty (such as a monetary debt).[72] A donee beneficiary is a recipient of a gift promise.[73] The First

68. For detailed descriptions of the evolution of third-party beneficiary rights, *see, e.g.*, Melvin A. Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1112–17 (1984) [hereinafter Eisenberg, *Responsive Model*]; Anthony Jon Waters, *The Property in the Promise: A Study of the Third-Party Beneficiary Rule*, 98 HARV. L. REV. 1109 (1985); Harry G. Prince, *Perfecting the Third-Party Beneficiary Standing Rule Under Section 302 of the Restatement (Second) of Contracts*, 25 B.C.L. REV. 919 (1984); David M. Summers, Note, *Third Party Beneficiaries and the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 880 (1982); Note, *Third Party Beneficiaries and the Intention Standard: A Search for Rational Contract Decision-Making*, 54 VA. L. REV. 1166, 1228 (1968) [hereinafter *Virginia Note*]; *Columbia Note, supra* note 67.

69. *See generally* Eisenberg, *Third-Party*, *supra* note 2, at 1365–71.

70. *See, e.g.*, *id.* at 1373.

71. H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896 (N.Y. 1928), is the instructive case that settled the identity of donee beneficiaries. The seminal case that established creditor beneficiaries is Lawrence v. Fox, 20 N.Y. 268 (1859).

72. RESTATEMENT (FIRST) OF CONTRACTS § 133(1)(b) (1932). The First Restatement states that a creditor beneficiary would be found "[w]here performance of a promise in a contract will benefit a person other than the promisee, that person is . . . a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred by the statute of limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds." RESTATEMENT (FIRST) OF CONTRACTS § 133(2).

Restatement labeled all other beneficiaries as incidental beneficiaries, which, as such, did not have enforceable rights under contract law.[74] The consistent application of the creditor and donee distinctions proved difficult for courts because it became evident that there were circumstances beyond those designations that warranted third-party beneficiary rights.[75] Also missing from the First Restatement was a "workable methodology" for determining the rights of any third parties seeking to enforce a contract.[76] As a result, the drafters of the Restatement (Second) of Contracts articulated a new rule that merged the concepts of donee and creditor beneficiaries into the single category of intended beneficiaries.[77]

B. Intent to Benefit

In between the inefficiency of the First Restatement and the attempted cure of the Second Restatement, courts developed the common law of third-party beneficiary rights by formulating an "intent to benefit" test, which proved to be a largely ambiguous methodology.[78] Under the rubric of this test, courts have sought to determine whether the parties to a contract intended to benefit the third party seeking to enforce the contract.[79] This test is, however, inherently vague and not conducive to consistent judicial decisions. As one scholar has asserted, "intent" can (at least) refer to the parties' subjective intent, the intent that is objectively manifested, or action to achieve a certain result.[80] In addition, the test

---

73. *See* RESTATEMENT (FIRST) OF CONTRACTS § 133(2). The First Restatement states that a donee beneficiary would be found "[w]here performance of a promise in a contract will benefit a person other than the promisee, that person is . . . a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary." RESTATEMENT (FIRST) OF CONTRACTS § 133(1)(a).

74. *See* RESTATEMENT (FIRST) OF CONTRACTS § 133(1)(c).

75. The main difference between the two designations was the ability of the parties to alter or discharge the duty owed to a creditor beneficiary (as long as the creditor beneficiary had not materially changed position in reliance of the promise) versus the inability to do so with a donee beneficiary. *See* RESTATEMENT (FIRST) OF CONTRACTS § 143.

76. *See* Summers, *supra* note 68, at 884–85.

77. *See, e.g.*, Eisenberg, *Third-Party*, *supra* note 2; Robert S. Adelson, Note, *Third Party Beneficiary and Implied Right of Action Analysis: the Fiction of One Governmental Intent*, 94 YALE L.J. 875 (1985). Although the term "intended beneficiaries" was crafted to serve as an umbrella term to encompass and represent the different categories of third-party beneficiaries, the terms "donee beneficiary" and "creditor beneficiary" appear in the Comments to Section 302. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302, Comments b – d (1981); *infra* notes 82–87 and accompanying text.

78. *See, e.g.*, Eisenberg, *Third-Party*, *supra* note 2, at 1378–81.

79. *See Columbia Note*, *supra* note 67, at 408–10.

80. Eisenberg, *Third-Party*, *supra* note 2, at 1379. The most consistent results were found when courts determined "whether the contracting parties, or the promisee, had a subjective motive to confer a benefit on the third party as an end." *Id.*

ignores the reasons why parties contract with each other in the first place.[81] Despite the failings of the intent to benefit test, the notion of "intent" strongly influenced the drafters of the Second Restatement.

C. Restatement (Second) of Contracts

Never satisfied with the third-party beneficiary designations articulated by the First Restatement, Arthur Corbin, the rule's most ardent champion, strongly lobbied for a more expansive doctrine.[82] The Second Restatement attempted to formulate more expansive terminology by replacing the creditor and donee beneficiary categories with the single category of "intended beneficiaries," while defining an "incidental beneficiary" as simply any beneficiary who is not an intended beneficiary.[83] In addition, it set forth a methodology by which to determine intended beneficiaries.[84] Under the Restatement, a non-party to a contract is a third-party beneficiary with enforceable contract rights if: (1) recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties; and (2) either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.[85] Subsections (a) and (b) seem to mirror the "creditor" and "donee" designations of the First Restatement, respectively; however, now the gift promise designation serves as a catchall for "any intended beneficiary as long as the promise is not one to pay a debt of the promisee."[86] While the Restatement Second's approach is not free from criticism, it unquestionably has had an impact on third-party beneficiary jurisprudence.[87] Unfortunately, however, by condensing terminology, Section 302 increased opportunities for ambiguity instead of bringing sorely needed clarity. Although a few courts still apply the intent to benefit test, the remainder of this article relies on the Restatement Second's articulation of the third-party beneficiary rule.

---

81. "Finally, the entire enterprise of finding an intent to benefit the third party as an end is misguided. Except in some cases involving true donee beneficiaries, the intent of the contracting parties is typically to further their own interests, not the interest of a third party. Accordingly, the question whether there is an intent to benefit the third party as an end normally cannot generate a meaningful answer." *See id.* at 1381.

82. *See, e.g.*, Waters, *supra* note 68, at 1148–73 (detailing Corbin's efforts to establish a third-party beneficiary rule).

83. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302(1)–(2).

84. *See id.*

85. *See* FARNSWORTH ON CONTRACTS, § 10.3 (3d ed. 2004).

86. *See id.* Commentary to the Restatement Second states that the terms "donee" and "creditor" carried "overtones of obsolete doctrinal difficulties." *See* RESTATEMENT (SECOND) §302, Reporter's Note.

87. *See* Waters, *supra* note 68, at 1172 (noting that the intended beneficiary classification made the third party beneficiary rule applicable to beneficiaries of federally funded contracts).

D. The Modern Approach

Court decisions interpreting the third-party beneficiary rule are inconsistent.[88] On one hand, courts have strictly adhered to precedent to deny a third-party beneficiary's rights with complete disregard for the particular facts of the case,[89] an approach that has contributed to numerous inconsistent judicial interpretations of the intent element.[90] On the other hand, courts have considered the fundamental fairness principles that speak to the rule's origins. "The reason for the [third-party beneficiary] doctrine is that it is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay."[91] As Professor Harry G. Prince explains, despite the inconsistency in judicial opinions, there is a general presumption against designating third-party beneficiaries:

> In tipping the balance toward denying third party rights, the courts are making a judgment that exposing a promisor to potential liability to a third party when the promisor has not explicitly contracted to assume that obligation is more undesirable than allowing a party to completely escape the consequences of a breach of contract when the promisee is disabled from or not interested in enforcing the promise.[92]

Although courts are historically more concerned with encouraging future contracts than providing remedies for third parties harmed by existing contracts, certain contractual relationships are more likely to implicate third-party beneficiary rights than others. Given the many parties typically involved in construction projects, it is not surprising that construction contract disputes have yielded a fair amount of third-party beneficiary claims.[93]

> Construction contract cases involve several parties standing in a variety of relationships: owners, attempting to recover for breach of contract by a subcontractor with whom they have no direct contractual relationship; subcontractors, wishing to recover either from surety companies or owners for damages resulting from breach by a general contractor; contractors, attempting to recover for injuries resulting from another contractor's breach of the latter's agreement with the owner; or adjacent property owners, wishing to recover

---

88. For a thorough analysis of court decisions interpreting third-party beneficiary rights, *see generally* Prince, *supra* note 68.

89. *See, e.g.*, Waters, *supra* note 68, at 1178 ("Indeed, we are now in a period of judicial resistance to this use of the rule; courts are resorting to a variety of devices to turn away the contract claim, without consideration of it merits.").

90. *See infra* notes 97–115 and accompanying discussion.

91. Wilmington Hous. Auth. v. Fidelity & Deposit Co. of Md., 47 A.2d 524, 527 (Del. 1946).

92. Prince, *supra* note 68, at 927.

93. *See, e.g.*, John V. Burch, *Third-Party Beneficiaries to the Construction Contract Documents*, 8-APR CONSTR. LAW. 1 (April 1988).

> from contractors for damages resulting from their performance under the construction agreement.[94]

A review of third-party beneficiary construction cases is particularly relevant to a discussion about urban redevelopment where construction relationships are significant.[95] Despite the often multiple relationships between the parties in construction contractual disputes, the courts have not provided much rationale for their decisions, just as with other types of third-party beneficiary claims. Some courts merely cite the third-party beneficiary rule as articulated by another court, only to rule in the opposite manner without distinguishing the facts or offering any reasoning for the decision.[96] Despite the inconsistency of the court decisions, it is clear that there are facts and circumstances that will allow a third-party beneficiary to prevail on a construction contract claim. The court decisions consistently focus on the parties' intent as evidenced by the circumstances, although the decisions do not lay out a clear methodology for interpreting intent. For example, in *Moore Construction Co., Inc. v. Clarksville Dept. of Electricity*, the court noted Arthur Corbin's assertion that "a third party beneficiary's action should be permitted if it advances the result intended by the contracting parties when they entered the contract."[97] Relying on this rationale, the court found that a co-prime contractor (Contractor A) was the third-party beneficiary of the contract between the owner and the defendant co-prime contractor (Contractor B) where the owner instructed Contractor A that it had to pursue remedies for damages from Contractor B.[98] The court based its reasoning on the terms of the contract and the course of dealing between the parties. Specifically, under the terms of the contract, Contractor B agreed to "confer a benefit" to other contractors on the project by doing its work in such a manner so as not interfere with the others and to remedy against damages caused to the work of others.[99]

---

94. Prince, *supra* note 68, at 960. Professor Melvin Eisenberg, to illustrate the utility of his third-party-beneficiary principle, divides construction cases into three categories: (1) suits by subcontracts against the sureties of prime contractors, (2) multi-prime contracts, and (3) suits by owners against subcontractors. Eisenberg, *Third-Party*, *supra* note 2, at 1396–1406.

95. Professors Prince and Eisenberg both provide detailed analysis of third-party beneficiary claims in construction contracts in their respective articles. *See* Eisenberg, *Third-Party*, *supra* note 2, at 1396–1406; Prince, *supra* note 68, at 960–68.

