REDEFINING BLIGHT IN ARIZONA'S GOVERNMENT PROPERTY LEASE EXCISE TAX (GPLET) ABATEMENT

Christopher Koester*

I. INTRODUCTION

The GPLET—controversial in both pronunciation and practice[1]—has played a major role in financing some of Arizona's most prominent commercial developments, including Phoenix's CityScape and Renaissance Square and the Hayden Ferry Lakeside office complex in Tempe.[2] The Arizona Legislature enacted the GPLET, officially the Government Property Lease Excise Tax, primarily as an economic development tool.[3] The GPLET incentivizes development by reducing developers' tax burdens by removing incentivized projects from the property tax rolls.[4] Instead, developers pay an excise tax to the local government based on the type of project, and eligible projects in central business districts can be completely exempt from the excise tax for eight years.[5] This period of exemption is called an "abatement."[6]

---

* J.D. Candidate, 2019, Sandra Day O'Connor College of Law, Arizona State University. The author would like to thank Professor Erin Scharff at Arizona State University, Grady Gammage, Jr., Founding Member of Gammage & Burnham, and Manjula Vaz, Member of Gammage & Burnham, for their guidance and encouragement, and the staff of the Arizona State Law Journal for their helpful edits.

1. GIP-let, JEEP-let, and JIP-let are among the various pronunciations attributed to the statute.

2. *GPLET*, CITY TEMPE, AZ, http://www.tempe.gov/city-hall/internal-services/finance/sales-tax-business-licenses/gplet (last visited Nov. 20, 2017); *GPLET LEASES IN ABATEMENT*, CITY PHX. (July 20, 2018), https://www.phoenix.gov/econdevsite/Documents/GPLET%20Leases%20in%20Abatement.pdf; *GPLET LEASES SUBJECT TO EXCISE TAX*, CITY PHX. (July 20, 2018), https://www.phoenix.gov/econdevsite/Documents/Leases%20Subject%20to%20Excise%20Tax.pdf.

3. S. RESEARCH, FINAL AMENDED FACT SHEET FOR H.B. 2054, S. 49, 2nd Sess. (Ariz. 2010), https://www.azleg.gov/legtext/49leg/2r/summary/s.2504fin_asenacted.doc.htm [hereinafter S. RESEARCH, FACT SHEET FOR H.B. 2054].

4. *Id.*

5. ARIZ. REV. STAT. ANN. § 42-6209 (2018).

6. *Id.*

Recently, the GPLET has been attacked as a derogation of Arizona's Constitution, an issue that is currently being litigated in the state trial court.[7] Its opponents disagree with the constitutionality of the GPLET itself.[8] Some are fighting to invalidate the blighted status of areas that currently see the bulk of GPLET projects, including downtown Phoenix.[9] The GPLET statute currently utilizes blight as a pre-condition to receive the abatement.[10] But the current standard—adopted from the slum and blight clearance statutes[11]—focuses heavily on notions of urban decay and redevelopment. As a result, it fails to clearly identify the economic indicia that justify the abatement incentive itself.[12] Moreover, use of this blight standard improperly suggests that the GPLET should not be used for economic growth projects, rendering blight designations highly susceptible to litigation. This Comment suggests statutory amendments to reduce litigation and increase the GPLET's use in the types of economic development projects to which the GPLET typically caters. These outcomes can be reached by creating a separate slum and blight definition for the GPLET abatement and supplementing the new blight standard with objective economic factors.

In Part II, this Comment reviews the purpose of economic development incentives generally and the GPLET specifically. It examines the role of blight in the GPLET, then analogizes the case law and statutes that have shaped blight in the eminent domain context. This sets the stage for Part III, where this Comment argues that the blight definition currently utilized for the GPLET is susceptible to judicial invalidation and is not entirely consistent with the GPLET's role as an economic development tool. This Comment then proposes amending the GPLET statute to include a new blight definition that includes specific and measurable economic factors.

---

7. Complaint for Declaratory and Injunctive Relief, Englehorn v. Stanton, No. 17-1742 (Ariz. Super. Ct. Mar. 1, 2017) [hereinafter *Englehorn* Complaint].

8. *Id.* at 2.

9. *Id.*

10. § 42-6209.

11. ARIZ. REV. STAT. ANN. § 36-1471 (2018); *see also* ARIZ. REV. STAT. ANN. tit. 36, ch. 12, art. 3 (2018).

12. *See* § 42-6209 (allowing abatement only in "central business district" and requiring increase of property value and analysis of "economic and fiscal benefit").

II. THE INCENTIVE: GPLET AS AN ECONOMIC DEVELOPMENT TOOL

A. GPLET: Purpose and History

One goal of programs like the GPLET is to enable municipalities to direct economic development.[13] Generally, the state authorizes a town or city to offer financial incentives—tax breaks in the GPLET's case—to developers.[14] But cities do not often award public dollars for any and all development projects.[15] Rather, they direct incentives to particular uses and areas.[16] And, as in the GPLET, a state can set the baseline by offering the most generous incentives to certain uses—perhaps housing—or certain areas, such as redevelopment areas and "slums [and] blighted areas."[17] By offering these incentives, the state and its municipalities are expecting to benefit from increased tax revenue from the development in the future.[18]

Proponents of development incentive programs justify them as filling in the gaps left by private development.[19] In short, these justifications include correcting market failures and redeveloping undesirable blighted areas.[20] Development incentives originated as a means to develop housing in struggling urban areas.[21] Today, many incentives exist to promote general economic development.[22] Areas designated as blighted—especially if incentives are in place—can actually be very desirable locations for private development.[23] Governments are able to justify incentivizing economic

---

13. *See* § 42-6209(A) (giving cities and towns authority to make abatement decisions).

14. *See* § 42-6209.

15. *See, e.g.*, George Lefcoe, *Redevelopment Takings After* Kelo*: What's Blight Got to Do with It?*, 17 S. CAL. REV. L. & SOC. JUST. 803, 805 (2008) (discussing municipalities' roles in making development decisions).

16. *Id.*

17. ARIZ. REV. STAT. ANN. § 36-1471 (2018).

18. Todd A. Rogers, *A Dubious Development: Tax Increment Financing and Economically Motivated Condemnation*, 17 REV. LITIG. 145, 162 (1998).

19. Richard F. Dye & David F. Merriman, *The Effects of Tax Increment Financing on Economic Development*, 47 J. URB. ECON. 306, 307 (2000).

20. *Id.*

21. Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 FORDHAM URB. L.J. 1119, 1121 (2011).

22. *See, e.g.*, Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 319 (2004) ("While early federal urban renewal policies sought to leverage investment in the rehabilitation of genuinely blighted areas, TIFs [tax increment financing laws] . . . are geared more toward new commercial investment . . . .").

23. *Id.* at 325 (noting that some areas designated as blighted are actually attractive areas for development).

development by asserting that the incentive is the "but-for" cause of the development and subsequent growth of the tax base.[24] Put another way, there are certain projects and areas that would not be feasible to develop if left to the "ordinary operations of private enterprise."[25]

Prior to the enactment of the GPLET, the possessory interest tax was the major state-sanctioned incentive to encourage development of public land.[26] Through the possessory interest tax, the government imposed a property tax on the developer based on the value of the developer's interest in the land.[27] However, there were special exemptions and valuation rules that applied to interests created before April 1, 1985.[28] These special exemptions and rules led to litigation challenging the constitutionality of the possessory interest tax.[29] Specifically, opponents of the scheme argued that the possessory interest tax violated the state constitution's uniformity clause.[30] As a result of the constitutional challenges mounted against it, the Legislature repealed the possessory interest tax in 1996, replacing it with the GPLET.[31] Because the GPLET is an excise tax and not a property tax, it is not subject to many of the constitutional requirements—like the uniformity clause—that ended the possessory interest tax.[32]

B. The GPLET Process: Broadly

The GPLET process has remained similar since its 1996 enactment.[33] Under the GPLET statute, a developer may either transfer ownership of its land to the government, or the government can lease existing public land to

---

24. Gil Williams, *Specificity, Blight and Two Tiers of TIF: A Proposal for Reform of Tax Increment Financing Law*, 33 ST. LOUIS U. PUB. L. REV. 255, 263–64 (2013).

