JUDICIAL REVIEW OF URBAN REDEVELOPMENT AGENCY DETERMINATIONS*

WHAT evidence a court will consider in reviewing local agency determinations will significantly affect the viability of urban redevelopment.[1] Encouraged by the availability of federal grants-in-aid,[2] and a congressional policy favoring local execution,[3] most states have empowered municipalities to assign authority to local agencies to combat urban decay through the formulation, organization, and administration of redevelopment projects.[4] These agencies

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*Bahr Corp. v. O'Brion, 146 Conn. 237, 149 A.2d 691 (1959).

1. Redevelopment is but one aspect of comprehensive urban renewal; the latter also includes rehabilitation, conservation, and reclamation. For definitions see Jacobs & Levine, *Redevelopment: Making Misused and Disused Land Available and Usable*, 8 HASTINGS L.J. 241, 245-46 (1957); Johnstone, *The Federal Urban Renewal Program*, 25 U. CHI. L. REV. 301 n.2 (1958); Note, 72 HARV. L. REV. 504, 505 (1959).

On the extent and problems of urban blight see Jacobs & Levine, *supra* at 242 n.15; Johnstone, *supra* at 302-05 nn.3-14; Note, 72 HARV. L. REV. 504 nn.1-3; Comment, 54 YALE L.J. 116, 117-18 nn.1-10 (1944) (collecting sources).

2. Housing Act of 1949, 63 Stat. 413, 42 U.S.C. §§ 1441-60 (1952), as amended, 66 Stat. 98 (1952), 67 Stat. 121 (1953), 68 Stat. 590 (1954), 69 Stat. 635 (1955), 70 Stat. 1091 (1956), 71 Stat. 294 (1957), 42 U.S.C. §§ 1446, 1450-60, 1462 (Supp. V, 1958), as amended, Housing Act of 1959, No. 86-372, 73 Stat. 654.

States and municipalities have been unable to finance urban renewal alone. Johnstone, *supra* note 1, at 307-08 & n.28. In addition, unintegrated, spotty local efforts—building and housing codes, subdivision and zoning regulations—and state efforts—attracting private enterprise—have failed to impede the spread of blight. *Id.* at 307-09.

3. See 63 Stat. 413 (1949), 42 U.S.C. §§ 1441(3), 1451 (1952), as amended, 42 U.S.C. § 1451 (Supp. V, 1958).

4. *E.g.*, ALA. CODE ANN. tit. 25, § 106 (Supp. 1956) (preexisting housing authority); COLO. REV. STAT. ANN. § 69-4-6 (1954) (city government may create a "rehabilitation authority"); CONN. GEN. STAT. § 8-126 (1958) (existing housing authority, "other appropriate state agency" or new "redevelopment agency"); ILL. ANN. STAT. ch. 67½, §§ 66, 67 (Smith-Hurd Supp. 1959) (Land Clearance Commission created under housing act, or new commission); MASS. ANN. LAWS ch. 121, § 26QQ (1957) (statute creates "Redevelopment Authority" in every town, but board is powerless until municipality determines need for its existence). Alaska, on the other hand, has one central agency. Comment, 68 YALE L.J. 1424, 1433 n.40 (1959).

At present, 45 states, the District of Columbia, Puerto Rico, and the Virgin Islands have passed enabling legislation. McFarland, *Urban Renewal: An Opportunity for the States*, 32 STATE GOV'T 193, 195 (1959). The constitutionality of these statutes has been overwhelmingly upheld. See, *e.g.*, Zurn v. City of Chicago, 389 Ill. 114, 59 N.E.2d 18 (1945); Herzinger v. Mayor & City Council, 203 Md. 49, 98 A.2d 87 (1953); Papadinis v. City of Somerville, 331 Mass. 627, 121 N.E.2d 714 (1954); Kaskel v. Impellitteri, 306 N.Y. 73, 115 N.E.2d 659 (1953), *cert. denied*, 347 U.S. 934 (1954); Fceller v. Housing Authority, 198 Ore. 205, 256 P.2d 752 (1953); Belovsky v. Redevelopment Authority, 357 Pa. 329, 54 A.2d 277 (1947). *Contra*, Adams v. Housing Authority, 60 So. 2d 663 (Fla. 1952); Housing Authority v. Johnson, 209 Ga. 560, 74 S.E.2d 891 (1953); Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956).

acquire a project site, clear it, and thereafter dispose of it to private redevelopers.[5] To ensure that the agency bases its site selection on all possibly relevant data, to provide a formal expression of community sentiment, and to accord affected property owners an opportunity to contest a proposed project,[6] the federal act[7] and most state statutes[8] require a public hearing. A property owner[9] who opposes a project may present evidence in support of his position at this hearing and may subsequently resort to the courts.[10] There he may seek to support his allegations with evidence not contained in the agency-compiled record of prior proceedings. The court must then decide either to hear such evidence or to confine review to the administrative record.

