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Informal Rules, Transaction Costs, and the Failure of the “Takings” Law in China

By CHENGLIN LIU*

Introduction¹

On the morning of September 15, 2003, a man named Zhu Qingliang poured a bottle of gasoline on himself and proceeded to light the gasoline on fire. Instantly, he became a massive fireball, lighting up Beijing’s Tiananmen Square.² Zhu’s tragic demonstration was a protest against the local government, which demolished his home without giving him proper compensation. A similar case happened in Nanjing three weeks earlier. There, a man named Weng immolated himself at the local demolition and relocation office, which had forcefully evicted his family and demolished his home without proper compensation.³ According to a report by Xie and Chen, six deaths were attributed to a single demolition project in Beijing running from January to April 2003.⁴ On January 9, 2005, two residents in

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1. Presented at the 9th Annual Conference of the International Society of New Institutional Economics (ISNIE), in Barcelona, Spain at Pompeu Fabra University from Sept. 22-24, 2005.

2. Yan Xiaomei, *Anhui Qingyang Xian Nongmin Zhu Zhengliang Ze Tiananmen Zifen Diaocha [Report on Mr. Zhu’s Immolation in the Tiananmen Square]*, DONGFANG ZAO BAO [EAST MORNING NEWS], (Sept. 18, 2003), available at <unn.people.com.cn/GB/14748/2095066.html>.

3. Wang Cijiang and Chengshi Chaiqian, *Sifa Heyi Quewai [Urban Demolition: Lack of Law and Order]*, CHINA NET, (Sept. 22, 2003), available at <www.china.org.cn/chinese/law/408670.htm>.

4. Xie Guangfei & Chen Xiaofeng, *Beijing Yeman Chaiqian Shijian Diaocha [A Investigation on “Savage Eviction” in Beijing]*, ZHONGGUO JINGJI SHIBAO [CHINA ECONOMIC NEWS], (Nov. 5, 2003), available at

Shanghai died in a fire deliberately set by a commercial developer attempting to scare and evict residents from the building.⁵

These tragedies were by no means isolated incidents. At the National Conference on the Management of Urban Demolition and Relocation, the Vice Minister of Construction revealed that similar incidents had resulted in 26 deaths and 16 injuries from January 2002 to July 2002. From January 2002 to August 2002, the Ministry of Construction received 1,730 in-office complaints, 70% of which concerned demolitions, and 123 group petitions, 83.7% of which concerned the same.⁶ A similar trend was reported by the State Bureau of Letters and Visits.⁷

The tremendous harm inflicted on private owners can be directly related to China's furious economic development. Since the 1990s, China has witnessed large-scale demolition projects aimed at making room for commercial development.⁸ To cut costs and gain maximum returns, commercial developers have been reluctant to provide residents with compensation and relocation arrangements after demolishing old houses. The tension between residents and developers has seriously affected social stability. In order to strike a balance between economic development and private property protection, the Chinese lawmakers passed several laws to regulate government takings. In March 2004, a clause was added to Article 13 of the Constitution, which requires the government to compensate private owners when their property is taken for public use. However, the widespread misuse of "public purpose" takings and forced evictions demonstrate that the newly-enacted rules have failed to protect private

<www.china.org.cn/chinese/2003/Nov/435359.htm>.

5. Yang Jinzhi, Xu Shousong & Huang Tingjun, *Shanghai Dongqian Shaosi Ren Yi'an [Arson Case in Shanghai Demolition and Relocation Project]*, XINHUA NET, (Aug. 24, 2005), available at <news.xinhuanet.com/legal/2005-08/24/content_3397043.htm>.

6. Liu Zhifeng Fubuzhang Ze Quanguo Chengshi Fangwu Chaiqian Gongzuo Zhuotang Hui Shang de Jianghua [Vice Minister of Construction Liu Zhifeng's Speech at National Conference of Urban Housing Demolition and Relocation, Sept. 3, 2002] [Vice Minister Liu's speech was archived in the Ministry of Construction's website at <www.cin.gov.cn/indus/speech/2002091601.htm> (visited July 22, 2005)]. The transcripts of the conference are useful sources for studying how the government dealt with confrontations between residents and developers in 2002. The entire transcripts are available at <www.cin.gov.cn/meeting/02cq/default.htm>.

7. Niu Aimin, *Anhui Nongmin Tiananmen Zifen Yuanyin Chamin: Chaiqian Jiufen Yinqi [The Incident of Self Immolation in the Tiananmen Square was Caused by Disputes Over Demolition]*, CHINA NET, (Sept. 17, 2003), available at <www.china.org.cn/chinese/2003/Sep/405803.htm>.

8. Zhao Ling, *Chaiqian Shinian Beixi Ju [Happy Endings Became Tragedies Over 10 Years]*, NANFANG ZHOUMO, (Apr. 14, 2004), available at <house.focus.cn/fviewmsg/1174/11266760.html>.

owners.

The objective of this paper is to analyze why the enforcement of China’s new takings law has failed. Many Chinese scholars argue that lackluster enforcement can be remedied by a well-drafted property code. However, this paper applies the New Institutional Economics’ (NIE) theory on institutions to the enforcement failure associated with the takings law. It draws attention to informal constraints, which may be the ultimate cause of failure in enforcing China’s takings law. Part I examines the basic theories on government takings and the NIE’s view on the relationship between formal and informal constraints. Part II provides a detailed analysis of the major informal constraints that are detrimental to the protection of private property. Finally, this paper concludes that fundamental institutional changes are needed in order to establish a functional body of property laws in China. These changes will ultimately reduce transaction costs resulting from China’s economic development.

I. Government Takings and Transaction Costs

A. *Justifications and Limitations of Government Takings (Eminent Domain)*

“Eminent domain is the power of the sovereign to take property for ‘public use’ without the owner’s consent.”⁹ Even though the coercive use of private property can be traced to the days of the Roman Empire, the term “eminent domain” originated from Grotius’ work *De Jure Belli et Pacis* in the seventeenth century.¹⁰ Grotius believed the state possessed the power to take or destroy property for the benefit of the social unit, but the state was obligated to provide compensation to the property owner for the loss.¹¹

The Fifth Amendment to the U.S. Constitution provides that no private property can be taken for public use without just compensation.¹²

9. 1 NICHOLS ON EMINENT DOMAIN §1.11 (Julius L. Sackman ed., 3d ed. 2004) [hereinafter NICHOLS].

10. *Id.* at §1.12.

11. *Id.* at §1.12[1]:

[T]he property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property.

12. U.S. CONST. amend. V.

This clause is often referred to as the “takings clause” or “eminent domain clause.” Eminent domain proceedings require that: (1) the property be put to public use; and (2) the owner of the property be provided with just compensation.¹³

Property taken through eminent domain proceedings has to be for public use according to law, even though the definition of “public use” is subject to debate.¹⁴ It does not mean that all for-public-use projects automatically warrant invoking the power of eminent domain. If public land is suitable for building a public school, it is not necessary to acquire private property for the same purpose. Eminent domain proceedings are often used in situations where land assembly involves a market failure on the supply side.¹⁵ For example, building a highway may require several adjacent parcels of lands, which are owned by different owners. If the government had no power to take the lands coercively, it would have to negotiate with each of the owners. If a single owner refused to sell her land to the government, the whole project would have to be scrapped. This leverage enables private owners to “holdout,” thus driving prices much higher than their normal market value. This so-called “holdout” problem in assembling land for public projects is analogous to monopolies in antitrust law.¹⁶

Eminent domain is designed to overcome the holdout problem as a result of market failure. However, one should not assume that eminent domain is cost-free. Sometimes, eminent domain is more costly than free-market exchange.¹⁷ According to Thomas W. Merrill, the administrative costs associated with eminent domain in the United States include:¹⁸

Costs to lobby the legislature to grant the power of eminent domain; Procedural costs required by the Fifth and Fourteenth Amendments and state laws, “includ[ing] drafting and filing . . . formal judicial complaint[s] and service of process on the owner;”¹⁹ Costs associated with professional appraisal services; Costs associated with the guarantee of condemnees’ rights, including public hearings on the condemnation’s legality and the amount of compensation required; and [i]f condemnees

13. THOMAS J. MICELI, *THE ECONOMIC APPROACH TO LAW* 215 (Stanford Economics and Finance 2004).

14. See NICHOLS, *supra* note 29, at § 7.02 [1], for a discussion on what constitutes “public use” or “public purpose.”

15. MICELI, *supra* note 13, at 216.

16. *Id.*

17. Thomas W. Merrill, *The Economics of Public Use*, 72 *CORNELL L. REV.* 61, 77 (1986).

18. *Id.*

19. *Id.*

file lawsuits to block the project, the costs of a lengthy lawsuit.²⁰

To determine whether the use of eminent domain power is desirable, it is necessary to weigh the administrative costs of eminent domain against the transaction costs of market exchange.

