

Congressional-Executive Commission on China Issues Roundtable

”Property Seizures in China: Politics, Law, and Protest”

Written Statement Submitted by Patrick A. Randolph, Jr.

Elmer E. Pierson Professor of Real Estate Law

University of Missouri, Kansas City, School of Law

The Urban Renewal Issue

News reports from China for more than a year have been full of stories of conflict over what is popularly referred to as “demolition,” but what we call “urban renewal” here. To understand the issue, one must first know what “urbanism” is being “renewed.”

During the 1980’s, the Chinese filled their cities with apartment blocks to provide basic housing as part of the “iron rice bowl” promise. Everyone gets an apartment, be it ever so humble. These were generally six story walk-ups made of concrete, with terrible plumbing, service porches on the window side (for drying clothes) and enough space to house one person comfortably, although generally families of five to eight lived in them. Having constructed these monstrosities in great dirty rows, the Chinese proceeded to ignore them for two decades, letting them deteriorate with rust, dirt, and the detritus of many poor people trying to live together in not enough space. Painted in fading green, dusty rose, and beige, these buildings were the dominant visual element of Beijing, Guangzhou, Shanghai, Xian and other Chinese cities I visited in the early 90’s.

Ugly and cramped as they were, the little concrete cubicles provided a warm (often too warm) and dry home for millions of workers in state-owned industries and lower-level government bureaucrats. The Chinese had become accustomed to living in close quarters, and often the apartments housed extended families that adjusted to the conditions and lived out their lives on top of one another. Buried somewhere in the rows of apartment blocks were schools, clinics, and community facilities all developed by the factory or bureau that owned them. In the interstices, very primitive concrete block or brick buildings housed the shops that provided food and basic necessities, again, all very convenient to the clientele. Sometimes these complexes actually were located within the walls of the big factories. Workers could easily walk or bike to their place of employment, and commonly went home on the long noon break to take a nap. The Chinese shopped for fresh meat and produce in open markets along the street. Few had refrigerators. Virtually none had air conditioning. But everyone that one knew (except a few high party bosses) lived pretty much the same way. At Peking University, the University President might have had a few extra square meters in his place, but it was otherwise indistinguishable from the nearby concrete cubes where his employees resided. This was the culture of communism.

Although, in theory, this housing was provided as part of one’s arrangement with the work unit to which one was assigned, in fact the system provided virtually perpetual occupancy. There was rent - but it was very small, and evictions for non-payment were virtually nonexistent. Laid off workers continued to be entitled to this housing (and also education and health care) from their former employer. When the family member who worked for the work unit died, other family members who still lived in the apartment were permitted to remain. When the state-owned industries failed, the state took over the housing and other social service responsibilities, and the housing remained.

Around 1997, Premier Zhu Rongji announced that the game was over. Everyone in China’s cities would

stop living in state provided housing and buy their own homes. He set a two-year deadline, but in fact the transformation, such as it was, took a number of years longer. The basic transaction was a sale of the living units by the state or the work units to the occupants, usually for small prices, which could be paid in installments that were not a lot more than the original tiny rent. Of course, now the occupants were responsible for their own maintenance, but they were used to very little of that. Today it is estimated that 80 percent of China's legal urban residents live in their own homes. I suspect the percentage is quite a bit smaller, since many Chinese own three or four of these little cubicles and rent them out to younger people who did not have the chance to buy an apartment when conversion occurred. But many of the lower echelon workers just stayed put in the concrete boxes they'd always known.

Then came prosperity and with it the development of newer, nicer housing that workers could buy. Tens of thousands of new apartment structures rose up virtually overnight, often on surplus land within the urban area or suburbs, but on the fringe. Chinese had more money to spend, and they sopped up these larger (60-120 square meter) boxes, in elevator buildings with far more amenities, at least when new. The maintenance is still appalling by Western standards, but compared to what people had before - this is "uptown."