Bahr Corp. v. O'Brion[11] offers an answer to this problem that presages

5. See Comment, 68 YALE L.J. 1424, 1425 (1959).

6. See Note, 72 HARV. L. REV. 504, 513 (1959).

7. 63 Stat. 416 (1949), as amended, 68 Stat. 625 (1954), 70 Stat. 1097 (1956), 42 U.S.C. § 1455(d) (Supp. V, 1958).

8. See, *e.g.*, ALASKA COMP. LAWS ANN. § 40-7A-7(h) (Supp. 1958); DEL. CODE ANN. tit. 31, § 4524 (1953); MASS. ANN. LAWS ch. 121, § 26KK (1957) (upon written request); N.J. STAT. ANN. § 40:55-21.4 (Supp. 1958).

Apparently due process does not require a hearing on the investigation of blight conditions, the preparation of a redevelopment project, or the validity of a project. See Robinette v. Chicago Land Clearance Comm'n, 115 F. Supp. 669, 672 (N.D. Ill. 1951); Wilson v. City of Long Branch, 27 N.J. 360, 385, 142 A.2d 837, 851 (1958), *cert. denied*, 358 U.S. 873 (1959); David Jeffrey Co. v. City of Milwaukee, 267 Wis. 559, 592, 66 N.W.2d 362, 380-81 (1954); *cf.* Ross v. Chicago Land Clearance Comm'n, 413 Ill. 377, 108 N.E.2d 776 (1952); State *ex rel.* Dalton v. Land Clearance for Redevelopment Authority, 364 Mo. 974, 994-95, 270 S.W.2d 44, 56 (1954). More certain, due process does not require a hearing on the necessity of an eminent domain taking, as long as one is granted on the issue of just compensation. United States v. Carmack, 329 U.S. 230, 242-43 (1946); Water Comm'rs v. Johnson, 86 Conn. 151, 162-63, 84 Atl. 727, 730-32 (1912); 1 NICHOLS, EMINENT DOMAIN § 4.11(1) (3d ed. 1950) [hereinafter cited as NICHOLS].

9. Property owners within a project site have the right to challenge a proposed redevelopment; undetermined, however, are the rights that others—like those who live or work in the designated tract—may seek to protect. See Sullivan, *Administrative Procedure and the Advocatory Process in Urban Redevelopment*, 45 CALIF. L. REV. 134, 143 (1957).

10. Various systems of judicial review are presently in operation. In Illinois, written objections to Land Clearance Commission orders must be filed within 20 days of their announcement. Thereafter, review follows procedure established for that of other administrative agencies. ILL. REV. STAT. ch. 67½, §§ 268, 280-81 (1957). California law provides that an individual may contest the validity of redevelopment agency actions in a court of competent jurisdiction, if such action is commenced within 90 days of project approval by the municipal governing body. CAL. HEALTH & SAFETY CODE ANN. §§ 33745-46 (Supp.). In New Jersey, judicial review of redevelopment agency determinations is had as of right through a proceeding in lieu of prerogative writ—the general administrative review procedure established by rules of court. See Wilson v. City of Long Branch, 27 N.J. 360, 142 A.2d 837 (1958), *cert. denied*, 358 U.S. 873 (1959); N.J. RULES 4:88-2 to -9. In most other jurisdictions apparently no applicable procedure has been established, and relief will probably be sought through plenary suit for an injunction or declaratory judgment or both.

11. 146 Conn. 237, 149 A.2d 691 (1959).

serious impairment of future redevelopment. Bahr owned business property in downtown New Haven, included in a ninety-six acre proposed project.[12] The redevelopment agency held a public hearing upon notice [13] which Bahr's representatives did not attend.[14] After the hearing, the agency determined that the area was blighted [15] and recommended adoption of the project.[16] Subsequently, the agency attempted to take Bahr's parcel by eminent domain.[17] Since the Connecticut Redevelopment Act does not specifically provide for the manner in which courts shall review agency actions, and since neither a state administrative procedure act nor applicable rules of court prescribing such procedure exist in Connecticut,[18] Bahr brought a suit in equity to halt the condemnation. It alleged that the acquisition of its particular property was for a private, rather than a public, use and that the inclusion of such property within the project was unreasonable, arbitrary, and an abuse of the

12. Called the Church Street Project, the total redevelopment cost is estimated at $85 million in federal, state, local, and private capital. The project site includes the four highest priced blocks in downtown New Haven, an area of choice retail sites. Geared to the construction of a major highway artery, the widening of streets, and the provision for off-street parking and underground truck delivery facilities, one of the project's avowed aims is to stimulate lagging business in the commercial center of the city, to lure back the consumer from suburban shopping centers and thus to bolster declining downtown land values and prevent the subsequent tax losses to the city. *Public Hearing on the Church Street Project Before the New Haven Redevelopment Agency*, June 28, 1957, pp. 131-34, 150-65 [hereinafter cited as Record]; New Haven Citizens Action Comm'n, Annual Report 1957, pp. 2-8.

