

TRANSPARENCY AND EFFICIENCY TO “YES”: SUPPORT OF THE APPLICATION OF PRINCIPLED EVALUATIVE MEDIATION IN PROPERTY HOLDOUT SITUATIONS

*Dennis A. Durkin, Jr.**

I. INTRODUCTION

Holdout property owners: who are they and what are their interests? The answer to this, of course, is relative to which side defines the term, and will be more fully analyzed throughout this Comment. Most fundamentally, however, holdout situations take place when existing landowners resist selling during “property assemblages” of multiple properties by either private developers or the government that occur for the purpose of a larger development.¹ As a result of this refusal to sell, one frequent perception of holdouts is that their goal is to either “seek increased compensation” for their properties or to simply resist “new development in the area.”² From the developer’s perspective, these holdouts boil down to opportunistic property owners seeking to capitalize on the fact that a developer’s inability to acquire any one property can effectively halt the entire development.³ Scholars have argued that this opportunistic gaming of circumstances, at times, prevents “socially desirable” transfers from occurring.⁴

On the other hand, from the property owner’s perspective, he is often refusing to sell for a variety of non-monetary reasons, such as

* J.D. Candidate, 2016, Seton Hall University School of Law; B.S., 2011, *magna cum laude*, Fairfield University. Thank you to Professor Angela Carmella for her guidance throughout the writing of this Comment. I am also deeply thankful to my friends and family for their continued love and support, especially my parents, siblings, and wife-to-be, Kaitlin.

¹ *Makowski v. Mayor of Balt.*, 94 A.3d 91, 101–02 (Md. 2014) (citing *Mayor of Balt. v. Valsamaki*, 916 A.2d 324, 344 n.18 (Md. 2007)).

² *Kelo v. City of New London*, 545 U.S. 469, 495–96 (2005).

³ *Valsamaki*, 916 A.2d at 345 n.18.

⁴ Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 19 (2006), <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3043&context=clr> (referencing property owners who become aware of a large project requiring their respective properties and who subsequently hold out for “inflated prices”).

sentimental attachment to his home.⁵ For instance, in a 2006 publicized episode illustrating the combination of both financial and non-financial rationale for refusing to sell to a large development, Vera Coking refused a nearly two million dollar offer from Donald Trump to purchase her Atlantic City property; in July 2014, this property had an auction reserve price of \$199,000.⁶ Ms. Coking's grandson has stated that Ms. Coking does not regret the decision because she did not view any of the offers as "reasonable": "[a] few million dollars may sound like a lot, but it's not for the place she loved."⁷

As an additional example of the non-monetary rationale for refusing to sell to a large development, the story of Edith Macefield, who was the alleged inspiration for the film *UP*, proves illustrative.⁸ Although her house later sold for \$310,000 in March of 2014, Ms. Macefield previously refused a one million dollar offer from developers seeking to build a mall in Seattle, Washington.⁹ Ms. Macefield stated that she did not wish to make a grand statement by standing up to a large development, but rather, had strong sentimental attachment to the property.¹⁰

⁵ Lucas J. Asper, *The Fair Market Value Method of Property Valuation in Eminent Domain: "Just Compensation" or Just Barely Compensating?*, 58 S.C. L. REV. 489, 491 (2007) ("Subjective value in the home results from the personal dignity and social status that accompany homeownership, as well as the sentimental value an individual places on the home and surrounding land."). See also Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 595 (2013) ("[T]he owner of a house may have great sentimental attachment to the property because of happy memories of watching her children grow up there, but the market neither knows nor cares about her memories, so their value to her is not reflected in the property's market price. As a result, there is a substantial gap—a "subjective premium"—between the compensation that owners receive when they are paid the market value of their property and the substantially higher value that the owners themselves actually place on that property.").

⁶ Matt A.V. Chaban, *A Homeowner's Refusal to Cash Out in a Gambling Town Proves Costly*, N.Y. TIMES, July 22, 2014, at A19, <http://www.nytimes.com/2014/07/22/nyregion/a-homeowner-who-refused-to-cash-out-in-a-gambling-town-may-have-missed-her-chance.html>.

⁷ *Id.*

⁸ Dominic Kelly, *The Story of The Woman Who Turned Down \$1 Million For Her Historic Seattle Home*, OPPOSING VIEWS (Mar. 21, 2014), <http://www.opposingviews.com/i/society/story-woman-who-turned-down-1-million-her-historic-seattle-home>.

⁹ *Id.*

¹⁰ *Id.* (quoting Ms. Macefield as stating: "Where would I go? . . . I don't have any family and this is my home. My mother died here, on this very couch. I came back to America from England to take care of her. She made me promise I would let her die at home and not in some facility, and I kept that promise. And this is where I want to die. Right in my own home. On this couch.").

This Comment will analyze the competing and divergent ways in which holdout property owners (“holdouts”) and developers perceive each other. Part II of the Comment examines the case history of the Eminent Domain Clause,¹¹ starting with an analysis of the seminal cases in this area and culminating in a discussion of the most recent decisions from both state courts and the United States Supreme Court.¹² Additionally, this Part, through the analysis of *Rick v. West*, compares the holdouts in real property eminent domain proceedings to those holdouts refusing to release covenants.¹³ Part III examines and evaluates the various recommended methods to circumvent or resolve a holdout situation, such as “secret buying agents”¹⁴ and “land assembly districts.”¹⁵ Part IV proposes an additional possible solution to the holdout problem as an alternative to eminent domain: alternative dispute resolution. This Part first surveys both the evaluative and transformative mediation models. Part IV then ultimately espouses that alternate dispute resolution, in the form of evaluative mediation that implements a negotiating framework based on *Getting to Yes*¹⁶ principles, represents a transparent and efficient avenue to solutions for both the developer and the holdout property owner.

II. HISTORY OF HOLDOUTS IN EMINENT DOMAIN PROCEEDINGS

A. Real Property Holdouts

Scholars have observed that the Supreme Court addressed the “connection between eminent domain and the holdout problem” in its first decision involving the federal government’s eminent domain power.¹⁷ The Supreme Court’s subsequent decisions in this area, up until *Hawaii Housing Authority v. Midkiff*,¹⁸ “signaled that almost any governmental taking, including a taking involving a private transfer, would qualify as a legitimate public use.”¹⁹

¹¹ U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

¹² See *infra* Part II.

¹³ *Rick v. West*, 228 N.Y.S.2d 195 (N.Y. Sup. Ct. 1962).

¹⁴ Kelly, *supra* note 4.

¹⁵ Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1469–70 (2008).

¹⁶ ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

¹⁷ Kelly, *supra* note 4, at 10 (citing *Kohl v. United States*, 91 U.S. 367 (1875)).

¹⁸ *Id.* at 11 (citing *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 230–31 (1984)).