25. Gordon, *supra* note 22, at 323 (quoting IND. CODE § 36-7-14-15 (1993)).

26. S. RESEARCH, FACT SHEET FOR H.B. 2054, *supra* note 3.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* Property tax in Arizona is guided by both the universality and uniformity clauses of the state constitution. Together, they require the Legislature to assess property tax on all property only based on value (universality) and at a uniform rate for "all similarly situated property" (uniformity). *See* ARIZ. CONST. art. IX, § 1; Robert Clark, *The Government Lease Excise Tax: Challenging the Excise-Property Tax Distinction*, 29 ARIZ. ST. L.J. 871, 872 (1997); *see also* Smith v. Mahoney, 197 P. 704, 707 (Ariz. 1921) (holding state law that imposed tax for each head of livestock only on non-residents violated uniformity clause).

31. Clark, *supra* note 30, at 878.

32. Gila Meat Co. v. State, 276 P. 1, 2–3 (Ariz. 1929).

33. SENATE RESEARCH, FINAL AMENDED FACT SHEET FOR H.B. 2504, S. 49, 2d Reg. Sess. (Ariz. 2010).

the developer.[34] The government, possessing fee title on the project land, then leases the property to the developer.[35] Ordinarily, under ad valorem taxation, the property would be taxed based on its assessed or appraised value.[36] But under the GPLET, a developer's leasehold interest in public land is not subject to ad valorem property tax.[37]

Instead, the source of tax revenue is the excise tax set forth in the GPLET statute.[38] The government calculates the tax owed by the developer-lessee based on the square footage of the property multiplied by a rate dependent on the type and use of the development.[39] Retail and hotel projects, for instance, are taxed at $1.50 per square foot.[40] Each county treasurer must allocate 13% of GPLET proceeds to the county general fund, 7% to the city or town, 7% to the community college district, and between 36.5–73% to each elementary and high school district.[41]

C. GPLET Abatement: Past and Present

The GPLET statute also provides a number of incentives based on this excise tax structure.[42] As an excise tax, the GPLET statute exempts entirely certain projects and improvements from the tax.[43] These include residential rentals occupied by the developer-lessee and public housing projects.[44] Developers that pay the GPLET also realize benefits over paying ad valorem property tax. The GPLET rate for a particular project may be lower than the regular property tax rate. For instance, projects taxed at the lower end of the

34. S. RESEARCH, FACT SHEET FOR H.B. 2054, *supra* note 3.

35. *Id.*

36. 71 AM. JUR. 2D *State and Local Taxation* § 18 (2018).

37. S. 1116, 42d Leg., 2d Reg. Sess. (Ariz. 1996) ("[T]he legislature intends by this act to reaffirm its decision that possessory interest will not be subject to any type of ad valorem tax and to establish a non-ad valorem excise tax . . . ."). See Clark, *supra* note 30, at 881–85 for an extensive discussion on the constitutionality of the replacement of ad valorem tax with excise taxes.

38. ARIZ. REV. STAT. ANN. § 42-6202(A) (2018).

39. § 42-6203.

40. *Id.* § 42-6203(A)(1)(d)–(e).

41. § 42-6205. Elementary and high school districts receive a percent of the excise tax based on the type of school district; common school districts and high school districts receive 36.5%, and common school districts not within a high school district and unified school districts receive 73%. *Id.* If the project is not located in a taxing jurisdiction—it is in an unincorporated area, for instance—the tax revenue that would otherwise go to that jurisdiction is distributed pro rata to the other taxing jurisdictions. *Id.*

42. § 42-6208.

43. *Id.*

44. ARIZ. REV. STAT. ANN. § 64-6208(2), (15) (2018).

GPLET rate structure may owe less total tax under the GPLET than under property tax.[45] In this situation, a developer is incentivized to structure a GPLET with the city even in the absence of the GPLET's other incentives.

But the statute also provides an additional development incentive. Projects located in a statutorily-designated "central business district" may be exempted from the excise tax for eight years after the issuance of the certificate of occupancy.[46] A primary purpose of this abatement is to incentivize developers to undertake otherwise cost-prohibitive projects, while ensuring that tax revenues will begin to flow after the eight-year abatement period.[47]

Since enacting the GPLET, the Legislature has gradually restricted eligibility for the excise tax abatement.[48] Originally, a project needed only to increase the value of the property by at least 100% and be located in a central business district (CBD) within a redevelopment area to receive the eight-year abatement.[49] Major changes to the abatement came in 2010, when the Legislature clarified the process, defined the term CBD, and created a new exemption for residential rental properties.[50] After the 2010 legislation, a city or town could only have one CBD, and it could not enter into a development agreement with a GPLET in its CBD until a year after an area has been designated the CBD.[51] The CBD must have been "geographically compact," located entirely within a slum or blighted area, and limited in size to the greater of 5% of the city or town's land area or 640 acres.[52]

The legislation also added new procedures for obtaining an abatement.[53] The governing body of the city or town in which the project is located must

---

45. J. LEGIS. BUDGET COMM., GOV'T PROP. LEASE EXCISE TAX (GPLET) REP., 52d Leg., 2d Sess., at 4 (Ariz. 2016) (noting warehouse/industrial structure owes 32.4% less under GPLET payment than under ad valorem property tax).

46. § 42-6209 (2018).

47. *GPLET 101*, GOV'T FIN. OFFICERS ASS'N OF ARIZ. 3, 5 (Aug. 3, 2017), http://www.gfoaz.org/docs/presos/17s/gplet_101.pdf (demonstrating expected tax revenue following abatement period).

48. S.B. 1116, 42d Leg., 2d Reg. Sess. (Ariz. 1996).

49. *Id.* The statute did not at the time define a CBD, but provided that a CBD must be within a redevelopment area for abatement purposes. *Id.* "Redevelopment area" and "blighted or slum" have been used seemingly interchangeably within the title 36 slum clearance statutes—in 1997, the Legislature changed all instances of "blighted or slum" to "redevelopment area." H.R. 2310, 43d Leg., 1st Reg. Sess. (Ariz. 1997). In 2003, "redevelopment area" was changed back to "blighted or slum." H.R. 2308, 46th Leg., 1st Reg. Sess. (Ariz. 2003).

50. H.R. 2504, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

51. *Id.*

52. *Id.*

53. *Id.*

approve the abatement by a simple majority vote.[54] Requisite to this approval, the government lessor must provide notice to the city or town and procure an estimate of the economic and fiscal benefit of the project to the public.[55] The notice must show that the expected public benefit is higher than the private benefits to be received by the developer-lessee from the incentive.[56] The amendment also prohibits the government lessor from changing the use of the project during the abatement period without notifying the local governing body.[57] Again, it must be determined that the project's public benefits will continue to exceed those realized by the developer-lessee.[58] Although most major changes to the abatement occurred in 2010, the Legislature made further amendments in 2017.[59] These ensure that the abatement period for any given project does not exceed eight years.[60] Though changes were proposed,[61] the blight definition, another major component of the abatement, saw no modifications from the 2017 reform.