96. *See, e.g.*, Hardaway Concrete Co., Inc. v. Hall Contracting Corp., 647 S.E.2d 488, 493 (S.C. Ct. App. 2007) (holding that a contractor for a new power plant was a third-party beneficiary to the contract between a concrete supplier and the public service authority that initiated the project by citing Bob Hammond Constr. Co. v. Banks Constr. Co., 440 S.E.2d 890, 891 (S.C. Ct. App. 1994), for the proposition that a third party beneficiary may enforce a contract if the parties intended to create a direct benefit for the third party although the *Hammond* court designated the third-party as incidental).

97. *Moore Constr. Co*, 707 S.W.2d at 9.

98. *Id.* at 11.

99. *Id.*; *see also* Syndoulos Lutheran Church v. A.R.C. Indus., Inc., 662 P.2d 109, 114 (Alaska 1983) (holding that a contract was expressly intended to benefit the third-party owner); Keel v. Titan Constr., 639 P.2d 1228, 1232 (Okla. 1982) (determining that an owner, as direct beneficiary of contract between a contractor and architect, could pursue a claim against an architect as a third-party beneficiary).

Additionally, Contractor B also agreed to assume the owner's responsibility to Contractor A to coordinate the work under the contract.[100] The court also gave due consideration to a series of preconstruction and pre-completion meetings that all of the parties attended and to a letter from the owner to the plaintiff in which the owner set forth its reliance on Contractor B's contractual obligation to compensate Contractor A for damages caused by Contractor B.[101]

Common law is not the only source of third-party beneficiary rights. Many states have adopted statutes to govern the designation of third-party beneficiaries. Not surprisingly, given the diversity of state statutes, the statutory language has not clarified the issue much. Again, breached construction contracts represent a fair amount of the third-party beneficiary claims that came before the courts. *Shell v. Schmidt* is a noteworthy case of statutory interpretation.[102] Pursuant to Section 1559 of the California Civil Code, "a third party beneficiary may maintain an action directly on . . . a contract" where the contract is "made expressly for the benefit of a third person and 'expressly' simply means 'in an express manner; in direct or unmistakable terms; explicitly; definitely; directly.'"[103] Noting that the designation of an intended beneficiary is a question of interpretation, the court held that plaintiffs, twelve sets of husbands and wives, were third-party beneficiaries to construction contracts between a contractor and the Federal Housing Authority where the contractor failed to build the homes purchased by the plaintiffs in accordance with the specifications of the Federal Housing Authority (the "FHA").[104] The court reasoned that the contract to build homes between the contractor and the FHA was for the benefit of plaintiffs as the homeowners.[105]

Likewise, in *Vanerian v. Charles L. Pugh Co., Inc.*,[106] the court held that a

---

100. *Moore Constr. Co.*, 707 S.W.2d at 11.

101. *Id.* In addition to the relationships between the various parties to a construction project, construction contracts present another interesting issue with respect to third-party beneficiary claims: whether the owner is a public or private entity. Depending on the project, a prime contractor who contracts with an owner might then contract with subcontractors to assist with the project. If so, an owner might require the prime contractor to obtain a performance bond, a payment bond, or both. Under the terms of a performance bond, a surety guarantees the owner that the prime contractor will perform under the contract. *See* JUSTIN SWEET, SWEET ON CONSTRUCTION LAW 20–22 (1997). Under the terms of a payment bond, a surety guarantees the owner that the subcontractors will be paid. *See id.* The traditional rule only allowed for recovery by subcontractors against payment bonds that ran to public entities because of assumed motivations of public and private entities under the intent-to-benefit test. *See* Eisenberg, *Third-Party*, *supra* note 2, at 1397. This was because subcontractors can file liens against property owned by private entities but not against government-owned property. Therefore, courts reasoned that if a public entity required a prime contractor to bond its payment obligations – even where the public entity could not be harmed by the prime contractor's failure to pay the subcontractors because there was no lien remedy to attach to the public land – the public entity did so for the benefit of the subcontractors.

102. 272 P. 2d 82 (Cal. Ct. App. 1954).

103. *Id.* at 89 (interpreting CAL. CIV. CODE § 1559 (West 2009)).

104. *Id.* at 90–92.

105. *Id.*

106. 761 N.W.2d 108 (Mich. Ct. App. 2008).

plaintiff homeowner was a third-party beneficiary to the contract between the contractor and the flooring subcontractor because the contract contained language explicitly stating that the parties would remove and replace the floor in the plaintiff's home.[107] Despite the general rule that property owners are not intended third-party beneficiaries of contracts between contractors and subcontractors,[108] the court determined that the plaintiff was a third-party beneficiary "as a matter of law"[109] under Michigan's third-party beneficiary statute, which reads in part: "Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee."[110]

In determining any party's rights under a statute, courts may look to the statute's legislative history to determine the drafters' intent. In *A.E.I. Music Network, Inc. v. Business Computers, Inc.*, the Seventh Circuit determined that the Illinois legislature intended for subcontractors to be a third-party beneficiary class to contracts made by public entities.[111] In this case, the court did not analyze a third-party beneficiary statute, but instead analyzed a statute requiring public entities to compel construction contractors to post bonds to guarantee payments of subcontractors.[112] The court determined that the legislature intended to protect subcontractors to public projects as a class by requiring the bond payment and, as such, that subcontractors to public projects are entitled to sue for breach of contract.[113] Specifically, the court stated that in a case where "the legislature interpolates a contractual term that the parties are not free to vary, the relevant intentions are no longer those of the parties but those of the legislature . . . Nothing more is required to make them 'direct' third-party beneficiaries, entitled to sue."[114]

Shell, *Vanerian*, and *A.E.I. Music Network* illustrate the approaches employed by courts to analyze a third-party beneficiary's rights: analysis of who is supposed to benefit from the contract and analysis of the legislative intent behind a third-party beneficiary statute. These cases support the argument that redevelopment statutes and local government ordinances are criteria that a third party can use as evidence that it is the intended beneficiary of the contract.[115]

---

107. *Id.* at 111–12.

108. *See id.* at 112 (citing 9 Corbin, Contracts (interim ed.), § 779D; RESTATEMENT (SECOND) OF CONTRACTS § 302, cmt. e).

109. *Id.* at 114.

110. MICH. COMP. LAWS ANN. § 600.1405 (West 2009).

111. 290 F.3d 952, 955–56 (7th Cir. 2002).

112. *Id.*

113. *Id*; *see also* Sloan Constr. Co., Inc. v. Southco Grassing, Inc., 659 S.E.2d 158, 165 (S.C. 2008) (following *A.E.I.* and holding that subcontractors are a protected class of third-party beneficiaries under a state statute requiring contractors that work on public projects to meet bond requirements to ensure payments to subcontractors).

114. *A.E.I*, 290 F.3d at 955–56.

115. *See infra* notes 180–193 and accompanying text for a discussion about state and local government redevelopment statutes and redevelopment plans.

IV. URBAN REDEVELOPMENT INTENDED BENEFICIARIES

Part IV focuses on (i) discerning the meaning of intent, as that term is contemplated by the Restatement (Second) of Contracts and the third-party-beneficiary principle; (ii) the significance of government contracts in the third-party beneficiary rights discussion; and (iii) the public policy reasons that support the recognition of urban residents as third-party beneficiaries to development agreements.

A. Discerning Intent

Succinctly stated, this article argues that urban residents are third-party beneficiaries of urban redevelopment development agreements and other contracts between local governments and private developers because, as articulated by the Restatement (Second) of Contracts, "recognition of a right to performance"[116] for urban residents "is appropriate to effectuate the intention of the parties and . . . the circumstances [surrounding the contract] indicate that the promisee intends to give the beneficiary the benefit of the promised performance."[117] Thus, there are two distinct categories of intent in the Second Restatement's formula for identifying a third-party beneficiary: (1) the intent or purpose served by the contract (meaning what the contract is supposed to accomplish), and (2) do the parties to the contract intend that a third-party will benefit from the execution of the contract (meaning do the parties intend for the tangible benefits of the contract to extend beyond themselves).

1. Contractual Intention

A contract is a manifestation of individual intentions merged into a common goal that serves those individual intentions. The first element for establishing third-party beneficiary rights is the establishment of the purpose of the contract through the identification of the goods or services exchanged and linking that purpose to the third party. As previously explained, local governments and private developers each have their own motives for pursuing redevelopment projects;[118] however, despite their individual motives, the ultimate goal, the purpose of the development agreement, is to undertake a redevelopment project. In other words, because a redevelopment project is the contracted performance (the "intention" of the parties) of a development agreement, to be designated as third-party beneficiaries urban residents must show that their rights to performance facilitate the intent of local governments and private developers to undertake a redevelopment project. Assuming urban residents are suing to

116. RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(a) (2009).
117. *Id.* at § 302(1)(b).
118. *See supra* notes 24–26 and accompanying text.

enforce a development agreement that one of the parties has breached, enforcement will fulfill the intent that was originally manifested by the execution of the contract. "Section 302 is not meant to impose the restrictive requirement that there be evidence of both parties' individual intent . . . but rather is meant to focus on the shared intent as reflected in the agreement and surrounding circumstances."[119]

2. Circumstantial Intent

As previously explained, the meaning of "intent" has been a consistently problematic concept throughout the evolution of the third-party beneficiary rule.[120] Intent centers on two questions: (1) Does a contract contain language that conveys an express intent to benefit a third party; or (2) Can the intent to benefit a third party be inferred from the circumstances surrounding the formation and execution of the contract? The latter question is the focus of this article[121] and is answered in the affirmative in the case of redevelopment contracts: intent to benefit urban residents can be inferred from the urban redevelopment deal-making process of local governments and private developers because these circumstances indicate that local governments and private developers intend to give urban residents the benefits of the planned redevelopment.[122]

Although previous scholarship discussing the third-party beneficiary rule distinguished between the "promisor" as a party making the promise and the "promisee" as the party receiving the promise, those distinctions are not useful here. "The most basic reason why exclusive focus upon promisee's intentions is unsound . . . is not merely that [the] promisor's [intentions] are treated as irrelevant, but that freedom of contract requires consideration of the common or shared intentions of both promisor and promisee."[123] In redevelopment projects, the two parties (the local government and the private developer) are both promisor and promisee.[124] Thus, the second category of intent required to determine third-party beneficiary rights is evidence showing that the circumstances surrounding the contract establish the parties' intent that the beneficiary receive the benefit of the promised performance. In other words, urban residents must show that local governments and private developers intend for the residents to receive the benefit of the redevelopment project.

---

119. Prince, *supra* note 68, at 981 (internal citations omitted).

120. *See supra* notes 76–83 and accompanying text.

121. Naturally, where the former exists there is no question about intent.

122. The idea of "surrounding circumstances" is a literal review of the circumstances surrounding the contract and includes facts such as course of dealing and industry standards. *See, e.g.*, Transatlantic Financing Corp. v. United States, 363 F.2d 312, 316 (D.C. Cir. 1966).

123. *See* Jones, *supra* note 66, at 320 (identifying "shared intentions" as a policy reason that should be used to justify third party beneficiary rights).