¹⁹ *Id.* at 12 (citing Mark C. Landry, *The Public Use Requirement in Eminent Domain-A*

For nearly twenty years after *Midkiff*, the Supreme Court did not decide a “major public use case”²⁰ This changed with the *Kelo v. City of New London* decision.²¹ In *Kelo*, nine owners of fifteen properties, including Susette Kelo, refused to sell to a development corporation²² that planned to replace the homes with privately owned office buildings and a hotel in order to capitalize on a new research facility for a large pharmaceutical company.²³ After having successfully negotiated with the majority of property owners within the planned development, city officials in New London argued that the condemnations were justifiable because of the extended condition of the city as a “depressed municipality.”²⁴ In a split decision, the Court found the transfer of property from one private owner to another in the interest of economic development to constitute a legitimate “public use.”²⁵ Justice O’Connor’s dissent vigorously argued that this was much too expansive and that “all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded.”²⁶

In the immediate aftermath of *Kelo*, Ohio was the first state to confront the “economic redevelopment takings”²⁷ issue. In *Norwood v. Horney*, the Supreme Court of Ohio refused to “extend state law to the extent allowed by *Kelo*.”²⁸ *Norwood* dealt with a situation where a developer was predominantly able to have property owners within a potential development sell their properties voluntarily, but a small minority refused to do so.²⁹ In its ruling, the court emphasized the

Requiem, 60 TUL. L. REV. 419, 430 (1985)).

²⁰ Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL’Y 491, 516 (2006).

²¹ *Id.* (citing *Kelo v. City of New London*, 545 U.S. 469, 470 (2005)).

²² *Kelo*, 545 U.S. at 494–95.

²³ *Id.* at 474.

²⁴ *Id.* at 504. The New London legislature characterized the city as a “depressed municipality” because of its “ailing economy.” *Id.* at 469.

²⁵ *Id.* at 484–86.

²⁶ *Id.* at 494 (O’Connor, J., dissenting) (“Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.”).

²⁷ Erik Stock, “*We Were All Born on It. And Some of Us Was Killed on It*”: Adopting A Transformative Model in Eminent Domain Mediation, 23 OHIO ST. J. ON DISP. RESOL. 687, 691 (2008) (citing Ian Urbina, *Ohio Supreme Court Rejects Taking of Homes for Project*, N.Y. TIMES, July 27, 2006, at A18).

²⁸ *Id.* (citing *Norwood v. Horney*, 853 N.E.2d 1115, 1128 (Ohio 2006)).

²⁹ *Norwood*, 853 N.E.2d at 1124–25.

importance of individual property rights, which are thought “to be derived fundamentally from a higher authority and natural law” and are “so sacred that they could not be entrusted lightly to ‘the uncertain virtue of those who govern.’”³⁰

In *Norwood*, a city sought to acquire property from existing owners and transfer it to another private entity as a part of an “urban renewal plan” for a “deteriorating area.”³¹ The court declined to allow such a transfer through eminent domain, noting that “judicial review of the taking is paramount” when the government seeks to seize private property and transfer it to another private entity.³² The court here observed that the commingling of the private and public interests in such cases creates the possibility that the government’s decision to impose eminent domain “may be influenced by the financial gains that would flow to it or to the private entity because of the taking.”³³

An additional case that serves to exemplify the use of eminent domain in holdout situations is a 2010 New York Court of Appeals ruling regarding Columbia University’s acquisition of land to expand its campus.³⁴ The court in *Matter of Kaur v. New York State Urban Development Corporation* allowed Columbia to effectuate the taking of seventeen acres for a satellite campus in West Harlem, New York.³⁵ The holdouts challenging the condemnation were several business owners within the zone of the potential development who contended that the blight findings that allowed the taking were illegitimate and “only serve[d] the private interests of Columbia.”³⁶ The court, however, reasoned that, since an earlier state decision held that the Brooklyn Nets basketball arena served a “public purpose,” then the educational promotion of Columbia University, although private, was also authorized as serving an equal, if not greater, “public purpose.”³⁷ The court favorably cited the anticipated additional benefits of the campus in Harlem, including the development of two acres of park-like space, a stimulus to job growth in the local area through the anticipated hiring of 14,000 people for the construction site area, and upgrades to

³⁰ *Id.* at 1128 (citing *Parham v. Justices of Decatur Cty. Inferior Court*, 9 Ga. 341, 348 (Ga. 1851)).

³¹ *Id.* at 1115.

³² *Id.* at 1139.

³³ *Id.* at 1140.

³⁴ *Kaur v. New York State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010).

³⁵ *Id.* at 724.

³⁶ *Id.* at 724, 730.

³⁷ *Id.* at 734 (citing *Develop Don’t Destroy (Brooklyn) v. Urban Dev. Corp.*, 874 N.Y.S.2d 414 (N.Y. App. Div. 2009)).

the overall transit infrastructure in Harlem.³⁸ Scholarly interpretation of this decision argues that the standards for review and deference that the decision of the New York Court of Appeals gave preserves the “tradition of broad eminent domain power in New York by limiting the judiciary’s power to invalidate state condemnations.”³⁹

Makowski v. Mayor and City Council of Baltimore provides an additional, even more recent example of the potential adverse outcomes that complete litigation can bring for a holdout in a condemnation proceeding.⁴⁰ In this case, the City of Baltimore sought to immediately take possession of an existing property owner’s office building.⁴¹ In recounting the facts that the trial level found, the Court of Appeals of Maryland drew attention to the history of the East Baltimore neighborhood that was the subject of the proceeding.⁴² In particular, the court noted the neighborhood’s historic loss of manufacturing jobs, dating as far back as the 1950s and continuing throughout the economic decline into the 1990s.⁴³ This continued loss of jobs carried with it corresponding deleterious impacts to the community, including substantial crime rates and population decreases, which collectively forced the neighborhood’s property values precipitously down and produced the image of East Baltimore as a “proverbial ghost town.”⁴⁴

As an initial effort to ameliorate these problems, Baltimore attempted to restore buildings within this zone on an individual basis.⁴⁵ These efforts, however, did not work to effectively combat the “urban decay.”⁴⁶ As a result, the city refocused its efforts of rehabilitating the neighborhood to a more “comprehensive” plan, which aimed to achieve “massive revitalization.”⁴⁷ This plan focused on redeveloping eighty-eight acres near Johns Hopkins University Medical Center through the construction of buildings for such purposes as biotechnology research and senior housing.⁴⁸

³⁸ *Id.* at 729.

³⁹ Matthew Pickel, *Standing Pat in a Post-Kelo World: Preservation of Broad Eminent Domain Power in Kaur v. New York State Development Corp.*, 52 B.C. L. REV. 257, 259 (2011).

⁴⁰ *Makowski v. Mayor of Balt.*, 94 A.3d 91 (Md. 2014).

⁴¹ *Id.* at 92–94.

⁴² *Id.* at 94–95.

⁴³ *Id.* at 94.

⁴⁴ *Id.*

⁴⁵ *Id.* at 94.

⁴⁶ *Makowski*, 94 A.3d at 95.