To illustrate the application of the abatement, consider a developer's hypothetical plan to build an urban apartment building in downtown Phoenix. If the developer currently holds title to the land on which it plans to build, the developer must first transfer ownership of the property to the city. Phoenix next records a Memorandum of Lease with Maricopa County, reflecting the relationship between the city and the developer as one of lessor and lessee. The developer must receive from the city a certificate of occupancy before it may build.[62] At this point, the developer is responsible for making an annual GPLET payment to the county.[63]

The rate of this payment is set by statute. In the absence of any exemptions or other incentives, the developer, for an apartment building, must pay fifty cents per square foot of building space. If the building contains 120,000 square feet of residential rental space, the developer must pay $60,000 annually at this rate. Parking and retail are taxed at different rates.[64] If the developer wishes to have, for instance, 5000 square feet of ground-floor retail space, it must pay $7500 per year, at a rate of $1.50 per square foot. If it wants

---

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* The statute does not require this estimate for residential rental projects. *Id.*
59. H.R. 2213, 53d Leg., 1st Reg. Sess. (Ariz. 2017).
60. *Id.* (making eight-year abatement period the maximum regardless of transfers of title).
61. *See* discussion *infra* Section II.D.2.
62. *Certificate of Occupancy*, CITY PHX., https://www.phoenix.gov/pdd/topics/certificate-of-occupancy (last visited Jan. 2, 2019).
63. ARIZ. REV. STAT. ANN. § 64-6202(A) (2018).
64. § 42-6203.

to build 150 parking spaces for future residents and retail guests, it is responsible for $15,000 per year, at a rate of $100 per parking space. Together, this project would incur a GPLET liability of $82,500 per year.

But because the developer is planning on building in downtown Phoenix, an area with a slum and blight designation, it can seek an abatement of GPLET payments from the city. Because this is an apartment, the developer will not need to prove that the benefit of the project to the municipality will outweigh the benefit to the developer. The developer will agree, likely through the development agreement with the city, that the project will increase the property value by at least 100%.[65] After meeting these requirements, the city council must approve of the developer's abatement request before the developer can receive the abatement. Upon approval, the developer will not be liable for its $85,000 GPLET bill until eight years after it received its certificate of occupancy. After eight years, the developer will pay the statutory GPLET rate annually for the duration of the lease with the government.

On April 17, 2018, Governor Doug Ducey signed into law further restrictions on GPLET abatements.[66] The amendments to section 42-6209 (1) limit the size and shape of CBDs and (2) require cities and towns to review and either renew, modify, or terminate each slum and blight designation every ten years.

The new law limits a CBD's size to the greater of 2.5% of the city or town's total land area or 960 acres.[67] Before, a CBD could be the greater of 5% of total land or 640 acres. This change reduces the potential size of CBDs in large cities and increases it for small ones.[68] The amendment also added a definition for "geographically compact."[69] To be geographically compact, a

---

65. Disposition and Development Agreement 16 (2016) [hereinafter Derby Development Agreement] ("Parties acknowledge that . . . the improvements constructed upon the Site shall increase the value of the Site by more than 100% from the value prior to this Agreement.") (on file with *Arizona State Law Journal*).

66. H.R. 2126, 53d Leg., 2d Reg. Sess. (Ariz. 2018).

67. *Id.*

68. Phoenix's land area is over 330,000 acres. *County and City Data Book: 2017*, U.S. CENSUS BUREAU 1, 712, https://www.census.gov/prod/2008pubs/07ccdb/ccdb-07.pdf (last visited Sept. 30, 2018). If designated in 2017, Phoenix's CBD could be 5% of that, or about 16,500 acres. If designated after this amendment, the CBD would be limited to 2.5%, or about 8200 acres. The amendment reduces the potential size of the CBD. Bisbee has about 3300 acres. *2017 U.S. Gazetteer Files*, U.S. CENSUS BUREAU, https://www2.census.gov/geo/docs/maps-data/data/gazetteer/2017_Gazetteer/2017_gaz_place_04.txt (last visited Sept. 30, 2018). Because even 5% of that would be only 165 acres, Bisbee could have designated a 640-acre CBD in 2017, and it can now designate a CBD of up to 960 acres. The amendment increases the potential size of its CBD.

69. H.R. 2126.

CBD's length must not be more than twice its width.[70] This prevents a city from designating a long and narrow strip-like CBD. Finally, the amendment grandfathers in all CBDs formed before 2018[71]—only CBDs designated on or after January 1, 2018 will have to follow the new geographically compact definition and size limitations.[72]

The new law also introduces a renewal requirement for slum and blighted areas in which a city's CBD is located.[73] Within its CBD, a city must first review each slum or blighted area and then choose to renew, modify, or terminate its slum or blight designation.[74] For a slum or blighted area designated on or after September 30, 2018, a city must make this review and decision within ten years of designating the area a slum or blighted area.[75] If after its review a city does not renew, modify, or terminate an area's slum or blight designation, the designation automatically terminates five years after its review.[76]

All slum and blighted areas containing a CBD are susceptible to this review, even those designated before September 30, 2018.[77] But a city does not need to review and decide on whether to renew, modify, or terminate slum or blight designations for these areas until October 1, 2020.[78] If a city does not decide to renew, modify, or terminate a slum or blighted area by then, the designation automatically terminates on September 30, 2025, or five years after any subsequent review.[79]

The renewal requirement protects projects from losing their GPLET abatements even if the underlying slum or blight designation is modified or terminated.[80] The termination or modification of a slum or blight designation does not affect a project if (1) the lease with the government was entered into before the termination or modification of the designation or (2) the city approved a development agreement, ordinance, or resolution that authorized the lease, if the lease was entered into within five years after the agreement, ordinance, or resolution was approved.[81] Additionally, the termination or modification of a slum or blight designation does not affect certain

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*

educational institutions that are tax-exempt under section 501(c)(3) of the Internal Revenue Code.[82]

D. GPLET Controversy: Blight Definition and Litigation

The GPLET abatement requires blight as a prerequisite for abatement.[83] Because Arizona courts have yet to consider blight within the GPLET context, the treatment of blight definitions in eminent domain, both federally and within Arizona, is instructive.

1. Current Litigation: *Englehorn v. Phoenix*

The GPLET abatement is a key component of the GPLET statute in its economic development role. Because it provides a substantial tax break for large downtown projects, the abatement has proven a litigious component of the GPLET statute.[84] Most recent is the lawsuit concerning the Derby: Roosevelt Row project ("Derby project").[85] The Derby project consists of a thirty-six million dollar,[86] 211-unit apartment building with parking and commercial space.[87] It will be built in the Roosevelt Row area of downtown Phoenix by developer Amstar/McKinley ("Amstar").[88] Specifically, this nineteen-story structure is to be constructed on the currently vacant lot adjacent to Angel's Trumpet, a locally-owned bar and restaurant.[89]

On March 2, 2016, the Phoenix City Council authorized the Derby project to enter into a GPLET, which included the eight-year abatement.[90] Through the abatement, Amstar will defer over eight million dollars in property taxes.[91] In return, it agrees—through its development agreement with the city—to ensure that the Derby project will increase the value of the property by more than 100%.[92] At the conclusion of the eight-year abatement, Amstar