124. Moreover, the designations are not relied on by courts.

> The approach of the [Restatement Second] is not to apply a presumption that disallows third party standing when there is not discoverable actual intent, that is, when a gap exist in the contract, but instead to provide that the third party rights should be allowed whenever the grant of standing is consistent with the contractual terms and furthers the goals of the contracting parties. *This determination is made by looking at the contract, in light of the circumstances, but does not involve a search for the individual subjective intent of the contracting parties.*[125]

Evidence of the intent of private developers and local governments to benefit third parties is found at many stages of the urban redevelopment deal-making process, including in the language of the federal, state, and local government statutes authorizing the redevelopment as well as redevelopment (or development) plans. "The relevant intent to be divined is [not] . . . that of a single individual or entity, but rather that of an amalgam of legislative bodies, administrative agencies, and government officials – each of whom may have differing expectations and objectives with regard to the contract."[126]

a. Federal Legislation

Redevelopment projects funded by federal funds may be subject to the Uniform Relocation Assistance and Property Acquisition Act of 1970 (the "URA").[127] The URA requires that private developers and public proponents of urban redevelopment provide financial support and other relocation benefits to persons or businesses displaced by redevelopment.[128] Benefits differ according to whether the displaced person is a homeowner, renter, or business owner and fall into one of three categories: advisory assistance, moving assistance, and housing or reestablishment assistance.[129] These benefits and their impact on urban residents are certainly circumstances that require consideration when evaluating the third-party beneficiary rights of urban residents.

Advisory assistance includes notices to residents that will be affected by a pending redevelopment project and relocation counseling.[130] The levels of notice

---

125. Prince, *supra* note 68, at 981 (emphasis added).

126. Recent Case, *Contracts – Third Party Beneficiaries – Persons for Whom the Government Contracts to Provide Training and Employment are not Third Party Beneficiaries,* 88 HARV. L. REV. 646, 651 (1975) (recent case note).

127. 42 U.S.C. § 4601 (2009). Although not the subject of this article, there are many who believe that the URA is inherently unfair and inadequate. *See, e.g.*, Ronald K Chen, Brian Weeks, & Catherine Weiss, *Compensation and Relocation Assistance for New Jersey Residents Displaced by Redevelopment: Reform Recommendations of the State Department of the Public Advocate*, 36 RUTGERS LAW RECORD 300 (2009); Brian J. Sutherland, *Killing Jim Crow and the Undead Nondelegation Doctrine with Privately Enforceable Federal Regulations*, 29 SEATTLE U. L. REV. 917, 933–34 (2006) (Comment).

128. *See, e.g.*, Karen Tiedemann, *Federal Relocation and Replacement Housing Law, in* THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 411–37 (Tim Iglesias & Rochelle E. Lento eds., 2005).

129. *See id.* at 426.

130. *See* 49 C.F.R. §§ 24.203, 24.205 (2009).

are (i) general notice provided "as soon as feasible" to inform all residents in the redevelopment's footprint of the pending project, (ii) eligibility or non-displacement notice to provide more specific information about applicable relocation benefits or to serve as notice of non-displacement for a particular resident, (iii) ninety day notice with specific relocation date information, (iv) post-acquisition tenant notice to a resident not entitled to relocation assistance because that resident moved into an affected property after the initiation of the redevelopment project, and (v) landlord-tenant law termination notice with a relocation date that is fixed to the tenancy of each existing lease in the redevelopment project's footprint, because the URA does not shorten existing tenancies.[131] Advisory assistance also includes relocation counseling to help a displaced resident locate new housing and complete payment claim forms.[132] Advisory assistance for business owners includes assistance with determining businesses' replacement site requirements, determination of whether the assistance of an outside specialist is needed, and, as with residential counseling, assistance with the claim forms.[133]

Moving assistance requires payment for moving and related expenses.[134] Displaced residential dwellers (homeowners and renters) and business owners are compensated for "actual, reasonable, and necessary moving expenses" as determined by a formula based on the manner used to move personal property from the dwelling or personal property and inventory from the small business's location.[135] Alternatively, residential dwellers can request fixed moving expense allowances.[136] For small business owners, moving expenses include transportation, storage, and connection/disconnection fees for equipment.[137]

Housing assistance is provided to residential dwellers,[138] whereas reestablishment assistance is provided to small business owners.[139] Housing assistance includes finding comparable replacement housing.[140] Reestablishment assistance consists of a $10,000 payment to displaced small business owners for "expenses actually incurred in relocating and reestablishing" the small business.[141]

While woefully inadequate in many instances and, as such, not without critics,[142] the assistance that is supposed to be available under the URA is clearly

131. *See* Tiedemann, *supra* note 128, at 416–19.
132. *See* 49 C.F.R. § 24.205 (2009).
133. *Id.*
134. *See* 49 C.F.R. § 24.301 (2009).
135. *Id.*
136. *Id.*
137. *Id.* at § 24.301(d), (g). The amount for searching for a new location is limited to $2,500. *See id.*
138. 49 C.F.R. §§ 24.401–403 (2009).
139. 49 C.F.R. §§ 24.304–305 (2009).
140. 49 C.F.R. §§ 24.401–404 (2009).
141. 49 C.F.R. § 24.304 (2009).
142. For a thought provoking and detailed analysis of the URA in the midst of the urban renewal craze, *see generally* Lawrence C. Christy & Peter W. Coogan, *Family Relocation in Urban Renewal*, 82 HARV. L. REV. 864 (1969).

for the benefit of displaced persons and business owners.[143] "[The URA's] major purpose is to assure that one who is displaced by a federally assisted program does not suffer a loss if that loss can be reasonably compensated by a money payment."[144] The payments and services that the URA is supposed to provide to displaced residents are well established circumstances surrounding urban redevelopment contracts, and this article argues that such circumstances should be considered in the circumstantial test as evidence of the parties' intent to benefit an intended third-party beneficiary.

Despite the difficulty courts have had in articulating clear and consistent rules for establishing third-party beneficiary rights and the presumption against those rights, the idea of third-party beneficiary rights to redevelopment contracts is not unprecedented. A few courts have contemplated whether urban residents are intended third-party beneficiaries to redevelopment contracts without deciding the issue.[145] Other courts have decided the issue, and these decisions have been based on the very specific facts and circumstances of each case.

In *Perrysburg v. Toledo Edison Co.*, the city government brought a declaratory-judgment action against an electric utility to determine which of the two parties was financially responsible for relocating electrical poles and equipment owned by the utility from an intersection that the city intended to widen.[146] The utility relocated the equipment and sought reimbursement from the city, which refused to pay.[147] As a function of the process of the widening project, the city entered into a contract with the state's department of transportation.[148] The utility argued that it was a third-party beneficiary to that contract in order to obtain compensation for relocating the equipment.[149] In analyzing the applicability of the third-party beneficiary rule, the court held that there was a genuine issue of

---

143. *See* Tiedemann, *supra* note 128, at 413 (stating that "Congress enacted the URA to address the human cost of property acquisition by providing compensation for the displacement of people and businesses.").

144. State v. Little, 100 P.3d 707, 712 (Okla. 2004).

145. In these decisions, courts have used discretionary and ambiguous language to describe the viability of third-party beneficiary claims of private residents affected by urban redevelopment projects even where that was not the particular issue before the court. *See, e.g.*, Edwards v. District of Columbia, 821 F.2d 651, 661 (D.C. Cir. 1987) (commenting "this cause of action might be read broadly to assert a third-party beneficiary claim to 'standard housing'" to a contract between the District of Columbia and HUD but not deciding either of those particular questions because they were not raised by the plaintiff); East Bay Mun. Util. Dist. v. Richmond Redevelopment Agency, 155 Cal. Rptr. 636, 643 (Cal. Ct. App. 1979) (denying a third-party beneficiary claim against a redevelopment agency because the plaintiff did not fit into either the strict creditor or donee designations but decided before the release of the Restatement Second's articulation of the third-party beneficiary rule which merged those categories into the broader category of intended beneficiary); Merge v. Troussi, 394 F.2d 79, 83 (3d Cir. 1968) (noting that it "may be true that as third-party beneficiaries of" the disputed contract the plaintiffs might have a "a claim for damages or performances" but not deciding the issue because the court concluded that it did not have jurisdiction).

146. Perrysburg v. Toledo Edison Co., 870 N.E.2d 189 (Ohio Ct. App. 2007).

147. *Id.* at 191.

148. *Id.* at 194.

149. *Id.*

material fact, denied summary judgment, and remanded the issue.[150] The court determined that there were two circumstances that proved the parties' intent to benefit a third party: (1) the contract between the city and the state, and (2) a letter from the state to the utility regarding its reimbursement. The court paid particular attention to the language of the contract that read in part as follows: "Publicly owned facilities which do comply with the reimbursement provisions of the [state agency's manual] will be removed and/or relocated *at project expense*, exclusive of betterments."[151] The court determined that this language "clearly contemplates an expense to be paid to a utility in furtherance of the project"[152] because it was clear that the language contemplated that a party would be reimbursed as long as there was compliance with the state agency's reimbursement provisions. In addition, the state agency sent a letter to the utility confirming that the relocation of the equipment was eligible for reimbursement in accordance with the agency's reimbursement policies and informing the utility that it would have to seek reimbursement from the city because the agency's cap had been reached.[153] The court concluded that the circumstances of this letter and the language in the contract between the state and the city were significant enough to manifest third-party beneficiary rights in the utility. Although this matter did not arise from resident claims, the court's analysis is quite instructive. Just as the *Perrysburg* contract was drafted to provide payments to third parties and the letter from the state agency to the utility served to inform the utility (as a third party) to seek reimbursement from the city, so does the URA provide that residents should receive benefits as third parties to redevelopment deal documents. Taken in their entirety, redevelopment deal documents evidence intent that third-party residents will benefit.

In contrast, two cases where courts determined that the circumstances did not justify third-party beneficiary rights are *Berberich v. U.S.*[154] and *Wallace v. Chicago Housing Authority*.[155] In *Berberich*, suit for breach of contract was filed against the United States government by residents of a town, including small business owners, who were to be relocated to accommodate a dam expansion by the Army Corps of Engineers (the "Corps").[156] The residents' claims came from two sources: (1) a series of contracts, which were accumulated by reference in a Relocation Contract between the town's administration and the Corps and (2) the enabling statute that authorized the project.[157] The residents sought to be designated as third-party beneficiaries to both the Relocation Contract and the

150. *See id.* at 194–95.
151. *Id.* (emphasis added).
152. *Id.*
153. *Id.*
154. 5 Cl. Ct. 652 (1984).
155. 298 F. Supp. 2d 710 (N.D. Ill. 2003).
156. *Berberich*, 5 Cl. Ct. at 654.
157. *Id.*

enabling statute.[158] They sought to show that the following provisions found in the Relocation Contract evidenced intent to benefit them as third parties:

- Parties' obligations to ensure that the residents had the maximum opportunity to participate in the relocation planning process;
- Parties' obligations to ensure the adequateness of the environmental assessment report;
- Recognition by the Corps in a Memorandum of Agreement that it had participated in the master plan of the new town through a process that maximized citizen participation; and
- Provisions in which the Corps agreed to a platting and conveyance schedule and to provide erosion control for the new town.[159]

In addition to seeking support from the various contractual documents surrounding the relocation, the residents argued that the enabling statue conferred third-party beneficiary rights because it authorized the Corps to contract with "non-Federal" interests to facilitate the relocation of the town, which permitted the Corps to contract with the town's administration.[160]