⁴⁷ *Id.*

⁴⁸ *Id.*

Before delving into the ultimate ruling in *Makowski*, it is sensible to first examine the cases to which the court cited in support of its ultimate ruling on this holdout situation: *Mayor & City Council of Baltimore City v. Valsamaki*⁴⁹ and *Sapero v. Mayor & City Council of Baltimore*.⁵⁰ *Valsamaki* involved Baltimore's attempt to use quick-take condemnation.⁵¹ The court held that the city must establish the reasons that require the city to possess a respective property immediately.⁵² The court additionally set forth the proposition that an impasse in negotiations for a property as part of a development does not allow for quick-take condemnation, since regular condemnation that affords "procedural due process protections" is still available in that event.⁵³ Furthermore, the court also examined the definition of a holdout and indicated that a failure to show the presence of a holdout situation in conjunction with the failure to show immediate necessity for possession would defeat a quick-take claim.⁵⁴

The Maryland Court of Appeals, two months after its decision in *Valsamaki*, again examined the idea of the holdout in a quick-title action in *Sapero*.⁵⁵ As in *Valsamaki*, the court in *Sapero* noted that there was potential for permitting a quick-take condemnation in the event of necessity, but held that the facts of the case, which demonstrated proposals that the city had received to redevelop the land, amongst other things, did not establish such necessity.⁵⁶ *Sapero* additionally noted that the city's lack of necessity manifested itself through its decision to stall the continuation of condemnation proceedings for over a year to instead go forward with the quick-take action that effectively "curtailed the property owner's ability to present a defense."⁵⁷

Applying the same standards espoused in both *Valsamaki* and *Sapero*, the court in *Makowski* held that the presence of a holdout in this case warranted the use of quick-take condemnation.⁵⁸ The court observed that the property owner was indeed a holdout who made immediate possession necessary because the owner at issue was the

⁴⁹ Mayor of Balt. v. Valsamaki, 916 A.2d 324 (Md. 2007).

⁵⁰ Sapero v. Mayor of Balt., 920 A.2d 1061 (Md. 2007).

⁵¹ *Valsamaki*, 916 A.2d at 326. Quick-take condemnation allows a municipality to obtain "immediate possession and immediate title to a particular property." *Id.* at 327.

⁵² *Id.* at 324.

⁵³ *Id.* at 346.

⁵⁴ *Id.* at 345 n.18.

⁵⁵ Makowski v. Mayor of Balt., 94 A.3d 91, 104 (Md. 2014).

⁵⁶ Sapero v. Mayor of Balt., 920 A.2d 1061 (Md. 2007).

⁵⁷ *Id.* at 1076.

⁵⁸ *Makowski*, 94 A.3d at 102.

only one in a block of over one hundred parcels of land who refused to sell, and his refusal obstructed the broader “urban renewal plan.”⁵⁹ The court proceeded to declare that the existing owner “retained leverage to hold a hammer over the City in order to gain financial advantage.”⁶⁰ As support for its assertion, the court noted that governments seeking to develop public projects suffer from unequal bargaining power as a result of public knowledge of the attempted acquisition of certain properties.⁶¹

B. Residential Covenant Holdouts

While the previous discussion focused primarily on cases of real property holdouts, the concept of holdouts extends beyond refusing to sell real property to refusing to release residential covenants.⁶² For instance, in the case of *Rick v. West*, the plaintiffs sought to force the defendant to release a covenant that restricted the respective land to single family dwelling status so that the plaintiffs could build a hospital.⁶³ After the defendant refused, the court held that a covenant that provides a real benefit to the person seeking to use it is enforceable.⁶⁴

In so ruling, *Rick* noted that the plaintiffs’ predecessor in interest was free to decide that, as an “inducement to purchasers,” he would create the residential covenants.⁶⁵ The court continued to assert that, since the defendant had established reliance on these covenants, the covenants would continue to have effect because “it is not a question of balancing equities or equating the advantages of a hospital on this site with the effect it would have on defendant’s property.”⁶⁶ There is, however, a “reverse damages” scenario where “restrictive covenants should [not] be enforced unless the parties who seek enforcement pay compensation to the parties who maintain that changed conditions have rendered the restrictions unenforceable.”⁶⁷ In addition, a current New York statute effectively renders unenforceable “non-substantial”

⁵⁹ *Id.* at 105 (citing Steve P. Calandrillo, *Eminent Domain Economics: Should “Just Compensation” Be Abolished, and Would “Takings Insurance” Work Instead?*, 64 OHIO ST. L.J. 451, 468–69 (2003)).

⁶⁰ *Id.* at 106.

⁶¹ *Id.* at 105.

⁶² *Rick v. West*, 228 N.Y.S.2d 195 (N.Y. Sup. Ct. 1962).

⁶³ *Id.* at 196.

⁶⁴ *Id.* at 201.

⁶⁵ *Id.* at 200.

⁶⁶ *Id.*

⁶⁷ JESSE DUKEMINIER ET AL., PROPERTY 933 n.1 (8th ed. 2014).

restrictions on the use of land.⁶⁸

The situation in *Rick* is, in a way, analogous to the large developer who seeks to take the land of an existing owner to put it to a supposedly better use for the public.⁶⁹ The court in *Rick* held that such a consideration of the competing equities to determine the supposed best societal use was not warranted.⁷⁰ So, the question then becomes, what techniques are there to confront the “holdout” in either the real property or residential covenant context?⁷¹

III. COMPARATIVE SURVEY AND ANALYSIS OF PROFFERED SOLUTIONS

A. *Secret Purchasing Agents*

One proposed alternative to eminent domain for confronting a real property holdout situation is the use of secret purchasing agents.⁷² This proposal makes the observation that the government customarily must make use of its eminent domain power to avoid a holdout situation.⁷³ The proposal discerns, however, that private parties can circumvent the use of eminent domain through the use of undisclosed agents, which can make “the use of eminent domain for private parties unnecessary and indeed undesirable.”⁷⁴

Daniel Kelly, an advocate for this solution, notes that secret purchasing agents, as seen in the situation of a private party’s seeking to purchase the properties on a development plan, derive their foundational legitimacy from agency law.⁷⁵ For agency law purposes in this area, the developer acts as the principal and authorizes the secret purchaser to act as an agent to deal with the third-party existing owner.⁷⁶ The way in which these purchases occur is through a “double-blind acquisition system,” where neither the existing owner nor the buying agent is aware of the larger development requiring the purchase of the property.⁷⁷ This would potentially address a central issue of the holdout problem: differentiating between those existing owners who are refusing to sell in order to achieve an inflated price

⁶⁸ *Id.* at 934 n.2 (citing N.Y. REAL PROP. ACTS § 951 (2016)).

⁶⁹ *See, e.g., Kelo v. City of New London*, 545 U.S. 469, 494 (2005) (O’Connor, J., dissenting).

⁷⁰ *Rick*, 228 N.Y.S.2d at 200.

⁷¹ *See infra* Part III.

⁷² Kelly, *supra* note 4.