13. See Connecticut Redevelopment Act, CONN. GEN. STAT. § 8-127 (1958). In addition to the public hearing held by the New Haven Redevelopment Agency on June 28, 1957, the Board of Aldermen conducted a public hearing on the project on July 24, 1957. Subsequently, both the agency and the Aldermen held public hearings on the land disposition agreement with the private redevelopers on May 23, 1958, and June 23, 1958. Brief for Respondent, pp. 4-8, Bahr Corp. v. O'Brion, 146 Conn. 237, 149 A.2d 691 (1959).

14. Reply Brief for Appellants, p. 9 n.**. Therefore, Bahr was not denied the opportunity to testify or cross-examine those who did. See 146 Conn. at 244, 149 A.2d at 694.

15. Appendix, Brief for Respondent, p. 9; Record, pp. 44-53.

The criteria applied in determining blight included the following aspects: Room and bedroom crowding, lack of private toilets and dual egress; inadequate lighting, heating, and ventilation; extensive interior deterioration; garbage and rubbish facilities; evidence of rat and insect infestation; faulty foundations, framing, and sheathing; inadequate or unsafe electrical installations, heating, plumbing, and fire protection; excessive floor loads; interior space and condition obsolescence; and general design. Record, pp. 44-53, 107-10. Such criteria are consistent with the statutory requirements. See CONN. GEN. STAT. §§ 8-124, 8-125 (1958).

16. Pursuant to statutory requirements, CONN. GEN. STAT. § 8-127 (1958), the Board of Aldermen approved the project on September 3, 1957, by a vote of 29 to 1. Brief for Respondent, p. 6.

17. Redevelopment agencies are given the power of eminent domain by CONN. GEN. STAT. § 8-128 (1958). All efforts to purchase Bahr's property through negotiation proved futile. See Brief for Appellants, p. 5.

18. See Mo. ANN. STAT. §§ 536.010-.140 (1953); N.J. RULES 4:88-2 to -15; Note, 10 RUTGERS L. REV. 673 (1956).

agency's powers.[19] In the absence of assertions that the agency had acted fraudulently, in bad faith, or from ulterior motives, the trial court refused to admit evidence not contained in the record,[20] and found for the agency.[21] On appeal, however, the Supreme Court of Errors, citing three cases [22] for the proposition that redevelopment agency determinations are subject to judicial review "to discover if [they are] unreasonable or in bad faith or [are] an abuse of the power conferred,"[23] held that the trial court had erred in refusing to admit the proffered evidence and remanded the case for a new trial.[24] Thus, when the owner of a single parcel within a redevelopment project alleges that his individual property is being taken for a private purpose,[25] or

19. Brief for Appellants, pp. 10-15. Bahr also alleged that the Connecticut Redevelopment Act was unconstitutional because it failed to provide a system of judicial review. *Id.* at 31-33. The trial court held, Bahr Corp. v. O'Brion, No. 88913, Super. Ct., Nov. 13, 1958, and the Supreme Court of Errors affirmed, 146 Conn. at 246-47, 149 A.2d at 695, that a statute authorizing an administrative board to make orders but failing to contain an express provision for judicial review is not unconstitutional since an aggrieved party always retains general recourse to the courts. Bahr further argued that the agency members had made up their minds in favor of the project prior to the public hearing. Brief for Appellants, p. 28; see note 20 *infra*.

20. On the allegation that the agency was precommitted to the project, the trial court heard extrinsic evidence. Brief for Appellants, p. 28.

21. Bahr Corp. v. O'Brion, No. 88913, Super. Ct., Nov. 13, 1958.

22. Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 104 A.2d 365 (1954); Connecticut College for Women v. Calvert, 87 Conn. 421, 88 Atl. 633 (1913); Water Comm'rs v. Johnson, 86 Conn. 151, 84 Atl. 727 (1912).

23. 146 Conn. at 250, 149 A.2d at 697.

24. *Id.* at 249-52, 149 A.2d at 696-97. The case was not retried, however, as the agency purchased Bahr's property subsequent to the instant decision for $1,056,000. New Haven Evening Register, April 20, 1959, p. 1, cols. 7-8. Fear of the damage that delay might cause the project might have prompted the agency to settle, rather than go to a new trial.