Despite the significant amount of involvement by the residents in the negotiation of the relocation and the planning of the new town, the court concluded that the circumstances did not warrant designating the parties as intended third-party beneficiaries.[161] The court determined that the provisions of the Relocation Contract were limited to "reflect only the planning efforts and procedures needed to establish obligations between the Corps and the Town."[162] The court concluded that those obligations "were for the general benefit of the Town," and that "[n]o private right of action against the United States [was] prescribed for breach of the Corps's obligations."[163] Moreover, the court determined that the enabling statute contained "no express authority to enter contacts that would create claims in non-parties to such contracts."[164] The court further stated that any such intent would be contrary to the "policy and intent" of the statute.[165]

In *Wallace*, residents sued the Chicago Housing Authority (the "CHA") as third-party beneficiaries to several federal statutes governing their forced

158. *Id.*
159. *Id.* at 656.
160. *Id.*
161. *Berberich* presents a set of very unique circumstances where the United States government operated to relocate an entire town via the Corps to facilitate the expansion of a dam project. The town had a population of approximately 650 people. *See* N. Bonneville, Wash. v. United States, 5 Cl. Ct. 312, 314 (1984).
162. *See id.* at 656.
163. *See id.*
164. *See id.* at 657.
165. *See id.*

relocation.[166] The residents alleged that the CHA failed to provide them with appropriate relocation benefits as they were being displaced from public housing that was demolished to accommodate a new mixed-use redevelopment project.[167] Among many claims, the residents argued that they were intended third-party beneficiaries to a Moving to Work Agreement between the CHA and the U.S. Department of Housing and Urban Development ("HUD").[168] The court denied the third-party beneficiary designation because it determined that "language and structure" of the agreement did not "demonstrate the parties' intent to confer an explicit benefit on" the plaintiffs.[169]

Berberich and *Wallace* were incorrectly decided.[170] The *Wallace* court found fault with the Moving to Work Agreement for the following reasons:

- The agreement's aim to "design and test innovative methods of providing housing and delivering services to low-income families in an efficient and cost effective manner" spoke to identifying the obligations of the two parties;
- The incorporation of a Resident Protection Agreement into the Moving to Work Agreement was not dispositive of an intent to benefit third parties;
- The Moving to Work Agreement between HUD and the CHA contemplated a subsequent agreement between CHA and the residents; and
- The Moving to Work Agreement did not demonstrate an intent "unequivocally intended to confer a benefit enforceable" by the residents.[171]

Reasoning based on the premise that redevelopment contracts are limited to identifying planning and procedures to determine the parties' obligations to each other completely ignores redevelopment practice as well as the parties' shared intent to accomplish a redevelopment project, the scope of which, by its very definition, far exceeds touching only the obligations of the parties. The *Wallace* court's analysis is somewhat contradictory. While declaring that a contract must be "undertaken for the plaintiff's direct benefit and the contract itself must

166. *Wallace*, 298 F. Supp. 2d 710.

167. *See id.*

168. *See id.* at 723–24.

169. *See id.* at 725.

170. The *Wallace* outcome is somewhat easier to understand because of the evidence that the CHA intended to enter into subsequent agreements with the residents (although that clearly had yet to happen). It is conceivable that these circumstances would prevent a third-party from establishing that it was an intended beneficiary, because the intent to execute a subsequent agreement with the residents was evidence of the CHA's intent to contract with the residents directly so that there would be no need for them to benefit as third parties. However, that fact that subsequent agreements were planned between the CHA and the residents does not affect the impact of the agreements between the CHA and HUD regarding the relocation and supporting programs. Again, but for the residents, who would benefit from these agreements?

171. 298 F. Supp. 2d at 724–25.

affirmatively make this intention clear,"[172] the *Wallace* court acknowledged that "courts have also accepted an implied showing where the implication that the contract applies to third parties is so strong as to be practically an express declaration."[173]

Moving to Work agreements are agreements between HUD and public housing authorities by which the parties design and test new approaches for providing housing assistance.[174] HUD's articulated purposes for the Moving to Work Program are (1) to reduce costs and improve cost effectiveness in federal spending, (2) to provide incentives for families with children and working parents (or parents attempting to find work), and (3) to increase housing options for low-income families.[175] These factors provide a strong implication that Moving to Work Agreements are for the direct benefit of public housing residents such as the plaintiffs in *Wallace*.

As argued by Professor Ernest M. Jones "[a] critical factor [in determining what evidence is sufficiently probative of shared intentions] should be the role [the parties] intended [the] beneficiary to play in the making, performance and informal enforcement of the agreement."[176] Such evidence could include evidence that (i) the parties expected the beneficiary to participate in the performance of the agreement; (ii) the parties expected the beneficiary to participate in the "informal enforcement or dispute settlement stage of the agreement;" (iii) establishes the circumstances under which the beneficiary will receive the promised performance as a direct benefit from the parties; and (iv) the beneficiary relied on the agreement.[177] *Berberich*, for example, meets (i), (iii), and (iv) of these criteria. To plan and facilitate their relocation, the residents participated in a series of workshops and planning sessions, which meet criteria (i) and (iii) because the planning workshops were part of the performance of the relocation (there could be no relocation without planning) and the planning workshops established the circumstances under which the beneficiaries would receive the promised performance of the relocation (because they themselves helped to plan it). Finally, in satisfaction of criteria (iv), given the reported course of dealings between the residents, the town, and the Corps, there could be no other outcome but reliance. The town administrators and residents specifically requested to be moved as a community, an undertaking that could not be achieved

172. *See id.* at 724 (citing 155 Harbor Drive Condo. Ass'n v. Harbor Point, Inc., 568 N.E.2d 365, 374–75 (1991)).

173. *Id.* at 724 (quoting Quinn v. McGraw-Hill Cos., 168 F.3d 331, 334 (7th Cir. 1999) (internal citations and quotations omitted)).

174. *See* U.S. Department of Housing and Urban Development, Moving to Work (MTW) Background and Purpose, http://www.hud.gov/offices/pih/programs/ph/mtw/background.cfm (last visited Jan. 22, 2010).

175. *Id.*

176. Jones, *supra* note 66, at 333.

177. *See id.* at 334–35.

without the assistance on the Corps.[178]

Third-party residents are almost inherent to redevelopment projects. Where public housing is demolished and replaced by mixed-use projects and a dam is expanded into the boundaries of an adjacent town, the current residents and other dwellers are displaced. When proponents of a redevelopment project seek public funding for a project, they create circumstances that evidence intent for the soon to be displaced residents and dwellers to benefit from relocation benefits or other benefits available per statute. The circumstances presented in *Berberich* and *Wallace* were sufficient to evidence the intent of the contracting parties to benefit the third parties that brought the claims, and those plaintiffs should have been recognized as third-party beneficiaries.[179]

b. State and Local Government Redevelopment Statutes

The language and requirements of state redevelopment-related statutes and their local government counterparts also serve as circumstances that evidence intent to benefit third-party residents. Under most circumstances, a redevelopment project is initiated by a "blight" designation or evidence that a particular geographic area meets the demographic requirements of state or local government legislation, such as economic development zones. An amorphous concept, the definition of blight varies from jurisdiction to jurisdiction.[180] Beginning with the earliest legal challenges to the blight designation, the term was used by government entities to describe perceived challenges to "public health, safety, morals, and welfare," including conditions such as substandard housing.[181] While the vague description is still floating around, many states have adopted more stringent definitions, particularly as a response to the Supreme Court's decision in *Kelo*.[182] For example, Oklahoma is a state that defines blighted conditions to include: deteriorated structures, inadequate street layouts, unsani-

178. *N. Bonneville, Wash.*, 5 Cl. Ct. at 313–14.

179. Neither case involved a public-private partnership that is typical of most redevelopment projects. That is not to say that private developers weren't involved in the projects, just that they weren't named defendants. The defendants in *Berberich* and *Wallace*, the U.S. government and the Chicago Housing Authority, respectively, were both government entities. The cases are distinguishable from the thesis of this article because while courts are allowed to place additional standards on cases involving government contracts, the *Berberich* and *Wallace* courts should not have applied those standards in these cases. Government actors are market participants in the course of dealing of urban redevelopment public-private partnerships. Notions of fairness and justice (the very notions from which the third-party beneficiary rule emerged) require that these entities, and their private partners, not be allowed to use the defense of government participation to shield them from the application of the third-party beneficiary rule.

180. *See, e.g.*, George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TULANE L. REV. 45, 50–66 (2008).

181. *See, e.g., Berman*, 348 U.S. at 28, n.1.

182. *See Kelo*, 545 U.S. 469; notes 54–58 and accompanying text. *See also* Lefcoe, *supra* note 180, at 74–75; Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2120–48 (2009).

tary or unsafe conditions, and absentee ownership.[183] In addition to blight designations, state and local governments legislate the demographics that a geographic area must exhibit before it can participate in a particular economic development activity. These requirements are very specific to the locality. For example, in the District of Columbia to establish an economic development zone, which is an area eligible for various tax and development incentives, an area must exhibit the following characteristics: a family poverty rate of at least 20%; at least 70% of the residents of the area must have an income of not more than 80% of the median income of the residents of the District of Columbia; "an unemployment rate . . . equal to at least 150% of the annual average unemployment rate in the District of Columbia for the immediately preceding calendar year" and a decrease in population of at least 20% between the two most recent census dates.[184] The demographics of the residents and the blight endured by the residents serve as the basis for any redevelopment project; yet, these are the very residents excluded and removed from the area to facilitate the project. The circumstances that surround the residents' existence and warrant redevelopment (e.g., the demographics that support the designation of economic development zones) are the same circumstances that evidence the intent of the redevelopers to benefit the residents as third parties because, ultimately, these circumstances trigger the relocation benefits previously discussed. Statutory language and concomitant demographic requirements are circumstances surrounding redevelopment deal documents that evidence intent to benefit third-party residents.[185]

c. Redevelopment Plans

Redevelopment projects present two distinct categories of benefits to urban residents, the previously discussed relocation benefits that are supposed to be available for residents who are displaced by the project,[186] and redevelopment dweller benefits,[187] which stem directly from the project itself. Redevelopment dweller benefits are the project's promises for improvements. Spurred by a renaissance in city living, redevelopment plans are drafted to include new housing such as loft-style apartments and condominiums, gourmet grocery stores, specialty boutiques, restaurants, art galleries, and sports stadiums and other entertainment venues. In addition, a limited number of urban residents may

183. *See* OKLA. STAT. tit. 11, § 40-113 (2009).

184. *See* D.C. CODE § 6-1502 (a)(1)–(4) (2001).

185. Thus, "[w]hile the intent to benefit the non-party need not be expressly recited in the contract, the intent must be apparent from the terms of the agreement, the surrounding circumstances, or both." Burch, *supra* note 93, at 25 (quoting E.B. Roberts Constr. Co. v. Concrete Contractors, Inc., 704 P.2d 859, 865 (Colo. 1985), and noting that the court relied heavily on the "surrounding circumstances" to designate a subcontractors as third-party beneficiaries to the contract between the general contractor and another subcontractor).

186. *See supra* notes 128–29 and accompanying text.