⁷³ *Id.* at 1.

⁷⁴ *Id.*

⁷⁵ *Id.* at 21–22.

⁷⁶ *Id.*

⁷⁷ *Id.* at 20–21.

versus those who are not.⁷⁸ Since purely governmental use of eminent domain is “subject to democratic deliberation” and thus becomes public knowledge, sovereign use of secret buying agents to forego eminent domain proceedings generally does not occur.⁷⁹

This proposed solution ultimately seeks to prevent “socially undesirable” transfers of land that might otherwise occur in certain circumstances where eminent domain is used to transfer land to private parties.⁸⁰ These “inefficient transfers” occur because courts have no way of understanding an owner’s subjective value and instead rely on an objective metric: fair market value.⁸¹ This sometimes “socially undesirable” outcome, Kelly observes, also happens in situations where “properties in a purportedly blighted neighborhood are valued more highly by the existing owners than by the assembler.”⁸²

There are notable examples of large-scale implementations of secret purchasing agents.⁸³ For instance, Harvard University, in an attempt to circumvent a potential holdout issue involving an existing property owner seeking an inflated price, used secret purchasing agents to purchase multiple parcels of land at a total cost of eighty-eight million dollars.⁸⁴ Likewise, Disney also used these agents to amass over one thousand acres of land for its theme parks.⁸⁵ Disney primarily took advantage of the secret purchasing agents to “overcome potential strategic behavior among sellers.”⁸⁶

While these instances certainly provide illustrations of the potential efficacy of secret purchasing agents, there are also countervailing risks associated with the mechanism.⁸⁷ These risks include: (1) foregoing positive externalities; (2) long durations of assembly and the possibility of collusion; and (3) distrust in the system.⁸⁸ The use of purchasing agents will potentially fail to overcome disincentives to development in instances where the societal benefit is greater than the value of the properties of the existing owners but

⁷⁸ Kelly, *supra* note 4, at 24.

⁷⁹ *Id.* at 1.

⁸⁰ *Id.* at 25.

⁸¹ *Id.* at 6–7.

⁸² *Id.* at 58.

⁸³ *Id.* at 6.

⁸⁴ Kelly, *supra* note 4, at 6.

⁸⁵ *Id.* (citing Mark Andrews, *Disney Assembled Cast of Buyers to Amass Land Stage for Kingdom*, ORLANDO SENTINEL, May 30, 1993, at K-2).

⁸⁶ *Id.* at 22–23 (citing Tim O’Reiley, *Playing Secret Agent for Mickey Mouse*, LEGAL TIMES, Jan. 10, 1994, at 2).

⁸⁷ *Id.* at 41–49.

⁸⁸ *Id.*

where the private benefit is lower than the value of those properties.⁸⁹ In these cases, the private party will not receive sufficient inducement to proceed with the development—even with secret purchasing agents—and a project that would have a net societal benefit will not take place.⁹⁰

In addition, the use of secret purchasing agents carries with it an elongated bargaining process and the threat of collusion.⁹¹ For example, the use of secret purchasing agents is often a time-intensive process because it requires bargaining with each existing owner, whereas eminent domain allows for relatively instantaneous acquisitions.⁹² While eminent domain still might require years of litigation,⁹³ its use is potentially preferable to secret purchasing agents where the development necessitates expedience.⁹⁴ Furthermore, there exists a possibility of collusion in the process between the agent and the existing owner where the agent, if cognizant of the larger development, could either inform the owner of the development or increase the price offer for a “kickback.”⁹⁵

Moreover, there exists the issue of creating general distrust in the system when developers utilize secret purchasing agents.⁹⁶ Since the use of these agents is contrary to normal “full disclosure” negotiation, the practice has the potential to engender the perception of the developer as “deceptive.”⁹⁷ In fact, when the owners discover the hidden developer, the negotiations often fail.⁹⁸ Existing owners who find out that they have dealt with secret agents may subsequently lose their trust in future property transactions.⁹⁹ This breakdown in trust can ultimately compel the developer to attempt to make costly amends with the community, such as where Harvard—in response to public censure of its use of secret purchasing agents—paid the government voluntarily.¹⁰⁰ Furthermore, even those who have not directly dealt

⁸⁹ *Id.* at 42.

⁹⁰ Kelly, *supra* note 4, at 42.

⁹¹ *Id.* at 45–47.

⁹² *Id.* at 45 (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 40–42 (2d ed. 1977); Richard A. Epstein, *Holdouts, Externalities, and the Single Owners: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553, 572 (1993); Thomas Merrill, Book Note, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1570 (1986)).

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ *Id.* at 46–47.

⁹⁶ Kelly, *supra* note 4, at 47–49.

⁹⁷ *Id.* at 47.

⁹⁸ Heller & Hills, *supra* note 15, at 1468.

⁹⁹ Kelly, *supra* note 4, at 47.

¹⁰⁰ *See id.* at 47–48 (citing Marcella Bombardieri, *Town Tensions Thawing as Harvard*

with secret purchasing agents but become aware of their general existence may take “wasteful precautions” to determine whether a buyer is a secret purchasing agent.¹⁰¹

B. *Land Assembly Districts*

Another proposed alternative to eminent domain for dealing with the holdout issue is known as the “land assembly district” (LAD).¹⁰² This solution aims to provide a way in which property assemblages can occur “without harming the poor and powerless,” which is the type of harm that advocates of the proposal believe eminent domain can cause in certain instances.¹⁰³ The advocates of this mechanism note that holdouts pose the problem of “underassembly” in private property transactions.¹⁰⁴ This issue occurs where a developer values a parcel of a desired assembly higher than the individual owner of that parcel contained within that assembly, but that owner nevertheless strategically seeks a higher price, thereby diminishing the interest of the developer to assemble the properties at all.¹⁰⁵

While the government has the power of eminent domain to deal with this issue, scholars note that eminent domain proceedings can result in “confiscatory condemnations”¹⁰⁶ and often do not compensate the owner with any “subjective surplus.”¹⁰⁷ The proposal seeks to have the law “retrofit a community with a condominium-like structure.”¹⁰⁸ The LAD formation and approval would be subject to a process “substantially parallel to those involved in existing redevelopment and condemnation procedures,” but the approving commission would need to “certify that a LAD is necessary to overcome the problem of excess fragmentation.”¹⁰⁹ This structure places a community into a district that would require a majority vote to approve the sale of the district to a “developer or municipality seeking to consolidate the land into a single parcel.”¹¹⁰ Scholars contend that this would circumvent

Earns Allston's Trust: University Wins Plaudits with Housing Support, BOS. GLOBE, Dec. 4, 2003, at B3).

¹⁰¹ *Id.* at 48.

¹⁰² Heller & Hills, *supra* note 15, at 1468.

¹⁰³ *Id.* at 1467.

¹⁰⁴ *Id.* at 1468 (citing Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 639, 673–74 (1998)).

¹⁰⁵ Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 927–28 (2004).