82. *Id.*
83. *Id.*
84. *See supra* note 1 and accompanying text.
85. *Englehorn* Complaint, *supra* note 7, at 3.
86. Derby Development Agreement, *supra* note 65, at 2.
87. Phx., Ariz., Ordinance S-42353 (Mar. 2, 2016).
88. *Id.*
89. Brenna Goth, *Goldwater Institute, Restaurant Sue Phoenix over Tax Break for Roosevelt Row Micro Apartments*, AZ CENT. (Mar. 9, 2017), https://www.azcentral.com/story/news/local/phoenix/2017/03/09/goldwater-institute-restaurant-sue-phoenix-over-tax-break-roosevelt-row-micro-apartments/98917132/.
90. Ordinance S-42353.
91. *Englehorn* Complaint, *supra* note 7, at 2.
92. Derby Development Agreement, *supra* note 65, at 16.

will begin paying an excise tax on the property, the rate of which is set by the GPLET statute.[93]

On March 1, 2017, Mat Englehorn, the owner of Angel's Trumpet, sued the City of Phoenix, claiming that the GPLET—including the abatement—violated a number of state constitution clauses and statutes.[94] The Goldwater Institute, Englehorn's counsel, is squarely opposed to the GPLET.[95] Labeling it a "shell game," the Institute claims that the GPLET and its abatement provision provide unjustified and unnecessary tax breaks to large real estate developers, resulting in increased property taxes across the board for Arizona cities.[96] Englehorn further claims Amstar would not require a GPLET abatement for the Derby project to be profitable.[97]

2. Blight Definition

Amidst the controversy over the effects and purposes of the GPLET is a debate over the use of the term "blight" in the GPLET's abatement section.[98] Blight is a critical component of the abatement. A project cannot receive an abatement unless it is located in a CBD, and a CBD must be located entirely within a blighted area.[99] The GPLET statute currently uses the blight definition set forth in the slum clearance and development statutes.[100] Under this definition, a blighted area is one "where sound municipal growth and the provision of housing accommodations is substantially retarded or arrested in a predominance of the properties."[101] The municipality determines this by looking to a number of conditions set forth by the definition.[102] These conditions consider the physical, economic, and title status of the area.[103]

---

93. *Id.*; *see also* ARIZ. REV. STAT. ANN. § 42-6203 (2018).

94. *Englehorn* Complaint, *supra* note 7, at 2. Englehorn is joined in this suit by other nearby property owners who claim that the Derby project's abatement will illegally pass Amstar's tax burden onto them. *Id.* at 3.

95. *Stopping the Subsidizing of Real Estate Developers:* Englehorn v. Stanton, GOLDWATER INST. (Mar. 7, 2017), http://goldwaterinstitute.org/article/englehorn-v-phoenix/.

96. *Id.*

97. *Englehorn* Complaint, *supra* note 7, at 2.

98. *See, e.g.*, *id.*

99. ARIZ. REV. STAT. ANN. § 42-6209 (2018).

100. ARIZ. REV. STAT. ANN. § 36-1471 (2018).

101. *Id.*

102. *Id.*

103. *Id.* The conditions set forth in the definition are:

> (a) A dominance of defective or inadequate street layout.
>
> (b) Faulty lot layout in relation to size, adequacy, accessibility or usefulness.

The GPLET statute places considerable limitations on areas eligible for an abatement.[104] That a project is simply located in a blighted area is not sufficient.[105] Rather, the project must be within a "geographically compact" CBD, and a city or town can only designate one CBD.[106] As a result, blighted areas eligible for a GPLET abatement are a small subset of the land eligible for slum clearance and redevelopment within the same blight definition. Finally, under the slum clearance statutes, a blight designation is not indefinite.[107] A slum or blighted area remains designated as such for ten years, after which the designation terminates "unless substantial action has been taken to remove the slum or blighted conditions."[108]

Some Arizona legislators have attempted to create a blight definition specific to the GPLET statute. The 2017 GPLET reform bill proposed new conditions that, for example, would classify an area as blighted by focusing on physical factors.[109] Physical factors focus on conditions such as structural dilapidation, and economic factors concern conditions like declining property values.[110] This definition would require that at least 50% of the property in an area be blighted.[111] The blighted properties would have to "substantially impair or arrest" growth, "retard the provision of housing . . . constitute an

---

> (c) Unsanitary or unsafe conditions.
>
> (d) Deterioration of site or other improvements.
>
> (e) Diversity of ownership.
>
> (f) Tax or special assessment delinquency exceeding the fair value of the land.
>
> (g) Defective or unusual conditions of title.
>
> (h) Improper or obsolete subdivision platting.
>
> (i) The existence of conditions that endanger life or property by fire and other causes.

Id.

104. § 42-6209.

105. *Id.*

106. *Id.*

107. ARIZ. REV. STAT. ANN. § 36-1474(C) (2018).

108. *Id.*

109. H.B. 2213, 53d Leg., 1st Reg. Sess. (as introduced Ariz. 2017). These conditions would consider whether the property "is dilapidated, unsanitary, unsafe or vermin-infested" and thus "unfit for human habitation or use," as well as whether the property "is substantially deteriorated or is abandoned" or "exhibits extensive damage . . . caused by a major disaster [that] . . . is not remediated within a reasonable time." *Id.*

110. George Lefcoe, *After* Kelo*, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and Schools Districts*, 83 TUL. L. REV. 45, 64 (2008).

111. H.B. 2213.

economic *or* social liability or [constitute a] menace to the public health, safety, morals or welfare."[112]

This definition was not present in the House engrossed version of the bill and did not make it into statute. Rather, the Legislature has chosen to continue using the definition borrowed from the slum clearance and redevelopment statutes.[113]

3. Comparison: Blight in Eminent Domain

Research analyzing blight within Arizona's GPLET framework is virtually non-existent. Much of the literature and case law focuses instead on blight as a justification for takings of land under eminent domain law.[114] When a condemnor seeks to effectuate a taking of a certain piece of land, it must engage in a judicial condemnation proceeding.[115] This requires the provision of notice and a formal offer to purchase the land from the current property owner.[116] The condemnor must also establish that its use of the land is "authorized by law" and the taking is necessary to that use.[117] Even after a court authorizes a taking, the condemnor must pay the condemnee just compensation for the taken property.[118]

The slum clearance and redevelopment statutes provide local governments flexibility when taking land for redevelopment within slums and blighted areas.[119] These statutes provide a mechanism through which condemnors may more easily take private land.[120] Critics of overly expansive blight definitions thus often focus on ensuring that condemnation authorities can appropriately answer condemnees' inquiries of "why me?"[121] An overly expansive blight definition could have the effect of permitting municipalities to designate

---

112. *Id.* (emphasis added). The six lawmakers who sponsored this version of the bill are all current members of the Arizona House of Representatives. *Id.*; *House of Representatives Members*, ARIZ. ST. LEGISLATURE, https://www.azleg.gov/MemberRoster/?body=H (last visited Jan. 2, 2019).

113. *Compare* § 42-6209, *with* H.B. 2213 (absence of blight standard in the statute).

114. *See, e.g.*, City of Phoenix v. Superior Court, 671 P.2d 387, 388 (Ariz. 1983); Gold & Sagalyn, *supra* note 21, at 1119.

115. ARIZ. REV. STAT. ANN. § 12-1116(A), (G) (2018).

116. *Id.*

117. § 12-1112. Purposes "authorized by law" do not include all legal uses—rather, the uses must be one of those listed in the eminent domain statutes, such as public use. § 12-1111.

118. § 12-1116(A). Though eminent domain is far more nuanced than explained here, there are clearly numerous safeguards and requirements in place to protect condemnees' constitutional rights, triggered by the government's desire to take their land without their consent.

119. *See* ARIZ. REV. STAT. ANN. § 36-1474 (2018).