187. "Redevelopment dwellers" is the author's term for residents who are not displaced permanently by a redevelopment project.

have a right to return to reside in the redeveloped area.[188] These benefits are the very substance of the project, the redevelopment plan. These benefits are touted at public meetings and community workshops and appear in public relations materials about the project. Redevelopment plans are drafted by local governments as a function of their police power to provide the framework of a redevelopment project.[189] Development agreements and other redevelopment documents are executed in connection with and to facilitate a redevelopment plan. Identified as a public use, the existence of a redevelopment plan is the judicial lynchpin for repudiating challenges to redevelopment projects. As Professor Audrey McFarlane writes, both the *Berman* and *Kelo* courts gave deference to the legislative bodies that drafted the redevelopment plans to validate the challenged redevelopment projects.[190] The *Berman* court was concerned with protecting integrated redevelopment plans.[191] The *Kelo* court determined that it was reviewing a "carefully considered" redevelopment plan projected to create over 1,000 jobs, increase tax revenues, and revitalize the city's downtown and waterfront areas.[192] Whether or not residents remained in these redevelopment project footprints, they were supposed to benefit from either relocation benefits or the redevelopment dweller benefits touted by both plans.

Redevelopment dweller benefits, in the form of a redevelopment plan, represent the basis of the bargain between the local governments and private developers and are the reason a project is attempted in the first place. Redevelopment dweller benefits present a different set of challenges. Because the overwhelming majority of urban residents affected by a redevelopment project are displaced, only a small number of residents are able to experience the benefits of the redevelopment plan – if they meet certain requirements, such as passing criminal background checks, unannounced home inspections, mandatory drug tests, and certain employment requirements.[193] Urban residents are supposed to benefit from redevelopment as either recipients of relocation packages or as residents of the revitalized area. Given the complexity of the redevelopment

188. Reentry rights entitle residents to return to their neighborhood after the replacement housing has been constructed. Replacement housing, however, is generally not the first construction priority and years may pass before it is built. As a result, many residents forgo their reentry rights for quicker access to permanent housing. *See* Siobhan O'Connor, *Two Tales of One City,* GOOD MAGAZINE, Feb. 11, 2008, http://www.good.is/post/two_tales_of_one_city (discussing how many residents chose to move with Section 8 vouchers rather than wait to reenter).

189. *See* Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 38 (2006).

190. *See id.* at 46–50.

191. *See Berman*, 348 U.S. at 35. To address an area where 64.3% of the housing units were reportedly beyond repair, the challenged plan purported to provide new housing units, one-third of which were to be low-income units. *See id.* at 30.

192. *See Kelo*, 545 U.S. at 470–78.

193. *See, e.g.*, O'Connor, *supra* note 188; Kohn, *supra* note 61. In addition, there can be tension between the "old" and "new" residents, which is why some mixed-use housing redevelopment projects require that all families of all income levels attend mandatory "good neighbor" orientation sessions. *See* Kohn, *supra* note 61.

process and the effect on residents, proclamations about projects are a far cry from mere puffery. Surely if courts are looking to the existence of a redevelopment plan to ratify redevelopment projects, courts can include the benefits described in the text of the plan to determine the circumstances surrounding the contract, as articulated by the third-party beneficiary rule.

B. Government Contracts

Redevelopment contracts, although facilitated by public-private partnerships, are government contracts. According to the *Restatement (Second) of Contracts*, third-party beneficiary rights can attach to government contracts as long as the designation of those rights would not run afoul of the laws that permit either the contract or damages for its breach.[194] Unless certain circumstances are present, third-party beneficiary rights generally cannot attach where the government has contracted for the provision of a public service to the general public.[195] The most widely adopted approach to analyzing third-party beneficiary rights to government contracts,[196] Section 313 of the Restatement (Second) of Contracts is based on the need to balance the recognition of third-party beneficiary rights in government contracts against the practical consequences of such recognition: excessive and unquantifiable liability claims.[197] Section 313 reads:

> (1) The rules stated in this Chapter apply to contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach.
> (2) In particular, a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless (a) the terms of the promise provide for such liability; or (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.[198]

Thus, a party seeking designation as a third-party beneficiary to a government contract must either prove that it is not part of the indeterminate general public that will benefit incidentally from a contract for public services or traverse the more limited test for establishing third-party beneficiary rights to government

194. *See* RESTATEMENT (SECOND) OF CONTRACTS § 313.
195. *See id.* at § 313(2).
196. *See* Adelson, *supra* note 77, at 879.
197. RESTATEMENT (SECOND) OF CONTRACTS § 313 cmt a.
198. *Id.* at § 313(1)–(2).

contracts found above in clause (2).[199] If the contract is not a contract for public services to the general public, then the articulation of Section 302 should control as long as there is no conflict with the policy supporting the authorization of the government contract.

Conceivably, every government contract is a contract for public services because that is the fundamental nature of government service. *Moch Co., Inc. v. Rensselaer Water Co.* is the seminal case that describes the viability of third-party beneficiary rights attaching to public service contracts.[200] In *Moch*, the plaintiff sought recognition as a third-party beneficiary to a contract for water service between a local government and a water company after plaintiff's property suffered fire damage because of the water company's failure to adequately supply water to the city's hydrants.[201] Citing concerns of unchecked liability, the court concluded that the plaintiff, like other members of the public, was an incidental beneficiary to the contract.[202]

Case law has continued to define public service contracts as contracts between a government actor and a private party for a service that incidentally benefits the large **and** indeterminate greater public.[203] Redevelopment contracts, however, do not concern a large **and** indeterminate public, and, as a result, are not public service contracts. In yet another example of judicial misconstruction of the third-party beneficiary rule, the California Supreme Court chose not to appreciate this important distinction in *Martinez v. Socoma Companies, Inc.*[204] The plaintiffs in *Martinez* were inner city residents who brought a class action against three corporations that had contracted with the federal government to provide job training and a minimum of one year of employment to East Los Angeles residents certified to participate in the program and to make leasehold improvements to the building in which many of these activities were to occur.[205] All three corporations breached their contracts, and the plaintiffs sought to recover damages for the breaches as third-party beneficiaries.[206] The court held that the plaintiffs were incidental beneficiaries because their benefit was an unintended consequence of

199. The commentary to Section 313 identifies the following balancing test for determining whether third-party beneficiary rights attach to a government contract: whether arrangements were made for the government to control any litigation or settlement of claims; whether there will be any impairment of service provided to the public; whether recognition of third party beneficiary rights will lead to any "excessive financial burden," and the availability of alternatives for relief (such as insurance). *See id.*, cmt. a.

200. *H.R. Moch Co.*, 159 N.E. 896.

201. *Id.*

202. *Id.* at 897. *See also* German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220 (1912) (dismissing the plaintiff's complaint seeking designation as a third-party beneficiary to a contract between a city and a water company for water services).

203. *See, e.g.*, City & County of San Francisco v. Western Air Lines, Inc., 22 Cal. Rptr. 216 (1962).

204. Martinez v. Socoma Cos., 521 P.2d 841 (Cal. 1974).

205. *Id.*

206. *Id.*

achieving "a larger public purpose."[207] The court also determined that the contracts did not manifest any intent to benefit the plaintiffs.[208] The court both mischaracterized the purpose of the contracts and employed an inappropriate intent requirement.

The court's conclusion that these contracts were intended to benefit the greater public instead of the plaintiffs is a gross misapplication of the principles set forth in *Moch*. The plaintiffs in *Martinez* represented a class of approximately 2017 people that were federally certified as disadvantaged and eligible to participate in the programs.[209] This finite number is clearly discernable from the greater public at large. In addition, the preambles of the contracts contained language specifically indicating that their purpose was to provide services to "hardcore unemployed, or underemployed", which, again, was clearly not the general public.[210] Moreover, the language of the preambles evidenced an intent to benefit the plaintiffs as third parties.[211] As stated by the dissent, "the congressional purpose was to benefit [b]oth the communities in which the impact programs [were] established [a]nd the individual impoverished persons in such communities."[212]

Contrary to the *Martinez* decision, redevelopment contracts are linked to a specific geographic location and directly affect an identifiable range of residents within the redevelopment footprint.[213] Moreover, mechanisms that are inextricably linked to the redevelopment process, such as relocation benefits, contradict the idea that a large and unidentifiable mass of people are impacted by redevelopment contracts because such mechanisms are designed to perform tracking functions to provide benefits to displaced residents. Finally, as previously stated, redevelopment is largely a function of public-private partnerships. As such, when a government entity is participating in a redevelopment project, it is acting in concert with a private partner who should not be able to take advantage of the exception for government contracts.[214]

---

207. *Id.* at 845.

208. *Id.* at 847. *Martinez* was decided in 1974, before the Restatement Second's final articulation of the third-party beneficiary rule. As such, the court analyzed the plaintiffs' claims using the creditor and donee beneficiary designations of the Restatement First. *Id.* at 845. The court's tone suggests that it would not have decided differently using the broader intended beneficiary designation, but its reasoning is useful for reinforcing the point that, at the most basic level, redevelopment contracts do no serve a large and unidentifiable public.

209. *Martinez*, 521 P.2d at 843.

210. *Id.* at 851 (Burke, J., dissenting).

211. *Id.*

212. *Id.*

213. Although the largest urban renewal and redevelopment projects have affected thousands residents, the number of people affected is ultimately an unascertainable number.

214. Even under the most benign circumstances, redevelopment contemplates the dislocation of residents and the closure of businesses. These activities could not be more dissimilar from contracting for water services. The doctrine of municipal immunity seeks to shield local governments from liability that arises from governmental activities, although the applicability of the doctrine varies greatly depending on the jurisdiction. *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND

Because redevelopment contracts are not contracts for service to the general public, the next step to securing third-party beneficiary rights to redevelopment contracts reverts back to the intent test presented by Section 302 of the Second Restatement.[215] Just as construction cases proved helpful to the earlier discussion, public housing cases are particularly relevant here. As with the cases previously discussed, the case law analyzing the question of intent in government contracts is not uniform. Courts that have denied the third-party designations to government contracts have done so with very narrow holdings and little rationale.[216] At the most, these courts looked to the language of the housing contracts for express intent and, if there was no explicit expression of intent in the contract, determined that the parties did not intend to benefit a third party.[217] This narrow approach completely ignores the role and significance of the circumstances surrounding the formation of the contract and has been rejected by courts and scholars.[218]

Those courts that have designated intended third-party beneficiaries have done so on the basis of finding a direct benefit to the beneficiary.[219] As exemplified by *Holbrook v. Pitt*,[220] these courts essentially asked the question: "If these third parties are not the intended beneficiaries of the breached contract, then who could possibly be?" In *Holbrook*, residents of public housing sought third-party beneficiary status to Section 8 contracts executed between the United States Department of Housing and Urban Development ("HUD") and a private landlord.[221] Pursuant to the contracts, the residents were entitled to housing assistance payments after the landlord certified the names of eligible tenants to HUD; however, the landlord certified the names approximately 5 months after the first date of eligibility.[222] The tenants sued to collect the authorized retroactive

---

LOCAL GOVERNMENT LAW 821–59 (6th ed. 2004). It is a generally accepted principal that government actors undertaking sovereign functions are immune from tort liabilities that arise from those activities. *See id.* However, government entities that participate in market-based transactions can be liable for breach of contract claims. *See, e.g.*, Doe v. United States, 37 Fed. Cl. 74, 77 (1996). Government entities that undertake redevelopment projects are participating in market-based transactions in a proprietary capacity and should not be shielded by governmental immunity. In fact, the issue is rarely raised as a defense. *But see* Parish v. Novus Equities Co., 231 S.W.3d 236 (Mo. Ct. App. 2007).