The new buildings often were developed on land that the developers bought from the state through the newly created program of "land use rights." The same system was used to build the new office complexes, shopping centers, business centers, and other structures that marked China's economic renaissance. Local governments profited from the sale of these land use rights, and used the money to fuel massive infrastructure development (the flocks and flocks of building cranes).

The process of providing better and better housing to Chinese consumers proceeds today unabated. Most are built on granted land use rights - so the residents in theory really have rights in the land itself, and not just occupancy claims in the buildings. The newest facilities can actually be pretty nice, and arguably the Chinese soon will be waking up to the fact that they're entitled to expect some real building maintenance from the state-owned maintenance companies paid out of owner's association assessments to care for these new places. Air conditioning is common, elevators work, and there is even underground parking. And, always keep in mind, we're talking lots and lots and lots of these buildings. There are a whole lot of urban Chinese seeking new housing.

But now many of the cities that were most proactive in bringing about this economic rebirth have discovered that there is precious little land now available for the creation of new land use rights. And they've spent the money they already earned as fast as they got it. How to meet their future growth plans? The answer lies right there in the heart of the city -- in those locations that were once dirty factory areas but now are prime residential sites as the city, surrounded by all the high rise office buildings, gleaming roads and other mass transit facilities. And convenience to work, once taken for granted and undervalued, has become a highly desired commodity. As the Chinese buy more and more private cars, they have discovered that wonderful western invention -- traffic gridlock. People who have acquired apartments in the suburbs have found that it takes an hour or more to get to work, and there's a huge demand for more convenient middle and high-end housing.

And there -- right in the urban core -- is all that land ripe for development. Even better, the land has never been the subject of granted land use rights, so the local land administrations can sell it to developers for a pretty penny.

Just one little problem -- there are people living in these squalid little places. In fact there are lots and lots of people, still trusting in government to take care of them consistent with the promises made to them during their youth. These people present special problems to the Chinese. In America, we've seen redevelopment of our urban cores time and time again. But, because theoretically we have an open market

that will provide alternative housing for people living in these kinds of situations, we just start up the bulldozers and start ripping away. We pay the owners of the old apartments and flophouses and slum brownstones that we demolish, but the residents -- usually rental tenants -- get little by way of relocation allowance except when federal money is used. But China had a political issue with that approach -- these were people who trusted in Communism, and Liberation was all about guaranteeing basic standards to poor citizens. So when urban renewal happens in China, the local laws usually required that some effort be made to provide alternative housing to those living in these places, regardless of how it was to come to be there, and pretty much regardless of what "ownership" they might have. The compensation responsibility is placed upon the developer, and it is in addition to whatever the developer paid for the land itself.

As the urban renewal push began in China we started to see people waking up one morning and discovering huge Chinese characters painted on their buildings indicating that demolition was imminent. This was the first thing that happened in the process, since it prevented anyone claiming relocation rights who moved into a building so decorated with warnings. Then the developers started to negotiate with the residents. But the residents, although their little apartments were hovels compared to many Chinese facilities, liked their little communities and especially valued their location. The developers offered replacement housing facilities instead of cash payments (permitted and even encouraged by the laws) but the tenants often concluded that the substitute housing, even when new, was too remote from their jobs, and in fact from the community that they'd always known, to be suitable. They knew that their location was valuable, and they wanted appropriate compensation, not some remote concrete box that required a complete change of life.

Note that there are parallels here to the relocation that occurred when the great dam was built in the Three Gorges on the Yangtze River. But those were peasants, with different rights and different expectations. Now we're talking relatively sophisticated urbanites, who have friends and relatives still more sophisticated. It was one thing to say that one had to be removed because of highways or other public works. But when the demolition characters appeared solely because some fat cat developer intended to make a huge profit building new private housing where old private housing stood, people expected to be paid well. The situation from the government perspective was not aided by the exposure of massive corruption in the granting of land use rights for these purposes. Even though the requisite handful of developers and land administration officials were cashiered and imprisoned for the most egregious corrupt practices, the Chinese populace in fact felt that the occupants of these places deserved better treatment. We started to see demonstrations, sit-ins, even newspaper and television reports, and the Beijing taxi drivers were outraged -- passing on their views to all who would listen.