25. Claims that an *entire* project is designed for a private purpose and not a public use have always gone to the question of constitutionality of enabling statutes in redevelopment cases, and have almost invariably been found to be without merit. See cases cited *supra* note 4. In these decisions, state and federal courts have defined public use, which was formerly construed to require possessory use by the public, to require only that a taking be useful, advantageous, or beneficial to the community. In addition, they have established that the public use is not vitiated by or incompatible with the existence of private gain. The liberalization of the definition was necessary in order to sanction the profit that would accrue to private redevelopers who buy or lease project land, as anticipated by the enabling statutes. *E.g.*, CAL. HEALTH & SAFETY CODE ANN. §§ 33709, 33267 (d), 33047(b); WASH. REV. CODE ANN. §§ 35.81.030, 35.81.090 (1957); see Opinion of the Justices, 254 Ala. 343, 48 So. 2d 757 (1950); People *ex rel.* Gutknecht v. City of Chicago, 3 Ill. 2d 539, 545, 121 N.E.2d 791, 794 (1954); Ajootian v. Providence Redevelopment Agency, 80 R.I. 73, 91 A.2d 21 (1952); Nashville Housing Authority v. City of Nashville, 192 Tenn. 103, 237 S.W.2d 946 (1951); 2 NICHOLS § 7.2; Mandelker, *Public Purpose in Urban Redevelopment*, 28 TUL. L. REV. 96, 99 (1953); Marquis, *Constitutional and Statutory Authority To Condemn*, 43 IOWA L. REV. 170 (1958); McDougal & Mueller, *Public Purpose in Public Housing: An Anachronism Reburied*, 52 YALE L.J. 42 (1942); Comment, 4 ST. LOUIS U.L.J. 316 (1957); Comment, 58 YALE L.J. 599 (1949). *Contra*, Edens

pursuant to unreasonable agency action, the courts must grant his claims a trial de novo.[26]

Bahr's vital weakness is that the court treated the fundamentally procedural problem of how review should be conducted as the substantive problem of whether review would be proper. The cases upon which the court relied speak only to the latter. *Connecticut College for Women v. Calvert*[27] concerned the validity of an eminent domain taking by a private corporation, not a public agency, and came before the court without any previous public proceedings. Since no administrative record existed, the possibility that the *Calvert* court may have heard the property owner's evidence does not support the proposition that a court in a redevelopment case must hear new evidence when the protestant made no effort to make his case a matter of record at the adminis-

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v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956), 16 MD. L. REV. 172 (1956), 41 MINN. L. REV. 219 (1957), 8 S.C.L.Q. 457 (1956). Compare Schneider v. District of Columbia, 117 F. Supp. 705 (D.D.C. 1953), *aff'd as modified sub nom.* Berman v. Parker, 348 U.S. 26 (1954). The logical consequence of the liberalization of public use is a narrowing of the role of the courts in reviewing a legislative determination:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia, or the States legislating concerning local affairs. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Berman v. Parker, *supra* at 32. (Citations omitted.) *Berman* is noted in 8 ALA. L. REV. 124 (1955); 40 IOWA L. REV. 659 (1955); 53 MICH. L. REV. 883 (1955); 1955 U. ILL. L.F. 145.

Within the redevelopment context, an allegation that *particular* property is being taken for a private use would be meaningful only with reference to the validity of an entire project. Once the overall public use of slum clearance has been established, what particular parcels are to be included within the project area is a legislative question. See Kaskel v. Impellitteri, 306 N.Y. 73, 115 N.E.2d 659 (1953), *cert. denied*, 347 U.S. 934 (1954). Thus, such an allegation—in order to have any meaning—must be a challenge, short of alleging fraud or bad faith, of the motives of the agency—a challenge similar to allegations of unreasonableness or abuse of power.

Bowker v. City of Worcester, 334 Mass. 422, 434-35, 136 N.E.2d 208, 213 (1956), and Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 145, 104 A.2d 365, 370 (1954), indicate, however, that the taking of particular property for a redevelopment project could be upset upon a showing that agency members acted from "malicious or dishonest" motives or for "ulterior purposes." Under the circumstances, this language suggests that profit accruing to members of the agency through the execution of a project would invalidate a taking.

26. Conceivably, later cases may construe the *Bahr* decision more narrowly than its implications now appear to indicate. One might contend that the Supreme Court of Errors only intended that on remand the trial court should hear the extrinsic evidence and, before the agency has the opportunity to rebut, pass on the sufficiency of the evidence as a matter of law.

27. 87 Conn. 421, 88 Atl. 633 (1913).

trative level.[28] *Water Comm'rs v. Johnson* [29] held that a determination of the necessity to take property by eminent domain is a political decision completely within the province of the legislature or the agency to which the legislature has delegated its power;[30] in dictum, the court stated that judicial review would lie upon an allegation of agency bad faith, unreasonableness, or abuse of power,[31] but did not decide what evidence would be heard upon review. *Gohld Realty Co. v. City of Hartford* [32] was an action for declaratory judgment on the constitutionality of the Connecticut Redevelopment Act. The case came before the Supreme Court of Errors on stipulated facts; no attempt had been made to introduce any new evidence. None of these cases, therefore, faced the question of how a court should proceed once it decides to review.