215. *See supra* notes 83–87 and accompanying text.

216. *See, e.g.*, Smith v. Washington Heights Apartments, 794 F. Supp. 1141 (S.D. Fla. 1992); Reiner v. West Village Associates, 768 F.2d 31 (2d Cir. 1985); Falzarano v. United States, 607 F.2d 506 (1st Cir. 1979); Feldman v. United States Dep't of Hous. & Urban Dev., 430 F. Supp. 1324 (Pa. E.D. 1977); Boston Pub. Hous. Tenants' Policy Council, Inc. v. Lynn, 388 F. Supp. 493 (Mass. Dist. Ct. 1974).

217. *See, e.g.*, Carter v. Murphey, 567 S.E.2d 326 (Ga. Ct. App. 2002); Harlib v. Lynn, 511 F.2d 51 (7th Cir. 1975); McCullough v. Redevelopment Auth. of Wilkes-Barre, 522 F.2d 858 (3d Cir. 1975).

218. *See, e.g.*, *Columbia Note, supra* note 67, at 408–10; *Virginia Note, supra* note 68, at 1228.

219. *See, e.g.*, Henry Horner Mothers Guild v. Chicago Hous. Auth., 780 F. Supp. 511 (N.D. Ill. 1991); Ayala v. Boston Housing Auth., 536 N.E.2d 1082 (Mass. 1989); Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp., 620 F. Supp. 806 (S.D. NY 1985); Zigas v. Superior Court, 120 Cal. App. 3d 827 (Cal. Ct. App. 1981).

220. Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981).

221. *Id.*

222. *Id.* at 1266.

assistance payments from HUD.[223] HUD argued that the tenants were incidental beneficiaries because the purpose of the contracts and the Section 8 program was to benefit "financially troubled HUD-insured projects."[224] By examining the congressional intent behind Section 8 and the HUD regulations that govern the program, the court rejected this argument. The court stated:

> HUD's position displays an astonishing lack of perspective about government social welfare programs. If the tenants are not the primary beneficiaries of a program designed to provide housing assistance payments to low income families, the legitimacy of the multi-billion dollar Section 8 program is placed in grave doubt.[225]

By designating intended third-party beneficiaries to government contracts, courts recognize that "third party beneficiaries seek no more than to have the promisor render the performance for which the promisor received consideration from the promisee."[226]

C. Breach: Material or Efficient?

From coast to coast, municipalities are attempting to develop their downtown corridors. While a current trend particularly because of a resurgent interest in residential living units, downtown development projects are far from a new concept.[227] Local governments are happy to offer up locations such as Baltimore's Inner Harbor, San Antonio's River Walk, and San Diego's Renaissance at North Park as successful redevelopment projects. Redevelopment projects, however, are not fairy tales with happy endings, even under the best of circumstances. In fact, in many respects, the completion of the above-mentioned projects is the exception to the rule.

When a party to a contract fails to perform, the failure is a breach for which there are consequences. "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else."[228] The available damages depend on the nature of the breach. A material breach is a breach of contract so severe that it frustrates the fundamental purpose of the contract.[229] The determination of a material breach is factual.[230] The character of public-private partnerships makes it possible for either party to be responsible for a redevelopment breach, although, practically speaking, failed

---

223. *Id.*
224. *Id.* at 1271.
225. *Id.* at 1271–72.
226. Prince, *supra* note 68, at 931.
227. *See, e.g.*, Peter Loftus, *Philadelphia Tax Breaks Draw Ire,* WALL ST. J., May 18, 2009, at A5.
228. Oliver Wendell Holmes, Jr., *The Path of the Law,* 10 HARV. L. REV. 457, 462 (1897).
229. *See* 23 WILLISTON ON CONTRACTS § 63:3 (4th ed. 2009).
230. *See id.*

redevelopment projects are the result of failed joint efforts. The occurrence of a breach is a condition precedent to an action to enforce a contract in most instances, but is not a requirement for the designation of intended third-party beneficiaries. As such, because this article posits that failed redevelopment projects are material breaches of the redevelopment contracts that permitted them, it is worthwhile to briefly explore the concept of breach.

A redevelopment project encompasses much more than the standard terms and provisions found in a development agreement. Local governments are drawn to the bait of improved infrastructures, enhanced aesthetic beauty and the eradication of "blight," and increased tax revenue. These concepts, however, are seldom memorialized in development agreements; although, as a practical matter, they could appear in development agreements in several ways, such as benchmarks in performance covenants.[231] Because such accountability benchmarks rarely exist with any teeth, when redevelopment projects fail, the consequences of the failure are immeasurable. First, there is the collective psychological shock experienced by the affected community that is displaced to support the redevelopment project.[232] That concept, however, is often too intangible for those not in the displaced community to appreciate. There are other measurements by which to judge the success or failure of a redevelopment project. Redevelopment failures generally fall into one of two categories. The first category describes scenarios where residents and businesses are displaced and neighborhoods and homes are razed but are not replaced by any new physical development. Instead, the cleared land lies vacant for years or decades, potentially becoming more blighted than before the land clearance. The second category describes scenarios where redevelopment projects are completed as a technical matter, but do not deliver the potential on which the development agreement is based.[233]

An empirical study of the successes and failures of redevelopment projects is beyond the scope of this article. What follows is a descriptive review of some of the more notorious redevelopment projects. While these narratives are not

---

231. *See infra* notes 273–279 and accompanying text for a discussion about community benefits agreements. Some local governments are better than others at negotiating contracts with private entities. For example, Pennsylvania's Allegheny County is requiring a beer brewer to pay back money it received to promote job creation and retention because the brewer's pending relocation triggers the repayment under the loan agreement. *See* Kris Maher, *Iconic Pittsburgh Beer Risks Losing the City by Leaving It*, WALL ST. J., June 20, 2009, at A3; *see also* Mary Lynne Vellinga & Dale Kasler, *GenCorp Says City Wish List Puts Project Out of Reach*, SACRAMENTO BEE, July 26, 2008 (discussing tense negotiations between a municipality and a developer). For a great instructional tool about drafting economic development contracts, *see* Rachel Weber & David Santacroce, The Ideal Deal: How Local Governments Can Get More for Their Economic Development Dollar (2007), *available at* http://www.goodjobsfirst.org/pdf/idealdeal.pdf.

232. *See generally* MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (One World/Ballantine Books 2004).

233. For an interesting depiction of redevelopment failures and a discussion of these categories, *see* Castle Coalition, Redevelopment Wreaks: 20 Failed Projects Involving Eminent Domain Abuse, East Hartford, Connecticut, http://www.castlecoalition.org/index.php?option=com_content&task=view&id=196.

statistically significant, they are representative of redevelopment trends and practice and, therefore, are an important part of this story.

In Chicago, Illinois, the historically significant Block 37 lay vacant for decades after hundreds of families were displaced and 16 buildings were demolished in preparation for a series of redevelopment projects that never materialized.[234]

The East Hartford Redevelopment Agency in East Hartford, Connecticut, authorized land assembly for a redevelopment project that involved the demolition of a very popular family-owned business and two other small businesses. The land remained vacant for more than six years because, although able to entice the redevelopment agency into condemning existing businesses, the developer was unable to produce a development plan that was acceptable to the redevelopment agency.[235]

One of the most noteworthy redevelopment failures is the historic jazz district in San Francisco, California, known as the Fillmore District. The redevelopment of the Fillmore District is notable for several reasons that are documented in a PBS documentary entitled *The Fillmore*.[236] The Fillmore District's redevelopment experience began during the urban renewal frenzy of the 1960s; however, many of the promises made by private developers and the redevelopment agency remain unfulfilled today.[237] In total, 883 businesses were closed; 4,729 households were relocated; and 2,500 Victorian homes were demolished.[238] The project spanned 40 years. Before the urban renewal project began, the Fillmore District was the most prominent African American neighborhood in San Francisco; however, the San Francisco Redevelopment Agency's efforts in the Fillmore severely stunted the growth of the African American population in San Francisco.[239]

One of the most recent examples of a failed redevelopment project is the announcement by the pharmaceutical company Pfizer that it intends to relocate from the New London, Connecticut facility that lied at the center of the 2005 *Kelo* decision.[240] The company intends to relocate approximately 1,400 jobs to another city to cut costs; leaving in its wake a razed nine-acre neighborhood and changed or pending legislation in 43 states in direct response to the redevelop-

---

234. *See* Ross Miller, Block 37, http://www.encyclopedia.chicagohistory.org/pages/146.html (last visited on August 13, 2009).

235. *See* Christopher Keating, *Nardi's Seeks More Time for Move,* HARTFORD COURANT, Apr. 9, 2001, at B1.

236. *See* PBS.org, http://www.pbs.org/kqed/fillmore/. For other fascinating documentaries, *see Flag Wars*, http://www.flagwarsthemovie.com/films_fw_synopsis.html; *Chavez Ravine*, http://www.pbs.org/independentlens/chavezravine/cr.html; and *Voices from Within*, http://www.jhsph.edu/source/audiences/Students/InOurOwnBackyard.pdf.

237. *See* Leslie Fulbright, *Neighborhood Closes a Checkered Chapter*, S.F. CHRON., July 21, 2008, at B1.

238. *See id.*

239. *See id.*

240. *See* Patrick McGeehan, *Pfizer to Leave City that Won Land-Use Case*, N.Y. TIMES, Nov. 13, 2009.

ment process litigated in *Kelo*.[241]

Evaluating the successes and failures of redevelopment projects is a nuanced and subjective notion. Counterarguments to a material breach claim include the doctrines of substantial performance and efficient breach. The antithesis of material breach,[242] substantial performance is performance that does not meet the full expectations of the receiving party but is significant enough to satisfy the purpose of the contract.[243] It, too, is a question of fact.[244] At this point, the argument becomes what redevelopment promises must be delivered to merit substantial performance and avoid material breach? A factor in determining substantial performance is the aggrieved party's duty to mitigate its damages.[245] Given the convoluted and frequently unwelcome nature of redevelopment public-private partnerships, it would be nonsensical to ask urban residents affected by redevelopment projects to mitigate their damages suffered upon the breach of redevelopment contracts.

Alternatively, public-private partners could argue that elements in the above examples and numerous others are not material breaches of contract but efficient breaches of contract. In generalized terms, an efficient breach occurs where a promisor breaches a contract and the cost of the breach for the promisor, including the payment of damages to the promisee, is less than the cost of the performance of the contract.[246] When a redevelopment project fails, both parties may argue that the breach of the redevelopment contracts is efficient. It may very well be true that the breach was in efficient in respect to their costs to each other; however, the cost to the affected community is unquantifiable. Thus, there is no way to calculate an appropriate amount to pay as damages that supports the argument that the breach is financially efficient. This eliminates the efficient breach counterargument.

D. Defenses Against Intended Third-Party Beneficiaries

Once designated as an intended third-party beneficiary, the beneficiary must still survive otherwise standard defenses to contract as if a party to the agreement.[247] For example, the breaching party(ies) might argue impossibility, impracticability, or frustration of purpose to excuse its performance under redevelopment contracts. These doctrines are based on the happening of a supervening event that alters the fundamental character of the redevelopment

241. *See id.*

242. 15 WILLISTON ON CONTRACTS § 44:55.