B. NIE, Transaction Costs and Informal Rules

One of the New Institutional Economics' (NIE) primary concerns is the interplay between transaction costs and institutions.²¹ According to Douglass C. North, institutions are the rules of the game in a society and consequently provide the framework of incentives that shape economic, political, and social organization. Institutions are composed of formal rules (laws, constitutions, rules), informal constraints (conventions, codes of conduct, norms of behavior), and the effectiveness of their enforcement. Enforcement is carried out by third parties (law enforcement, social ostracism), by second parties (retaliation), or by the first party (self-imposed codes of conduct).²²

Institutions, such as property rights, have a great impact on transaction costs and thus on economic performance. "There is an intimate connection between the institutions and technology employed; the efficiency of a market is directly shaped by the institutional framework."²³ Well-defined property rights provide certainty and encourage individual owners to participate in market competition and secure the return of their investments. An open and competitive market as a result of well-defined property rights is a powerful force to reduce transaction costs. On the contrary, if property rights are ill-defined, or not enforceable, individuals are less likely to make efforts to pursue long-term investments.²⁴ A good example of this correlation is the experience of developing economies, which seek foreign investment. A 1997 World Bank report indicated that "countries with stable governments, predictable methods of changing laws, secure property rights, and a strong judiciary saw higher investment and growth than countries lacking these institutions."²⁵

20. *Susette Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

21. DOUGLASS C. NORTH ET AL., *THE FRONTIERS OF THE NEW INSTITUTIONAL ECONOMICS* xvi. (John N. Drobak & John V.C. Nye eds., Academic Press 1997) [hereinafter Drobak].

22. *Id.* at 6.

23. *Id.*

24. *See*, RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 453 (Cambridge University Press 2002).

25. *Id.* at 450 (quoting WORLD BANK, *ENTERING THE 21ST CENTURY: WORLD DEVELOPMENT REPORT 1999/2000* 23 (1999)).

For developing economies, the implication of the NIE theory is that the first step to economic growth is to establish a well-defined and enforceable property rights framework. During this process, developing economies must be fully aware that while formal rules on property rights are relatively easy to establish (chiefly through legal transplantation), informal norms that create indirect property rights protections are not. Concerning the relationship between formal and informal rules, North pointed out that even in the most developed economies, formal rules only account for a small portion of the constraints.²⁶ On the other hand, informal rules play an important role in shaping the general climate in which property rights are enforced. North further observed that “[t]he informal constraints that are culturally derived will not change immediately in reaction to changes in the formal rules. As a result, the tension between altered formal rules and the persisting informal constraints produces outcomes that have important implications for the way economies change.”²⁷ Therefore, the effectiveness of property rights protections depends not only on well-defined legal rules, but also on informal rules that either constrain or motivate behavior.²⁸

The task to build a functional system of property rights in China is, therefore, an arduous one. Formal property laws, such as constitutional provisions and property codes, may be easy to enact, but informal rules are far beyond the lawmakers’ control. The deep-rooted bias against private ownership, a weak judiciary, the unrestricted powers of the government and widespread corruption problems are among the various informal constraints that render formal rules unenforceable. Part II of this paper identifies several informal constraints that are harmful to the protection of private property rights in the process of massive government takings.

II. Informal Rules that Contribute to the Failure of the Takings Laws

A. Misuse of “Public Purpose”

In 2004, a new clause was imbedded in Article 13 of China’s Constitution. According to this new clause, private property may be

26. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 36 (Cambridge University Press 1990).

27. *Id.* at 45.

28. LEE J. ALSTON, GARY D. LIBECAP, & BERNARDO MUELLER, *Violence and the Development of Property Rights to Land in the Brazilian Amazon*, in Drobak, *supra* note 21, at 145.

expropriated or taken by the state, but the taking has to be for public use and with compensation.²⁹ This amendment became instant good news to residents who were struggling to keep their houses or wanted fair compensation. There were reports that residents posted copies of the new constitutional clause on their front doors to defend their homes. However, the principle that the amendment set forth met harsh reality. Despite the amendment, developers carried out demolitions for commercial development as previously planned. Neither the People's Congress nor the Supreme People's Court issued any interpretations on the meaning of "public use." As a result, local governments simply took advantage of their inherent powers to over-stretch the scope of "public use." Chinese scholars analogized the term "public use" to a big "basket," into which local governments threw every conceivable project.³⁰ The reasons for the misuse of the "public purpose" are as follows.

1. GRC Doctrine

In the 1990s, several coastal cities created the *GRC doctrine* (*Zhengfu Jingying Chengshi*), which means government officials run a municipality in the same way a chief executive officer runs a large for-profit corporation. The major goal of those cities was to attract foreign investment and increase local GDP. The governments in the cities sold urban land-use rights, together with utility supplies and infrastructures, to foreign investors. The proceeds from land sales became the major source of revenue. To maintain a competitive edge, these cities sold, to foreign investors, the land in the best locations with built-in utility lines and access to highways. In most cases, the best locations were in downtown residential areas. To make the land readily available, the cities carried out massive demolition and relocation. In order to maximize gains from the land sales, the cities often lowered compensation standards and shortened the time period for residents to seek remedies either through petition or litigation. At the same time, the cities carried out public campaigns to

29. Article 13 of the Constitution of China [XIAN FA art. 13 (2004) P.R.C.] (amended as of 2004) states:

The lawful private property of citizens may not be encroached upon. By law, the state protects citizens' rights to own private property and the rights to inherit private property. The state may, for the public interest, expropriate or take over citizens' private property for public use, and pay compensation in accordance with law.

30. Zhu Linxing, *Qieshi Guifan Jiti Tudi Zhengshou Zhengyong Zhidu [Ways to Improve Land Acquisition System]*, JIEFANG RIBAO [LIBERATION DAILY], (Jan. 24, 2005), available at <www.jfdaily.com.cn/gb/node2/node4085/node4086/node6038/userobject1ai780651.html>.

persuade residents to make personal sacrifices in support of the decision to revitalize the local economy.

Since the end of the 1990s, cities have become accustomed to selling the best locations to foreign investors and commercial developers. The *GRC* doctrine is widely adopted among local leaders throughout the country. The major reason is that selling land to commercial developers is the most expedient way to increase local GDP. In recent years, local GDP has become an overwhelming standard for assessing the ability of the local officials. Under the centralized system, the appointment to key posts of local officials is decided by a level of government higher than local constituencies. Consequently, the basic criteria for reappointment or promotion is how well the local officials could implement orders from the top, not how well they served the local people. As a result, local governments have put their sole emphasis on economic growth and have paid less attention to social issues, such as forced evictions.³¹ In addition to selling land for commercial development, local leaders found that engaging "showcase projects" or "legacy projects" (*Xingxiang Gongcheng*), such as building gigantic squares and widening streets, can also bring their cities into the national spotlight. All of these showcase projects involve either massive demolition of residential houses or the imposition of heavy taxes on urban residents.³²

What happened in Jiahe illustrates how a local government can aggressively engage in a demolition and relocation under the guise of a "public project." The Jiahe incident was the first reported case after the State Council issued an Urgent Notice, requiring the local government to

31. See CHENGLIN LIU, *CHINESE LAW ON SARS* (W.S. Hein Co. 2004). When SARS broke out, local governments' first reaction was to assess how the disease would affect the image of the local region and hurt the local economy. During a news conference, Guangdong health officials told reporters that 305 SARS cases were not too many so they did not think it was necessary to release the information. Apparently, the dollar value that the local government put on people's health was far less than that of the protection of local image and economic growth. Solving social problems that concern the local people most, such as increasing input to the health care system, upgrading medical facilities, and improving networks for screening infectious disease, is unlikely to gain officials credit for promotion or reappointment, because the results of those efforts are intangible in an economic sense.