Conversely, other cases may support the *Bahr* trial court's refusal, in the absence of fraud or "bad faith,"[33] to go beyond the administrative record. Courts exercising review of other administrative determinations pursuant to statutory procedures ordinarily examine only the proceedings held before the administrative body to which the legislature has delegated the power to make the contested decision.[34] Connecticut follows this rule;[35] in a recent zoning

28. The use of *Calvert* in a redevelopment context is particularly remarkable since it is conceptually incompatible with modern case law and has been specifically held not controlling in redevelopment cases by Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 144, 104 A.2d 365, 370 (1954). *Calvert* held that the taking of private property for a private college by eminent domain was not a taking for a public use. The opinion advocates the "possessory use" definition of public use which requires that the public have a common right upon equal terms to the use and benefit of the property independent of the will or caprice of private individuals or corporations. 87 Conn. at 430, 88 Atl. at 637. Such a concept of public use would have invalidated redevelopment enabling statutes if applied.

29. 86 Conn. 151, 84 Atl. 727 (1912).

30. *Id.* at 157-63, 84 Atl. at 729-30.

31. *Id.* at 158-59, 84 Atl. at 730.

32. 141 Conn. 135, 104 A.2d 365 (1954).

33. When directly questioned by the court, Bahr expressly denied that it was alleging fraud or bad faith. Record, pp. 38-39, 44-46; see *id.* at 12-13, 17-18. Such allegations might necessitate the consideration of extrinsic evidence on the theory that agency officials, acting from ulterior motives, would not include evidence of their misconduct in the administrative record. But Bahr's allegations only required the court to determine the reasonableness of the agency's decision to take its property and whether that decision lay within agency authority. Brief for Appellants, pp. 10-14.

34. *E.g.*, McKenna v. New Jersey Highway Authority, 19 N.J. 270, 277, 116 A.2d 29, 33 (1955); Gateway City Transfer Co. v. Public Serv. Comm'n, 253 Wis. 397, 409, 34 N.W.2d 238, 244 (1948); California Co. v. State Oil & Gas Bd., 200 Miss. 824, 27 So. 2d 542 (1946); see Harris, *Administrative Practice and Procedure: Comparative State Legislation*, 6 OKLA. L. REV. 29, 58-60 (1953); Note, *State Administrative Procedure—Scope of Judicial Review*, 4 W. RES. L. REV. 45 (1952).

Basically, this same procedure is followed in federal courts under the "substantial evidence" test of the Administrative Procedure Act, § 10(e), 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1958). See 4 DAVIS, ADMINISTRATIVE LAW § 29.01 (1958) [hereinafter cited as DAVIS]. The same theory applies under the MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 12(7)e. NATIONAL CONFERENCE OF COMMISSIONERS OF UNIFORM STATE

case,[36] for example, under a statutory provision[37] that specifically enables a court to hear additional evidence "for the equitable disposition of the appeal" from decisions of local zoning boards of appeals, the same court that decided *Bahr* ruled that a trial de novo below was improper. More pertinent, however, are a series of Massachusetts cases, which, under a statute[38] as silent on review procedure as Connecticut's, consistently refuse to permit the introduction of evidence extrinsic to the record, even in the face of allegations denying the truthfulness of redevelopment agency findings and conclusions or attacking the motives of agency members.[39]

In addition, no workable redevelopment program can tolerate delay—the practical effect of *Bahr*. Once an agency begins to acquire a project site, redevelopment should progress swiftly, for the city will face appreciable tax losses, particularly in a predominantly commercial area while the land remains unoccupied.[40] Delay may also make it impossible for the agency to meet its contract commitments with private redevelopers, enabling the latter to withdraw:[41] a serious hazard when few redevelopers can accommodate a multi-million-dollar project.[42] The agency may also have to sustain considerable losses due to factors such as rising construction and interest costs by renegotiating with the redevelopers at a lower price. And should a particular taking be held invalid after protracted litigation, an entire integrated project could be destroyed. Undue delay may also rob the municipal administration

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LAWS, HANDBOOK 329, 336 (1944), reprinted in GELLHORN & BYSE, ADMINISTRATIVE LAW CASES 1244 (1954), and 33 IOWA L. REV. 372, 375 (1948).

35. See, *e.g.*, Beach v. Planning & Zoning Comm'n, 141 Conn. 79, 103 A.2d 814 (1954); DeMond v. Liquor Control Comm'n, 129 Conn. 642, 30 A.2d 547 (1943); Neubauer v. Liquor Control Comm'n, 128 Conn. 113, 20 A.2d 669 (1941).

36. Wil-Nor Corp. v. Zoning Bd. of Appeals, 146 Conn. 27, 147 A.2d 197 (1958).

37. CONN. GEN. STAT. § 8-8 (1958).

38. MASS. ANN. LAWS ch. 121, §§ 26JJ-MM (Supp. 1958).

39. During the trial the petitioners sought to introduce evidence to controvert the findings of the authority, the planning board and the Board. Such evidence was properly excluded. The Legislature has given these agencies power to make necessary findings in the circumstances of this case. Their findings are not to be retried in our courts.