120. *See id.*

121. Lefcoe, *supra* note 15, at 818–19.

nearly any plot of land as blighted, completely circumventing the protections in place for property owners.[122]

To protect the public from condemnation abuses, takings for clearance and redevelopment must follow specific requirements. After a local governing body establishes a detailed redevelopment plan, the respective planning commission must review and recommend the plan, and the local governing body must provide for public notice and hearings over the proposed plan.[123] Finally, the development plan, and each condemnation action, must be approved by the local governing body by a two-thirds vote.[124]

4. Arizona's Approach to Blight

Arizona courts have not yet addressed the blight definition used in the GPLET statute. The soonest an Arizona court will take up this issue is likely in Englehorn's suit against Phoenix.[125] The Arizona Supreme Court has, however, announced the standard of judicial review for legislative blight determinations used in condemnations for clearance and redevelopment.[126]

In *City of Phoenix*, the city's resolution designating blight reported empirical findings on the age and condition of buildings, land use, vacancies, and crime rate.[127] The court found that the presence of these express findings precluded a holding that the blight designation was arbitrary and capricious, thus upholding the designation.[128]

It held that taking property in a slum or blighted area, and even transferring that property to a private entity for use in either a public or private enterprise, can satisfy the public use requirement of eminent domain.[129] Moreover, a court will not disturb the legislative designation of property as a slum or blighted area without evidence "of fraud, collusion, bad faith or arbitrary and capricious conduct."[130] To survive judicial scrutiny, the governing body that made the blight designation need only state its "ultimate findings."[131] A court

122. Gold & Sagalyn, *supra* note 21, at 1142.

123. *See* ARIZ. REV. STAT. ANN. § 36-1479 (2018).

124. § 36-1478(C) (2018); § 36-1479(F).

125. *See* discussion *supra* Section II.D.1.

126. City of Phoenix v. Superior Court, 671 P.2d 387, 391–92 (Ariz. 1983).

127. *Id.* at 392–93.

128. *Id.* at 394.

129. *Id.* at 389. In 2003, the Arizona Court of Appeals clarified that *City of Phoenix* does not stand for the proposition that the government automatically satisfies the public use requirement for condemnation when taking land in a slum or blighted area—a court must still determine that the use is "really public." Bailey v. Myers, 76 P.3d 898, 902 (Ariz. Ct. App. 2003).

130. *City of Phoenix*, 671 P.2d at 394.

131. *Id.* at 391.

must generally defer to such findings, ensuring only that they are reasonably supported by the facts.[132] This standard does not require a city to hold a formal hearing before making a slum or blight determination.[133] Rather, a city's governing body can make its decision after piecing together facts and information from various sources, its staff, reports, and even the perceptions of city council members themselves.[134]

In his suit against Phoenix, Englehorn is challenging the city's determination that the project area is blighted.[135] He asserts that Phoenix's reliance on a declaration of slum and blight made in 1979 in designating this area as blighted was arbitrary and capricious.[136] Though not cited in his complaint, Englehorn will likely argue that *City of Phoenix*'s standard of review necessitates invalidating the slum and blight designation.

5. Federal Blight Jurisprudence: *Berman* and *Kelo*

Federal courts have long recognized the importance of government involvement in redevelopment.[137] Courts have not relegated governments to a role of developer-of-last-resort.[138] Rather, they have the power to promote the broad concept of "public welfare."[139] The United States Supreme Court in *Berman v. Parker*[140] held the government may go as far as ensuring that a community is "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[141] When analyzing the role of government in community redevelopment, the Court stressed that governments are not limited to taking only discrete plots of blighted land.[142] Rather, so long as there is a public purpose under eminent domain law, the legislative branch decides the "amount and character of the land to be taken for [a] project."[143]

---

132. *Id.* at 394 (holding that courts must accept blight findings, even if "reasonably doubtful or fairly debatable").

133. *Id.* at 391.

134. *Id.*

135. *Englehorn* Complaint, *supra* note 7, at 13.

136. *Id.* at 13–14.

137. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954).

138. *Id.* at 33.

139. *Id.*

140. In *Berman*, a landowner's estate challenged the constitutionality of a Washington, D.C. redevelopment act after the government designated his property as blighted and condemned it. The Supreme Court held against the landowner. *Id.* at 28, 35–36.

141. *Id.* at 33.

142. *Id.* at 35–36.

143. *Id.* at 35.

This opinion opened the door for government condemnors to take property within blighted areas even if the individual property "standing by itself, is innocuous and unoffending."[144] The Court mirrored this view of the government's role in *Kelo v. City of New London*.[145] Its expansive language assured governments of their power to employ eminent domain for redevelopment purposes.[146] The *Kelo* Court held that condemnation for economic development projects—even where the condemned land will not be open to the general public—can satisfy the public use requirement for an eminent domain action.[147]

Armed with the favorable *Kelo* holding, states offered economic development incentives, namely tax increment financing (TIF), to encourage development in blighted areas.[148] After *Kelo*, many states have sought to curb the potential abuses of redeveloping blighted land.[149] Their legislatures feared that local governments could take advantage of overly broad or ambiguous blight definitions to condemn land that is not truly blighted and incentivize private developers to build in these so-called blighted areas with large tax breaks.[150] Although TIFs and similar development programs have sought to reduce blight, many blight definitions allow room for development beyond that meant to combat decay, deterioration, "and economic and social distress."[151] Blight definitions in various state statutes consider such factors as "lack of community planning" and "faulty street or lot layout," expanding blight to encompass areas that are "underdeveloped" and that are not yet "seriously deteriorated."[152]

But after *Kelo*, many states revised their blight definitions, thereby restricting areas the government can designate as blighted.[153] Their goals are to eliminate so-called "pretextual" blight takings and ensure that only areas

144. *Id.*

145. 545 U.S. 469, 484 (2005). In *Kelo*, Susette Kelo, the owner of residential property in New London, Connecticut, argued that the city had not met the "public use" requirement of the Fifth Amendment of the U.S. Constitution when taking her property as part of a large development plan. *Id.* at 475. The Supreme Court held against Ms. Kelo, allowing the city to proceed with the urban development project, which included a "waterfront conference hotel," river walk, marina, and other amenities. *Id.* at 474, 489.

146. *Id.* at 486.

147. *Id.* at 479–80.

148. *See, e.g.*, Williams, *supra* note 24, at 259.

149. For an in-depth discussion on the modifications states have made to their blight statutes post-*Kelo*, see Gold & Sagalyn, *supra* note 21, at 1150–59.

150. Williams, *supra* note 24, at 275.

151. Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 78 (2010).

152. *Id.*

153. Gold & Sagalyn, *supra* note 21, at 1154.

that suffer from "true blight" can be condemned under slum and blight clearance statutes.[154]

Searching judicial review of blight designations is truly a "rare exception" to the general rule of legislative deference.[155] In response to *Kelo*'s expansive holding, forty-three states—including Arizona—modified their blight statutes from 2006–2008, narrowing the definition of blight and limiting the ability to use blight to justify condemnation.[156] Arizona was one of fifteen states that chose to redefine blight more narrowly,[157] and one of sixteen to require a "parcel-by-parcel determination" of blight when effecting a taking rather than allowing a condemning authority to take an entire swath of land.[158] This analysis requires condemnors to show that redevelopment of each parcel is "necessary to eliminate a direct threat to public health or safety" by clear and convincing evidence.[159] This burden only applies to condemnations under the slum clearance statute.[160]

Through these statutory changes, Arizona joined the ranks of states that—at least in the eminent domain context—statutorily associated blight with "condition[s] that pose[] a threat, [are] detrimental to or an actual danger to public health and safety, or [are] unfit for human habitation."[161] Because they defer to the Legislature's blight standard, Arizona courts now look to these types of conditions when analyzing blight designations.[162] Though a court will generally avoid invalidating a city's blight designations, it will still require findings that support the blight factors set forth by the Legislature.[163] Arizona courts have not yet had occasion to decide the validity of a blight designation since these post-*Kelo* reforms.