32. Sui Guanzuo, *Liaoning Pinkun Xian 800 Wan Xiu Huaohua Guangchang Yangbuqi Caoping Gaizhong Xiaomai* [An Undeveloped County Spent RMB 8 Million Building a Luxury Square], *BEIJING QINGNIAN BAO* [BEIJING YOUTH DAILY], (Sept. 8, 2004), available at <www.china.org.cn/chinese/2004/Sep/654970.htm>. In order to build a showcase, a poor county in Liaoning Province invested RMB 8 million to build a huge square in the center of the city. When the square was finished there was no fund left for planting grass so the county leaders decided to grow wheat instead. To build the square, a People's Liberation Army memorial site was demolished and relocated to a suburban area.

focus on ordinary people's long-term interests and strike a balance between pursuing economic growth and improving people's living standards. Despite the strict rules placed on the national media,³³ some devoted journalists made great efforts to investigate the Jiahe case.³⁴ A series of investigative reports were circulated on the Internet and in national newspapers.

In 2004, the Jiahe County government decided to build the Pearl Spring Commercial Mall (Pearl Spring) in the center of the downtown area in order to attract investment and improve the local economy. With the government's full support, an overseas company obtained the no-bid contract at a surprisingly low price—RMB 30 per square meter.³⁵ The

33. The Central Government quickly became aware of the social repercussions resulting from massive demolition and relocation projects across China. On September 19, 2003, the same week as Zhu's immolation protest, the State Council issued the Guanyu Renzhen Zhuohao Chengzheng Fangwu Chaigian Gongzhuo Weihu Shehui Wending De Jinji Tongzhi [An Urgent Notice on Diligently Carrying out Urban Housing Demolition and Relocation, Maintaining Social Stability], Guoban fa ming dian [2003] No. 42, (Sept. 19, 2003) available at <www.southcn.com/news/china/china04/chaigian/zyjs/200310220876.htm>. The Urgent Notice (Jinji Tongzhi) is a type of normative document, which has no legally binding effect; however, it can have a huge impact on local governments in a time of crisis. For example, during the SARS epidemic in 2003, the State Council issued several influential urgent notices urging local governments to take measures on prevention, control, and treatment of the disease. *See generally*, LIU, *supra* note 31. The Urgent Notice acknowledged that some condemners did not provide residents with proper compensation and relocation housing. Some condemners used improper means to evict residents, causing bloody incidents, which provoked a large number of residents to file class-action petitions with local governments and even the central government. The Notice attributed the chaos to local governments' lack of proper management over the demolition and relocation projects. It required that local governments focus on ordinary people's long-term interests and strike a balance between pursuing economic growth and improving people's living standards. It also urged governments to act in accordance with the law. Even though the Notice emphasized transparency and supervision, it laid out strict rules on what national media outlets should report on issues arising from such projects. For example, it required the national media to focus on achievements rather than problems with urban construction, to maintain a positive tone and avoid exaggerating or intensifying the existing failures and problems. Although it did not explicitly blame the media for reporting the above-mentioned tragedies, it sent a strong message to all journalists as to what the government would expect from them.

34. The first intensive investigation of this case was released by Chinese Central TV. Other news outlets reprinted this report and conducted their own investigations. Sina.com and Sohu, two prominent websites, created their own special edition reports on the Jiahe investigation. *See generally* Sina.com, available at <news.sina.com.cn/z/hnjiahe/index.shtml>. China Internet News Center also has a compilation of news sources called *Facing Demolition*, available at <www.china.org.cn/chinese/zhuanti/dhcq/417954.htm> [hereinafter *Jiahe Investigation*].

35. *Hunan Jiahe Chaigian Diaocha 2: Yin Yang Hetong [Investigation Report on Demolition and Relocation in Jiahe, Hunan Province 2: Yin Yang Contract]* (China Central TV broadcast May 14, 2004), available at <news.sina.com.cn/c/2004-05-

whole project covered 120,000 square meters in an area where more than 7,000 residents lived in 1,100 residential units.³⁶

Cheap land deals do not necessarily satiate developers' greediness. Once it comes to demolition, relocation and compensation, the developers are extremely tight-fisted. In Jiahe, the developer's registered capital was only RMB 10 million, while the required budget of the project was well over RMB 1 billion.³⁷ The inadequate funding for the project meant that it was impossible for the developer to properly compensate the affected residents. The county government was fully aware of the difficulties it would face in carrying out the demolition and relocation work. Therefore, the government utilized all the powers at its disposal to clear the way for commercial development.

After selling the land, the Jiahe County government launched a series of propaganda campaigns. Red banners flew over major streets saying, "[t]hose who are against the Pearl Spring project for a few days will be affected by the county government for a lifetime."³⁸ During a countywide meeting, the secretary of the political and legal committee shouted that those who were against the project were counter-revolutionaries,³⁹ a radical term used in the Cultural Revolution of 1966.⁴⁰ By using such radical terms, the county leader tried to turn compensation disputes into a political issue. All residents affected by the project had to sacrifice personal interests for the "common good" of the county.

On August 7, 2003, the Jiahe County Communist Party Commission and People's Government jointly issued a normative document—Jie Ban [2003] Notice No. 136 (Notice 136), which required that all county employees make four guarantees:

14/11203228616.shtml>.

36. Yangshi <<Shehui Jilu>>: *Hunan Jiahe Chaiqian Zhi Tong* [China Central Television Station Investigation: The Pain of Jiahe Demolition] (China Central TV Broadcast May 26, 2004), available at <news.sina.com.cn/c/2004-05-26/10553336990.shtml>.

37. Zeng Pengyu, *Hunan Jiahe Beibu Chaiqian Hu Huode Guojia Peichang Meiren Yue RMB 1700* [Condemnees who were Arrested During Demolition Received State Compensation in the Amount of RMB 1,700/per person], BEIJING QINGNIAN BAO [BEIJING YOUTH DAILY], (June 28, 2004), available at <news.sohu.com/2004/06/02/28/news220352857.shtml>.

38. See *Jiahe Investigation*, supra note 34.

39. *Id.*

40. In Cultural Revolution era (1966-1976), "counter-revolutionary" was the most threatening term. Persons officially put into this category faced public humiliation, torture, labor camps, and their families were socially isolated by the community. Around 30 million "counter-revolutionaries" died during the Cultural Revolution.

To persuade family members (family members includes extended family members)⁴¹ to accept the official appraisal within the time limit;

To persuade family members to sign the demolition, relocation and compensation agreements;

To persuade family members to hand in all necessary housing certificates and assist with relocation; and

To prevent family members from obstructing the demolition process, participating in class-action suits, or filing petitions with higher levels of government.

For those who failed to fulfill the above guarantees, their jobs and salaries were to be suspended. Employees who did not prevent their relatives from obstructing demolition and relocation projects were to be dismissed or sent to remote areas to work.⁴²

Even though Notice 136 was nonsensical, officials in Jiahe faithfully enforced it. Some 160 county employees were officially told to guarantee that their relatives move out of the demolition zone within the time limit set by the government. A number of employees were either dismissed or transferred to the countryside for failing to persuade their family members in this way. As a result of such practices, on the same day, two sisters divorced their husbands in protest. Mr. Li, their father, owned a four-story building along the busiest street in Jiahe that was designated as part of the demolition zone. Due to its ideal location, Mr. Li turned the first floor into profitable shops. Not satisfied with the low compensation given him, Mr. Li refused to sign the deal and vacate the building. Because both his daughters' husbands were county employees, they were obligated to guarantee their father-in-law would move out of the demolition zone. The sisters hoped that their divorces would save their husbands' jobs. However, the divorce strategy did not work. Further, because the sisters were English teachers they were also considered county employees. Soon after their divorces, the sisters were notified that they were to be transferred to schools in remote areas. The government believed that the two sisters deserved demotions because they had set bad examples by deliberately avoiding their responsibility to facilitate the Pearl Spring project.