Bowker v. City of Worcester, 334 Mass. 422, 434, 136 N.E.2d 208, 215 (1956); *accord*, Worcester Knitting Realty Co. v. Worcester Housing Authority, 335 Mass. 19, 138 N.E. 2d 356 (1956); Despatchers' Cafe, Inc. v. Somerville Housing Authority, 332 Mass. 259, 124 N.E.2d 528 (1955); see Stockus v. Boston Housing Authority, 304 Mass. 507, 24 N.E.2d 333 (1939).

40. See Jacobs & Levine, *supra* note 1, at 258.

41. Contracts with private redevelopers on large projects usually contain a provision that the redeveloper may recover his deposit and withdraw from his obligation if the local agency fails to convey the specified property on schedule. See Trial Transcript, New Haven Redevelopment Agency v. Bahr Corp., Jan. 19, 1959, p. 3; Schenck v. Pittsburgh, 364 Pa. 31, 35, 70 A.2d 612, 614 (1950).

42. *Public Hearings on Church Street Redevelopment and Renewal Area Land Disposition Agreement—Blocks A, B, C, D—Before New Haven Redevelopment Agency*, May 26, 1958, p. 27.

of the public support vital to a successful project.[43] Finally, permitting trial de novo of allegations of unreasonableness or abuse of power, with the attendant delay, encourages "holdup" suits by property owners for the purpose of forcing a higher settlement price. The total effect of the *Bahr* decision, therefore, is critically to disrupt redevelopment machinery.[44]

Nonetheless, *Bahr* may have been implicitly based on inadequacies of the present system. The public hearing required by redevelopment statutes, unlike the judicial-type hearings conducted by traditional administrative agencies,[45] may pragmatically afford little or no protection to affected property owners. Ordinarily, an agency invests thousands of dollars and man-hours in planning and preparation prior to the public announcement of a project and hearing[46]—expenditures which can produce officials committed to a project before the public has had opportunity to voice opposition.[47] Second, a redevelopment campaign which could resolve the political future of its official advocates[48] does not encourage maximum agency impartiality. Furthermore, the close cooperation between private redevelopers and local agency during the formulative stages of project planning[49] and administrative considerations which demand the rapid and unhindered transition of a project from planning

43. See generally Lewis, *Citizen Participation in Renewal Surveyed*, 16 J. HOUSING 80 (1959). One or several intervening city elections may radically affect project plans and completion.

44. The project involved in the instant case is an excellent example of delay-caused difficulties. The agency defaulted in its obligation to convey project land on schedule. The principal redeveloper did not withdraw, however, but renegotiated its agreement with the city. New Haven Evening Register, Oct. 2, 1959, p. 1, col. 2.

In addition, the proposed construction of a multimillion-dollar bank building in the project was canceled when, during the unexpected delay, the bank decided to merge with another banking institution and no longer needed the structure. *Id.* at 8, col. 1. Even when the threat of antitrust action against the banks subsequently ended merger plans, the bank decided to participate in the project only by locating a branch office. *Id.*, Oct. 16, 1959, p. 1, col. 6. As long as court action continues, redevelopers find it difficult to attract major commercial organizations. See *Id.*, Oct. 2, 1959, p. 8, col. 2. Finally, city officials originally expected completion of the project by September 1, 1961; present plans call for "construction completion target date [at] the end of 1963." *Id.* at 8, col. 1.

45. See note 34 *supra*. Judicial deference to the actions taken by well-recognized expert administrative bodies is common. See, *e.g.*, *In re* Masiello, 25 N.J. 590, 603, 138 A.2d 393, 399 (1958); U.S. ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, REPORT 91 (1941), quoted in 4 DAVIS § 29.02, at 125.

46. The New Haven Redevelopment Agency, for example, began investigation and study of the Church Street Project late in 1954; the project was not publicly announced until June 12, 1957, after some 75,000 man-hours of preparation. Brief for Appellants, p. 14, Brief for Respondent, p. 4, Bahr Corp. v. O'Brion, 146 Conn. 237, 149 A.2d 691 (1959).

47. Sullivan, *Administrative Procedure and the Advocatory Process in Urban Redevelopment*, 45 CALIF. L. REV. 134, 148 (1957).

48. See Johnstone, *supra* note 1, at 313; McFarland, *supra* note 4, at 194; Morris, *He Is Saving a "Dead" City*, Saturday Evening Post, April 19, 1958, p. 31; *Redevelopment*, 15 J. HOUSING 94, 100 (1958).