---

154. *Id.* at 1133; Williams, *supra* note 24, at 274.

155. Gold & Sagalyn, *supra* note 21, at 1143.

156. *Id.* at 1151–52.

157. *Id.* at 1155–56.

158. ARIZ. REV. STAT. ANN. § 12-1132(B) (2018); Gold & Sagalyn, *supra* note 21, at 1157. There is no like rule applicable to GPLET abatement. Professor George Lefcoe cautions that "a blight norm meant to limit economic development to areas that desperately need rejuvenation must be predicated on an area wide basis and include unblighted properties necessary for a successful economic development effort." *Id.* (quoting Lefcoe, *supra* note 110, at 47–48).

159. § 12-1132(B).

160. *Id.*

161. Gold & Sagalyn, *supra* note 21, at 1155.

162. *See* discussion *supra* Section II.D.4.

163. Rusty D. Crandell, Comment, *Arizona's "Public Use" Debate: Statutory and Constitutional Limitations on the Power to Take Private Property*, 38 ARIZ. ST. L.J. 1169, 1185 (2006); *see* discussion *supra* Section II.D.4.

E. Other States' Jurisprudence

To determine how to approach Arizona's blight definition, this Comment considers the decisions other states have made. Though the blight definitions in other states are tailored to condemnation or TIF statutes, they still provide insights into how Arizona can approach modifying the blight definition used in its GPLET abatement statute.

1. California: Narrow Blight and Specific Economic Factors

California has adopted a very narrow blight definition—it strives to limit blight to only those areas that are in dire need of government-assisted development and is regarded as "the only state to retreat significantly from granting expansive discretion to its municipalities."[164] A blight designation requires findings of *both* physical and economic blighting conditions—the statute provides a list of detailed factors for each.[165] Moreover, a blighted area must be "predominately urbanized" and the conditions must constitute so serious a burden that it "cannot reasonably be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment."[166]

Finally, California is one of few states to disallow consideration of "future blight."[167] *Beach-Courchesne v. City of Diamond Bar* exemplifies California's restrictive blight definition.[168] In this case, California's Court of Appeal invalidated a city's blight designation.[169] The city's redevelopment authority designated 1300 acres of land as blighted after finding that 27% of its buildings exhibited both physical and economic blight conditions.[170] The court held that these findings did not constitute blight and that a city's findings that physical and economic blighting conditions exist do not

164. John H. Herman, *Municipal Blight Declarations*, 23 URB. L. ANN. 423, 429 (1982).

165. CAL. HEALTH & SAFETY CODE § 33030(b) (requiring a finding of physical and economic blighting conditions); CAL. HEALTH & SAFETY CODE § 33031(a)–(b) (2018) (listing physical and economic blighting conditions).

166. HEALTH & SAFETY CODE § 33030(b).

167. Gordon, *supra* note 22, at 329 (citing 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1130, 1130 n.2 (C.D. Cal. 2001)).

168. 95 Cal. Rptr. 2d 265, 268 (Ct. App. 2000).

169. *Id.* at 279.

170. *Id.* at 269, 275.

constitute per se blight.[171] Rather, California courts must determine whether a city has put forth "substantial evidence" of physical and economic blight.[172]

2. Missouri: Rich Body of Case Law and Similarities with Arizona

Missouri does not apply one blight definition in all situations. For instance, the definition used for redevelopment corporation projects is different from the one applied to TIF projects.[173] The definition applied to redevelopment corporations examines both the current and future physical and economic state of the area and requires a finding that an area exhibits *both* physical and economic blighting conditions.[174] This definition considers whether the combination of age, obsolescence, poor design, and physical deterioration "are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes."[175]

Blight determinations have often been litigated in Missouri courts, and the case law demonstrates the high level of deference given to blight determinations.[176] In *Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp.*, for example, the Missouri Supreme Court upheld a city's blight designation where only 28% of the buildings in the area were "deteriorated or substandard to a degree requiring clearance," and these buildings occupied only 14% of the entire area.[177]

However, the court invalidated a blight determination as arbitrary in *Centene Plaza Redevelopment Corp. v. Mint Properties* because the redevelopment corporation failed to show evidence of social liability.[178] The blight designation in *Centene Plaza* was analyzed under the blight definition in Missouri's redevelopment corporations statute.[179] Because Missouri uses a

171. *Id.* at 268.

172. *Id.*; *see also* County of Riverside v. City of Murrieta, 76 Cal. Rptr. 2d 606, 612–13 (Ct. App. 1998) (holding insufficient evidence to support blight designation where city report found fewer than 5% unsafe structures, described physical conditions without "tangible proof," and did not "quantify[] loss of property value" when citing economic conditions).

173. MO. REV. STAT. § 99.805(1) (2018); MO. REV. STAT. § 353.020(2) (2018).

174. § 353.020 (emphasis added) (requiring finding of "economic *and* social liabilities").

175. *Id.* § 353.020(2).

176. *See, e.g.*, Parking Sys., Inc. v. Kan. City Downtown Redevelopment Corp., 518 S.W.2d 11, 15 (Mo. 1974) ("Judicial review [of blight determinations] is limited to whether the legislative determination was arbitrary or was induced by fraud, collusion or bad faith, or whether the City exceeded its powers.").

177. *Id.* at 14.

178. Centene Plaza Redevelopment Corp. v. Mint Props., 225 S.W.3d 431, 433–34 (Mo. 2007).

179. *Id.* at 433.

different blight definition in its TIF statute, its courts have—in TIF cases—upheld blight designations without even considering the social liability factors.[180]

Missouri's TIF blight definition focuses more heavily on economic conditions than physical or social ones. Under the TIF statute, the blight factors need only demonstrate "an economic *or* social liability *or* a menace to the public health, safety, morals, or welfare."[181] Moreover, this definition—unlike the one in the redevelopment corporations statute—lists a number of specific economic conditions, including: "defective or inadequate street layout" and "improper subdivision or obsolete platting."[182]

Missouri's TIF statute also contains a "but-for" test.[183] Prospective TIF areas must not be "subject to growth and development through investment by private enterprise and would not reasonably be anticipated to be developed without the adoption of tax increment financing."[184] The statute requires the project developers submit an affidavit supporting this conclusion with a "detailed description" of the relevant factors.[185] In principle, the but-for test places limits on the number of acceptable TIF areas and serves as a check on condemnation.[186]

Some have been critical of the way these but-for tests are currently applied. By requiring affidavits only from the developers—as in Missouri—this test creates a potential conflict of interest in which developers that wish to receive TIF benefits will "attest[] to their unwillingness to proceed without public subsidy."[187] Municipalities might also manipulate the test to produce desired results under the so-called "edifice complex."[188] A city, "holding out" for a particular type of project—such as an upscale shopping center or high-rise apartment building—could stymie other development in an area, artificially satisfying the but-for test by rendering private development

180. Meramec Valley R-III Sch. Dist. v. City of Eureka, 281 S.W.3d 827, 835–38 (Mo. Ct. App. 2009).

181. MO. REV. STAT. § 99.805(1) (2018) (emphasis added). The current Missouri Revised Statutes contain nine definitions of "blighted area," each applying to a different development activity.

182. *Id.*

183. § 99.810(1)(1); Gordon, *supra* note 22, at 323.