In addition, the county government mobilized a large number of the police force and judicial officers to deal with the “holdouts.” On April 24, 2004, when the government carried out a forced eviction, an old couple

41. See *Jiahe Investigation*, *supra* note 34.

42. *Id.*

stood on the roof and refused to move. The couple was arrested by the Jiahe police on charges of resisting official eviction and disturbing public order. The couple was held in prison for 17 days until the State Council Investigation Team intervened. However, the county police refused to admit any misconduct.⁴³

2. Unenforceable Zoning Law

Among other factors, an unenforceable zoning law is attributed to local officials having unlimited power to authorize massive demolition and relocation projects.⁴⁴ The Urban Zoning Law (UZL) was passed in 1989 and took effect in 1990. The objective of the UZL is to ration limited land resources in urban areas. The law requires the State Council to draw a plan for national land use and local governments to draw respective plans for local development. Pursuant to the UZL, a local land-use plan is subject to two levels of approval. First, the plan should be submitted to the local people's congress for approval. Second, the local government should send the plan to a higher level of government for approval. Large cities with a population of over ten million should submit their land-use plans to the State Council. The reporting and approval requirement is used to institute a system of checks and balances. However, the system fails to achieve its intended result, mostly because the law does not specify legal liabilities for those government officials who fail to observe city planning. Furthermore, because China does not have a separation of powers system, the local people's congress is a branch of government, rather than an independent political entity, which is vested with the power to exercise effective supervision over the government.

Consequently, like any other law designed to impose constraints on the government, the UZL became unenforceable as soon as it was promulgated. A high official from the Ministry of Construction admitted, "[s]ome cities do not have a zoning plan, or if there is one, it is not enforced at all. In those cities, normative documents from the local government take precedence over zoning plans."⁴⁵ In April 1999, in an

43. See Zeng, *supra* note 37. Under pressure from the national media and the Central Government, the police released Mr. Li and his wife and paid RMB 1,700 per person as compensation for lost salary.

44. *Chaiqian Jiufen Benke Bimian Chengshi Guihua Ying Zhuzhong Baohu Gongquan* [Disputes Over Demolition is Avoidable if Urban Zoning Plan Embraces Public Input], ZHONGGUO GONGSHANG SHIBAO [CHINA INDUSTRY AND COMMERCE DAILY], (Nov. 16, 2004), available at <www.bjhouse.com/xwpd/dczx/2004111695404.htm>.

45. Fu Bochang, *Jianshe Bu Zhuzai Si Fu Si Zhang Jiedu Chengshi Fangwu Chaiqian Guiju* [Official of the Construction Ministry Explains Rules on Demolition], RENMIN RIBAO

effort to enforce the UZL, the State Council promulgated the Outline of National Land Use Plan (1997-2010) (Outline), which set land use quotas for local governments. However, the Outline has been largely ignored by local governments. Some wealthy provinces used up land quotas at an enormous speed. By 2004, Shandong province had used up 80% of its land quotas. Jiangsu province used almost its entire quota six years ahead of schedule.⁴⁶ Some Chinese scholars observe that city planning is like a scribble on a local leader's drawing board—it can be easily changed according to city leaders' preferences.⁴⁷

Without taking the zoning law into consideration and being accountable to the local congress, local leaders have the freedom to authorize new development projects at will. As previously discussed, in order to increase their chances of being promoted or reappointed, local leaders are eager to engage in so-called "showcase" or "legacy" projects. Because it is considered politically unwise to continue a predecessor's project, most projects start when a new leader takes office and end when he leaves office. As a result, city development is often in a state of uncertainty. Even though the 2001 Regulations provide that the Demolition Bureaus should abide by local city planning and applicants should submit zoning certificates, among other documents, in order to obtain a demolition license,⁴⁸ neither the Demolition Bureau nor the applicants take this provision seriously. It takes only a special note or phone call from high officials to set aside this requirement.⁴⁹

The following case illustrates how volatile a zoning plan can be in a well-developed metropolitan area.⁵⁰ On March 26, 2005, 80 owners of an apartment complex in Wuhan, the capital of Hubei Province, suddenly

[PEOPLE'S DAILY], (July 23, 2004), available at <big5.china.com.cn/chinese/2004/Jul/617397.htm>.

46. Wang Libin, *Tudi Guihua Geng zhe "Shui" Ze Zou?* [*Forces Behind Zoning Plan*], XINHUA NET, (May 12, 2004), available at <news.xinhuanet.com/house/2004-05/12/content_1464972.htm>.

47. ZHANG QINHUA, *ZHONGGUO TUDIFA CAOZUO SHIWU* [PRACTICAL MANUAL OF CHINA LAND LAW] 194 (Law Press China 2d ed. 2004).

48. GUOWUYUAN FAZHIBAN NONGYIE ZIYUAN HUANBAO FAZHI SI [THE STATE COUNCIL AGRICULTURAL RESOURCES ENVIRONMENTAL PROTECTION BUREAU, ET AL], CHENGSHI FANGWU CHAIQIAN GUANLI TIAOLI SHIYI [THE INTERPRETATIONS OF THE REGULATIONS ON URBAN HOUSING DEMOLITION AND REMOVAL] art. 7, at 120, (Zhishi Chubanshe [Knowledge Press] 2004) [hereinafter INTERPRETATIONS].

49. WANG CAILIANG, FANGWU CHAIQIAN JIUFEN JIAODIAN SHIYI [GUIDE TO SOLVING DISPUTES OVER URBAN HOUSING DEMOLITION] 18-19 (Law Press China 2004).

50. *Xifang Queyao Chaiqian!* [*Demolishing New Houses!*], XINLANG WUHAN FANGCHAN [XINLANG WUHAN REAL ESTATE], (Apr. 19, 2005), available at <wh.house.sina.com.cn/sye/fcbgt/2005-04-19/15098181.html>.

received an eviction notice stating that their apartment building was in the redevelopment zone and would be demolished. The owners were shocked by the eviction order because the building was recently built in 2002. All the owners had official documents to prove their ownership, which included the building authorization certificate issued by the City Zoning Office. The owners did not receive any information about the rezoning until they noticed eviction orders posted on their front doors.

3. Corruption

Bribes from land sale deals account for a major source of corruption, which is a widespread problem in China. The estimated loss of revenue from the nationwide sale of state-owned lands reaches hundreds of billions of RMB each year.⁵¹ In recent years, foreign countries have become safe havens for corrupt Chinese officials. The exact number of officials who have fled overseas with state money is not clear. In 2004, the Ministry of Public Security estimated that some 500 corrupt officials had fled China with state property totaling approximately RMB 70 billion (\$8.45 billion).⁵²

The close relationship between commercial developers and government officials is an open secret. While there is no clear indicator of which—developers or government officials—is first to reach out to the other, one thing is certain, developers cannot make a profit without government support. The local government is the sole entity entrusted to manage and sell state-owned land. The local government has the power to promulgate and enforce city-zoning plans and approve urban construction. If the construction involves demolition and relocation, the developers must seek approval from the government. The government also decides how the developers will compensate residents and adjudicate disputes. Finally, the government has the power to authorize forced evictions. However, this does not mean that developers have nothing to offer the government in return. Under the current political system, local officials are appointed by higher levels of government. The officials are evaluated on how well they promote the local economy.⁵³ In order to pursue higher growth, local leaders have made great efforts turning old city districts into shopping

51. See ZHANG QINHUA, *supra* note 47, at 51.

52. *Woguo Muqian Waitao Jingji Fanzui Xianyi Ren 500 Duo, She'an Jin'e 700 Yi* [China Currently has 500 Suspects Fleeing Abroad with RMB 70 billion], RENMING RIBAO [PEOPLE'S DAILY], (Sept. 10, 2004), available at <news.xinhuanet.com/fortune/2004-09/10/content_1964988.htm>.

53. DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* 439 (Thomson West 2003).

malls and drawing foreign investments.⁵⁴ Commercial developers are essential to the carrying-out of leaders' political ambitions. Close relationships between local leaders and commercial developers are mutually beneficial.⁵⁵ Without a system of checks and balances, these kinds of relationships are tainted with corruption.⁵⁶ Developers offer huge gifts to local officials in order to purchase land at extremely low prices and gain government's full backing for forced evictions.

B. Lack of Compensation

Grossly inadequate compensation was the major source of confrontation between developers and residents. Having realized this problem, the Ministry of Construction issued the Guiding Opinions on the Appraisal of Urban Housing Demolition (Opinions) on December 1, 2003, which took effect on January 1, 2004. The Opinions⁵⁷ set forth detailed guidelines on the procedure to conduct appraisals of urban housing.

1. Government Price Listing v. Market Value

The major difference the Opinions have made is that all demolition appraisals must be based on the market value of affected houses, rather than the replacement value at the time the houses were built. While this change has been hailed as a fundamental step towards fair compensation, the Opinions fail to take the opportunity to clarify this market value-oriented approach. Instead, the Opinions lay out two parallel benchmarks for appraisal—the prices annually announced by the government and the prices indicated by the real-estate market. As to which benchmark carries more weight and how to deal with situations where a considerable discrepancy between the two benchmark prices occurs, the Opinions offer no guidance. Scholars have questioned the credibility of the official prices announced by the government.⁵⁸ It is not a novel requirement that governments publish housing market prices. Article 32 of the Law on the

54. See *Xingxiang Gongcheng Baihuai Xingxiang [Legacy projects smeared image]*, XINHUA NET, (July 14, 2004), available at <news.xinhuanet.com/forum/2004-07/14/content_1596024.htm>, for a detailed discussion about legacy projects.

55. See ZHANG QINHUA, *supra* note 47, at 51.

56. *Id.*

57. *Chengshi Fangwu Chaiqian Gujia Zhidao Yijian [Guiding Opinions on the Appraisal of Urban Housing Demolition]* [hereinafter *Opinions*]. The Opinions were included in XINBIAN CHENGSHI FANGWU CHAIQIAN SHIYONG ZHINAN [PRACTICAL GUIDE TO URBAN HOUSING DEMOLITION (NEW COMPILATION)] 135-139 (Dang Bo & Bai Zhanfeng eds., Zhongguo Minzhu Fazhi Chubenshe [China Democracy and Law Press] 2005) [hereinafter *PRACTICAL GUIDE*].

58. See WANG CAILIANG, *supra* note 49, at 69.

Management of Urban Real Estate in the PRC (1994) (Urban Real Estate Law) provides that housing replacement prices be published periodically. However, local governments do not take this provision seriously. In Mr. Weng's case, the only available government price listing, on which the compensation was based, was outdated by five years.⁵⁹ It is doubtful that the local governments will be able to keep up with the volatile real estate market.

According to experts, a list of market prices of urban housing is more complex to compile than the replacement value list mandated by the Urban Real Estate Law.⁶⁰ While the easier one has not been kept up to date, it is unrealistic to expect that the complex list could be compiled objectively and timely. In addition, who should be responsible for the financial cost of the compilation? Furthermore, the Opinions were promulgated by the Ministry of Construction, which is at the same administrative rank as local governments. As a result, the effectiveness of the requirement for publishing housing prices is largely undermined because local governments often ignore administrative orders from the Ministries.

Taking one step back, suppose that the local governments overcome all the hurdles and publish the price list of urban housing annually, questions still remain. If there is a housing market free from government interference, it is meaningless to maintain a government price list independent of the data from the market. Fair market value should be "the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell it," taking into consideration other factors.⁶¹ Therefore, the information should come from the marketplace, not from the government. In practice, the Opinions give the local government too much leeway to manipulate the market price in favor of the developers.⁶² The provision mandating government price

59. Ju Jing, *Jiujiang Shi Shenmo Yuanyin Daozhi le Canhuo de Fasheng* [What Caused Those Tragedies?] WAITAN HUA BAO [SHANG HAI WAITAN NEWS], (Sept. 3, 2003), available at <news.sina.com.cn/c/2003-09-03/11041667135.shtml>; Yang Jiang, *Yieman Chaiqian Niangcheng Canhuo, Nanjing Chaiqian Hu "Zifen" Shijian* [Salvage Demolition Caused Deadly Incident: A Condemnee Set Himself on Fire], DAHE BAO [BIG RIVER DAILY], (Sept. 1, 2003), available at <news.sina.com.cn/w/2003-09-01/0601666041s.shtml>.

60. Yang Jinsong, *Tiantao Chengshi Fangwu Chaiqian Buchang Jiage Chaozuo Moshi* [Study on an Operational Model of Urban Housing Demolition Appraisal], ZHONGGUO FANGDICHAN PINGGU SHI [JOURNAL OF CHINA REAL ESTATE APPRAISERS], Mar. 19, 2004 (analyzing what constitutes real-estate market prices).

61. See NICHOLS, *supra* note 9, at 12.02 [1], at 12-60 to 12-67. "Fair market value" means the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell it, taking into consideration all uses for which the land was suited and might be applied.

62. See WANG CAILIANG, *supra* note 49, at 18 (analyzing why local governments tend

lists reflects the notion that the lawmakers are still under the shadow of a planned economy. One expert accurately pointed out that the government price listings have substantially suppressed the appraisers’ most important function as determiners of market price. As their hands are tied by the official price listings, the appraisers’ job is reduced to simply applying predefined formulas and benchmark prices in calculating compensations.⁶³ Experts have even raised questions over the legitimate need for the appraisal profession.⁶⁴

2. Biased Appraisers

Besides the problems caused by government price listings, the impartiality of the appraisers has also been called into question.⁶⁵ According to the Opinions, the selection of an appraisal firm occurs either through residential voting or by drawing lots. This provision seems to warrant an open and transparent environment in appraiser selection. However, the Opinions also provide that choices can only be made among appraisers that are recommended by the city or county real-estate bureaus. The bureaus’ endorsement is, therefore, crucial for appraisal firms to stay in business. In order to be on the list, appraisal firms are vying for the favor of the bureaus, which also authorize condemnations. Consequently, no matter how open the selection process is, the end result will not ensure the impartiality of the appraisers. The reason is that the appraisers are susceptible to the pressure exerted by the real-estate bureaus and the developers.⁶⁶ In addition, since demolitions are usually carried out in large scales,⁶⁷ it would be nearly impossible to have effective communication among residents. In China, concerted efforts to protect private properties are rare. Individual residents are reluctant to rally neighbors to conduct background checks of the listed firms. The final choice of appraisers will

to side with developers).

63. See Yang Jinsong, *supra* note 60.

64. *Id.*

65. Wang Da, *Chengshi fangwu Chaiqian Gujia Wenti Tiansou [A Study on Urban Housing Demolition Appraisal]*, ZHONGGUO FANGDICHAN PINGGU SHI [JOURNAL OF CHINA REAL ESTATE APPRAISERS], (Aug. 4, 2004), available at <www.zgpg.net/show.aspx?id=3786&cid=31>.

66. *Id.*

67. Guo, Zhongkui, Nie, Qibo & Li, Guoqing, *Shi Lun Fangwu Chaiqian de Shichang Jiage Pinggu Fangfa [Comments on the Methods in Defining Market Value in Urban Housing Demolition Appraisal]*, ZHONGGUO FANGDICHAN PINGGU SHI [JOURNAL OF CHINA REAL ESTATE APPRAISERS], (Aug. 4, 2004), available at <www.zgpg.net/show.aspx?id=3783&cid=31>. For example, in 2003, there were 115 projects involving 179 square meters, 24,000 households in Nanjing.

be invariably favorable to the developers.