¹⁰⁶ Heller & Hills, *supra* note 15, at 1527.

¹⁰⁷ *Id.* at 1468.

¹⁰⁸ *Id.* at 1469.

¹⁰⁹ *Id.* at 1489.

¹¹⁰ *Id.* at 1469.

the holdout situation because the owners would be subject to a “collective voting procedure.”¹¹¹

While this proposal certainly has the potential to mitigate the holdout problem, it too brings corresponding concerns. For instance, there exists the risk of “majoritarian tyranny” due to the voting schematic of the proposal that requires a majority decision.¹¹² This structure threatens minority property owners, as the majority may “enact rules solely benefiting itself at the expense of a minority for no better reason than that the majority can hold together a coalition of the selfish.”¹¹³ Additionally, the majority may vote for a given assembly when other property owners within it would not do so.¹¹⁴ The constituent elements of the district’s majority may additionally be corporate entities, such as real estate investment funds, which may by their nature perceive the district as a strict investment endeavor and fail to account for the subjective valuation of any individual property.¹¹⁵ Furthermore, those with “transient” interests within the district could potentially “gang up on owners with deep connections to their parcels.”¹¹⁶ Thus, while LADs offer a democratic mechanism to confront the holdout issue in the real property setting as an alternative to eminent domain, it may run the risk of failing to adequately protect the interests of the minority within the district.¹¹⁷

Each of the proposed solutions above offers theoretically attractive alternatives to the use of eminent domain for dealing with the holdout situation. Without more widespread acceptance of secret purchasing agents and in the absence of the creation of LADs, however, an already available alternative that has proven itself to be a highly effective tool in numerous other areas will provide a practical solution to the problem: mediation.

¹¹¹ See *id.* at 1469–70.

¹¹² *Heller & Hills*, *supra* note 15, at 1499.

¹¹³ *Id.*

¹¹⁴ *Id.* at 1498.

¹¹⁵ *Id.* at 1499.

¹¹⁶ *Id.* at 1503.

¹¹⁷ See *supra* notes 102–16.

IV. PROPOSAL FOR MEDIATION THAT USES PRINCIPLED FRAMEWORK

A. *Mediation Benefits*

The notion of dissuading traditional litigation is not a novel one, as both federal judges and American Presidents have noted the potential drawbacks of proceeding to trial.¹¹⁸ Abraham Lincoln, for instance, exhorted the following: “Discourage litigation. Persuade your clients to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses, and waste of time.”¹¹⁹ Furthermore, and more specifically for purposes of this Comment, the notion of alternate dispute resolution in the context of eminent domain proceedings is also well established and has been used since the 1660s.¹²⁰

An additional form of alternate dispute resolution used in eminent domain proceedings, mediation, consists of an independent mediator engaging with the government and the existing property owner in order to have both parties come to terms with an agreement that both sides find suitable.¹²¹ The mediation session is dependent on the will of the parties and can occur at any stage at which the parties agree to do so.¹²² In this circumstance, the mediator functions to “facilitate communication between the parties, identify their respective interests, and, hopefully, help them resolve the issues on terms with which both can live.”¹²³ At the mediation session, both parties, with legal representation, join the mediator.¹²⁴ The format of the mediation is subject to tailoring and variation to fit the needs of the parties.¹²⁵ The mediation process begins with a joint session involving the parties and the mediator.¹²⁶ Then, the mediator conducts separate caucuses with each party.¹²⁷ During these caucuses, the mediator separately conveys offers between the parties through “shuttle diplomacy.”¹²⁸ Ultimately,

¹¹⁸ Deborah A. Ferguson, *Eight Benefits of Mediation*, ADVO., Oct. 2012, at 44, 44.

¹¹⁹ *Id.*

¹²⁰ Stock, *supra* note 27, at 692 (citing LISA JARDINE, *THE CURIOUS LIFE OF ROBERT HOOKE: THE MAN WHO MEASURED LONDON 157–59* (2004)).

¹²¹ Stanley Leasure & Ray Gosack, *Eminently Sensible: Why Mediation Works in Eminent Domain Cases*, ICMA.ORG (May 27, 2014), http://icma.org/m/en/Article/104506/Eminently_Sensible.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Leasure & Gosack, *supra* note 121.

¹²⁸ *Id.* Shuttle diplomacy is a process where the mediator is “relaying offers and counter offers between the parties and continuing to assist the parties and their

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the goal is to have the mediator join the parties again to write and sign a settlement agreement.¹²⁹

The advantages to mediation include high reports of settlement, low costs, increased confidentiality, and a greater degree of control.¹³⁰ Settlement rates for mediation are approximately eighty percent, with the settlement rate for eminent domain mediations tracking closely to that figure, albeit with a small sample size of reported settlements.¹³¹ For instance, this sample consists of a mediator in Tennessee who has conducted eminent domain mediations and approximates the settlement rate of his cases at around eighty percent.¹³²

Furthermore, mediation foregoes the costs associated with litigation, including the potentially sizeable expenses of “pretrial attorney fees and costs arising from discovery, depositions, transcripts, motions, briefs, research, experts and witnesses.”¹³³ The slow nature of the litigation process further compounds these costs, which increase over time.¹³⁴ Eminent domain litigation costs additionally include “negative public perception.”¹³⁵ In contrast, mediation is “far less expensive,” allows the cost of the mediator to be shared equally amongst the parties, and is generally less time consuming.¹³⁶

Mediation also offers increased confidentiality, whereas litigation is often an “extremely public process.”¹³⁷ This confidentiality comes about as a result of statutes that prohibit the admission of evidence concerning the mediation.¹³⁸ Statutes also view the information presented to the mediator as protected.¹³⁹ Furthermore, the parties can add additional confidentiality protection through any agreed upon contractual stipulations.¹⁴⁰

representatives to analyze the important elements of the case.” *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² TENN. ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, EMINENT DOMAIN IN TENNESSEE 9 (2013), <https://www.tn.gov/assets/entities/tacir/attachments/EminentDomain.pdf>.

¹³³ Ferguson, *supra* note 118, at 45.

¹³⁴ *Id.*

¹³⁵ Leasure & Gosack, *supra* note 121.

¹³⁶ Ferguson, *supra* note 118, at 45.