184. § 99.810(1)(1).

185. *Id.*

186. Missouri's constitution specifically allows condemnation of blighted properties, if a public purpose exists. Tax Increment Fin. Comm'n of Kan. City v. J.E. Dunn Constr. Co., 781 S.W.2d 70, 78 (Mo. 1989) (quoting MO. CONST. art. VI, § 21).

187. Gordon, *supra* note 22, at 324.

188. *Id.*

unfeasible.[189] In practice, a city could put up roadblocks—such as strict zoning restrictions and onerous building permit requirements—that make it impossible for private developers to build without incentives from the city. The city would then be able to claim that no private development can occur in the absence of incentive packages, such as the GPLET, even though the city itself restricted private development potential.

Today's blight definitions reflect the Legislature's efforts to prevent condemnation abuses. A slum or blight designation opens the door for local governments to take advantage of the redevelopment tools located within the slum clearance statutes. But an area must satisfy the demands of the slum or blight definitions before any of these tools become available. These definitions have become a fundamental part of the GPLET, as well. Though the GPLET process does not itself involve condemnation, municipalities and private developers must work within a blight definition originally established in the eminent domain context. Though Arizona's courts have announced a deferential standard of review for blight designations, it remains to be seen how or whether this standard will apply to the GPLET.

III. A NEW STANDARD, DRIVEN BY ECONOMIC DEVELOPMENT

The GPLET abatement's current blight standard is unclear and it fails to reflect the GPLET's purpose as an economic development tool. Though slum clearance and the GPLET may work together—such as when the government wishes to enable developers to build on land taken through eminent domain—they are distinct processes with often disparate goals. Whereas the Legislature has deliberately limited the blight standard used in eminent domain cases to target areas reflecting "common sense notions of blight," the GPLET is broader in that it also aims to promote economic development in CBDs and strengthen state and local tax bases. A new standard reflecting this would reduce litigation over arbitrary blight designations and instill confidence in the public that its cities are responsibly awarding the GPLET's substantial incentives.

This Comment proposes replacing the borrowed blight standard with an economic development-focused test for determining whether an area can be a CBD under the GPLET abatement statute. Section A will analyze Arizona's

189. *Id.* Professor Gordon also argues that but-for tests in their current form are naturally local-only determinations, and pay no heed to state, regional, or metropolitan policies. He also suggests that but-for tests may be ineffective because redevelopment authorities avoid incentivizing projects in "genuinely blighted areas" in order to ensure that the TIF's debt component will be paid off. *Id.* at 324–25. Arizona's GPLET may protect against this result because it imposes an excise tax instead of creating a creditor-debtor relationship with the developer.

main blight designation case. Section B will propose the addition of slum and blight definitions to the GPLET statute that adopt some of the economic factors found in California's blight definition. These modifications are not intended to significantly alter the current use of the GPLET abatement. They seek to clarify the GPLET's purpose and reduce litigation over blight designations used in GPLET projects.

A. Judicial Review

The results of Mat Englehorn's lawsuit against Phoenix could spell the end of the GPLET abatement as a development incentive in downtown Phoenix. If Arizona courts accept Englehorn's proposition that Phoenix's reliance on Resolution 15128 is "arbitrary, capricious, and an abuse of discretion," it follows that a court could hold as unblighted the entire Downtown Redevelopment Area.[190] As a result, no part of downtown Phoenix would be condemnable under the slum and blight clearance statutes and cities generally would be significantly limited in their abilities to offer the GPLET abatement. Phoenix would entirely lose these statutory tools for downtown area development.

Based on the lack of factual findings in Resolution 15128, an Arizona court could potentially invalidate Phoenix's slum and blight designation of the Downtown Redevelopment Area. Applying the deferential standard of review set forth in *City of Phoenix v. Superior Court*, a court will be limited to asking whether Phoenix's reliance on Resolution 15128—and thus its continued determination that downtown Phoenix is an area of slum and blight—is the product of arbitrary and capricious conduct. The slum and blight designation the Derby project relies on for the abatement lacks the empirical findings present in *City of Phoenix*'s blight designation.[191] Aside from concluding that there is a "serious and growing menace . . . injurious to the public health, safety, morals and welfare,"[192] the resolution does not cite any numerical figures. The designation in *City of Phoenix* notes substandard housing and general deterioration. Resolution 15128 makes no mention of any similar conditions.

Turning from Arizona's sparse case law on the subject, Missouri courts employ a standard of review similar to Arizona's. But even compared with Missouri cases, it appears that Resolution 15128 lacks the sorts of findings that would keep its slum and blight designation safe from judicial

190. *Englehorn* Complaint, *supra* note 7, at 14.
191. Council of the City of Phx. Res. 15128 (Ariz. 1979).
192. *Id.*

invalidation. Unlike the designation in *Parking Systems*, for instance, Resolution 15128 does not even mention figures pertaining to the percentage of deteriorated properties.[193]

To be sure, whether the resolution itself contains these findings is not dispositive. Under *City of Phoenix*, the city would have the opportunity to submit findings that support the downtown slum and blight designation as evidence at trial.[194] The city could submit reports and information from other sources that addressed slum and blight factors as they pertained to the downtown area in 1979. If at trial the city is able to produce data on these factors—such as crime statistics, deterioration, and obsolescence of buildings—an Arizona court will uphold the city's slum and blight designation under *City of Phoenix*'s deferential standard of review.

To be sure, a court would conceivably not need to rely at all on *City of Phoenix*'s standard to analyze the requirements of the GPLET abatement, distinguishing that rule as applicable only to slum and blight designations used to justify condemnation. Though the wording of the court's holding was not specific to condemnations,[195] the court stated as its policy rationale that courts must "be more than rubber stamps in the determination of the existence of substandard conditions in . . . condemnation cases."[196]

B. Proposed Slum and Blight Definitions for GPLET Abatement

The slum and blight definition used for the GPLET abatement tracks the definition used for condemnation. Thus, judicial invalidation of the slum and blight designation with the intent to curtail condemnation abuse necessarily invalidates the same designation for purposes of the GPLET abatement, a mechanism that does not rely on condemnation. The courts should have a method to limit abuses of slum and blight designations in condemnations without necessarily impairing the GPLET. This is because the GPLET is a distinct mechanism that does not always rely on condemnation, but on cooperation between local governments and developers that already have rights to property.

---

193. *Id.* at 4.

194. City of Phoenix v. Superior Court, Maricopa Cty., 671 P.2d 387, 392 (Ariz. 1983) ("[T]he court may receive evidence at trial on the issue of necessity vel non and may determine, from that evidence, whether the resolution of necessity was arbitrary.") (quoting Tucson Cmty. Dev. & Design Ctr., Inc. v. City of Tucson, 641 P.2d 1298, 1303 (Ariz. Ct. App. 1981)).

195. *Id.* at 394 ("We hold, therefore, that the function of the judiciary in determining whether an area is a slum or blighted area is to review the findings of the governing body . . . .").

196. *Id.* at 391 (quoting Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 333 (N.Y. 1975)).

1. The GPLET statute should contain slum and blight definitions.

At minimum, the GPLET abatement should adopt a definition of slum and blight that is not linked to the definition used for clearance condemnation. Missouri's courts employ the same judicial standard of review of slum and blight designations as Arizona. But their statutes give them the flexibility to invalidate a blight designation as to clearance condemnation without affecting a blight designation used for a TIF project. To allow Arizona courts similar flexibility, Arizona should follow Missouri's approach by amending the GPLET statute to include its own definitions of slum and blight.