49. Sullivan, *supra* note 47, at 140.

to execution [50] may influence agency open-mindedness when a project comes up for approval. Finally, with perhaps insufficient resources, often short notice,[51] and usually no subpoena power, a protestant may be unable adequately to prepare a challenge at the public hearing. Hence, an inarticulate judicial reluctance in redevelopment cases to apply the familiar administrative-law doctrine of review limited to the record may explain the *Bahr* decision.

The most satisfactory reconciliation of the conflicting interests illustrated by *Bahr* would be a statutory system that would provide property owners with a fair opportunity to challenge a project; guarantee an impartial hearing, deliberation, and determination of that challenge; and avoid the disruptions caused by delay. Only a few changes in local agency procedure are necessary. To overcome any disparity between agency or property owner preparedness at the public hearing, approximately thirty days notice should be required.[52] Although a month may be insufficient time to enable an individual to compile as much evidence as an agency, it should be sufficient for the preparation of an adequate challenge. In addition, a local agency should be required to make specific findings to be incorporated into the record along with all data presented at the public hearing and all other factors which the agency considered in reaching its decision.[53] No change in the time of the agency hearing in terms of the overall redevelopment process is proposed.[54] To hold the hearing so late that an agency has all but officially committed itself to a project may vitiate impartiality. But it would seem unfeasible statutorily to designate a particular time when a project is mature, and yet tentative enough to be influenced by testimony presented at the hearing and previously unheard by the agency.[55]

Reconciliation of private interests and the need for unhindered execution might be achieved by creating a statutory cause of action for any property owner aggrieved by redevelopment agency determinations. The trial court could be empowered to hear any evidence extrinsic to the administrative record which would aid in the proper disposition of the case. The avoidance of delay requires both a short statute of limitations [56] and docket priority, on

50. See text accompanying notes 40-44 *supra*.

51. *E.g.*, CONN. GEN. STAT. § 8-127 (1958) (14 days); DEL. CODE ANN. tit. 31, § 4524 (1953) (17 days).

52. See CAL. HEALTH & SAFETY CODE ANN. §§ 33530-34 (28 days minimum notice); OHIO REV. CODE ANN. § 725.03(E) (Page 1954) (37 days minimum); PA. STAT. ANN. tit. 35, § 1710(g) (Supp. 1958) (24 days).

53. See CAL. HEALTH & SAFETY CODE ANN. § 33481; MASS. ANN. LAWS ch. 121, § 26KK (1957).

54. Most enabling statutes require no specific time at which the public hearing must be held, other than that a hearing must be held before the agency approves a project. *E.g.*, CONN. GEN. STAT. § 8-127 (1958); DEL. CODE ANN. tit. 31, § 4524 (1953); PA. STAT. ANN. tit. 35, § 1710(g) (Supp. 1958).

55. See Sullivan, *supra* note 47, at 147-48.

56. See CAL. HEALTH & SAFETY CODE ANN. § 33746 (Supp.) (action challenging redevelopment agency determinations must be initiated within 90 days of project approval

both trial and appellate levels, for the protestant's suit. To prevent the court from substituting its judgment for that of the agency, review should remain limited to such questions as arbitrariness, unreasonableness, and abuse of power. From the trial court, appeal would lie in due course to higher courts, where review would be limited to the administrative and trial records. But the required docket priority might detriment other litigants; moreover, a court may not be as equipped as an agency properly to compile a meaningful record for eventual appeal.

This record could be compiled satisfactorily under a second alternative solution: the local agency could hold a judicial-type hearing, conducted as an adversary proceeding between the agency staff and opposing property owners. After hearing the staff's evidence supporting the project, the agency might adjourn to enable property owners to gather material for rebuttal, which the agency would hear upon reconvening. Review, restricted to the record, could be accorded by expedited appeal to the courts. The effectiveness of this procedure, however, would depend upon the availability in every redeveloping municipality of personnel competent to conduct a judicial hearing.[57] And such a procedure would conflict with and possibly destroy the hearing's function as a vehicle for agency-community communications, public participation, and maximum collection of information. On the whole, a legislative hearing seems most satisfactory at the local level.[58]

Perhaps the most satisfactory method of preserving the flexibility of local agency procedures while assuring property owner-protection would be the placing of ultimate responsibility for the compilation of an adequate record in the hands of a small, well-qualified state redevelopment review board,[59] geared to the preparation of a comprehensive record for eventual, limited judicial review.[60] Equipped with the power to subpoena, swear, and cross-examine

by municipal governing body). N.J. RULES 4:88-15 requires that appeals from state administrative agency decisions be made to the appropriate court within 30 days.

57. See Sullivan, *supra* note 47, at 148.

58. And inasmuch as the purpose for the hearing is to call agency attention to and procure agency consideration of the interests, attitudes and constructive ideas of interested citizens, the legislative hearing, with broad opportunity for expression, argument and introduction of documentary materials, would seem of most utility. Moreover, to utilize an adjudicative procedure might be to invite the skillful opponent of redevelopment to seek to put not only the proposed plan, but the agency and its staff "on trial."