As I've been saying all along, with prosperity in China comes the expectation of protection from government for vested rights. And this in turn leads to participation in government. Since, in fact, there was little formal right to participate, the affected Chinese citizens and their friends resorted to the time-honored method of seeking redress from the power structure -- harangue. Party officials and land administration leaders were contacted regularly and called to account for what were perceived to be abusive practices. The plot thickened when stories emerged about the emotional impact that destruction of these traditional urban communities had on the beloved older folks who had trusted in Communism their whole lives. There were some suicides that occurred while the bulldozers chugged toward the buildings, and other dramatic examples of how Chinese, like the rest of us, place an extraordinarily high value on the concept of "home."

I've seen U.S. newspaper pieces, fueled often by dissidents and "China knockers," who have suggested that this is one more example of how much more abusive China is to its citizens as compared to the West. In fact, anyone involved in urban renewal here knows that we regularly have beat up on our poorest citizens in the same circumstances through the last fifty years. Tenants in slum buildings slated for

demolition get virtually no compensation and little if any relocation assistance. Even commercial tenants routinely sign leases that say that any lease rights end on condemnation, thus eliminating any compensation for claimed property takings, and leaving the whole condemnation award for the landlord.

In fact, if anything, China's greatest oversight as compared to the U.S. was the failure to recognize the claims of the landowners and non-resident owners of the apartments who had been renting to others. Oh yes, there were stories of inadequate payments and abusive evictions. But these were not, so far as I can tell, the dominant complaint. Most of the complaints have been about nothing more than money. And neither these abuses nor the underpayments were condoned by law. For several years, there have been a national statute and local regulations that clearly provided for adequate compensation for residents and an appeal process to resolve disputes. But neither the regulations nor the system provided for proper attention to the actual owners of the land use rights or the housing units (if they were not residents).

Recently, things have commenced to change dramatically. There has been a dizzying release of new statutes and regulations. The national administration has promoted an amendment to the Chinese Constitution containing a guaranteed protection of property rights lawfully obtained and a specific requirement for compensation when such rights are taken. I saw a New York Times report citing Chinese scholars who said that the Constitution in China is not binding in the same way that the U.S. Constitution controls government behavior. True, but beside the point. The really significant fact is that the Hu administration is the interest group that initiated these reforms, and therefore the government appears prepared to take them seriously.

There is one glaring omission in this whole structure, at least as compared to Western process. The Chinese system, so far as I can tell, provides no opportunity for notice or review by interested landowners of the question of whether a public purpose exists to justify taking away the private interests of some citizens and giving them to others. My Chinese scholar friends tell me that a "public purpose" requirement undoubtedly exists - apparently in some Supreme People's Court interpretation of the Constitution - and the demolition must be consistent with zoning decisions, where relevant. But most of the decisions to grant land use rights to developers occur outside of the public eye and immune from judicial review. Once the characters go up on the buildings, there is process and judicial review concerning payment (although usually by the time the fight is settled, the residents are out - condemnation in China is "quick take.")

Clearly there should be greater process to make sure that there is public justification to strike down the old buildings, and the justification probably should be something more than just making a housing developer rich. But because there is no real process, there are no standards here. Likely, in light of China's tradition of powerful government, any system that will be developed will favor the government. But the point is that legal due process rights often lead to the development of political process. The harangue tactics could start sooner, and citizens could openly negotiate with the government toward some standard as to when demolition is appropriate, and when not.