But why Missouri? First, Missouri and Arizona utilize an identical judicial standard of review over slum and blight designations. Moreover, Arizona's main case on the issue cites a related Missouri case, *Parking Systems*,[197] when announcing the standard of review for slum and blight designations in Arizona. In addition, Missouri's slum and blight definitions contain factors similar to those in Arizona's statutes. Missouri's courts have also decided numerous slum and blight designation cases under these definitions.[198] That Missouri's slum and blight factors and judicial standard of review are similar to Arizona's suggests that Arizona courts may again cite to Missouri's wealth of case law when deciding the GPLET cases of Englehorn and others. This is especially likely given the sparse number of Arizona slum and blight designation cases on which to rely.

Arizona's statutes currently contain only one set of slum and blight definitions, located within the slum clearance statutes. The least sweeping statutory modification required to follow Missouri's approach entails two steps. First, the Legislature would amend the GPLET abatement statute, removing the cross-reference to the slum clearance statute's slum and blight definitions.[199] Then, it would add definitions for "slum" and "blighted area" to the definitions section of the GPLET statute.[200]

These modifications would be generally consistent with current practices. On its face, any slum and blight designation that meets the slum clearance statute's requirements would also meet those for the GPLET abatement. Cities would administer the GPLET abatement essentially the same as they do currently. Potentially, more areas would be eligible for GPLET abatement

197. *City of Phoenix*, 671 P.2d at 392 (citing Parking Sys., Inc. v. Kan. City Downtown Redevelopment Corp., 518 S.W.2d 11 (Mo. 1974)).

198. *See* discussion *supra* Section II.E.2.

199. ARIZ. REV. STAT. ANN. § 42-6209(A)(1)(c)(i) (2018). The sentence, after amendment, would read: "(i) Located entirely within a slum or blighted area."

200. § 42-6201. Without modifying the current slum and blight definitions, this step would require only copying the slum and blight definitions from the slum clearance statute.

under this modified statute. This is because courts would be able to invalidate slum and blight designations for purposes of slum clearance condemnation without affecting designations used for GPLET abatement purposes. Finally, inserting slum and blight definitions into the GPLET statute would serve a practical purpose for readers of the statute. The state Legislative Council recognizes that restating a definition, particularly across different titles of statute, can improve readability.[201]

2. The GPLET's blight definition should focus on specific, measurable economic factors.

Though an improvement from the current statute, restating the current slum and blight definition in the GPLET statute would not adequately address all of the issues discussed in this Comment. The Legislature should also revise the GPLET's blight definition to be more consistent with the GPLET's economic development purpose. This new definition should emphasize economic conditions, such as depreciation of property values and building vacancies. California's blight definition lists numerous blight factors that specifically target economic conditions. California's blight definition is one of the most stringent and searching in the country.[202] Its economic factors are demarcated as such, and a city can measure each with objective, numerical data.

Because they are specific, measurable, and focused on economic conditions, this Comment advocates implementing California's economic blight factors in the GPLET. Missouri has taken a similar approach by utilizing a blight definition that places heightened emphasis on economic conditions in its TIF statute. In Missouri, a blighted area can exist for TIF purposes solely based on economic factors.[203] But under the redevelopment corporations statute—in which a governmental entity can grant a private party the power to condemn property for development—an area must exhibit economic and social conditions. These conditions must be "conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes."[204] The difference suggests—in line with other states' post-*Kelo* reforms—that Missouri uses a more stringent blight definition in the redevelopment corporations statute to curb the potential abuses of condemnation, especially

201. ARIZ. LEGISLATIVE COUNCIL, THE ARIZONA LEGISLATIVE BILL DRAFTING MANUAL 2017–2018, at 39 (2017).

202. *See* Herman, *supra* note 164, at 429–30.

203. MO. REV. STAT. § 99.805(1) (2018) (blighted area is an "area which . . . retards the provision of housing accommodations *or* constitutes an economic *or* social liability *or* a menace to the public health" (emphasis added)).

204. MO. REV. STAT. § 353.020 (2018).

when performed by a non-governmental entity. Arizona should take a similar approach, creating a blight definition in the GPLET statute that focuses on economic conditions. Such a blight definition, adopting California's economic factors, would resemble the following:

> "Blighted area" means an area, other than a slum area, where sound *economic* growth *or* the provision of housing accommodations is substantially retarded or arrested in a predominance of the properties by any of the following:
>
> (a) A dominance of defective or inadequate street layout.
>
> (b) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness.
>
> ~~(c) Unsanitary or unsafe conditions.~~
>
> (c) Deterioration of site or other improvements.
>
> (d) Diversity of ownership.
>
> (e) Tax or special assessment delinquency exceeding the fair value of the land.
>
> (f) Defective or unusual conditions of title.
>
> (g) Improper or obsolete subdivision platting.
>
> ~~(i) The existence of conditions that endanger life or property by fire and other causes.~~
>
> *(h) Depreciated or stagnant property values.*
>
> *(i) A serious lack of necessary commercial facilities that are normally found in neighborhoods, including grocery stores, drug stores, and banks and other lending institutions.*
>
> *(j) A high crime rate that constitutes a serious threat to the public safety and welfare.*[205]

Above is an example of a definition that closely follows California's and Missouri's approaches while remaining as consistent as possible with the current blight definition. The key changes include allowing a blight designation upon only economic considerations (similar to Missouri) and removing factors that cannot be readily calculated with numerical data or either industry or legal standards. The example also adds factors that address

---

205. The GPLET abatement currently uses the blight definition located in section 36-1471 of the Arizona Revised Statutes. The proposed definition is based on this definition and would become section 42-6201(1). Stricken phrases indicate deletions and italicized phrases indicate additions.

economic conditions and can be readily calculated with numerical evidence or measured against standards currently in existence.

This Comment does not argue for an expansion of cities' abilities to condemn property for GPLET or other economic development purposes. The statutory modifications proposed here would not have that effect. This is because the GPLET statute provides no mechanism for condemnors to take property through eminent domain. Even if a city uses the GPLET's slum and blight definitions to designate an area as a slum or blighted area, it must still adhere entirely to the separate definitions and requirements located in the slum clearance statutes. In part, the slum clearance statutes require a municipal government to, by a two-thirds vote, find the existence of a slum or blighted area as defined by the slum clearance statute. Thus, the existence of separate slum and blight definitions in the GPLET statute is inapposite for purposes of slum clearance condemnation projects.

CONCLUSION

Arizona's GPLET provides incentives to developers to boost economic growth. Organizations like the Goldwater Institute take particular issue with the abatement, which allows developers to defer GPLET payments for eight years. The existence of a slum or blighted area is one of the prerequisites to receiving the abatement. The GPLET currently applies the slum and blight definitions from the slum clearance and redevelopment statutes. These definitions reflect Arizona's wariness toward condemnation abuses after *Kelo*. This opens the gates for litigants like Mat Englehorn to challenge the validity of blight designations in Arizona's growing cities.

The GPLET is meant to promote economic development and does not pose the same policy concerns as condemnations premised on blight. Often, the developer in a GPLET project already has rights to the land upon which it wishes to build. The GPLET itself does not possess a mechanism through which to condemn property.

A new blight definition specific to the GPLET abatement would better reflect the GPLET's economic development goal. The statutes of Missouri and California provide a suitable framework for the blight definition this Comment proposes for Arizona. By adopting the language found in those economic development statutes, Arizona courts will be better equipped to analyze blight designations in the GPLET context. Courts will also have greater flexibility when considering blight designations in different contexts. The changes proposed by this Comment allow courts to curb improper blight designations as they relate to either the GPLET or eminent domain without necessarily impacting the other.