Id. at 144. To provide that local redevelopment agency hearings follow the rules of evidence might be a mistake. Hearsay testimony, for example, which might be inadmissible in a trial-type hearing, might provide valuable information and insights for a deliberating agency. A statutory provision for the right to cross-examine those who testify at the local hearing, on the other hand, would not conflict with hearing functions, and yet would provide a disgruntled property owner with the opportunity to elicit information favorable to his cause.

59. Board members could be drawn from the bar, the university faculties and service organizations concerned with urban problems, as well as from persons experienced in housing, zoning, real estate, city planning, and redevelopment itself.

60. Of course, a board might be established to exercise overall control over rede-

witnesses, this board, upon application by a dissatisfied property owner shortly after local project approval, would be authorized to review all local agency determinations and findings. If the record of the local agency did not reasonably support its findings or failed to meet allegations of the contesting property owner, the state board would have authority to hold public hearings and take any pertinent extrinsic testimony and evidence. Evidence so taken would be incorporated with the record of the local agency, and findings would be made by the state board. Initial review would thus be handled by a body well qualified to evaluate and collate data and unharrassed by congested court calendars. To facilitate review, the state board would be additionally empowered to prescribe the record-keeping forms and methods to be used by the local agency.[61] The responsibility for the initiation, formulation, approval, and execution of redevelopment projects would remain exclusively at the local level.[62]

Appeal from the state board's decision would lie directly to the highest state court.[63] The court's role would be confined to a determination of whether the record reasonably supports the determinations of the local and state agencies.[64] Introduction of evidence extrinsic to the record would be permitted

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velopment procedures. For commentator support of such a state agency, see Jacobs & Levine, *Redevelopment: Making Misused and Disused Land Available and Usable*, 8 HASTINGS L.J. 241, 266 (1957); McFarland, *Urban Renewal: An Opportunity for the States*, 32 STATE GOV'T 193, 196 (1959); Sullivan, *supra* note 47, at 148. Massachusetts law provides for the submission of a local project plan to the state Housing Board for approval. MASS. ANN. LAWS ch. 121, § 26KK (1957). California formerly had a state redevelopment agency, but the state legislature failed to maintain it. Cal. Stat. 1947, ch. 1515; see Jacobs & Levine, *supra* at 266-67 (arguing for re-creation); *cf.* Housing Act of 1959, No. 86-372, § 401, 73 Stat. 654 (encouraging "the utilization of local public agencies established by the States to operate on a statewide basis in behalf of smaller communities . . .").

61. See ILL. ANN. STAT. ch. 67½, § 88 (Smith-Hurd Supp. 1959).

62. And by preserving a responsible local hearing, the proposed system would afford more opportunity for local property owners to exert their influence on a project than the state-approval system currently in effect in Massachusetts, where hearings are only held upon request, and only by the State Housing Board, after the locality has approved a plan. MASS. ANN. LAWS ch. 121, § 26KK (1957). This system does not enable local residents to effect changes or modifications in a project plan through the expression of opposition at the local level.

63. In accordance with general principles of administrative law, recourse to the courts would not be available until an individual had exhausted the applicable administrative remedies. See 3 DAVIS §§ 20.01-.10.

64. This has been called the "substantial evidence test": if substantial evidence exists in the entire record of the administrative proceedings, then the findings of the agency would be upheld. Quantitatively, substantial evidence has been analogized to enough evidence to justify a refusal to direct a verdict in a jury case. 4 DAVIS § 29.02, at 118. Established in the federal courts by case law, *e.g.*, NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939); Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938); ICC v. Louisville & N.R.R., 227 U.S. 88 (1913), the test was enacted into positive law by the Administrative Procedure Act § 10(e), 60 Stat. 243 (1946), 5 U.S.C.

only upon a showing of exceptional circumstances which would justify the failure to offer it at any previous level.[65] Upon such a showing, the court would remand the case to the state board either for a complete rehearing or with specific instructions as to which issues require more testimony and evidence.[66]

These proposals are designed fairly to reconcile the demands of expediency and the need to protect individual property rights. An individual property owner would be offered more than an adequate opportunity to prosecute a valid challenge without tempting him to "holdup" an agency. Another *Bahr* would be improbable, and redevelopment would be facilitated in its attack upon urban decay.

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§ 1009(e) (1958). In addition, the test has been incorporated into § 12(7)e of the Model State Administrative Procedure Act. See note 34 *supra*.

65. Similar provisions are contained in many state statutes involving judicial review of other administrative action. See, *e.g.*, CONN. GEN. STAT. § 30-60 (1958) (liquor control commission); CONN. GEN. STAT. § 8-8 (1958) (local zoning boards of appeals).

66. See N.J. RULES 4:88-9.