The impartiality of appraisers is also affected by the lack of an effective review process. According to the Opinions, unsatisfied residents can appeal the appraisal results only twice. The first review is conducted by the original firm or a new firm. The final review is conducted by an expert committee. However, the Opinions are not clear about the expert committees' composition. According to the wording of the Opinions, the expert committees are *ad hoc* in nature. The committees consist of appraisers, who hold full-time appointments in the government. Therefore, the independence of the expert committees is not guaranteed.

The problem has been further exacerbated by the lack of serious legal liabilities for appraiser misconduct.⁶⁸ As stated in the previous section, in relation to other rules and regulations, legal sanctions offered by the Opinions are extremely lenient. For example, if an appraiser is found to have conspired with developers with an intent to cause damage to the residents, the appraiser is fined less than RMB 30,000 (\$3,600). This small fine cannot serve as a deterrent, as appraisers can receive much higher commissions from massive demolition projects, which usually involve hundreds of millions of RMB.

68. See *Opinions, supra* note 57. Legal liabilities for appraisal firms or appraisers are laid out in Article 27 of the Opinions. The punishable acts include: issuing false appraisal reports, conspiring with developers causing damage to residents, obtaining appraisal projects by illegal means (such as offering kickbacks), allowing others to engage in demolition appraisal projects using their names, transferring appraisal projects to others under disguise, or repeatedly being reviewed and found incorrect or in violation of the Standards of Real Estate Appraisal and other regulations. However, the Opinions do not prescribe corresponding legal responsibilities for each of the above acts. Instead, the Opinions refer to other laws and regulations: The Regulations on the Management of Urban Housing Real Estate Agents (2001), the Measures on the Management of the Registration of Real Estate Appraisers (2001), and the Criminal Law (1996). Because the wording of the Opinions does not exactly square with the relevant clauses in other laws, it is disappointing that the liabilities for illegal acts in the Opinions are not clear. After comparing the three pieces of laws and regulations with the Opinions, the responsibilities can be summarized as follows: (1) if an appraiser has intentionally decreased or increased appraisal value causing direct economic damage to relevant parties, or allowed others to practice appraisal under his name, the appraiser should be administratively admonished and may be fined in the amount of not more than 3 times the amount of the illegal gains, but not more than RMB 30,000; (2) if the appraiser's illegal gains have been confiscated, the fine should not exceed RMB 10,000; (3) if an appraiser has conspired with one of the parties with intent to cause damage to the opposite party, or allowed other persons to practice appraisal under the appraiser's name, the appraiser's license will be revoked and the appraiser will be fined not less than RMB 10,000, but not more than RMB 30,000; and (4) if the circumstances are serious, the appraiser will be investigated according to the Criminal Law.

C. Lack of Due Process

1. Short Notice

After granting demolition, the Demolition Bureau is required to make a public announcement of its decision regarding the name of the licensed developer, and the scope and duration of the demolition. In addition, the Demolition Bureau and the licensed developer are obligated to inform affected residents of the demolition project and offer an explanation of the nature of the project.⁶⁹ The purpose of this provision is to increase transparency and reduce confusion and confrontation. However, this requirement is more of a recommendation than a legal provision, because there is no legal penalty if a Demolition Bureau or a demolition unit fails to abide by it.⁷⁰ Among the local rules enacted to implement the Regulations, very few require a time period for the announcement. The Nanjing rules provide that upon receiving a license for demolition, the demolition unit should publicly announce the decision to the affected region 30 days before carrying out the demolition.⁷¹

In practice, the requirement for communicating with residents is largely ignored by many Demolition Bureaus and developers. For developers, it is crucial to keep the announcement period as short as possible. The reason is that a longer period will enable residents to communicate with each other and to take collective action against the project, which increases costs. Consequently, cases, such as that which happened in Tianjin, are not uncommon. After returning from a vacation in April 2004, a man named Mr. Wang was surprised to see that his Tianjin neighborhood, where he owned one of the 2,000 residential units, had been leveled to the ground. He could not even identify where his house formerly stood. According to a former neighbor, the court posted an eviction order on the front door of Mr. Wang's house on April 16, 2004. The next day, the house was completely demolished. In the same neighborhood, Mr. Zhang had no chance to remove his belongings before his house was demolished. Mr. Zhang's family had to live in public baths, schools, and even on the streets. Some demolitions were even more dramatic. After sending his daughter to school in the morning, Mr. Chen found his house flattened in the afternoon. His belongings and cash had also disappeared.⁷²

69. See INTERPRETATIONS, *supra* note 48, art. 8, at 120.

70. See *id.* at ch. 4: 123-24.

71. See art 8, *Nanjing Chengshi Fangwu Chaiqian Guanli Tiaoli [Nanjing Rules on Urban Housing Demolition and Relocations]*, in PRACTICAL GUIDE, *supra* note 57, at 355.

72. Li Xingling, *Qiangzhi Chaiqian Fangzhu Jing Buzhi [Forced Eviction Carried Out*

2. *Forced Agreements*

After being granted a license for demolition, the next step for the developer is to enter agreements with residents on the method and amount of compensation, place of relocation, duration of relocation, and transitional period.⁷³ According to Article 16 of the Regulations, the Demolition Bureau is the only entity that may arbitrate disputes between residents and developers with regard to compensation and resettlement. Most residents distrust the Demolition Bureau as an impartial arbitrator. The obvious reason is that the Demolition Bureau has already examined and approved the compensation standard and resettlement plan in the process of granting the demolition license to the developer. It is unlikely that the Demolition Bureau would rule against its own decision. In addition, as a regular department, the Demolition Bureau leaders are beholden to the government for their appointments and promotions. It is impossible for the Demolition Bureau to be immune from external interferences, especially from government officials who have close ties to developers. According to a 2001 survey of five cities, conducted by a Chinese scholar, the odds of a resident winning an arbitration adjudicated by a Demolition Bureau was one in thirty-seven.⁷⁴

In order to restore public trust in the Demolition Bureau and maintain social stability, the Ministry of Construction enacted the "Administrative Arbitration Procedure for Adjudicating Disputes Arising from Urban Housing Demolition (Arbitration Procedure),"⁷⁵ which took effect on March 1, 2004. The Arbitration Procedure spells out new requirements in the arbitration process. For example, a public hearing should be held if a large proportion of residents refuse to agree with a compensation package,⁷⁶ and developers are forbidden to enforce eviction orders by cutting water and electricity.⁷⁷ However, there are no new measures in the procedure to guarantee the impartiality of the Demolition Bureau, which is the key to rendering a fair decision. Therefore, the Arbitration Procedure has not substantially altered the imbalance between private owners and

Without Owners' Notice], ZHONGGUO QINAN BAO [CHINA YOUTH DAILY], (May 14, 2004), available at <zqb.cyol.com/gb/zqb/2004-05/14/content_869728.htm>.

73. See INTERPRETATIONS, *supra* note 48, art. 13, at 121.

74. See WANG CAILIANG, *supra* note 49, at 100.

75. MINISTRY OF CONSTRUCTION, CHENGSHI FANGWU CHAIQIAN XINGZHENG CAIJUE GONGCHENG [ARBITRATION PROCEDURE] (Dec. 30, 2003, effective Mar. 1, 2004), in INTERPRETATIONS, *supra* note 48, at 200-04 [hereinafter ARBITRATION PROCEDURE].

76. *Id.* at 201.

77. *Id.* at 204.

commercial development.⁷⁸ The chances of a resident winning arbitration before the Demolition Bureau remains slim.