¹³⁷ Leasure & Gosack, *supra* note 121.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

The voluntary nature of mediation allows the parties to exert significant control over the way in which the process occurs.¹⁴¹ The parties are not obligated to follow “court-mandated procedures” and instead have the freedom to define their own process.¹⁴² Since the process is voluntary, the parties can reach a compromise.¹⁴³ This is in clear contrast to litigation, where the judgment at trial will create a “winner and loser.”¹⁴⁴ Furthermore, the parties exert autonomy when they choose the mediator of the dispute.¹⁴⁵

B. Examples of the Use of Mediation to Avoid Eminent Domain Proceedings

A recent example of the use of mediators to avoid eminent domain litigation is the attempt of Vermont Gas Systems to run pipeline through various private properties.¹⁴⁶ After failing to reach an agreement with a minority percentage of the affected property owners for the easements, the company offered those owners the opportunity to conduct mediations with third-party mediators.¹⁴⁷ A spokesperson for Vermont Gas lauded mediation as an attractive alternative to eminent domain litigation because it is “quicker and generally cheaper.”¹⁴⁸

Another example of the successful use of mediation to forego eminent domain proceedings is found in Fort Smith, Arkansas.¹⁴⁹ The city made substantial use of mediation in its efforts to acquire various properties “for expansion of a regional water-supply lake.”¹⁵⁰ Before beginning the mediations, the town informed the landowners that the city would pay for the cost of the mediator in order to “encourage participation.”¹⁵¹ In the group sessions of the mediations, the city made sure to inform the property owners of the regional benefits of the project as well as the city’s intention to be fair during the

¹⁴¹ Ferguson, *supra* note 118.

¹⁴² Leasure & Gosack, *supra* note 121.

¹⁴³ Ferguson, *supra* note 118.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Vermont Gas Offers Landowners Mediation*, WASH. TIMES (Aug. 13, 2014), <http://www.washingtontimes.com/news/2014/aug/13/vermont-gas-offers-landowners-mediation/>.

¹⁴⁷ *Id.* http://icma.org/m/en/Article/104506/Eminently_Sensible

¹⁴⁸ Joel Baird, *Vermont Gas Upbeat on Pipeline Mediation*, BURLINGTON FREE PRESS (Aug. 12, 2014, 6:30 PM), <http://www.burlingtonfreepress.com/story/news/local/vermont/2014/08/12/vermont-gas-upbeat-pipeline-mediation/13966905/>.

¹⁴⁹ Leasure & Gosack, *supra* note 121.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

negotiations.¹⁵² The mediations were so uniformly successful that each session resulted in a settlement.¹⁵³

C. *Proposal for Transformative Model*

One type of proposed mediation as an alternative to eminent domain proceedings is based on the “transformative” method.¹⁵⁴ This proposal recognizes that mediation in general may address “problematic power imbalances inherent in any eminent domain dispute.”¹⁵⁵ The transformative model, along with the “facilitative” and “evaluative” models, is a “generally accepted mediation [model].”¹⁵⁶ The transformative model consists of the least involved mediator, while the evaluative process implements the most involved mediator of the three aforementioned models.¹⁵⁷ In the transformative process, the mediator does not unilaterally establish the way in which the mediation will occur, but rather seeks input from the parties as to how to organize the session.¹⁵⁸ To foster and encourage “engagement” between the parties, the transformative mediator makes use of unstructured questioning without suggesting the answer beforehand.¹⁵⁹ While the mediator here is minimally involved, he will nevertheless draw attention to points in the discussion where one party “recognizes and acknowledges the perspective of the other.”¹⁶⁰

The proposal for transformative mediation supports that model specifically in the eminent domain context because the minimal involvement of the transformative mediator may lead to maintenance of the relationship between the parties.¹⁶¹ An advocate for the proposal, Erik Stock, notes that the mediator who implements a transformative methodology seeks “to foster opportunities for the disputants to experience empowerment and recognition.”¹⁶² The transformative model, Stock argues, will allow the existing owner in an eminent domain proceeding to feel “empowerment.”¹⁶³ According to Stock, the use of the transformative model is particularly appealing in

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Stock, *supra* note 27, at 687–88.

¹⁵⁵ *Id.* at 694–95.

¹⁵⁶ *Id.* at 696–97.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 697.

¹⁵⁹ *Id.* at 697–98.

¹⁶⁰ Stock, *supra* note 27, at 697.

¹⁶¹ *Id.*

¹⁶² *Id.* (citation and internal quotation marks omitted).

¹⁶³ *Id.*

this context because eminent domain cases frequently involve parties located in “neighborhoods lacking in political power,” and the transformative model affords those parties an opportunity to “gain a voice in a dispute where they might otherwise have none and reconnect to the government entity involved in the dispute.”¹⁶⁴

Stock goes on to cite the Uniform Mediation Act (“the Act”) as reinforcement for the transformative model, since the Act emphasizes “self-determination” in order to create a sense of equity and satisfaction with the mediation proceeding.¹⁶⁵ This transformative dynamic, according to Stock, is potentially useful because it necessitates cooperation where there can be a large “emotional and psychic” discrepancy between the property owner and the government in eminent domain cases.¹⁶⁶ Furthermore, Stock contends that, on a more macro level, the transformative model will preserve the relationship between property owners and the government by engendering “democratic values,” which the scholar deems potentially greater than reaching a settlement.¹⁶⁷ Stock’s conclusion emphasizes the process value of mediation, where if the property owner feels a sense of “empowerment” while dealing with the government through a robust level of control in the mediation itself, then the use of the transformative method is justified.¹⁶⁸

D. Argument for an Evaluative Model of Mediation to Avoid Eminent Domain Litigation

While the proposal of a transformative model certainly has appealing and meritorious characteristics, including the empowerment of the existing owner as discussed *supra*,¹⁶⁹ a holdout situation may call for more active involvement from the mediator in an effort to reach a settlement. This active involvement is a chief feature of evaluative mediation—indeed, it consists of the highest level of mediator involvement of the three primary mediation models.¹⁷⁰ Whereas a transformative mediator takes a predominantly hands-off approach in an effort to bestow upon the parties a sense of control over the mediation process, an evaluative mediator focuses much more on the outcome of the mediation and “will not only encourage

¹⁶⁴ *Id.* at 698.

¹⁶⁵ *Id.* at 700.

¹⁶⁶ Stock, *supra* note 27, at 701.

¹⁶⁷ *Id.* at 702–03.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 696.

settlement, but will at times propose a particular outcome for the dispute.”¹⁷¹

In general, an evaluative mediator “focuses on the legal rights of the parties and evaluates the merits of each party’s claim.”¹⁷² A mediator who implements this methodology seeks to address the fundamental origin of the controversy.¹⁷³ While this technique engenders a “more practical focus than in a purely facilitative mediation,” it does not do so to neglect either side’s interests.¹⁷⁴

A core competency of the evaluative model is the ability of the mediator to act as an “agent of reality” for the parties.¹⁷⁵ The evaluative mediator acts as such when providing objective and neutral advice.¹⁷⁶ The mediator in this evaluative capacity seeks to reach a settlement by overcoming “unrealistic opinions about the value of [the parties’] claims.”¹⁷⁷ To accomplish this end, an evaluative mediator “provides new information, helps parties realize the costs and risks of litigation, and points out weaknesses and strengths of each side.”¹⁷⁸

More specifically in the eminent domain context, an evaluative mediator provides the parties with “opinions on any of the many issues which arise in eminent domain matters, including the potential outcome at trial.”¹⁷⁹ The evaluative mediator in this context may also candidly assess the costs and benefits of proceeding to litigate the issue.¹⁸⁰ During this discussion, the evaluative mediator may choose to present a “verdict range” that incorporates the probability of potential outcomes within that realm of possibilities.¹⁸¹ Since an evaluative mediator has this ability to offer opinions on the matter, the use of an “experienced mediator with eminent domain expertise” serves to

¹⁷¹ *Id.* at 696–97.