It is important to note that, from the standpoint of substantive legal standards, American law also is grossly tilted toward the government. In 1954, in *Berman v. Parker* (the famous "Poletown" case), the U.S. Supreme Court pretty much rubber-stamped the notion that condemnation, redevelopment and resale to private developers is a legitimate government response to the problem of decaying central cities. The progeny of that decision have been some pretty egregious tactics in many local areas as governments vie with their neighboring cities to develop business opportunities, shopping centers, and, on rare occasion, even housing. In a few recent cases, state courts, interpreting the U.S. Constitution, have started to put the brakes on the most extreme practices. The Illinois Supreme Court struck down a local eminent domain action designed to eliminate the property rights of a factory owner who had the bad luck to be located just where a booming NASCAR track sought to put up an additional parking lot. The factory was by all

accounts neat, clean and making a nice little profit. It was not a decaying urban core. But it was in the way, and NASCAR had neither the time nor the inclination to negotiate an acquisition price with the owner. The local government was more than accommodating, and authorized a “quick take” of the factory site at a price determined by eminent domain proceedings. But the owner had the resources to fight back, and his lawyers ultimately prevailed, convincing the state’s high court that the procedure violated both state and U.S. Constitutions. The case does not stand alone, but is part of a series of lashback decisions responding to abuses of the eminent domain process around the country. But the U.S. Supreme Court has yet to address the issue, and there are lots of states where the process continues unabated.

Even the Illinois court acknowledged that if the local government had gone through an administrative process by which it determined, by application of objective and reviewable standards, that there was a demonstrated public need for public intervention to resolve creeping urban blight, the public decision would have been entitled to great deference. But the local politicians here had dispensed with that process -- perhaps because, on the facts -- any such decision would have been a pure sham that would have received embarrassing treatment in the press and ultimately might not have survived even the gentle judicial review that the courts might have applied.

In talks in China, I have emphasized this developing authority in America, noting that the political upset over the “demolition” practices might be alleviated, if not eliminated, by greater process before the actual taking commences. If people are given warning and opportunity to object, the most egregious corrupt decisions simply don’t happen. Corruption dries up in the light of day, and in the threat of public scrutiny.

Further, the Chinese need to educate their people better about what it is they are receiving compensation for. The Chinese practice of using replacement properties instead of money for relocation compensation strikes me as sound, so long as the new properties do not unduly destroy community or employment access. Further, the government needs to explain to its citizens that the right of occupancy for which they are being compensated is just that and no more. Most of these occupants of old residential blocks never paid for the land use rights (in many cases no one did), and the “location value” that goes with land value was never traded out by the state. Consequently, the state should not be required to pay for that value. Even the newest laws in China do not draw an adequate distinction between granted land use rights (where people pay for the right in the dirt itself) and allocated land use rights (where there is only a sort of revocable license for the dirt, but people own the buildings - an independent object of ownership in China.) Clarity of legal provisions and greater information to the people about these distinctions would help a lot.

Of course, it’s fun to criticize and cluck our tongues at the struggle of traditionally all- powerful government officials to deal with the new political awareness of their citizens. And it’s useful to provide constructive criticism. But all of this should not obscure the real point here-- the very publicizing of these disputes, and the agonizing of public officials over how to resolve them, and the consequent exposure of corruption-- all of this is new stuff in China. It’s clearly the result of a new commitment to openness, at least with regard to private ownership rights. Further, we should not lose sight of the fact that we here in America have swept these very issues under our own public policy carpets for many years. When we needed revitalized cities and gentrification of the slums, we didn’t stand too hard on Constitutional principle, and this in a society that has limited government as a basic principle. The Chinese deserve credit and support for moving their traditional all-powerful government structure toward a new property rights regime. The battle over demolition in China shows that a highly developed, multi-layered and overbearing bureaucracy does not disappear overnight. But, given the opportunity to progress, I think we’ll see some real political process emerging here, at least in the larger cities. Further, the U.S. is hardly in the best position to cast stones.