3. Forced Eviction

For residents, losing to developers in Demolition Bureau arbitration is disastrous. Even though residents may choose other channels to challenge a Demolition Bureau’s arbitration decision, they have to deal with an immediate forced eviction by the winning developer with the Demolition Bureau’s backing, or sometimes even with judicial force. According to Article 16(2) of the Regulations, if either of the two parties is not satisfied with the Demolition Bureau’s decision, the unsatisfied party (in almost all cases the unsatisfied party is the resident) may appeal the Demolition Bureau’s decision to the People’s Court. However, the Demolition Bureau’s decision is enforceable while the case is pending before the court.⁷⁹ This means that even if residents win their case in court, their only remedy is monetary damages. Regardless of whether the demolition project is for a real public purpose, or for commercial development, injunctive relief has never been an option.

During the execution of forced eviction orders, cutting off water and electricity, verbally threatening residents, physically assaulting residents, and sending thieves around to break into homes, are among the various means utilized by condemners to drive residents away. Violence eviction (also called savage eviction) has deeply affected people’s lives and resulted in social unease. A chilling news report, regarding how a family was forcefully evicted, was published in the *China Economic News*⁸⁰ and was subsequently reprinted in other news sources across China. At midnight on September 19, 2003, five people smashed windows and broke into Mr. Wang’s apartment. The men brandished large sticks, used a torch to blind Wang’s eyes and told the family not to make any noise. Wang, his wife, and their nine-year-old son, were forced to the ground. After badly beating the family, the men tied up their legs and hands, put blindfolds over their

78. Tang Yan, *Chaiqian Xu Pingheng Siren Yu Gonggong Liyi Chaiqian Zhengdi Jidai Lifa [It is Necessary to Strike a Balance Between Private Property and Public Interests in the Process of Demolition; Law on Condemnation and Land Acquisition is Needed]*, ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], (Jan. 12, 2004), available at <www.china.com.cn/chinese/zhuanti/dhcq/478124.htm>.

79. See INTERPRETATIONS, *supra* note 48, art. 16(2), at 121.

80. Wang Xiaoxia, *Huanyi Baoli Chaiqian, Beijing yi Jumin Zao Kunbang Mengmian Fangwu Beichai [Suspected Violent Eviction, After a Resident in Beijing was Tied up and Blindfolded, His House was Demolished]*, ZHONGGUO JINGJI SHIBAO [CHINA ECONOMIC NEWS], (Sept. 24, 2003), available at <www.china.org.cn/chinese/zhuanti/dhcq/418519.htm>.

eyes, gagged them with cloth, and threw them outside. A few minutes later, some 20 to 30 men showed up at the building with a huge bulldozer. While Wang and his family were lying on the ground terrified in the chilly night, his apartment building was leveled to the ground. The group of men quickly left the scene. Wang and his family were finally rescued by a garbage collector. After sending his son to a relative's house, Wang called the police. To his surprise, the police would not confirm that this was even a crime. Strangely enough, this happened only 300 meters away from the district government and police station in Haidian, a northwest district of Beijing.

4. *Lack of Remedies*

When faced with a forced eviction order, residents have two channels to challenge it, within three months of receiving it.⁸¹ The first is to file a petition with the government for administrative reconsideration of the order. If residents are not satisfied with the result of administrative consideration, they can appeal the case to the government at a higher level for further administrative reconsideration or to the court for administrative adjudication. The other is to take the case directly to the court.⁸² If residents are not satisfied with the court's decision, they may appeal the case to a higher court. Whether residents can receive fair reconsideration or adjudication for their cases depends on whether the administrative review board or court is independent and competent. Because administrative law in China is a new area in which much work needs to be done, winning an administrative reconsideration or litigation is extremely difficult.

Administrative reconsideration is carried out within the government structure. The purpose of administrative reconsideration is "to prevent or rectify illegal or inappropriate administrative actions and safeguard citizens, legal persons, and other organizations' lawful interests."⁸³ However, administrative reconsideration has not proved an effective means for residents to challenge forced eviction orders for two reasons. First, the Administrative Reconsideration Law (ARL) does not require that an independent review body be set up to handle administrative reconsideration cases. As a result, the responsible entity for reviewing Demolition Bureau decisions is usually a part of the land administration bureau, which

81. See ARBITRATION PROCEDURE, *supra* note 75, art. 16.

82. XINGZHENG FUYI FA [ADMINISTRATIVE RECONSIDERATION LAW (P.R.C.)], art. 15, 16, available at <www.molss.gov.cn/correlate/xzfyF.htm>.

83. *Id.* at art. 1.

oversees the Demolition Bureau. Because of close relations between the review entity and the Demolition Bureau, it is impossible to ensure objectiveness in the reconsideration process. Second, the ARL requires that only concrete administrative acts be reviewable. Residents have no way to challenge abstract acts, such as the legality of local regulations, rules and measures on which the forced eviction order was based. As a result, frustrated residents have rarely taken their cases to the government for administrative reconsideration.

As administrative reconsideration is unlikely to offer adequate remedies, those determined to challenge an eviction order must pursue administrative litigation in the courts. However, due to various constraints, the courts are not immune from the influences of government officials on behalf of developers or from developers themselves. Under the centralized system, the courts in China are not an independent entity. Rather, they are integral parts of the government, which are accountable to the corresponding levels of government. The courts are dependent on the government for funding and basic facilities such as court buildings, computers and other necessities.⁸⁴ Judges are elected by the corresponding people’s congresses, which, in fact, are controlled by the local party committees and governments. Judges do not enjoy life tenures and are treated the same as other government officials, who are elected or appointed to their posts for five years but may be reappointed for an additional term. Further, judges in the lower courts are often recent law school graduates, largely directed and influenced by higher courts. Therefore, judges are susceptible to various influences from party and government officials. Because commercial developments are directly beneficial to local leaders’ political future and personal gain, they utilize all disposable powers to clear the way for commercial development. For example, in the Jiahe incident,⁸⁵ the county government instructed the county court to send over 200 judicial policemen to enforce eviction orders.⁸⁶ In addition, lower courts are subject to directions from higher courts. In 2003, the Guangxi High People’s Court, Guangxi’s Supreme Court, issued an internal circular (also referred to as the No. 180 document) requiring local courts not to hear a series of sensitive cases. The No. 180

84. Li Fujin, Ma Liping & Guanyu Dui, “*Renmin Fayuan Zuzhi Fa*” *Xiugai de Jidian Sikao* [Several Thoughts on Reform of the Law of P.R.C. Courts] at <www.dffy.com/faxuejieti/zh/200311/20031118152714.htm> (visited July 23, 2005).

85. For details of the Jiahe incident, see Part II, B-1 of this paper.

86. Wang Bin, *Fayuan Bu Ying Chengwei Chaqian de Maqianzu* [Court Should not be Involved in Illegal Demolition], *ZHONGGUO JINGJI SHIBAO* [CHINA ECONOMIC TIMES], (Dec. 22, 2004), available at <news.xinhuanet.com/house/2004-12/22/content_2365597.htm>.

document listed 13 types of sensitive cases that could cause class-action lawsuits and social instability. Cases involving demolition and relocations were third on the list.⁸⁷ As a result of the judicial system's weak position in the overall government structure, the effectiveness of seeking relief through administrative litigation is very limited.⁸⁸

According to the Administrative Litigation Law (ALL), courts can only review the legality of concrete acts performed by governmental agencies.⁸⁹ Courts have no power to review the appropriateness of an act.⁹⁰ The law also provides that courts should not review general legislation, such as administrative regulations, rules, and measures.⁹¹ In addition, orders targeting indefinite groups or individuals are not reviewable. The narrow scope of the ALL substantially discourages aggrieved residents from challenging local normative documents that are inconsistent with national laws. This limited scope allows governments the vast discretion to craft local rules to set compensation and resettlement standards below market value.