¹⁷² Kenneth M. Roberts, *Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement*, 39 LOY. U. CHI. L.J. 187, 195 (2007) (citing Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 268 (2000)).

¹⁷³ *Id.* (citing Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309, 313–14 (2000)).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 196 (citing Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309, 315 (2000)).

¹⁷⁶ *See id.*

¹⁷⁷ *Id.*

¹⁷⁸ Roberts, *supra* note 172, at 196.

¹⁷⁹ Stanley Leasure, *Eminent Domain Disputes: The Role of Mediation*, RIGHT OF WAY, Mar./Apr. 2012, at 32, 33, https://www.irwaonline.org/eweb/upload/web_mar_apr12_EminentDomainMediation.pdf.

¹⁸⁰ *See id.* at 34.

¹⁸¹ *See id.*

enhance the session.¹⁸²

E. Incorporating Principled Framework to Evaluative Model

This Comment proposes that a principled negotiating framework based on the seminal book *Getting to Yes*¹⁸³ will augment the efficacy of evaluative mediation in the eminent domain context. Scholars have referred to this work as the “‘Bible’ for cooperative negotiations and generally a very useful blueprint for mediation.”¹⁸⁴ The main precepts of the work are: “1) separating the people from the problem, 2) focusing on interests not positions, 3) inventing options for mutual gain, and 4) using objective criteria.”¹⁸⁵

1. Separating the People from the Problem

As to the first principle of “separating the people from the problem,” the book notes that “[t]he ability to see the situation as the other side sees it, as difficult as it may be, is one of the most important skills a negotiator can possess.”¹⁸⁶ This ability to analyze the situation from both sides underscores the evaluative mediator’s goal of objective assessment of the root causes of the case.¹⁸⁷ Furthermore, while this principle recommends focusing on the problem itself, it does not disregard the emotions of the parties involved and advises negotiators to “deal with the people as human beings.”¹⁸⁸ Since emotions on the part of the potential holdouts have the tendency to run high,¹⁸⁹ the evaluative mediator would be prudent to heed the advice of this principle and recognize these human emotions at the mediation session, while maintaining a simultaneous but separate focus on the problem, as the principle suggests.

The use of this principle is highly complementary to evaluative mediation, which emphasizes the role of the mediator as bringing objective and neutral reality to the parties.¹⁹⁰ Conversely, this principle is at odds with the precepts of transformative mediation, which does not separate the people from the problem but instead seeks to have

¹⁸² See *id.* at 33.

¹⁸³ FISHER & URY, *supra* note 16.

¹⁸⁴ See, e.g., John Barkai, *What’s A Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem*, 10 CARDOZO J. CONFLICT RESOL. 43, 81 (2008).

¹⁸⁵ *Id.* (discussing FISHER & URY, *supra* note 16).

¹⁸⁶ FISHER & URY, *supra* note 16, at 23.

¹⁸⁷ See Roberts, *supra* note 172.

¹⁸⁸ FISHER & URY, *supra* note 16, at 39.

¹⁸⁹ See, e.g., *supra* notes 6–10 and accompanying text.

¹⁹⁰ See Roberts, *supra* note 172, at 196 (citing Richard Birke, *Evaluation and Facilitation: Moving Past Either / Or*, 2000 J. DISP. RESOL. 309, 315 (2000)).

the parties feel empowerment over the problem.¹⁹¹ The use of evaluative mediation with the application of this principle is preferable to the transformative model in the eminent domain context because, while it would address the emotional element¹⁹² of potentially selling one's property, it would not allow these emotions to create "unrealistic opinions about the value of their claims" that would conceivably interfere with a settlement.¹⁹³ For instance, in the example of Vera Coking, who turned down an offer to sell her property for nearly two million dollars to Donald Trump only to ultimately have the property receive an auction reserve price of approximately \$1.8 million less than that offer,¹⁹⁴ an evaluative mediator would have acted as an "agent of reality" to make Ms. Coking aware of this potential precipitous price decrease as well as the objective assessment of the offer at the time it was made.¹⁹⁵

By adhering to this principle, the evaluative mediator would also be able to avoid the potential issue of distrust in the system related to the secret purchasing agent proposal.¹⁹⁶ That proposal would effectively remove the people from the problem through the use of undisclosed purchasing agents so as to not make an existing owner aware of a larger development plan, but this practice is often seen as "deceptive."¹⁹⁷ Indeed, property owners who come to realize that they have transacted with undisclosed agents may suffer from a breakdown in trust in future property dealings.¹⁹⁸ This "separating the people from the problem" principle seeks to accomplish just what it claims; however, it untangles the issue at hand from emotion, but does not wholly remove the human component.¹⁹⁹ Thus, the evaluative mediator implementing this principle would not have to rely on deception, as is the potential case with the use of secret purchasing agents.²⁰⁰ In order to achieve a positive outcome for the parties, the evaluative mediator can still objectively assess the merits of each party's position without conflating the problem with emotion.²⁰¹ This would forego the potential costs to the secret purchasing agent proposal,

¹⁹¹ Stock, *supra* note 27, at 701.

¹⁹² See FISHER & URY, *supra* note 16, at 39.

¹⁹³ Roberts, *supra* note 172, at 196.

¹⁹⁴ See Chaban, *supra* note 6.

¹⁹⁵ Roberts, *supra* note 172, at 196.

¹⁹⁶ See Kelly, *supra* note 4, at 47–49.

¹⁹⁷ *Id.* at 47.

¹⁹⁸ *Id.*

¹⁹⁹ See FISHER & URY, *supra* note 16, at 39.

²⁰⁰ See Kelly, *supra* note 4, at 47.

²⁰¹ See FISHER & URY, *supra* note 16, at 39.

including the monetary costs associated with making a financial apology to the community, as was the case with the Harvard example,²⁰² and the costs associated with precautionary assessments of whether a buyer is a secret purchasing agent.²⁰³

2. Focus on Interests

As to the second principle of “focusing on interests not positions,” *Getting to Yes* asserts that, “a close examination of the underlying interests will reveal the existence of many more interests that are shared or compatible than ones that are opposed.”²⁰⁴ This focus on interests by the evaluative mediator would lend itself to separating those property owners who are holding out for opportunistic reasons from those holding out for non-monetary reasons.²⁰⁵ For instance, the evaluative mediator would aim to objectively determine whether someone like Edith Macefield is actually imputing a sentimental premium on the value of a given property, is strategically seeking a higher price knowing that her property is essential to the larger development scheme, or is indeed attempting to make some sort of grand statement against the development itself.²⁰⁶ As another example, in the Columbia University expansion case, the evaluative mediator would actively seek to establish whether the business-owner holdouts in that case truly believed that the area was not blighted,²⁰⁷ or whether the business owners’ true interests for holding out were strategic in nature.