243. *See, e.g.*, Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 890–91 (N.Y. 1921).

244. 15 WILLISTON ON CONTRACTS § 44:55.

245. *See, e.g.*, Anderson v. Rexroad, 306 P.2d 137, 147 (Kan. 1957).

246. *See, e.g.*, Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Break, and the Indifference Principle in Contract Law*, 93 CAL. L. REV. 975, 997 (2005) [hereinafter *Actual and Virtual Specific Performance*].

247. *See* RESTATEMENT (SECOND) OF CONTRACTS § 309.

project. Impossibility of performance suggests that a party cannot literally perform under a contract due to the occurrence of a supervening event.[248] Impracticability suggests that the occurrence of an unanticipated supervening event has dramatically increased costs, making performance impracticable.[249] Frustration of purpose is argued when the occurrence of an unanticipated supervening event obviates the need for the contract. The success of these doctrines depends on whether these events were foreseeable and on how and whether a contract has allocated liability for these risks. It is not uncommon for redevelopment projects to stall because of downtowns in the real estate markets, lost financing, or other financial reasons. These reasons are hardly unforeseeable and are fairly common risks in real estate transactions. Accordingly, absent the most extraordinary nonfinancial set of circumstances, these doctrines should not be helpful as excuses for nonperformance.

The most efficient way, however, to defend against third-party beneficiary rights is to include in the contract a provision that explicitly disclaims third-party beneficiary rights to the contract.[250] If the contract contains language that explicitly states the parties' intent that no third parties benefit from the agreement, then the inquiry will not get far.[251] Although this notion supports the ideal of allowing parties the freedom to contract, it is contrary to the public policy supporting the third-party beneficiary rule. Contract law will prohibit enforcement of contracts or contract terms on public policy grounds.[252] The local governments and private developers who form public-private partnerships should not be able to dismiss third-party beneficiary rights to redevelopment deals by simply including such a provision in the redevelopment documents. As argued throughout this article, public-private partners are not the only parties affected by redevelopment. It is cruel to allow the blanket dismissal of third-party beneficiary rights to redevelopment contracts where all other aspects, including the very demographics that permit the redevelopment, are inherently linked to the third-party residents. Community participation in redevelopment deal-making is often a superficial concept. Because interactions between residents and public-

248. For example, the Restatement (Second) of Contracts identifies the death or incapacitation of a party as supervening events that satisfy the impossibility doctrine. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 262, 263.

249. *See* RESTATEMENT (SECOND) OF CONTRACTS § 261.

250. A typical disclaimer can read "This agreement is for our exclusive benefit and not for the benefit of any third party." 1 Tex. Prac. Guide Probate § 2:102 (2009). Also, *see, e.g.*, Boye v. United States, No. 07-195 C, 2008 WL 4416733 (Fed. Cl. 2008); Cobos v. Dona Ana County Hous. Auth., 908 P.2d 250 (N.M. Ct. App. 1995). *Cf. Virginia Note*, *supra* note 68, at 1188 (discussing the need for "clear contractual language").

251. *See, e.g.*, Kansas City Hispanic Ass'n Contractors Enter., Inc. v. City of Kansas City, 279 S.W.3d 551, 555–56 (Mo. Ct. App. 2009) (holding that contractors and a contractors' association were not intended third-party beneficiaries to a development agreement because the agreement contained a provision explicitly providing for liquidated damages for contractual violations which effectively prohibited any enforceable third-party beneficiary rights).

252. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 178–79.

private partners are based on unfair bargaining power, the ability to disclaim third-party beneficiary rights in redevelopment contracts is unconscionable and should be prohibited on public policy grounds.

E. The Purpose of Urban Redevelopment Contracts

1. Third-Party-Beneficiary Principal

It is the nature of the common law to evolve with time and circumstance to keep up with advances in technology, science, and business. Common law is not immune to innovation and modern practice, as exemplified by the evolution of the third-party beneficiary rule up through the Second Restatement. Modern practice again calls for the expansion of the rule, and the necessary expansion is best expressed by Professor Melvin Aaron Eisenberg's third party principle. Whereas the "intent to benefit" test searches for the subjective intent of contracting parties before designating a third-party beneficiary and the Second Restatement reviews the circumstances surrounding a contact to determine the intent of the contracting parties, the third-party-beneficiary principle looks to the objective purpose of the contract. According to Professor Eisenberg:

> [A] third-party beneficiary should have power to enforce a contract if, but only if: (I) allowing the beneficiary to enforce the contract is a necessary or important means of effectuating the contracting parties' performance objectives, as manifested in the contract read in the light of surrounding circumstances; or (II) allowing the beneficiary to enforce the contract is supported by reasons of policy or morality independent of contract law and would not conflict with the contracting parties' performance objectives.[253]

Thus, the third-party-beneficiary principle has two mutually exclusive prongs. The first prong seeks to ensure that enforcement of a contract by a third party will advance the interests of the contracting parties (versus deciding whether the contracting parties intended a benefit for a third party). Similar to the Second Restatement, the fist prong considers the surrounding circumstances. Instead of using the circumstances to determine the intent of the parties, however, the prong links the circumstances to the objective purpose of the contract. The second prong acknowledges that there are instances where external policy and moral concerns should shape contract law and recognizes that there are circumstances under which third parties should be able to enforce contracts. The second prong permits enforcement of contracts by third parties where such enforcement is warranted for policy and moral concerns and enforcement does not conflict with the performance objectives of the contracting parties.

Professor Eisenberg's third-party-beneficiary principle presents an objective

253. Eisenberg, *Third-Party*, *supra* note 2, at 1385.

methodology that reflects the underlying rationale for third-party rights by recognizing that there are moral and public policy reasons that justify the designation of some third-party beneficiaries. Interestingly enough, according to Professor Eisenberg, the third-party-beneficiary principle would not change the outcome of *Martinez*[254] because the damage remedies sought by the plaintiffs were contrary to the liquidated damages and dispute resolution provisions in the contracts – which Professor Eisenberg interprets to mean that the plaintiffs' claims were contrary to the parties' performance objectives because the parties intentionally contracted to limit damages and prescribe dispute resolution.[255] Professor Eisenberg defines performance objectives to include "those objectives of the enterprise embodied in the contract, read in the light of surrounding circumstances, that the promisor either knew or should have known at the time the contract was made."[256] Redevelopment stretches far beyond the parties to the development agreements and deal documents. The parties know this because they are largely responsible for disseminating the information about the project, particularly when compliance with statutory requirements such as the URA is required or the parties are responsible for recruiting program participants. The defendant corporations in *Martinez* were aware of the information being disseminated to the residents expecting to participate in the program.[257] Using Professor Eisenberg's terminology, this knowledge should be considered when evaluating performance objectives and should not keep the parties from being accountable to third-party urban residents.

2. The Totality of Urban Redevelopment Circumstances

As previously explained, the review of circumstances required by the Second Restatement would find the intent to benefit it requires to designate a third-party beneficiary from the statutory language governing redevelopment projects and collateral materials that are distributed by the public-private partnership. In addition, the article also finds that designating urban residents affected by redevelopment projects as third-party beneficiaries preserves the performance objectives of the public-private partnership, as required by the third-party-beneficiary principle, because the parties' performance objectives are the achievement of the planned redevelopment project and the parties overwhelmingly control the circumstances surrounding the contract at its formation. In accordance with the third-party-beneficiary principle, this article argues that there are moral and public policy reasons that compel the designation of third-party beneficiaries to urban redevelopment contracts, including the reliance of the affected residents and the unconscionability doctrine. The purpose of

254. *See id.* at 1410–12.
255. *See id.* at 1412.
256. *Id.* at 1385.
257. *See supra* notes 204–212 and accompanying text.

exploring these themes is not to focus on individual enforcement rights, but to underscore the importance of the need for coordinated redevelopment planning on the front-end of the project.

Reliance. The principle of freedom of contract permits the parties to a contract to agree to modify or cancel the contract. The Second Restatement, however, limits this freedom where a third-party beneficiary "would be reasonable in relying on the [contract] as manifesting an intention to confer a right" on the intended beneficiary.[258] Urban residents affected by redevelopment projects are homeowners, renters, and small business owners. Each responds differently to an announced redevelopment project. Homeowners that occupy the residence may postpone home improvement plans for fear of later losing their improved property. Commercial and residential landlords may have the same reaction believing that they may later sell the property in connection with the redevelopment project. In addition, landlords may increase rents to address anticipated increases in property values. Longtime renters may prematurely move out of the neighborhood to avoid being forced out. Like homeowners, small business owners may postpone physical improvements to their location for fear of losing the investment to the redevelopment project. In addition, depending on the industry, small business owners may make significant changes to the goods or services they provide in an attempt to meet the needs of a projected new customer base or delay plans for expansion entirely. Each of these scenarios makes it clear that urban residents affected by redevelopment projects may act or forbear to act in anticipation of receiving a redevelopment benefit, as previously defined.[259] The reliance doctrine exists in contract law to prevent injustice.[260] Reliance is not a requirement for designation as a third-party beneficiary, and scholars have strongly critiqued the Second Restatement's link between reliance and third-party beneficiary rights.[261] Protecting the reliance interests of residents affected by redevelopment projects is, however, a matter of morality and public policy.

Unconscionability. The doctrine of unconscionability will invalidate a contractual term or contract where a court finds that enforcement would be fundamentally unfair and contravene the interest of justice.[262] An unconscionability determination may be on procedural or substantive grounds. Procedural unconscionability may exist where there are unfair bargaining discrepancies or other problems with the formation of the contract. In contrast, substantive unconscionability may lie in a contractual term, provision, or document. In a renowned decision, the DC Circuit Court defined unconscionability as "an absence of meaningful choice on the part of one of the parties together with contract terms

258. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d.
259. *See supra* notes 78–81 and accompanying text.
260. *See* Prince, *supra* note 68, at 989 (citing the RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981)).
261. *See* Eisenberg, *Third Party*, *supra* note 2, at 1383–84; Prince, *supra* note 68, at 987–89.
262. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 208.

which are unreasonably favorable to the other party."[263] Scholars have argued that residents and community groups lack meaningful participation rights in redevelopment projects,[264] which manifests as unequal bargaining power. Redevelopment practice, by design, severely limits or prohibits resident choice and promotes a plan that the public-private partners argue benefits the residents but is comprised of terms and conditions favorable to the public-partners themselves. One might question the applicability of the unconscionability doctrine as support for third-party beneficiary rights because, by definition, third-party beneficiaries do not participate in the negotiation of the contract from which they benefit, are not supposed to have any bargaining power, and have no need to raises any defenses to a contract. As previously explained, however, the contractual relationships of redevelopment projects are unique and warrant the qualified application of contract law principles. Here the doctrine is not used as a defense to excuse performance. This article does not argue that redevelopment contracts are substantively unconscionable. It, however, does argue that the denial of third-party beneficiary rights for urban residents affected by redevelopment projects is procedurally unconscionable because of the lack of bargaining power available to residents in comparison to their interests that are at risk. This inequity violates public policy and morality considerations, and, in accordance with the third-party principal, warrants the designation of third-party beneficiary status for urban residents affected by redevelopment.

3. Revised Redevelopment Contracts and Practice

City governments embody a schizophrenic existence of dual personalities as both market participant and service provider.