III. Conclusion

A. Transaction Costs

Private homeowners and commercial developers multiplied at about the same time the land and housing reforms began in China. This was the intended result of the reformers. For the government, housing reforms significantly relieved its burden of providing public housing to urban

87. Luo Changping, *Guangxin Fayuan Xiawen Bu Shouli 13 Lei An'jian* [Guangxi High Court Required Lower Courts Not to Accept 13 Types of Cases], XIN JING BAO [NEW BEIJING NEWS], (Aug. 12, 2004), available at <www.china.org.cn/chinese/law/633142.htm>. In the 1990s, Xiangshan Cement Factory (XCF) required employees to contribute savings to the factory to help it out of economic depression. XCF promised to repay the contributed capital with interests when its financial wellbeing improved. Several years later, however, XCF was still in the economic quagmire due to poor management. In 2002, 150 workers brought a class-action suit against XCF at the county court, claiming repayment of its debts. Through court mediation, the case settled after XCF agreed to repay all its debts to the employees. After discovering that XCF refused to honor the agreement, 60 workers gathered in front of the county courthouse demanding enforcement of the settlement agreement. The protest turned into a riot, which was highly publicized locally. The incident seriously hurt the court's image. Against this backdrop, the High Court issued a circular requiring local courts to accept sensitive cases.

88. See PEERENBOOM, *supra* note 24, at 420.

89. XINGZHENG SUSONG FA [ADMINISTRATIVE LITIGATION LAW (P.R.C.)], art. 11, available at <www.molss.gov.cn/correlate/xzssF.htm>.

90. *Id.*

91. *Id.*

residents. For residents, they provided an opportunity to own a home—a dream quietly cherished by generations of Chinese. For developers, the reforms created an unprecedented opportunity to profit from construction projects. However, this seemingly win-win-win scenario soon met harsh reality. Only a few years into the reforms, new homeowners found that their properties were obstructions in the way of commercial development. In the unbalanced tug-of-war between individual homeowners and deep-pocketed developers, the government sided with the latter by changing zoning plans to fit commercial development, authorizing forced evictions, deploying judicial police to execute eviction orders, lowering compensation standards, instructing courts not to hear cases involving demolitions, blocking class actions, and more. Chinese scholars pointed out that “the government has inappropriately become both a player and referee at the same time.”⁹²

The rationales for local governments giving commercial development full support is invariably to reduce “transaction costs,” increase local GDP, and improve local image. Because transaction costs are often narrowly construed as the sheer costs for developers, the value of private property is left out of the equation. In the absence of a system of enforceable property rights, powerless private owners are unfairly forced to bear the cost of economic development.

What constitutes transaction costs for economic development? Part II of this paper shows that the lack of protection for private property rights results in several indirect transaction costs. The first cost is the residents’ loss of confidence in the government. Without strictly enforced zoning plans and public consultations, virtually all residential houses are at risk of being demolished for commercial development. Even developers themselves are at risk of losing their investments if one day a better-connected and more powerful developer enters the market requesting the government exercise its eminent domain power. Lack of certainty and predictability will discourage long-term investment and eventually hinder economic development.

The second cost is the loss of momentum for building property law. Building property rights is a systematic process. While legislative activities are important, it is more important to create a climate in which property rights are well respected. “For a new property to exist, the owner

92. Zhang Hui, *Chaiqian Biancheng Raomin Gongcheng, Zhengfu Ying Zhuanxin Danghao “Caipan Yuan” [Demolition Infringed Upon Private Property Rights; Government Should Offer Protection]*, BEIJING WAN BAO [BEIJING EVENING NEWS], (Apr. 2, 2004), available at <news.xinhuanet.com/newscenter/2004-04/02/content_1398552.htm>.

must possess 'the consent of fellow men to allow him to act in a particular way. An owner expects the community to prevent others from interfering with his actions, provided that these actions are not prohibited in the specification of his rights.'"⁹³ When a local government arbitrarily permits forced evictions for commercial development, it sets a bad precedent, and has a chilling effect on property ownership. It will take a long time and extra effort to restore the social environment for property protection.

The third cost is the negative impact on law enforcement in general. Without public representation and consultation, the decisions to grant demolition licenses and forced eviction orders are often made in secrecy. As a result, the enforcement of those orders has met furious resistance from property owners. The disrespect of government action and police power has a spillover effect, which has made normal law enforcement more costly.⁹⁴

The fourth cost is the enlarged gap created between the rich and poor as a result of demolition projects. Development projects often take place in the center of downtown areas that are heavily occupied by low-income residents. These so-called "golden spots" offer employment opportunities to residents, especially laid-off workers. Residents often turn their apartments into street-side shops to make a living. However, when these buildings are demolished, the owners are only compensated under the reduced residential price, rather than the commercial business price. This is a major source of confrontation between residents and developers. The new development actually further marginalizes those disadvantaged groups. The enlarged gap between the rich and poor has given rise to a host of social problems.

If the above factors are counted as transaction costs and reflected in

93. JEAN ENSMINGER, *Changing Property Rights: Reconciling Formal and Informal Rights to Land in Africa*, in Drobak, *supra* note 21, at 165, 167-68 (quoting H. Demetz, *Toward a Theory of Property Rights*, 57 AMERICAN ECONOMIC REVIEW 347, 347 (1967)).

94. For example, on July 1, 2005, fourteen law enforcement officers in Chongqing were burnt in a clash with the occupants of a temporary building undergoing demolition. Seven of the officers were in critical condition. Unlike other commercial development demolitions, this one was to clear the road blocked by the temporary building. The occupants illegally erected the building on a sidewalk and refused to move. After several notices, the government issued a forced eviction order. See Liu Zhan, *Chongqing 14 Ming Zhifa Renyuan Chaiqian Shi Beiren Yinran Qiyou Shaoshang* [14 Law Enforcement Officers Were Burned in the Process of Demolition], ZHONGGUO GUANGBO WANG [CHINA BROADCASTING NET], (July 1, 2005), available at <www.china.org.cn/chinese/law/904368.htm>. See also, Zhang Rundong, *Beijing Yi chaiqian hu yong liusuan Poshang Chaiqian Renyuan 7 Ren ei Shaoshang* [A Condemnee Poured Liquid Acid Onto Law Enforcement Officers; Seven Officers Were Burned], JINGHUA SHIBAO [JINGHUA TIMES], (June 21, 2003), available at <www.china.org.cn/chinese/law/350881.htm>.

the government's decision-making process, the developers are likely to find that it is more costly to evoke the power of eminent domain than to negotiate with owners on a consensus basis and purchase land-use rights from the open market.

B. Informal Constraints

Based on New Institutional Economics, property rights are viewed as institutions, which are composed of formal rules, informal constraints and enforcement characteristics. In most cases, the three elements of the institutions are not compatible with each other. As Dr. North observed, "[w]hile the formal institutions may be altered by fiat, the informal institutions are not amenable to deliberate short run change and the enforcement characteristics are only very imperfectly subject to deliberate control."⁹⁵ Therefore, a mere enactment of property law is unlikely to be sufficient to offer adequate protection for private property rights. As analyzed in this paper, the challenges facing the lawmakers in China are not only how to formulate property rules, but, more importantly, how to respond to and eventually alter the informal constraints that are hostile to weak property owners.

While it is not perfectly clear how informal rules work in a formal context, they do impose severe constraints on the ability to effectuate changes. North and Thomas pointed out that "[p]roperty rights are always embedded in the institutional structure of a society, and the creation of new property rights, demands new institutional arrangements to define and specify the way by which economic units can cooperate and compete."⁹⁶ In order to reduce transaction costs in the development process and make property rules effective, the following changes to informal rules are necessary. First, the government's discretion in altering zoning plans and authorizing takings must be restrained. This can be done by increasing local congress' involvement and requiring public hearings. Second, without independent appraisal, it is impossible to ensure just compensation. Therefore, the ties between appraisal firms and developers must be cut off. In order to do this, unethical appraisers must be held accountable. Legal liability must be increased to deter false appraisals. Third, the state should make efforts to promote judicial independence, which is essential for limiting the opportunities for government to abuse its powers.

95. DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 157 (2005).

96. ENSMINGER, *supra* note 93, at 167 (quoting D.C. NORTH & R. THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY, 5 (1973)).