This is an additional, yet appealing, distinguishing characteristic of evaluative mediation implementing this principle from the transformative model, since the transformative mediator would simply focus on creating the feeling of empowerment amongst the parties.²⁰⁸ While there is a strong argument that this emphasis on the process will enable the parties to feel a greater sense of control over the mediation,²⁰⁹ the session may very well conclude without an objective third party determining the reasoning behind the refusal to sell, which

²⁰² Kelly, *supra* note 4, at 47–48 (citing Marcella Bombardieri, *Town Tensions Thawing as Harvard Earns Allston’s Trust: University Wins Plaudits with Housing Support*, BOS. GLOBE, Dec. 4, 2003, at B3).

²⁰³ Kelly, *supra* note 4, at 48.

²⁰⁴ FISHER & URY, *supra* note 16, at 42.

²⁰⁵ See *supra* Part I.

²⁰⁶ Kelly, *supra* note 8.

²⁰⁷ *Kaur v. New York State Urban Dev. Corp.*, 933 N.E.2d 721, 730 (N.Y. 2010).

²⁰⁸ Stock, *supra* note 27, at 697.

²⁰⁹ *Id.*

is the precise determination that this focus on interests promotes.²¹⁰ This would ultimately better enable the evaluative mediator in the active promotion of settlement.²¹¹

3. Inventing Options for Mutual Gain

Moreover, in reference to the third principle of “inventing options for mutual gain,” the book notes that, “[i]n a complex situation, creative inventing is an absolute necessity. In any negotiation it may open doors and produce a range of potential agreements satisfactory to each side.”²¹² The potential efficacy of the application of this principle is seen in the result in *Rick v. West*, a case in which the construction of a hospital did not occur because of a holdout’s enforcement of a residential covenant.²¹³ The court held that it would not conduct a balancing of the potential benefits of a hospital with the potential burden imposed on the covenant holder if it were not enforced, but would instead focus on whether the covenant-created reliance was an “inducement to purchasers.”²¹⁴ In such a case, an evaluative mediator implementing this principle would attempt to come up with a broad range of possible solutions²¹⁵ that could produce the ostensibly favorable result of the construction of a hospital, such as possibly giving the holder of the restrictive covenant some interested stake in the new hospital for releasing the covenant. In addition, the evaluative mediator could use his active involvement in the mediation to create solutions based on the purported benefits of the development, such as in *Matter of Kaur v. New York State Urban Development Corporation*, where an evaluative mediator could potentially have based a number of creative solutions on the litany of potential benefits of Columbia University’s expansion, such as its creation of thousands of jobs and benefits to the local transit system and environment.²¹⁶

This is another chief advantage of evaluative mediation over its transformative counterpart, since the more active involvement of the evaluative mediator is more conducive to the creation of different, possible solutions, as opposed to the general passivity of the

²¹⁰ FISHER & URY, *supra* note 16, at 42.

²¹¹ *Id.*

²¹² *Id.* at 79–80.

²¹³ *Rick v. West*, 228 N.Y.S.2d 195, 201 (N.Y. Sup. Ct. 1962).

²¹⁴ *Id.* at 201.

²¹⁵ FISHER & URY, *supra* note 16, at 79–80.

²¹⁶ *Kaur v. New York State Urban Dev. Corp.*, 933 N.E.2d 721, 734–35 (N.Y. 2010).

transformative mediator.²¹⁷ Furthermore, the evaluative mediator could also present the parties with a probability analysis of these outcomes if a trial is needed as a backdrop to any other devised solutions so as to convey the possible risks involved with each solution.²¹⁸

4. Establishment of Objective Criteria

Finally, *Getting to Yes* encourages establishing “objective criteria” upon which to base the negotiations.²¹⁹ This measurement, the book argues, should consider “standards of fairness, efficiency, or scientific merit.”²²⁰ This principle complements the risk-assessment and opinion-providing function of the evaluative mediator²²¹ by underscoring the need to establish an objective basis for that judgment.

One such possible criteria to assist the evaluative mediator’s creation of a “verdict range”²²² would be the use of past holdout case results. For instance, *Kelo* could potentially provide caution to the holdout who is considering creating an impasse at mediation, as the Supreme Court, albeit in a split decision, asserted the transfer of property from one private owner to another in the interest of economic growth to be a permissible “public use.”²²³ Similarly, *Makowski* illustrates another result that the evaluative mediator could use as an objective benchmark to provide admonition to a would-be holdout. There, the court provided guidance as to who constitutes a holdout and ultimately held that the refusal to sell in that case amounted to interference with the more comprehensive “urban renewal plan” at issue and thus warranted condemnation.²²⁴

Conversely, the evaluative mediator could juxtapose these potential outcomes with the result in *Norwood*, which held that condemnation was not warranted when a municipality attempted to obtain private property and transfer it to another private party in order to ostensibly revitalize the city, with the court noting that this raises the possibility of improper financial benefits to the city or to the private

²¹⁷ Stock, *supra* note 27, at 697.

²¹⁸ Leasure, *supra* note 179, at 34.

²¹⁹ FISHER & URY, *supra* note 16, at 83.

²²⁰ *Id.*

²²¹ See Leasure, *supra* note 179, at 32–34.

²²² *Id.* at 34.

²²³ *Kelo v. City of New London*, 545 U.S. 469, 484–86 (2005).

²²⁴ *Makowski v. Mayor of Balt.*, 94 A.3d 91, 101–02 (Md. 2014).

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party to which the property is ultimately transferred.²²⁵ Thus, these case results could provide the evaluative mediator with the tools necessary to establish the type of “objective criteria” that *Getting to Yes* espouses.²²⁶

V. CONCLUSION

This Comment began with the definition of a holdout as a landowner who resists or refuses to sell to a larger development. These holdouts are often subject to eminent domain proceedings to effectuate the development. As discussed, various alternatives to eminent domain exist to deal with the holdout issue, including secret purchasing agents and land assembly districts. This Comment then advanced evaluative mediation as a beneficial approach to dealing with holdouts due to this model’s emphasis on mediator activity and settlement.

The proposal centered on the general appeal of mediation, including the cost and control advantages compared to traditional litigation of eminent domain cases. More specifically, this Comment argued that evaluative mediation is better suited to reach the needed settlements in eminent domain cases through the ability of the mediator to actively provide evaluations of the matter, distinguished from the general passivity of a transformative mediator. This Comment then offered a negotiating framework, based on *Getting to Yes* principles, to complement and enhance this evaluative mediation. Using this framework, the mediator will have a strong basis upon which to conduct these potentially highly emotional holdout cases as well as to provide independent opinions of these cases based on objective criteria.

²²⁵ Norwood v. Horney, 853 N.E.2d 1115, 1139–40 (Ohio 2006).

²²⁶ FISHER & URY, *supra* note 16, at 83.