> Economically the city. . .is an employer of labor, a purchaser of supplies and materials, a seller of services. The city is also an agency for promotion of social welfare with officials providing free education, health protection, poor relief, public recreation, and social welfare activities of many kinds.[265]

A city should protect the interests represented by both of these personalities when partnering in public-private redevelopment projects; however, for reasons previously explained, the market participant personality is generally the more dominant personality—to the detriment of communities affected by redevelopment. This presents a conflict of interest: in the pursuit of redevelopment, does a

---

263. Williams v. Walker-Thomas Furniture Comp., 350 F.2d 445, 449 (D.C. Cir. 1965).

264. *See, e.g.*, Crowder, *supra* note 46; Audrey G. McFarlane, *When Inclusion Leads to Exclusion: the Unchartered Terrain of Community Participation in Economic Development*, 66 BROOKLYN L. REV. 861 (2001); Deeohn Ferris, *Communities of Color and Hazardous Waste Cleanup: Expanding Public Participation in the Federal Superfund Program*, 21 FORDHAM URB. L. J. 671 (1994); Chester Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745–817 (1971).

265. MAX WEBER, THE CITY 59 (1958).

city owe a greater duty to its corporate citizens and partners, its most desired residents, or its most vulnerable residents? Naturally, this question is neither easily nor uniformly answered. City governments are creations of state law and can only act as permitted by state law.[266] Pursuant to frameworks established by federal and state law, city governments provide much of the detail and logistical support for redevelopment projects through the production and execution of development agreements and related documents.[267] In response to the question asked above, city governments certainly can revise their form documents and practice to decrease inequities in redevelopment projects.[268] The heart of this argument is not the desire for the recognition of individual enforcement rights; instead, this article argues that the designation of third-party beneficiary rights that cannot be summarily disclaimed will force public-private partnerships to facilitate more inclusive, transparent, and coordinated redevelopment planning in an effort to avoid later suits for breach by third-party beneficiaries. To illustrate this point, this section examines liquidated damages as a conceptual remedy, as well as some of the standard provisions found in community benefits agreements, to assert that certain types of provisions in redevelopment deal documents can be revised to better reflect third-party beneficiary interests.

Liquidated Damages. The underlying premise of this article is that the role of public-private partnerships in urban redevelopment projects marks these projects as undeniably unique transactions that require appropriately tailored legal responses. As third-party beneficiaries to urban redevelopment contracts, residents would be able to sue to enforce the contracts or to recover for breach of the contracts. As such, liquidated damages provisions provide an interesting remedy option.[269] A liquidated damages provision allows the parties to a contract to

---

266. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062–1063 (1980). The strength of municipal governments is a constantly evolving area of legal scholarship. *See, e.g.*, Richard Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System,* 115 YALE L.J. 2542 (2006); Terrence S. Welch, *Containing Urban Sprawl: Is Reinvigoration of Home Rule the Answer?*, 9 VT. J. ENVTL. L. 131 (2008).

267. *See supra* notes 190–192 and accompanying text.

268. The "right to the city" and the "right to development" are established and emerging movements at the domestic grassroots level and in international arenas, respectively. *See generally*, RIGHT TO THE CITY, NEW YORK CITY POLICY PLATFORM (2009), *available at* http://www.righttothecity.org/; REFLECTIONS ON THE RIGHT TO DEVELOPMENT (Moushumi Basu, Archna Negi & Arjun Sengupta eds., 2005).

269. Specific performance is another interesting option if only because redevelopment projects involve a large amount of land. Specific performance is an equitable remedy that may be awarded for a breach of contract action where damages for the breach would be inadequate. *See* RESTATEMENT (SECOND) OF CONTRACTS, §§ 357, 359–60, 367. To decide whether to award specific performance, courts consider certain questions of fact concerning the subject matter of the contract. Specific performance is deemed appropriate where the subject matter of the contract is unique. Real property is typically found to be unique. Regardless of the uniqueness of the service, specific performance is generally not awarded where the contract is for personal services. Because land is generally considered to be a unique contract subject matter, the amount of land required to facilitate an urban redevelopment project suggests that it is possible for urban residents to receive specific performance as a remedy for breached redevelopment contracts. Land, however, is not the sole subject matter of redevelopment contracts. The subject matter of redevelopment contracts also includes land improvements and economic development programs to be

stipulate an amount of damages that can be recovered for the breach of the contract.[270] Courts will uphold liquidated damages provisions as long as the amount is not unconscionable, an illegal penalty, or a violation of public policy.[271] To adequately protect the rights of affected residents, city governments can negotiate to include liquidated damages provisions in redevelopment contracts. In the event of a breach that triggers the provision,[272] the city could collect the stipulated amount and use the funds for improvement projects specific to that community. Given all of the different elements to redevelopment, it is not hard to imagine a liquidated damages provision based on a formula that fairly considers any government subsidies provided to the project and costs associated with remediation that might be required as a result of preparation for the redevelopment project.

Community Benefits Agreements. Community Benefits Agreements ("CBAs") are private agreements between private developers and community groups that will be affected by a proposed redevelopment project.[273] These agreements are being increasingly used by community groups to get private developers to agree to redevelopment benefits that best meet their most direct needs. Typical CBA provisions concern affordable housing, job training programs, living wages, targeted hiring programs, open and green space, recreational centers, child care and afterschool programs, and environmental issues.[274] In an attempt to ensure resident support and avoid contentious public hearings, developers negotiate with residents to flush out deliverables on these points.[275] As these are agreements between a developer and a community group, CBAs theoretically provide a more direct mechanism of enforcement for the community.[276] CBAs, however, are not typically executed by the tri-party interests reflected by public-party partnerships:

---

executed in connection with the physical development of the land. The additional subject matter weighs against specific performance as a viable remedy. Moreover, even where residents supported a redevelopment project, courts generally will not award specific performance where undue judicial supervision will be required. *See Actual and Virtual Specific Performance*, *supra* note 246, at 1016. Given the history of urban renewal and redevelopment, it seems likely that an award of specific performance for breach of a redevelopment contract would require a fair amount of ongoing judicial supervision. As a technical matter, specific performance and liquidated damages provisions are not mutually exclusive. A party can sue for specific performance despite the fact that the breached contract contained a liquidated damages provision. *See, e.g.*, 25 WILLISTON ON CONTRACTS § 67:9.

270. *See* 24 WILLISTON ON CONTRACTS § 65:1.

271. *See id.*

272. As discussed Part III, a breach can range from a stalled project to a finished project that does not deliver on the deliverables promised in connection with the formation of the initial developer's agreement.

273. *See* JULIAN GROSS WITH GREG LEROY & MADELINE JANIS-APARICIO, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 9 (2005), *available at* http://www.goodjobsfirst.org/pdf/cba2005final.pdf.

274. *See id.* at 10.

275. See the Fall 2007/Winter 2008 edition of the *Journal of Affordable Housing & Community Development Law* for a detailed analysis of CBA case studies.

276. Although CBAs have been referenced as background in the fact recitation of reported cases, a CBA has not been a subject of litigation to date and their enforceability is questioned by some. *See, e.g.*,

private developers, city governments, and affected residents. Although city governments may support the idea of CBAs and may assist with negotiations, it is not standard practice for a city government to execute a CBA.

Redevelopment contract negotiation and enforcement are areas in which city governments can vastly improve.[277] As previously discussed, most development agreements lack any meaningful performance benchmarks; however, city governments should seek to substantively improve redevelopment contracts (from the perspective of both the city and affected residents) by improving performance valuation techniques, setting performance standards, and strengthening penalties for breach.[278] Improved redevelopment contracts would be a tremendous improvement, but still present the opportunity for the community to be excluded.

Although changes to the governance structure of cities may be necessary, the ideal situation would allow for all three parties to be meaningfully involved with the planning, implementation, and execution of a redevelopment project. The growing use of CBAs may present methods of accomplishing that goal. First, it may be possible to draft CBAs to reflect the interests of, and bind, all three parties. Second, cities may be able to incorporate standard CBA provisions or the requirement for a negotiated and executed CBA into their legislative process.[279] Both of these options might require cities to strongly lobby their state governments for increased powers to avoid land use concerns about developer exactions.

V. CONCLUSION

The strongest barrier to designating urban residents as third-party beneficiaries to urban redevelopment contracts is fear of increased liability that would have a "chilling" effect on redevelopment. Admittedly, designating urban residents as third-party beneficiaries to redevelopment contracts increases the number of persons with rights to the contract. That number, however, is not indeterminate, and the class is easily defined. It is a consequence of the nature of the business, and one from which local governments and private developers should not be protected artificially.

Redevelopment might slow down until an informed response is developed, but the practice will not cease altogether.[280] Innovation comes from compromise, and

---

Naved Sheikh, *Community Benefits Agreements: Can Private Contracts Replace Public Responsibility?*, 18 CORNELL J.L. & PUB. POL'Y 223 (2008).

277. For detailed strategic tips on this point, see Weber & Santacroce, *supra* note 231.

278. *See id.*

279. For example, to facilitate a redevelopment project in New York, the city's Economic Development Corporation invited proposals from developers willing to pay living wages. *See* Terry Pristin, *Bronx Groups Demand a Voice in a Landmark's Revival*, N.Y. TIMES, June 25, 2008, at C6.

280. Again, the recent postscript to the *Kelo* case underscores the need for a more deliberate examination of the practice. *See* McGeehan, *supra* note 240 and accompanying text.

there is certainly a need for innovative compromises in redevelopment practice.[281] In theory, the recognition of third-party beneficiary rights to urban redevelopment contracts would force a more inclusive process because the parties (private developers and local government entities) would act in consideration of the third parties at the front end to avoid liability at the back end. In other words, the parties would produce and execute redevelopment projects that the affected urban residents support. As Professor Prince states:

> The practical and academic interest in third party beneficiary rights, however, should spring not only from the inherent potential for third party claims in contractual arrangements, but also from the possibilities for the deliberate and strategic use of third party beneficiary arrangements in structuring transactions or pursuing remedies for wrongful conduct.[282]

The goal of transactional lawyering is to structure relationships and draft documents to prevent and avoid litigation. This article explains that urban redevelopment projects are driven by contractual relationships between private developers and local governments. The recognition of third-party beneficiary rights in urban deal documents would force local governments and private developers to adopt a different approach to creating these deals. Current practice is for these parties to present deals at public meetings and take a "wait and see" approach towards the response from the community. If residents find the proposed deal objectionable and if the city and private developer choose to hold steadfast to the proposed plan, then litigation becomes the only "viable" option for concerned citizens. Litigation is "viable" in the sense that it is technically an option; however, the expenses of litigation as well as the cost in time typically rule it out as a practical option. This article has argued that enforcement of urban redevelopment deals by affected residents will further the performance objectives of the parties (local government and private developers). This article does not intend to stand for the proposition that redevelopment is a social ill. This is not an anti-redevelopment article; it is an article arguing for coordinated and inclusive redevelopment. In response to the first question asked in the Introduction, enforcement is a worthy objective when affected residents are participants in the planning process and not displaced in their entirety. In response to the second question, city governments must work with state governments to incorporate CBA-type provisions into their legislative process. Further research will explore whether there are existing local government mechanisms or corporate law practices that can be enhanced to accommodate the needs of all three parties because urban residents are more than merely incidental.

---

281. CBAs are an excellent example of innovative compromise.

282. Prince, *supra* note 68, at 921–22.